

**International Union of Operating Engineers, AFL-CIO, Local Union 450 and Joel Lathan and Larry Schubert and Houston Chapter, Associated General Contractors of America, Inc., and Construction Employers' Association of Texas, Parties to the Contract. Cases 23-CB-2557-1 and 23-CB-2557-2**

26 August 1983

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
JENKINS AND HUNTER**

On 10 December 1982 Administrative Law Judge Richard J. Linton issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.<sup>1</sup>

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, find-

ings,<sup>2</sup> and conclusions<sup>3</sup> of the Administrative Law Judge and to adopt his recommended Order, as modified herein.<sup>4</sup>

It is true that the Board has found violations based upon the application of a rule because the rule as applied did not conform to the standard of fairness required of a union hiring hall system. It is equally clear that the Board has premised hiring hall violations upon the nature of the rule itself, or upon the arbitrary departure from the rule, rather than solely upon the application of the rule. Cf. *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50 at 50-51 and fn. 6 (1982), enf. 701 F.2d 504 (5th Cir. 1983) (violation premised upon arbitrary departure from self-established referral system); *Boilermakers Local 667 (Union Boiler Co.)*, 242 NLRB 1153, 1155 (1979) (violation premised upon vagueness and indefiniteness of rule itself). We believe Respondent's failure to follow its referral system procedures is such an arbitrary departure from its hiring hall rules.

The Administrative Law Judge found that Respondent violated Sec. 8(b)(1)(A) and (2) by failing to announce jobs which were filled by request or steward appointment in accord with the established hiring hall procedures. Inasmuch as the remedy for the 8(b)(1)(A) violation remains the same as that provided by the Administrative Law Judge, we do not find it necessary to adopt his finding that Respondent's deviation from its hiring hall rules violated Sec. 8(b)(2).

In his discussion of par. 11 of the complaint, the Administrative Law Judge stated that the Board has found that attempts to apply steward preference clauses in the context of an exclusive hiring hall are not burdened with a presumption of illegality, citing *Teamsters Local 959 (Ocean Technology)*, 239 NLRB 1387 (1979). Chairman Dotson and Member Hunter note that, since no exceptions were filed with respect to the Administrative Law Judge's reliance on *Ocean Technology*, they need not pass upon the validity of this precedent at this time.

The fourth word of the last sentence of the sixth paragraph in the Administrative Law Judge's discussion of par. 11(a) of the complaint is Johnson. It is clear from the record and the context that this name should be Roberts. We hereby correct this inadvertent error.

<sup>3</sup> In concluding that Respondent violated Sec. 8(b)(2) by causing an employer to lay off Charging Party Lathan, the Administrative Law Judge considered a statement by a foreman as admissible under the "present sense impression" exception to the hearsay rule and, alternatively, as hearsay which the Board may admit and give such weight as its inherent quality justifies. We find it unnecessary to adopt the Administrative Law Judge's "present sense impression" theory and rely instead on his alternative rationale. We agree that the circumstances of this case, including that Respondent's business agent harbored animus toward Lathan and that Lathan was selected out of the customary layoff sequence, provide sufficient basis for finding that Respondent caused Lathan to be laid off.

<sup>4</sup> We shall modify the Administrative Law Judge's recommended Order to provide that Respondent expunge from its files any reference to the unlawful layoff of Joel Lathan in accord with *Boilermakers Local 27 (Daniel Construction)*, 266 NLRB 602 (1983).

And, we shall modify the Administrative Law Judge's recommended Order in accord with *Sheet Metal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773 (1981), to provide that Respondent notify J. W. Bateson

*Continued*

<sup>1</sup> Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

<sup>2</sup> Respondent has 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*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Contrary to our dissenting colleague, we find that the record supports the Administrative Law Judge's conclusion that Respondent departed from its established hiring hall procedures. There is no dispute that a sign is posted in the Union's hiring hall stating that all jobs will "be called out upstairs." Business agent Johnson, who admitted the existence of the posting, did not even deny that the condition contained therein constitutes part of the Union's established hiring hall procedures. We are unpersuaded by his explanation that positions which are filled by individuals who are requested by name are not considered "job openings."

In these circumstances—i.e., Respondent has designed specific objective hiring hall procedures—we believe Board precedent compels finding a violation of the Act when Respondent departs from those procedures.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, International Union of Operating Engineers, AFL-CIO, Local Union 450, Houston, Texas, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following as paragraph 1(b):

"(b) Operating its exclusive hiring hall and referral system in an arbitrary or a discriminatory manner by failing to announce at the 7 a.m. job calls at its second floor hiring hall facility which job orders have been filled by request and by appointment of stewards and the names of the operators so requested and appointed, and by failing to follow the sequential referral of registrants from the out-of-work list without such deviation being necessary to the effective performance of its representative function and also without the reason for any such deviation being announced at the pertinent 7 a.m. job call."

2. Substitute the following as paragraph 2(a):

"(a) Make Joel Lathan and Larry Schubert whole for any loss of earnings and benefits they may have suffered by reason of Respondent's unlawful operation of its hiring hall in the manner set forth in the section the Administrative Law Judge's Decision entitled 'The Remedy.'"

3. Insert the following as paragraphs 2(b), (c), and (d), and reletter the remaining paragraphs accordingly:

"(b) Make Joel Lathan whole for any loss of wages and benefits suffered by reason of the discrimination against him from the date of his layoff to the date of his reinstatement by J. W. Bateson Company, Inc., to his former or substantially equivalent job or to the date he secures substantially equivalent employment with some other employer. Backpay shall be computed in the manner set

Company, Inc., that it no longer objects to Joel Lathan's hiring or employment; that Respondent affirmatively request J. W. Bateson Company, Inc., to reinstate Lathan; and that Respondent make Lathan whole for all losses of wages and benefits suffered as a result of Respondent's discrimination against him from the date of his unlawful layoff on 3 December 1981 until Lathan is either reinstated to his former or substantially equivalent position or until he obtains substantially equivalent employment elsewhere.

In certain circumstances the Board has held that the *Zinsco* rationale is applicable to cases in which a union refuses to refer an employee in violation of the Act where there is no finding of culpability on the part of the employer. *Iron Workers Local 118 (Pittsburgh Des Moines Steel)*, 257 NLRB 564 (1981). However, as in *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50, we shall not apply that remedy to the failures to refer herein where the discrimination appears to have involved short-term or temporary jobs.

forth in the section of the Administrative Law Judge's Decision entitled 'The Remedy.'

"(c) In writing, with copies furnished to Joel Lathan, ask J. W. Bateson Company, Inc., to remove any reference to Lathan's unlawful layoff on 3 December 1981 from J. W. Bateson Company, Inc.'s files; notify J. W. Bateson Company, Inc., that it has no objection to the hiring or employment of Lathan; and request J. W. Bateson Company, Inc., to reinstate Lathan to his former job or to a substantially equivalent position.

"(d) Expunge from its files any reference to the unlawful layoff of Joel Lathan on 3 December 1981 and notify him, in writing, that this has been done and that evidence of this unlawful layoff shall not be used as a basis for future personnel actions against him."

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

MEMBER JENKINS, dissenting in part:

I agree with the various findings of my colleagues herein, except for their finding that Respondent has violated Section 8(b)(1)(A) of the Act by failing to operate its hiring hall so that all referrals are announced in the assembly room where applicants for referral are waiting. In the circumstances of this case, there is insufficient basis to find that Respondent acted unlawfully by announcing certain referrals from its administrative offices in the union hall.

The underlying facts are not in dispute. At the beginning of each workday, the union business agent on duty assembles work orders from employers and distributes referrals to the waiting hiring hall applicants located on the second floor of the union hall. Congruent with this basic procedure, there is a sign posted at the hall which states: "All jobs will be called upstairs." However, there are two basic types of referrals which, so far as the record here discloses, have never been announced in the upstairs assembly hall. First, approximately 25 percent of the requests from employers specify the name of the individual requested, and the Union's established practice has been to honor these requests and to inform the individuals directly from the Union's downstairs offices.<sup>5</sup> The second group of referrals has involved those individuals dispatched to a job as the union steward, a procedure here found sanctioned by the parties' bargaining agreement. The testimony shows that ordinarily the first unit employee dispatched to a job is designated the steward, and that this selec-

<sup>5</sup> The Union's business agent, Johnson, explained that a request for a specific individual is not considered a job opening, and that there would be no point in making that referral at the upstairs job call.

tion of the steward is done without regard to the individual's comparative standing on the out-of-work register. The referral of these stewards has been made from the downstairs offices.

I find no violation of the Act as a result of these practices for the simple reason that the majority errs in concluding that there was a departure from the Union's established hiring hall procedures. The sole factual basis for their conclusion is that there was a sign posted at the union hall stating: "All jobs will be called upstairs." However, this single sign, uncorroborated by hiring hall rules either in the bargaining agreement or unilaterally established by the Union, is insufficient to define what is "the established procedure" in the face of uncontradicted evidence that at all material times over 25 percent of the referrals were separately announced from the downstairs offices.<sup>6</sup>

Moreover, the cases cited by the Administrative Law Judge, and relied on by the majority for finding the violation, do not provide an adequate basis for the majority's broad holding that a Union's departure from hiring hall procedures which has no impact on the actual selection of employees to be referred is violative of Section 8(b)(1)(A). The quoted section from *Ford, Bacon & Davis Construction*<sup>7</sup> relied on by my colleagues states that a violation occurs where the departure from established referral rules "results in a denial of employment to an applicant . . . ." Here, the fact that the referral occurred downstairs as opposed to upstairs has no bearing on who would be selected under criteria which the majority otherwise has found to be lawful. Similarly, their reliance on the Board's statement in *Building Contractors of N.J.*,<sup>8</sup> that exclusive hiring halls must be operated on objective standards, again is aimed solely at preventing officials responsible for referrals from denying employment to referral applicants for arbitrary or discriminatory reasons. Although the referral of employees upstairs in the Union's assembly hall would subject the Union's practices to far greater scrutiny, with arguably less chance of suspicion being aroused on the part of the referral applicants, in the absence of general hiring hall abuses<sup>9</sup> this is not the proper

basis for the Board's intervention into purely procedural aspects of the operations of a hiring hall.

I would dismiss this allegation in the complaint.

abuses the Board specified hiring hall procedures to be adopted by the respondent therein. There is no such pattern of abuse in the instant case.

## APPENDIX

### NOTICE TO EMPLOYEES AND 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.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT coerce or restrain you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act, as amended, by threatening to remove you from your job if you file charges with the National Labor Relations Board, or by threatening you with death if you persist in your right to investigate conduct which you suspect to be backdooring in the referral of members or other job applicants to jobs, or by assaulting you or using physical force against you because you have engaged in such conduct or because you have filed charges against Local 450 with the National Labor Relations Board.

WE WILL NOT file internal union charges against you, subject you to an internal union trial, fine you, or expel you from membership in Local 450 because you investigate suspected backdooring or because you express an intention to file, or do file, charges against Local 450 with the National Labor Relations Board.

WE WILL NOT operate our exclusive hiring hall and referral system in an arbitrary or a discriminatory manner by failing to announce at the 7 a.m. job calls at the second floor hiring hall facility which job orders have been

<sup>6</sup> Although the record does not indicate what percentage of referrals are for individuals designated as stewards, it is apparent that their numbers are not inconsiderable. Accordingly, it is probable that the downstairs referrals are substantially higher than 25 percent of the total, which figure is based solely on referral requests by name.

<sup>7</sup> *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50 (1982).

<sup>8</sup> *Laborers Local 394 (Building Contractors of N.J.)*, 247 NLRB 97 (1980).

<sup>9</sup> Out of the 35 allegations of hiring hall abuse regarding referrals, only 3 were found to have violated Sec. 8(b)(2) because Respondent had insufficient evidence to rebut the presumption that referrals out of sequence are unlawful. Compare *Iron Workers Local 480 (Building Contractors of N.J.)*, 235 NLRB 1511 (1978), where as a result of widespread hiring hall

filled by request and by appointment of stewards and the names of the operators so requested and appointed, and by failing to follow the sequential referral of registrants from the out-of-work list without such deviation being necessary to the effective performance of our representative function and also without the reason for any such deviation being announced.

WE WILL NOT cause or attempt to cause employers to discriminate against Joel Lathan, Larry Schubert, or any other employee, member, or applicant for employment based on reasons rendered unlawful by the National Labor Relations Act, as amended.

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

WE WILL announce at the daily 7 a.m. job call at the second floor hiring hall which jobs have been filled by request and steward appointment and notify you of the names of the operators so requested and appointed.

WE WILL make Joel Lathan and Larry Schubert whole, with interest, for any loss of earnings they may have suffered because of our failure and refusal to refer them on various occasions after 1 January 1981 to work with various employer-members of the AGC and CEA.

WE WILL make Joel Lathan whole for any loss of wages and benefits suffered by reason of the discrimination against him from the date of his layoff to the date of his reinstatement by J. W. Bateson Company, Inc., to his former or substantially equivalent job or to the date he secures substantially equivalent employment with some other employer, less his net earnings during this period.

WE WILL, in writing, with copies furnished to Joel Lathan, ask J. W. Bateson Company, Inc., to remove any reference to Lathan's unlawful layoff on 3 December 1981 from J. W. Bateson Company, Inc.'s files; notify J. W. Bateson Company, Inc., that we have no objection to the hiring or employment of Lathan; and request J. W. Bateson Company, Inc., to reinstate Lathan to his former job or to a substantially equivalent position.

WE WILL expunge from our files any reference to the unlawful layoff of Joel Lathan on 3 December 1981 and notify him, in writing, that this has been done and that evidence of this unlawful layoff shall not be used as a basis for future personnel actions against him.

WE WILL declare the 9 July 1981 internal union charges and the 24 September 1981 trials, fines, and membership expulsion of Joel Lathan and Larry Schubert to be nullities, and WE WILL expunge from our records all references to such charges, trials, fines, and expulsions and WE WILL notify such members in writing that we have done so.

WE WILL respect your rights to investigate and discuss what you suspect to be backdooring, and WE WILL respect your right to file charges with the National Labor Relations Board, and WE WILL read this notice to all members attending a regular membership meeting as part of our compliance with the Order of the National Labor Relations Board.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, LOCAL UNION 450

### DECISION

#### STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge: This case was tried before me in Houston, Texas, on May 10, 11, and 12 and June 1 through 4, 1982, pursuant to the August 12, 1981, consolidated complaint (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 23 of the Board. The complaint, as subsequently amended, is based upon a charge filed on June 8, 1981, in Case 23-CB-2556-1 by Joel Lathan (Lathan) against International Union of Operating Engineers, AFL-CIO, Local Union 450 (Respondent, the Union, or Local 450), and also upon a charge filed on June 8, 1981, in Case 23-CB-2557-2 by Larry Schubert (Schubert) against Respondent.<sup>1</sup>

In the complaint the General Counsel alleges that Respondent violated Section 8(b)(1)(A) of the Act by certain conduct, including threatening Lathan with job loss, internal union charges, beating, and death, physically assaulting Lathan, and prosecuting and fining Lathan and Schubert \$1,000 each in an internal union trial,<sup>2</sup> and Section 8(b)(2) of the Act by "backdooring" favored members to jobs even though Lathan and Schubert, and other unfavored members and nonmembers, were higher than such favored members on the out-of-work list.

By answer, Respondent admits certain factual matters but denies that it has violated the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consider-

<sup>1</sup> All dates are in 1981 unless otherwise indicated.

<sup>2</sup> Lathan and Schubert also were expelled from membership in Local 450. Lathan's timely appeal is pending before the Union's International. Schubert's appeal was filed late. At the trial and in his brief the General Counsel asserts that he is attacking all aspects of the union trials in seeking an order declaring them to be a nullity.

ation of the briefs filed by the General Counsel and Respondent, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

Respondent does not contest jurisdiction. Houston Chapter, Associated General Contractors of America, Inc. (AGC), and Construction Employers' Association of Texas (CEA) are Texas corporations with their separate principal offices and places of business in Houston, Texas, where each is engaged in the business of representing its employer-members in respect to negotiating and policing collective-bargaining agreements, labor relations, and kindred matters. Respondent admits that specified members of AGC and CEA each purchased materials valued in excess of \$50,000 from other enterprises which received said materials directly from points located outside the State of Texas. Local 450 admits, and I find, that such members of AGC and CEA are employers within the meaning of Section 2(2), (6), and (7) of the Act.

### II. LABOR ORGANIZATION INVOLVED

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

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

##### 1. Local 450

The Union has a big membership and covers a large territory in referring operating engineers to employer-contractors engaged in the building and construction industry. N. F. Renaud, business manager of Local 450 since June 1980, testified that the Union's territory consists of 96 Texas counties stretching from the city of Brownsville, in the Texas Valley, north to Austin and eastward to the Louisiana border. In short, the area encompassed covers much of the southern half of Texas. Renaud further testified that the Local has some 4,500 members.

Local 450 is divided into seven districts. Houston, Texas City, and Freeport are respectively Districts 1, 2, and 7. Although the events alleged herein occurred within District 1, Houston, "Local 450, Districts 1, 2, and 7," is the recognized and contractual collective-bargaining representative of the operating engineers in the territory of such districts. The collective-bargaining agreement "Local 450, Districts 1, 2, and 7," has which is involved herein is with the AGC and CEA. The agreement (G.C. Exh. 2) is effective for the period of April 2, 1981, through March 31, 1982. As will be discussed shortly, the parties herein stipulated that respecting the employers involved in this case Local 450 has an exclusive hiring hall arrangement.<sup>3</sup>

<sup>3</sup> Under the express language of the collective-bargaining agreement, the Union is only a source of operating engineers.

R. L. "Sonny" Johnson, assistant business manager, also serves as one of the business agents for the Houston District. He testified that his territory covers, generally, downtown Houston northwest to Byran, Texas.<sup>4</sup> Other business agents, such as Bill Barker and Lester Dennis, also have assigned geographical territories within the Houston District. Most of the allegations herein pertain to events occurring within Johnson's territory. As we shall see, Johnson and Lathan are the principal witnesses involved in this case. Johnson has been a member of Local 450 since 1956, and has been a business agent for nearly 15 years. Johnson also is the elected financial secretary of the Union, one of the Union's trustees of trust fund management, and has held at least one other union office.

##### 2. Charging Party Joel Lathan

Joel Lathan, a heavy equipment operator since 1955, testified that he joined Local 953 in Albuquerque in 1973 and transferred to Local 450 in 1976.

The genesis of Lathan's problems with Local 450 dates back to December 1979. According to Lathan, at that time he had worked his way up through 1- and 2-day jobs to second on the out-of-work list (o-w-l herein) when he was referred to a shutdown (a "turnaround" job with many overtime hours) with Pan Con, Inc., at the ARCO refinery.<sup>5</sup> After reporting to the job he discovered that, of the 26 operators already there, the foreman had requested (by name) only four. Lathan subsequently complained to Gordon Hyatt, then a business agent who had jurisdiction over the job location. In essence Lathan's complaint was that 22 operators had been "backdoored" to the job while he was sitting on the bench in the number two position on the o-w-l.<sup>6</sup> Lathan complained that it was Christmas time, that he paid his dues, and that it was unfair.<sup>7</sup>

Hyatt replied that the practice had been going on for a long time and there was nothing Lathan could do about it except get himself "into a lot of trouble."

No shrinking violet, Lathan thereafter made inquiry as to the appropriate source to carry his protest, and in January 1980 he filed an unfair labor practice charge against Local 450 in Case 23-CB-2375. Following its investigation of the charge in that case, the NLRB's Regional Office in Houston issued a complaint setting the matter for trial in August 1980. On the day the trial was to

<sup>4</sup> Renaud estimated that there are 1,800 members in District 1, but Johnson placed the number at or about 2,200.

<sup>5</sup> The story is pieced together from Lathan's testimony, the pension reporting form (G.C. Exh. 26-4), and his first pretrial affidavit dated July 6, 1981 (Resp. Exh. 4, p. 6).

<sup>6</sup> By "backdooring" is meant that union representatives, in the context of an exclusive hiring hall, disregard established referral procedures in order to send their friends, relatives, or other favored persons to jobs without regard to where the names of such individuals are located on the o-w-l or, in some cases, without regard to whether they even have registered as out of work. Backdooring is to be distinguished from established exceptions to the FIFO (first in, first out) out-of-work list, such as employees requested by name, where such exceptions are fairly administered and are not inherently discriminatory. This subject is discussed in more detail later, including the text for fn. 88 below.

<sup>7</sup> It appears from Lathan's testimony that Hyatt is no longer a business agent.

commence, in the very courtroom where the hearing in the instant case was held, Johnson called Lathan into the hallway for a conversation.<sup>8</sup> In the conversation Johnson suggested that Lathan, by proceeding with the trial, would only be harming the Local and that in the long run it would be better if he settled the case.<sup>9</sup>

Lathan went to the General Counsel's trial attorney and said he wanted to settle the case. A settlement was arranged. Although the details are not set forth in the record completely, it appears that Lathan agreed to accept a cash settlement to be presented by check which Lathan in turn would endorse back to the Union. In his July pretrial affidavit, Lathan states that the General Counsel's trial attorney informed him that, while he was entitled to backpay, he could do anything with it that he desired.<sup>10</sup> In addition, business manager Renaud was to send a letter to Lathan declaring that there would be no backdooring.

Renaud's promised letter is dated August 13, 1980 (Resp. Exh. 5). The text reads:

Dear Brother Lathan:

I am writing to you pursuant to the agreement made with you on Wednesday, August 13, 1980, at the National Labor Relations Board, Region 23.

I understand, and am sympathetic with, your concern over the need for non-discriminatory application of our referral procedure. Since my appointment as Business Manager, I have taken certain steps that I feel will insure that no referrals are made in violation of our long-established referral procedure, and further, that no favoritism is shown to any member with regard to job referrals. I have personally instructed everyone on my staff that any deviation from the referral procedure will not be tolerated and that punitive measures will be taken if any is found to exist. As a member of our Union, you certainly have the right to demand no less.

I want to further assure you, that you will in no way be discriminated against because you filed a charge with the National Labor Relations Board. That was nothing other than an exercise of a right you have under the law.

I would encourage you, in the future, to report any violations or suspected violations, of our referral procedure directly to me, and they will be remedied immediately.

<sup>8</sup> Over Respondent's objection that the conversation involved a compromise and settlement, Lathan was permitted to describe the conversation on the basis that it contained an admission by Johnson showing motivation relevant here.

<sup>9</sup> On cross-examination, Respondent had Lathan confirm the account he had set forth in his pretrial affidavit of July 6, 1981. In that version Lathan quotes Johnson as stating, "He said we could go ahead with the trial but if we did they were going to make it hard on me. He said it would be better for me and my family if I settled the case." That version, of course, reflects an unlawful motivation by the threat to make it hard on Lathan if he failed to drop the case. Johnson did not address this testimony. I find that the conversation occurred as set forth in Lathan's pretrial affidavit.

<sup>10</sup> Respondent's objections to testimony about the check transaction, as being part of a compromise and settlement, were overruled on the basis that the details lead to an understanding of the events (and motivation) in this case.

The door to my office is always open to you or any other member who feels they have been mistreated in any way.

Fraternally yours,  
/s/ N. F. Renaud  
N. F. Renaud  
Business Manager

The settlement check was not mailed to Lathan. During most of the time between August 1980 and the end of the year, Lathan worked for Deck and Rogers, a crane rental firm. Lathan testified that the firm sold out to Equipco around November 1980. Lathan remained until about the first part of January 1981 at which time he left to sign the o-w-l. Lathan testified that he was not permitted to sign the o-w-l until, in the office of Renaud, he endorsed over the settlement check. Renaud, over the objection of privilege of compromise and settlement, admitted that Lathan did endorse the check.<sup>11</sup>

It apparently was during the fall of 1980 that Lathan, while working for Deck and Rogers, filed a hospitalization claim on which he subsequently discovered that there was no coverage because the employer had not made the required contractual contributions. In December 1980 Lathan went to the office of business agent Bill Barker, who had jurisdiction over the territory, and complained that there was no coverage because Deck and Rogers had not made the required contributions to the medical and welfare fund.<sup>12</sup> Barker said he would check into it. As the days passed without word, Lathan again checked with Barker, who did not seem very interested in helping Lathan in that he would give no answer as to what he was doing on Lathan's request.

Lathan then went to Renaud with the matter, and Renaud said he would check into it. Two weeks later Lathan again asked Renaud about the matter, and the business manager said he would turn it over to the accounting office in Washington. Lathan asked for and received the name and telephone number of the person there who handles such matters. Hearing nothing further, Lathan telephoned the number that Renaud had given him earlier. The person there informed Lathan that there was no record of Local 450's submitting the claim to them for action.<sup>13</sup> Lathan's claim was never paid. It was shortly thereafter, in January 1981, that Lathan went to the union hall to sign the o-w-l.<sup>14</sup>

At the risk of confusing matters by getting ahead of the sequence of events, it should perhaps be noted that the nature of Lathan's employment at Deck and Rogers is touched on briefly later herein when the September 1981 trial of Lathan on internal union charges is discussed.

<sup>11</sup> Such details of the settlement are relevant to a consideration of the motivation of the same participants in this case.

<sup>12</sup> When Equipco took over in November, Barker appointed Lathan steward when the latter called to report that the firm was not abiding by the contract in certain respects.

<sup>13</sup> Neither Barker nor Renaud addressed this subject in his testimony.

<sup>14</sup> In his pretrial affidavit of July 6, 1981, Lathan asserts that he left Equipco because the firm was not abiding by the contract.

There is no dispute that Lathan sustained a head injury when knocked unconscious on February 5, 1981, while operating a forklift for All State Erectors, Inc. He incurred this injury from his head striking a metal canopy of the forklift as the equipment lurched when a chain broke while Lathan was pulling a crane with the forklift (Resp. Exh. 1). Within the required time, Lathan filed a workers' compensation claim. The details of the claim have some bearing upon credibility. At this point it may be noted that Lathan was paid \$3,325 in temporary total disability payments for the period of February 6 through September 15, 1981, with the exception of the time of April 14 through June 24.<sup>15</sup> These payments were in addition to medical expenses paid by the insurance company. On September 23, 1981, the Texas Industrial Accident Board approved a lump sum settlement of \$20,000.<sup>16</sup> This sum was in addition to the \$3,325 previously received by Lathan.

In its brief Respondent argues that Lathan testified falsely concerning his sources of income by failing to disclose the compensation payments when initially asked about them. The context of the record, however, shows that Respondent first asked Lathan whether he operated any business on the side other than his operating engineer work. Lathan was then asked whether he had any other source of income before his September 19, 1981, union trial other than what he earned as an operating engineer. Lathan replied, "[N]one at all." To the question of whether the only income he had during that period was what he earned as an operating engineer, Lathan replied, "Right. Yes, sir." But in the followup question as to whether he had no other income whatever, Lathan responded that he did have one small job doing some core drilling. To another question about his sources of income, Lathan again reiterated that he had no other source of income.

After a series of other questions ending with whether he had any money coming in, Lathan testified that he had "no earnings." When Respondent's counsel stated that he was talking about sources of income, counsel for the General Counsel objected on the basis that the question was misleading in the sense that the witness would have thought that the questions related to earned income and not whether the witness had a bank deposit, for example, drawing interest. When the question was finally clarified and made specific that it included money from any source, including stock dividends, inheritance, or whatever, Lathan answered in the affirmative. In these circumstances, and in light of the entire record and my observation of the witness, I find that Lathan did not testify falsely when he initially answered questions about other sources of income in the negative. This is not to say that the matter is free from all doubt. Lathan did not appear to be a naive person, and, while he possibly

should have recognized that his compensation payments would have been considered a source of income, the sequence and nature of the questions were such as to focus Lathan's attention on *earned* income. It is not at all unusual for a person not to think of other relevant topics when focusing intently on a specific item.

Although Lathan was taken to a medical center at the time of his injury, it appears that he only received an examination and X-rays and was not admitted for any period of time. He did receive medical examinations, medications, and treatments by doctors thereafter.

Lathan testified that as a result of the injury he lost work "off and on" until about May, but that he nevertheless had worked when possible because the weekly insurance payments of \$126 were too small not to work.<sup>17</sup> Moreover, he testified, "I asked the insurance company about it and they said that was agreeable with them, to go to work. So I did. I come there [the union hall] and took whatever job I could get." Under further questioning by Respondent, Lathan testified that an employee of the Hartford Insurance Company had agreed that he could draw compensation while he worked. Lathan could not recall the employee's name, and stated that he would be released to return to work at different times.

If Lathan was attempting to explain that there was an understanding whereby he would receive disability compensation only for the periods he was not released to return to work, it must be said that his testimonial clarification falls short of articulating that concept. Moreover, although he told the insurance carrier (Parker) on February 24, and again on March 18 (Resp. Exh. 9, p. 2), that he had not yet been released to return to work, in fact he was working on various dates throughout those weeks as his union work history record (G.C. Exh. 17-12), his pension report (G.C. Exh. 26-4), and the o-w-l (G.C. Exh. 8) all show. Indeed, complaint paragraph 11, as amended, contains several allegations falling in the time frame that Hartford was making disability payments in which it is asserted that Lathan had been bypassed on the out-of-work list. It appears that three of the allegations fall on two dates, March 12 and July 8, when Lathan visited his doctors.<sup>18</sup>

On the other hand, Hartford Assistant Manager Parker candidly admitted that it was Lathan who called in mid-April and reported that he was working. Parker testified that a Doctor Goldstein released Lathan to return to work on April 14.

Parker testified that, while temporary *total* disability is not paid to a claimant who is working, temporary *partial* disability can be paid in the statutory amount. He further testified that had he known that Lathan was working through much of this period up to the September settle-

<sup>15</sup> So testified Leonard P. Parker, an assistant manager with the Houston office of the Hartford Insurance Company, the insurance carrier.

<sup>16</sup> Of which \$5,000 went to Lathan's attorney. The settlement also included 3 years of any medical expenses incurred at the direction of three named doctors as a compromise settlement for Lathan's apparent claim of total and permanent incapacity.

Official notice is taken of art. 8306, sec. 10, "Total Incapacity," of the Texas Civil Statutes. A copy of the statute is included in the record as Resp. Exh. 23.

<sup>17</sup> Insurance records show that his weekly payments were \$133 (Resp. Exh. 1).

<sup>18</sup> I attach no significance, such as a conflict, to the fact that the doctors' appointments were made and/or kept on dates covered by the complaint. There is no evidence that these medical appointments interfered with Lathan's availability to work. Rescheduling of medical or other appointments is a common experience, and there is no evidence that Lathan would not have, or could not have, rearranged his medical appointments had he received conflicting job referrals.

ment he would have evaluated the claim at no more than nuisance value.<sup>19</sup>

Arguing from the foregoing at page 46 of its brief, Respondent asserts that Lathan lied during his testimony (about an understanding that he could be paid even while working), and "that he defrauded Hartford Insurance Company out of several thousands of dollars."

While the foregoing matters do raise a question concerning Lathan's good faith, the evidence fails to establish fraud. There is no evidence that Lathan understood the distinction between *partial* and *total* disability payments, and when the doctor released him to return to work Lathan notified Hartford. The record supports the inference, which I draw, that Lathan drew a distinction between working with adverse physical conditions while under the regular treatment of a physician and working after the doctor's release. Until such release, it appears that Lathan concluded that he technically was not able to work because he had not been released to return to work.

By way of comparison, the Texas courts interpret the statute as permitting an injured employee to receive *total* and *permanent* disability even though he, with pain for example, is working full time. As stated in *Consolidated Underwriters v. Whittaker*, 413 S.W.2d 709, 714 (Tex. Civ. App., Tyler, 1967) (error refused, n.r.e.):

The rule is established in this state that the fact that an injured employee resumes work after injury, but only under the whip of necessity, does not necessarily preclude a finding of total permanent disability; the latter issue remains, nevertheless, one of fact to be passed upon by the jury.

In *Consolidated Underwriters* the insurance company was appealing from an award of total and permanent disability on the basis the record showed that Whittaker, after his injury, worked at hard manual labor and earned even more from the same employer than he had before his injury. The court rejected this argument, ruled as shown above, and observed:

In the case at bar, there is evidence which was not disputed that Whittaker had to work, despite his incapacity to do so, in order to eat and feed his family.

Lathan testified here that he had to work because he could not live on the weekly disability payments.

#### B. Referral Procedures of the Exclusive Hiring Hall

The record contains a great deal of testimony by Johnson, Lathan, and others about the operation of the referral system through the o-w-l register. There seems to be no dispute regarding the mechanics of the referral procedure. Thus, when an employer calls the union hall and makes a request for an operating engineer, a "work order" card is completed. The dated work order lists the name and telephone number of the person calling, the

<sup>19</sup> Although this particular testimony was part of a rather lengthy offer of proof regarding file memorandums, I shall reverse my rejection of the offer as to this portion and receive this limited testimony because of the relevance it has to Lathan's credibility.

contractor, the reporting time, the job location, a description of the equipment to be operated, and states, if such is the case, that a specific operator is requested.<sup>20</sup> Business agent Johnson testified that in District 1 about 25 percent of the work orders are for specific operators.<sup>21</sup> Whether the percentage ratio is different in the winter months is not shown.

The business agents rotate certain office duties, including opening the office at 6 a.m., receiving the work orders by telephone, and calling out the work (or job) orders. At Local 450, the general offices are downstairs and the assembly hall, where most of the jobs are called out, is upstairs on the second floor. It is generally between 6 and 7 a.m. that the job orders are received by telephone and the work orders filled out. Before the business agent on duty takes the bulk of the work orders, that is, the 75 percent in which a specific operator has not been requested, *upstairs* at 7 a.m. to call out the jobs to the operators who are out of work, he distributes *downstairs* most, if not all, of the remaining 25 percent to the operators who have been requested by name.<sup>22</sup>

That the *downstairs* distribution is subject to being misinterpreted so as to invite charges of backdooring is proven by many of the allegations involved in this case. Much of the bitter resentment reflected in the testimony of Lathan, as he described the downstairs distribution,<sup>23</sup>

<sup>20</sup> There is no dispute that contractors may bypass a FIFO (first registered, first out) operation of the o-w-l by requesting a specific person. Business agent Johnson even testified that if it were mandatory that referrals be strictly by sequence of registration, with no consideration of capabilities and with the contractors unable to request by name, then the contractors would be put out of business. Aside from the question of whether that opinion is a bit hyperbolic, one issue which has been raised here is whether the request system has been operated in a discriminatory manner. Neither the General Counsel nor the Charging Parties attack the referral system as being either (1) facially illegal or (2) unlawful because effects of the request system exception might be considered inherently discriminatory in practice.

<sup>21</sup> This percentage estimate is based upon an analysis Local 450 made for the 3 months of June-August 1981. The analysis did not include the factor of job duration because the Union does not know how long an operator works on a particular job. While it could attempt to extrapolate from the pension report of the number of hours worked for an employer, that process no doubt could be inaccurate in that more than one job can be listed under a contractor on the pension report for a given month.

On occasion Local 450 is asked to recommend an operator who has certain capabilities and experience. While the traditional request by name system does not seem to be an issue, it is unclear whether the recommendation practice is free of controversy.

<sup>22</sup> During recross-examination, Johnson admitted that there is a sign at the union hall which states, "All jobs will be called upstairs." When asked how he could reconcile distributing requests to operators downstairs only a few feet from the posted sign, Johnson testified that there would be no point in his carrying a work order involving a request to the upstairs job call. By definition, he testified, a request is not a job opening, and it is the job openings which are called out upstairs.

<sup>23</sup> Lathan's anguish over what he perceived to be rampant nepotism appears throughout his testimony. One pithy description he gives is that about 50 operators constitute a favored clique which gets the choice jobs (long-term jobs or jobs involving a lot of overtime) downstairs, while Lathan and the others languish upstairs in a sort of labor pool waiting for day jobs they can get to make a living. As operator Bill Johnson picturesquely phrased it, the meat is distributed downstairs while only the bone is brought upstairs. Moreover, it is clear that Lathan's charge is that, while the hiring hall (under present rules) could be operated fairly, it in fact is administered nepotically.

could have been avoided if the Union had openly explained that such distribution was for operators who had been requested and for operators selected by Local 450 to be stewards.<sup>24</sup> This is shown by some of the explanations given by Respondent's witnesses at the instant trial and by Lathan's candid statement on the last day acknowledging that some of the instances of alleged backdooring possibly could have involved requests, and that the instances of backdooring were fewer than what they were just a few years ago.

Business agent Johnson testified that when he calls out the jobs upstairs he first goes through the whole stack of work orders, describes the equipment to be operated and the job location, and then starts down the o-w-l with the top name given first choice. While it has happened that he has exhausted the o-w-l before all the work orders, apparently that usually is not the case. When work is good there will be no more than 25 to 30 names on the o-w-l, but in recent months the list frequently has contained 80 to 100 operators' names. When an operator is given a work order card, whether upstairs or downstairs, he takes it to the secretary at the dispatch window,<sup>25</sup> who in turn writes out a referral (dispatch) slip<sup>26</sup> which the operator carries to the job where he tenders it to the steward, who usually discards it at a later time. The steward also checks the operator's membership card for good standing in the Union.<sup>27</sup>

The contractor employing operators referred by Local 450 under the collective-bargaining agreement files a monthly fringe reporting form for each employee with a firm which handles the pension reports. The pension reporting firm in turn prepares the monthly report which shows, by employee by month, the number of hours worked for which contractor.

As earlier noted, business agent Johnson testified that the exception to the referral rules for requests by name includes the situation where a contractor may ask a business agent to "hand pick" (and then recommend) an operator who has the necessary skill and experience on certain types of equipment or work. Johnson described such a request in which he recommended Jim Flanary and the contractor then requested Flanary.<sup>28</sup> Johnson also de-

<sup>24</sup> The appointment of stewards, as we shall see momentarily, is a separate source for protests of discrimination.

<sup>25</sup> Operators coming from upstairs go to a window, whereas operators who receive the work orders in the office of some business agent will simply walk over to the dispatch secretary's desk.

<sup>26</sup> An office clerical records some of the information on a work history card maintained by Local 450 on each operator.

<sup>27</sup> So testified Dean Jacka, a steward who figures prominently in one of the allegations. Lathan and Schubert gave similar testimony. Respondent admits that the stewards are its agents. The parties stipulated that Texas is a right-to-work State. Notwithstanding that fact, Jim Flanary, an operator who is sometimes a steward or foreman, testified that if an operator's book "ain't stamped up just right, you don't get to work." On this same point, although it gets ahead of the story sequence, business manager Renaud testified that it would not take long for employers in a district of Local 450 to learn that a certain member had been expelled by the Union and that he was a "problem." Testifying that he would not say the employer would not hire the expelled member, neither would he say the contractor would hire him.

<sup>28</sup> Johnson testified that, just as he has an obligation to his membership to see that working rules are upheld, so he feels an obligation to send competent operators in view of the dangerous nature of the work and the impact they have on a job by virtue of being a service craft enabling the other crafts to do their work. And, when Local 450 recommends an op-

scribed about three other exceptions in situations involving retired members, members about to lose their medical insurance because of too few hours, and members of other districts needing a job in Houston to be near a family member undergoing treatment in a Houston hospital. It does not appear that the privileges granted in the foregoing humanitarian situations are the source of any dispute.

When a job ends an operator returns to the union hall and signs the o-w-l. The preexisting rules for placement on the o-w-l were ratified by the membership of Local 450 on August 28, 1980, and such ratified rules read (G.C. Exh. 5):

1. If you accepted a job and worked more than 2 days, you went to the bottom of the list.
2. When you accepted a job, a date was placed beside your name.
3. If you were back on the third day, the date was removed. If you were not back by the third day, your name was marked off.
4. You must attend roll call on Monday morning at 8:00 A.M. in order to retain your position on the list or have a doctor's certificate that you were unable to work, or you must have a card from the Texas Employment Commission stating that you were drawing unemployment.
5. If you accepted a job and quit for any reason, you went to the bottom of the list.
6. If a member agreed to walk a picket line, his name was placed at the top of the list.
7. In your By-Laws, this out of work procedure is backed up by Article 5, Section 2, Paragraph B, to wit:

"Failing to observe and follow customary procedures and regulations concerning assignment to work, transfer of work or reporting on 'out-of-work' list."

The Monday rollcall referred to in rule 4 works this way. Every Monday not a holiday Johnson, or some other business agent, takes the o-w-l upstairs at 8 a.m. for rollcall.<sup>29</sup> The list he carries up has been typed by a secretary following the rollcall made the previous week as modified by handwritten deletions and additions occurring the balance of that week. An operator who answers is "saved" in his position on the o-w-l. If an operator does not answer when his name is called, Johnson draws a line through the name on the o-w-l.<sup>30</sup> At the conclusion, Johnson inquires whether he has missed anyone.

An operator can "save" (maintain) his position on the o-w-l even though not present at rollcall in situations

erator, it must be careful. Johnson testified, for the Union currently is the defendant in a damage suit in Beaumont, Texas, in which the Union allegedly recommended an incompetent operator. In any event, art. IV of the collective-bargaining agreement requires Local 450 to refer "skilled workmen." (G.C. Exh. 2, p. 5.)

<sup>29</sup> The 8 a.m. weekly rollcall is not to be confused with the daily 7 a.m. job call.

<sup>30</sup> If the operator's signature appears toward the bottom of the list, after his typed name in an earlier position has been scratched, it means that he made himself available later in the week for referral.

such as a car breakdown on the way to the hall or a doctor's appointment. He simply explains the situation to the business agent and has his name restored.<sup>31</sup> Johnson testified that he simply takes the man's word. In this connection, Johnson testified that the o-w-l depends largely on the honor system for successful operation. Although the rules do not expressly require an operator to call the Local and report that he is working, or has worked, more than 2 days, Johnson testified that such is expected under the honor system. Sometimes, Johnson testified, operators cheat the system and their brother members by not reporting when they work more than 2 days.<sup>32</sup>

All an operator has to do to maintain his position on the o-w-l, or even to move up on the list, is to be present and answer at the Monday rollcall. Johnson testified that this is so because an operator does not have to accept a particular job or any job.

### *C. Alleged Threats by Business Agent R. L. Johnson*

#### 1. Introduction—paragraph 13 dismissed

Independent allegations of threats are alleged in complaint paragraphs 12, 13, and 14(a) against business agent R. L. "Sonny" Johnson. Paragraph 14(b) alleges that on December 3 job steward Dean Jacka threatened and assaulted Lathan at the J. W. Bateson Company job because of the unfair labor practice charges Lathan had filed in this case.

Paragraph 13 alleges that on June 29 Johnson told employee-members at Respondent's hall "that he was going to file internal union charges against Charging Party Joel Lathan because he had filed unfair labor practices with the Board." As no evidence was offered in support of this allegation, I shall dismiss paragraph 13.

#### 2. May 25 threat at Four Seasons Hotel

##### *a. Background of May 24*

By paragraph 12 the General Counsel alleges and argues that on May 25, 1981, Johnson threatened to remove Lathan from the Four Seasons Hotel job of the W. S. Bellows Construction Corporation if Lathan filed charges with the Board as he had done in 1980. To understand and evaluate the events of May 25, we must consider what occurred a day earlier.

It is undisputed that on May 24 Charging Party Larry Schubert and operator Billy Wheelis drove to the jobsite of W. S. Bellows Construction Corporation at Austin and Lamar Streets in downtown Houston, where Bellows was constructing the Four Seasons Hotel, and there held a conversation with Lathan.<sup>33</sup> Schubert testified

that because he was exasperated at seeing the backdoor-ing he decided that he wanted to talk to Lathan, who, Schubert had heard, knew how to file a charge with the Labor Board. Schubert did not know where the job was located, but his friend Billy Wheelis did know and offered to drive Schubert to the site.

When Schubert and Wheelis arrived at the Four Seasons Hotel jobsite they drove down to the basement where the change shacks were located. No one was there at the moment, but in a few minutes Operator Foreman James Robinson walked up.<sup>34</sup> Schubert asked him if Robinson could reach Lathan on the radio which Robinson was carrying, and Robinson said that he would try because Lathan did have one.<sup>35</sup> In their presence Robinson made the call. Lathan, who was operating light equipment on the job, testified that Robinson told him over the radio that he had some visitors.<sup>36</sup> When Lathan arrived he observed Schubert, Wheelis, Robinson, and Frank Goodwin, the job steward, standing within a few feet of each other. Lathan knew Wheelis but was only vaguely acquainted with Schubert. He credibly testified that their visit was a surprise to him.

After the exchange of greetings, Lathan, Schubert, and Wheelis walked into the operator's change shack where they engaged in conversation. Lathan placed the time at or about 10 a.m. The witnesses differed on the length of the conference, with their time estimates ranging from 10 minutes to no more than 30 minutes. A time of 15 to 20 minutes would seem to be very close to the time the three visited in their meeting.<sup>37</sup>

parties concede that Schubert and Wheelis did visit Lathan, apparently in late May. I shall utilize the May 24 date herein for the purpose of convenience and to avoid confusion.

<sup>34</sup> The record establishes that, although the older term of "master mechanic" is sometimes used interchangeably with the newer term "foreman," the terms describe the same function or person. Under the contract a foreman operates the equipment until there are six or more operators, at which time he performs foreman duties only. In the vernacular the former is termed a "working foreman" and the latter is referred to as a "walking foreman." When the total of operating engineers reaches 14 or more "on any one job" an additional foreman, referred to as an assistant foreman, is designated. Under sec. 20(r) of the contract's working rules, "The selection of craft foreman and general foreman shall be entirely the responsibility of the employer . . . . Foreman and general foreman shall take orders from individuals designated by the employer." Robinson testified that at the time on that job he was a walking foreman.

Foreman Robinson testified that he was on the street when Schubert and Wheelis drove up. To their inquiry about Lathan's whereabouts, he said Lathan might be downstairs in the change shack. For several reasons, including the facts that the version of Frank Goodwin, the steward, is more consistent with Schubert's version than with Robinson's and that both Robinson and Lathan had two-way radios which Robinson could then have used rather than referring to the change shack, I credit Schubert in his version.

<sup>35</sup> I do not credit Robinson's denial that Lathan carried one. Lathan operated about six pieces of small equipment, such as welding machines and air compressors, scattered around and over the 30-story building and it makes sense that he would carry one so that he could be reached in the event one of the pieces developed trouble while he was 30 floors away.

<sup>36</sup> I do not credit Robinson's denial that he radioed Lathan.

<sup>37</sup> As we shall see, business manager Renaud subsequently filed internal union charges against Lathan and Schubert for, in part, "holding meetings on jobs and causing dissension among members." Lathan preferred to describe the conference as a visit rather than a meeting. The descriptive term chosen will not control the decision herein.

<sup>31</sup> Business agent Bill Barker testified that an operator who is on vacation has his position saved for him. The business agent or secretary writes "vacation" after the operator's name on the o-w-l.

<sup>32</sup> Johnson also testified that in preparing for this case he discovered other instances of operators working more than 2 days, yet their names were not marked off the o-w-l. Presumably these instances include oversight by Local 450 and the operators as well as possible deliberate cheating by some operators. In this connection, it is unclear just how much pressure is put on the operators to notify the hall when they are on a job extending beyond 2 days. Telephoning in from the job during business hours may not be easy for the operators.

<sup>33</sup> As May 24 was a Sunday, and Monday, May 25, was the Memorial Day holiday, it would seem that the alleged date is incorrect. Because all

Reconstructing the events is difficult because there are so many discrepancies, disputes, and peculiarities in the testimony. For example, although both Lathan and Schubert testified that Robinson left when Lathan came down after being radioed by Robinson, Lathan also testified that Robinson entered the change shack for a moment just as Lathan and the others were sitting down. But Schubert testified that Robinson never came in. Schubert's version agrees with Robinson's because the latter testified that he did not recall walking to the operator's change shack. Yet the minutes of the September 24 trial of Lathan and Schubert on internal union charges record Robinson as testifying there that he did enter the change shack they were in and that Lathan and the others ceased talking until he left (G.C. Exh. 15-13, p. 2).

For some peculiar reason, both job steward Frank Goodwin and Foreman Robinson testified that, apparently independently of the other, each had a compelling need to get some "tools or something" from the change shack some "15 or 20 minutes" after each had seen Schubert and Wheelis drive downstairs. Goodwin testified that he walked in, introduced himself, shook hands, and "went on about my business."<sup>38</sup> Consistent with the version he gave at the internal union trial on September 24, Goodwin testified that he did not overhear whatever Lathan and the others were talking about.

Robinson testified that as he approached the door (which Lathan admitted was left open) to the shack he could hear what was being said because the voices were rather loud. What caught Robinson's attention was Schubert's remark that he had proof operator Lloyd Risinger had been backdoored to a job.<sup>39</sup> The three were "upset" at this and discussing what they could do about it. Robinson testified that he had not been noticed and that he stepped inside the adjoining shack of the surveyors and continued to listen. According to Robinson, the wall partitioning the two shacks was made of 3/4-inch plywood. Schubert described the partition as a "solid wall," but Lathan testified that it was made of scrap lumber and contained such large openings that he could observe Goodwin seated next door appearing to read a newspaper while Lathan and the other two conversed.<sup>40</sup> He specifically asserted that it was Goodwin and not Robinson in the next room. He confirmed that anyone in the next room could overhear what was being said in their shack.

Some of Lathan's certainty about Goodwin's presence derives from his assertedly hearing an ironworker trying to locate Goodwin on the radio to service their needs by operating a crane known as a "cherry picker." This not only supposedly occurred during the conference, but Lathan testified he walked around to Goodwin, reported about the call, and told Goodwin that if he did not go he, Lathan, would do so because, as he told Goodwin, "they have been complaining about you before, not standing with your machine, and somebody's got to man it. So if you are not going to go, I will go." Goodwin

said he would go and he left. Thereafter Lathan, Schubert, and Wheelis talked another minute or so and they then left.

Wheelis did not testify. Schubert testified that he did not remember a call being received over a radio, and that he did not recall seeing anyone else around the room at the time of the meeting, and specifically not Goodwin. When they all walked out together he did not see anyone around the shack, and he would have seen anyone there.

It does not appear reasonable to suppose that if the conference was interrupted by the radio call for Goodwin, followed by Lathan's walking around to speak to Goodwin, Schubert would not remember such an event. Moreover, it seems highly likely that if Lathan had observed Goodwin in the adjoining room he would have told Schubert that they should keep their voices low so Goodwin could not overhear their conversation. Under all the circumstances, I do not credit Lathan's testimony on this point.

Returning now to the subject matter of the conversation, it is clear, and I find, that Schubert complained about the backdooring going on, and that Lathan offered his assistance in accompanying him to the NLRB to file a charge, and told Schubert that he would need facts. I find that Risinger's name was mentioned in connection with the backdooring.<sup>41</sup>

Robinson testified that while eavesdropping he overheard Lathan tell the others that he had "proof" that Local 450 was planning a barbecue for a bunch of people from the job and that the Union intended to pay the cost. Robinson testified that about "15 or 20" minutes later he saw Goodwin and related what he had heard about the backdooring and the barbecue and that he was going to report the matter to Johnson. When Robinson reported the details to Johnson, the latter told him not to worry about it, and if they met again to eavesdrop and learn what was happening. Foreman Robinson thereafter informed job steward Goodwin of his conversation with Johnson.

Robinson not only admitted that when he overheard the conversation he knew that Lathan was referring to a private party which had been held over the weekend of May 15-17, 1981, which Local 450 did not underwrite, but also that he so informed Johnson in his telephone report. Robinson knew that this barbecue was different from a "topping out" party a company has when big construction crews finish the top floor. At the instant trial, Robinson produced a copy of the invitation and map (Resp. Exh. 6) which Goodwin had drawn up. He testified that a half dozen or so copies had been laying on the table in the change shack since about Friday, May 8. As the invitation, appearing above the map, is not addressed to anyone, it seems to be more of an announcement informing everyone of the "BBQ!—Beer!—Booze!" to be enjoyed at a certain river location over the week-

<sup>38</sup> Neither Lathan nor Schubert addressed the question of whether Goodwin came in at any point.

<sup>39</sup> I do not credit Schubert's denial that Risinger was mentioned.

<sup>40</sup> While the descriptions of the partition have surface inconsistency, they are not mutually exclusive. It could easily have been made of scrap 3/4-inch plywood, an essentially solid wall, but with several holes or gaps in the lumber.

<sup>41</sup> I do not find that anyone said he had "proof" that Risinger was backdoored, or that it was necessarily Schubert who made the remark. Most probably it simply was an expression of the same bitter resentment about Risinger being backdoored that Lathan expressed at the instant trial.

end of May 15-17. Robinson testified that money was collected to pay for the cost and that Local 450 did not pay.

Without attempting to reconcile every disputed detail of the change shack incident, I find that what happened when Lathan arrived downstairs and Robinson left the area was that Robinson conferred with Goodwin<sup>42</sup> and then telephoned Johnson who instructed Robinson to return and eavesdrop. As directed, Robinson returned and slipped unnoticed into the surveyor's shack next door where he surveilled the balance of the meeting of Lathan, Schubert, and Wheelis and heard Lathan and Schubert (apparently Wheelis only listened) complaining to each other about the backdooring and discussing the procedure for filing a charge with the NLRB.<sup>43</sup>

Regarding the barbecue, I find that Lathan did little more than raise the question of whether Local 450 had paid for some of the cost. Robinson did not testify persuasively on this score when he quoted Lathan as asserting that Local 450 was "planning" a barbecue. The barbecue already had been held and Lathan would have been well aware of the announcement-map by virtue of the copies laying on the table in the change shack since about May 8. Robinson testified that Goodwin, the job steward, had been, in effect, the social chairman in arranging the barbecue and running off copies of the map and he further testified that Johnson had been invited. Renaud also testified that he was invited but did not go. As a collection was taken up, presumably on the job, it is most likely that Lathan would have been aware of that fact. Even so, he could have surmised that Local 450 might end up paying part of the cost, and therefore wondered aloud to Schubert about such possibility in the change shack. Lathan's expression on this point, I find, was thereafter seized upon and distorted by Local 450 through Robinson.

Renaud conceded that people, including Robinson and Goodwin who told him about Lathan's remarks, had confused his barbecue parties. Whether Lathan in fact confused them is immaterial since it is obvious that Respondent was of the opinion that Lathan had confused them.

#### b. *The May 25 threat*

Continuing with his testimonial recitation, Lathan stated that, around 8:30 a.m. the following day while he was tending an air compressor on the ground level, business agent Johnson came to the job and inquired as to the whereabouts of Robinson. Lathan tried unsuccessfully to raise Robinson on the radio. In response to questions of whether the conversation continued and whether he remembered Johnson saying anything else, Lathan answered, "No." He could not recall a single word, and testified that Johnson left the area.

<sup>42</sup> It is quite possible that Goodwin was not present in the basement when Lathan arrived, for only Lathan places him there. However, it is an insignificant point.

<sup>43</sup> On cross-examination, Robinson conceded that what he overheard about the backdooring was a complaint that the hiring hall was not being operated as they felt it should be.

After a series of Respondent's objections<sup>44</sup> were overruled, Lathan was prompted, in an attempt to refresh his recollection, as to whether he recalled Johnson saying anything about the NLRB. Still drawing a complete blank, Lathan testified, "I don't recall." After silently reading pages 14-15 of his pretrial affidavit of July 6, 1981, Lathan asserted that he did recall something else.

Once Lathan had refreshed his recollection, he testified that Johnson said he had heard that Schubert and Wheelis had been there and that Lathan was going "to start more shit with the NLRB," and that he was going to see if he could get Lathan removed from the Four Seasons Hotel job. Lathan told Johnson to do whatever he wanted, but that Lathan would have to return to the NLRB "to get them to protect me in some way." At that point Johnson walked away.<sup>45</sup>

For whatever reason, Johnson did not address Lathan's foregoing testimony, and it therefore stands undenied.<sup>46</sup> Although Lathan's testimony on this point is undisputed, Respondent asserts in its brief that the record demonstrates that Lathan is a totally unbelievable witness. In his brief the General Counsel refers to the fact that before taking the witness stand Lathan asserted that he was taking Tylenol to overcome a fever from the "flu" and that he did not believe he could think clearly.

While I have no doubt that Lathan's first day of testimony, given before a recess of over 2 weeks, was delivered while he was under some personal discomfort, that lack of personal comfort did not appear to affect his ability to testify on any other matter. Accordingly, I find that such condition had no bearing on Lathan's failure to recall, without refreshing his recollection, the damaging statement he attributed to Johnson.

Not lacking in imagination, the General Counsel's follow-up argument is that "Lathan's inability to remember the horrendous things said to him" by Johnson "was caused by sheer terror at Johnson being in the Courtroom and is certainly no reflection upon Lathan's credibility." That argument is unpersuasive, for Lathan never exhibited the least amount of fright, nor does the content of his testimony in general support the "terror" argument.

I am left with the question of whether Lathan's failure to recall was a type of Freudian slip indicating that the remark was never made, or whether it was just one of those tricks the memory can play at an inopportune moment. Resolution of the matter would perhaps be

<sup>44</sup> Including repetitive questioning, leading, no proper predicate, and the General Counsel impeaching his own witness and attempting to bolster his witness. I advised that all circumstances would be considered in resolving credibility.

<sup>45</sup> Lathan was bumped from the job about May 29 when a tower crane was temporarily placed out of service by the Bellows firm. In order to keep the tower crane operator on the job, Lathan was bumped to make room for the former. The record reflects that tower crane operators are specialists and that contractors will go to great lengths to keep tower crane operators available. The General Counsel does not allege that Respondent unlawfully caused Lathan's removal from the Four Seasons Hotel job.

<sup>46</sup> Frank Goodwin, the job steward, conceded that he saw Johnson on the jobsite around the time of the May 24 visit by Schubert and Wheelis, and Foreman Robinson testified that Goodwin told him he had seen Johnson on the job the next day.

easier had Johnson addressed the issue during his testimony.

In resolving the foregoing matter, I take note that operator Bill Johnson gave testimony similar to Lathan's involving a conversation with "Sonny" Johnson in December 1980. On that occasion, member Johnson became upset when W. O. "Ty" Bloodworth, president of Local 450 and also a business agent, dispatched another operator to a job without calling out the job upstairs. Member-operator Johnson lived not far from the job. He testified that he confronted Bloodworth about it, and that Bloodworth said that the other operator lived near the job. Shortly afterwards, member Johnson, apparently no relation to business agent Johnson, was dispatched to a W. S. Bellows job across the street from the Four Seasons Hotel project in downtown Houston.

That same morning after he arrived at the Bellows job downtown, member Johnson testified, business agent "Sonny" Johnson approached him on the job and asked him what had happened that morning. Johnson described the episode whereupon business agent Johnson, pointing his finger at operator Johnson,<sup>47</sup> stated that the next time a man went to the NLRB and filed charges on the Local he was going to take his book away from him. Member Johnson explained that he had no plans to say anything about the matter and intended to overlook it because he thought Bloodworth had been ill. The parties stipulated that member Johnson had filed a charge against Local 450 in Case 23-CB-2242 on January 19, 1979, which was closed by the February 20, 1979, approval of a withdrawal request, and had filed another charge against the Local in Case 23-CB-2399 on April 17, 1980, which was dismissed by the Region on May 7, 1980.

In his own testimony, business agent Johnson did not address the accusation of operator Johnson. He seemingly did deny operator Johnson's testimony about the "meat" being passed out downstairs with only the bone left over for the people upstairs. Thus, he testified, "I am disputing his words is all I am doing." While I treat that as a denial of any backdooring, it is not a denial of the conversation. If it was intended to be, it was ambiguous and less persuasive than member Johnson's straightforward testimony on the December 1980 conversation.

Under all the circumstances, I credit the testimony of Lathan and Bill Johnson as set out above.<sup>48</sup>

<sup>47</sup> Regarding an occasion in the coffeeroom in January 1982 when Johnson warned Charging Party Schubert not to involve the business agent's family in union politics, Johnson admitted that "I had my finger pretty close to his nose." While the Johnson-Schubert matter is discussed in more detail later, it serves here to support the credibility of member Johnson.

<sup>48</sup> I do not overlook Johnson's testimony that he has never denied Lathan a job, "gotten him run off a job," or issued an order to get him removed from a job. While a denial of Lathan's accusation may be implicit in such testimony, its indirect nature is insufficient to overcome the affirmative version of Lathan. Although Lathan's recollection had to be refreshed from scratch, and even though I do not credit him on all aspects of his testimony in this case, he delivered his version of his conversation with Johnson in a believable enough fashion after his memory had been refreshed. Had Johnson addressed the subject directly I might find otherwise, but it would be idle to speculate. Finally, in assessing Lathan's credibility here, and on other points, I have taken into consideration the entire record, including the factor of his bitter resentment and also his

### 3. The death threat of July 9, 1981

Complaint paragraph 14(a) alleges that, about July 9, R. L. "Sonny" Johnson, in his office at Respondent's hall, instructed Lathan to keep his "mouth shut or suffer the dire consequence of ending up dead."

According to Lathan, around July 9 as he and operator Don Smith were about to leave the union hall, Johnson motioned for Lathan to come to his office. With just Johnson and Lathan present, Lathan initiated the conversation by asking how operator Lloyd Risinger managed to bounce from one job to the next when he was at the bottom of the list. In obscene language, Johnson told Lathan that it was none of his business, that he was sick and tired of Lathan's trying to wreck the Local, and that Lathan had better keep his mouth shut or he would end up dead. Lathan responded that he probably was as good a union member as Johnson or anyone. Johnson said, "Well, we are getting ready to see how good of a member you are."<sup>49</sup> Lathan left.

Johnson's version is that he was late for an appointment elsewhere that morning, and, when Lathan said he needed 2 minutes to talk with Johnson, the latter said that was all the time he had.<sup>50</sup> Lathan asked where Lloyd Risinger had been dispatched that morning. Johnson testified that he asked Lathan why he did not just back off and "let things go." Lathan replied that he was not backing off because Johnson was doing wrong by backdooring people. Johnson asked him: "Joel, why don't you quit trying to tear the Local up? You know, let's just knock it off." Lathan replied that he was not seeking to tear up the Local. Johnson responded that by all indications Lathan was seeking to do so.

Johnson told Lathan that if he had nothing else on his mind that he, Johnson, was in a hurry. "No," Lathan replied. Johnson stated, "Well, let's get out of here," walked Lathan to the door, and then returned to his office to pick up his briefcase and left himself.<sup>51</sup> There is no express denial by Johnson that he told Lathan he could end up dead although it might be argued that a denial is implicit in Johnson's version.

Regarding the process of resolving credibility on this allegation of a threat of violence, the General Counsel points to two other incidents as lending credence to a finding that Johnson has a propensity toward threatening violence. These have to do with operator Bill Johnson's description of an incident about December 5, 1981, and an event in January 1982 described by Lathan and Schubert. In both instances the witnesses quoted Johnson as

tendency to repeat loose gossip and speculation as if they were akin to established fact.

<sup>49</sup> By so remarking, the General Counsel argues, Johnson telegraphed the Union's next move and revealed "the fact that the internal union charges were being prepared in retaliation for the unfair labor practice charges which had been filed approximately one month before." Indeed, the internal union charge against Lathan was filed that very day and a copy mailed to Lathan on July 10 (G.C. Exh. 15).

<sup>50</sup> Johnson made it clear that a few minutes elapsed between Lathan's request and the time Johnson signaled Lathan to come in. Thus, Lathan's testimony about Johnson motioning for him and that Lathan initiated the conversation is consistent with Johnson's version up to this point.

<sup>51</sup> There is testimony, denied by Lathan, that Lathan remarked in the presence of other members that he had "backed" Johnson down during their conversation. I credit Lathan's denial.

either forcefully or angrily stating that Schubert had an ass whipping coming. Operator Johnson was about to enter Sonny Johnson's office on December 5 when the latter, in response to a question about the union trial of Lathan and Schubert by other members then in his office, remarked that Schubert had an ass whipping coming as soon as he got his union book from him.

In the January 1982 incident, Lathan and Schubert were in the coffeeroom when Johnson, already expressing anger at an oiler about some matter, turned on Schubert and stated that he was tired of Schubert's telling the members how much money he made and interfering with his family life by calling and threatening his wife and shooting holes in his car.<sup>52</sup> When Schubert said he had done none of that, Johnson stated that Schubert had an ass whipping coming. Johnson told Schubert to take his friend, pointing to Lathan, to the Labor Board and file some more charges.

Business agent Johnson did not address the specific testimony of operator Johnson. In his version of the coffeeroom incident with Schubert and Lathan, Johnson testified that he had received a couple of telephone calls reporting that Schubert was telling members on a job that Johnson had made in excess of \$55,000 plus what he was stealing. Johnson confirmed this by a telephone call to one of the apprentices to whom Schubert supposedly had made the statement. Johnson concluded that Schubert, in arriving at the \$55,000 figure, had included the earnings of Johnson's wife, who works for Delta Air Lines.<sup>53</sup> That someone would involve his wife in "union politics" made Johnson, in his words, "pretty hot."

Johnson testified that he therefore told Schubert that because Schubert was attempting to involve his wife in union politics he was making Schubert a solid promise:

If you involve my family in any way, I am going to give you one of the damndest ass kickings you will ever get in your lifetime, and don't you ever believe that I am telling you a lie, Larry, because I am making you a promise. And if you think I am not, you take your friends down in the hall and go to the Labor Board and tell them people that, because I will tell them that.

When asked whether he put his hands on Schubert, Johnson said he did not, "But I had my finger pretty close to his nose."

The General Counsel argues that Johnson merely used his wife as a convenient basis of indignation in order to shield his vituperative conduct toward Schubert. The

<sup>52</sup> The mention of Johnson's earnings is in reference to the salary, and possibly expenses, paid by Local 450 in the year ending June 30, 1981. Such matters are shown on the financial report, Form LM-2, submitted annually to the Department of Labor by labor organizations. In late 1981, Lathan and Schubert, in the course of being referred by the NLRB's Regional Office in Houston to the Department of Labor on a particular question, obtained a copy of Local 450's LM-2 for the year ending June 6, 1981 (G.C. Exh. 25). Lathan posted a copy of the report on the Union's bulletin board for all members to see. The report reflects that in the period covered Local 450 paid Johnson a salary of \$41,311 and expense reimbursements of \$10,531.

<sup>53</sup> At the trial Schubert demonstrated confusion over the LM-2 amounts, at one point testifying that the report showed Johnson's salary at \$51,000, plus expenses of \$10,000.

real reason, it is argued, for Johnson's outpouring of "personal animus" against Schubert was because the latter was so disloyal as to file NLRB charges against Local 450.

While the issue is close, I accept Johnson's version of the coffeeroom exchange, and I find that Johnson's animus was indeed "personal." That is, it related to Johnson's perception that Schubert was including the earnings of Johnson's wife. I note that Schubert even at the instant trial erroneously quoted Johnson's earnings as exceeding \$50,000. Moreover, in the December 5 comment of Johnson, overheard by operator Johnson, as well as in the coffeeroom incident, Johnson referred only to Schubert, yet it was Lathan who posted the LM-2. Even though Johnson may not have known which one posted the LM-2, if he was seeking to use that as a pretextual shield to threaten physical violence over the filing of charges, it would seem that his threats would go to Lathan as well as to Schubert. Under all the circumstances, I find that Johnson uttered the beating threats about Schubert because Johnson perceived, whether rightly or wrongly, that Schubert was including the earnings of Johnson's wife in the figure Schubert supposedly was quoting.

But threats of violence create an atmosphere receptive to such conduct, and reports of such threats may not carefully distinguish between personal disputes and disputes involving rights protected by the Act. Moreover, Johnson admittedly referred to the Labor Board in making his threat. Reports of the incident and reference to the Labor Board would hardly be likely to make the fine distinctions in order to separate personal issues from protected rights.<sup>54</sup>

Although these specific incidents occurred subsequent to an incident of alleged violence against Lathan by job steward Dean Jacka on December 3, it is clear that threats of violence by Johnson, second in command at Local 450,<sup>55</sup> are conducive to an atmosphere receptive of violence. Such an atmosphere is unacceptable when it involves rights protected by the Act.<sup>56</sup> An example of what can happen when such an atmosphere gets out of control and violence becomes the master is exemplified in the case of *Iron Workers Local 433 (AGC of California)*, 228 NLRB 1420 (1977). Indeed, business manager Renaud testified that, in the weeks when he was seeking legal approval from counsel to file internal charges against Lathan and Schubert, he told counsel that "this thing" will cause a *killing* if it keeps on. Not once did Renaud or Johnson describe any firm or stern message given by them to the membership to the effect that Lathan had a statutory right to investigate possible back-dooring and the right to file NLRB charges and that there should be no talk of violence. Renaud's August 1980 letter to Lathan does not qualify in this respect. Johnson admitted that he wanted to file internal union

<sup>54</sup> The threat is not the subject of an independent allegation in the complaint.

<sup>55</sup> Not only is Johnson a business agent, but he also is the financial secretary of the Union and the assistant business manager.

<sup>56</sup> Of course, local authorities also have jurisdiction over all threats of physical violence.

charges against Lathan and Schubert long before they were in fact filed, but the advice of counsel was to hold off.

Recitation of the foregoing is not to overlook Johnson's testimony that he utilizes diplomacy in labor relations now compared to his assertion that 25 years ago in Houston organized labor was run by "muscle." Comparisons are relative, however, and the search here is for ascertaining what occurred in this case.

Returning now to the allegation that on July 9 Johnson told Lathan that he had better keep his mouth shut or he would end up dead, I note that Johnson's version confirms some of the account given by Lathan, with the exception, of course, about the threat. Johnson's version also reflects that he considered Lathan's investigation of perceived backdooring as conduct designed to destroy the Union. Given that attitude, and Johnson's finger-pointing tendency, the step to threatened violence is not a long one. In considering the demeanor of the two witnesses on this point, I observed that Lathan testified more naturally, and I credit him regarding this issue. Accordingly, I find that Respondent violated Section 8(b)(1)(A) of the Act as alleged in complaint paragraph 14(a).<sup>57</sup>

#### D. The Internal Union Charges and Trials

##### 1. Introduction

By letters dated July 9, 1981, business manager N. F. Renaud preferred internal union charges against Lathan and Schubert on the following two grounds. First, under article XXIV, section 7(e), of the International constitution,<sup>58</sup> to wit:

Brother Lathan [and Schubert] violated the Constitution of the International Union by holding meetings on the jobs and causing dissension among members.

Second, under the bylaws of Local 450, article V, section 2(g),<sup>59</sup> to wit:

<sup>57</sup> I make no finding that Johnson said he would personally cause Lathan's death. As a practical matter, Johnson may have been warning Lathan that if he did not cease his protected activities other members, incensed over his investigation and NLRB charge, would take matters into their own hands and kill him. The violation is the same whether it was in the form of a "friendly" warning or in the blunt words described by Lathan. Local 450's responsibility is not to threaten Lathan, but to take firm and decisive action in preventing an atmosphere receptive to expressions of threats and violence and in extinguishing forthwith the slightest development of such an atmosphere insofar as such relates to members' activities protected by the Act.

<sup>58</sup> This section reads in relevant part (G.C. Exh. 4):

Any officer or member of a Local Union who . . . creates dissension among the members . . . who willfully slanders or libels an officer or member of the Organization . . . may be disciplined, or upon trial therefor and conviction thereof, be fined, suspended or expelled from his Local Union.

<sup>59</sup> This section of the bylaws reads in relevant part (G.C. Exh. 3):

Members . . . shall not slander or libel the Local Union, its members or its officers . . . No member shall be permitted to [at] any assembly or meeting of other members to engage in any of the conduct hereinbefore described.

Slandering the Officers and Agents of the Local Union.

Renaud served as the prosecutor at the September 24, 1981, trials at which both Lathan and Schubert were found guilty, fined \$1,000 each, and expelled from membership. Lathan perfected his appeal to the International, but Schubert's appeal was untimely when the original was lost in the mail. Copies of the minutes of the trials were received in evidence herein.<sup>60</sup>

Neither Lathan nor Schubert appeared at his trial. Lathan and Schubert testified that they were told it would be unsafe for them to attend. Supposedly, one member had threatened to blow off their heads with a shotgun if they appeared.

Lathan and Schubert did prepare a letter, dated September 24, 1981, which was read at the union trials.<sup>61</sup> In their letter, Lathan and Schubert asserted that they were proud of their membership in the Union, but that they felt compelled, as good union members, to obtain compliance by Local 450 with the referral procedure by filing charges with the NLRB. Quoting at length from Renaud's August 1980 letter to Lathan promising that there would be no favoritism in job referrals, and asserting that current NLRB charges were tied to the internal union charges, they requested that the Union postpone the trials until the NLRB ruled. This joint request was denied and the trials took place.

To some extent, the parties in the instant hearing, principally the General Counsel, elicited evidence concerning what matters were or were not litigated at the Lathan-Schubert trials of September 24. Most of the witnesses at those trials did not testify before me. On the other hand, Lathan and Schubert gave testimony before me contradicting various evidentiary matters presented at the September 24 trials.

I find that Lathan and Schubert testified credibly before me as to such matters. An example of such is the testimony offered on September 24 by member Ken Deck of Deck and Rogers that Lathan had solicited a job and agreed to work for less than was required by the contract. As such an allegation was not a part of the charges brought against Lathan, the General Counsel argues that Local 450, by offering such evidence, sought to prejudice the voting membership and further that this demonstrates Renaud's unlawful purpose in charging and prosecuting Lathan. In the instant hearing, Lathan credibly testified in extensive detail about his work with Deck and Rogers and it is clear that he did not engage in soliciting or working outside contract conditions.

Respondent contends in its brief that the reasonableness of the fines imposed is not before me. While that is true as a general rule, the excessiveness or severity of such a fine may nevertheless be considered in ascertaining the motive, reason, and purpose for the fine. *Operating Engineers Local 965 (Elcon Pipeliners)*, 247 NLRB

<sup>60</sup> Copies of the documents relating to the trials of Lathan and Schubert are in evidence as G.C. Exhs. 15 and 16, respectively.

<sup>61</sup> There is some discrepancy between Lathan and Schubert concerning the extent to which they had help in drafting and typing the letter. The difference is immaterial.

203, 210 (1980). In this case there is evidence that Local 450 has assessed members fines of \$1,000 in the past for conduct such as soliciting a job. Accordingly, I find that the size of the fine itself is of no assistance in determining whether Local 450 had an unlawful motive in filing the charges and conducting the trials.<sup>62</sup>

What is before me is whether Lathan and Schubert were charged and tried because they discussed filing and/or filed NLRB charges against Local 450. If the answer is yes, then, as Respondent acknowledges, the trials must be declared a nullity and an appropriate remedial order issued. Moreover, even if such a motive is not shown, the internal union trials must be declared unlawful if the conduct of Lathan and Schubert upon which the charges or trials are based was protected by the statute.

## 2. Meetings and slander

The "meetings" proved by Local 450 on September 24 consist of the Lathan-Schubert-Wheelis conference of May 24 at the Four Seasons Hotel job<sup>63</sup> and apparently a visit by Lathan and Schubert around late May or early June to the Morgan's Point jobsite of Bickerton Iron Works for the purpose of checking on possible backdooring there. While at the jobsite they conversed with member Ed Willis as part of their investigation. The referral of Willis to that jobsite is the subject of complaint paragraph 11(f). As business agent Bill Barker testified, Lathan and Schubert came to him after their visit and complained about certain perceived violations of the contract.

The details of the events of May 24-25 at the Four Seasons Hotel job already have been discussed. At the September 24 trials, member-foreman James Robinson, as previously noted, testified concerning what he observed and member-steward Frank Goodwin testified that he saw the Lathan-Schubert-Wheelis group engage in a meeting but that he did not overhear anything they said.

At the trial before me, business manager Renaud made it very clear that the Four Seasons Hotel meeting was a major, if not the principal, reason he charged and prosecuted Lathan and Schubert. He also made clear that he considered the discussion about the Union's paying for a private barbecue as constituting prohibited slander of Local 450 officers. Yet Renaud admitted that in the reports to him about the meeting he was told that Lathan had confused that barbecue with another. Robinson knew that Lathan had confused the river barbecue with the "topping out" barbecue party, yet no one bothered to tell Lathan on May 24 or the voting membership on September 24 that Lathan was acting from mistake and not in bad faith.

<sup>62</sup> As Renaud is the business manager for Local 450, the fact that he filed the charges in his own name is an immaterial distinction, and I find that Local 450 was the moving and responsible party for the filing of the charges and the prosecution of the trials involving Lathan and Schubert on September 24, 1981.

<sup>63</sup> Robinson never cautioned Lathan that the meeting was improper. Indeed, Schubert testified that in the past he has visited operators on jobsites from time to time without question. Accordingly, I find that the record supports the finding, which I make, that under past practice members may visit jobsites to speak to other members or operators insofar as union rules are concerned.

Robinson testified before me that he did not give evidence on September 24 of any slander against union officers by Lathan. I take this to mean that he did not consider Lathan's barbecue remarks to constitute "slander." But that is beside the point. Local 450 and its members are entitled to consider anything slander so long as that consideration is not a pretext to mask an unlawful motive to punish Lathan and Schubert for activities protected by the Act, and so long as they do not seek to fine Lathan and Schubert based on conduct protected by the Act.

Actually, Robinson's testimony of giving no slander evidence against Lathan is literally accurate. A review of the minutes of the two trials on September 24 reveals that Renaud, possibly through oversight, failed to elicit the barbecue testimony at Lathan's trial. Robinson omitted Lathan's barbecue remarks in his description of the Lathan-Schubert-Wheelis meeting in testifying at Lathan's proceeding. It was at Schubert's trial, as shown by the minutes, that Robinson reported Lathan's barbecue remarks. Before Schubert was tried, however, Lathan had been found guilty, fined, and expelled—based partly upon Renaud's closing argument in which he contended that Lathan had "slandered officers." He asked the membership to find Lathan guilty. They promptly did so by a vote of 218 to 20.

The only evidence of any "slander" in the September 24 trial as to Lathan was the testimony there of members Glen Wolcik and Frenchie Cormier that they had heard Lathan bragging that he had "backed down" "Sonny" Johnson.<sup>64</sup> Although no clarification was given by them at the September 24 trial, their testimony was an apparent reference to the occasion of July 9 when Lathan, in Johnson's office, asked where member Lloyd Risinger had been referred. Johnson testified that after that incident Wolcik and Cormier told him that Lathan had made the "backing down" comment in describing his visit with Johnson. Lathan credibly denied the accusation before me. However, the test is not whether I believe Lathan's denial but whether the evidence presented on September 24 was improper. I find that it was unlawful for Respondent to present it and consider it because it was based on Lathan's protected activity of questioning Johnson about possible backdooring. Even if Lathan had made the "backing down" comment, therefore, it would be nothing more than protected "puffing" in describing the result of his protected activity and meeting with Johnson. Local 450 acted unlawfully in charging and convicting Lathan based on such evidence.<sup>65</sup>

There is little to be gained by examining in detail the additional matters covered at the September 24 trials of Lathan and Schubert. All relate to the protected conduct of Lathan and Schubert in investigating possible backdooring, perceived violations of the hiring hall rules,<sup>66</sup> the filing of NLRB charges, or associated conduct.

<sup>64</sup> Neither Wolcik nor Cormier testified before me. Johnson testified that Wolcik was in the hospital at the time of the trial.

<sup>65</sup> This is not to say that Lathan is free to engage in rhetoric which might be so egregiously defamatory as to lose the Act's protection. We have none of that here.

<sup>66</sup> An example is the visit of Lathan and Schubert to a jobsite of Bickerton Iron Works and Lathan's telephoning Robinson, then the foreman of the Four Seasons Hotel job, in June 1981 to inquire how member Lloyd Risinger had gotten hired on that project.

### 3. Conclusion

Although case law reflects that a union enjoys a wide latitude in conducting internal union matters, it is equally clear that a union may not unlawfully interfere with a member's employment or his free access to the Board. If Lathan and Schubert were fined because of conduct engaged in by them to prevent invidious discrimination against themselves and others in Respondent's operation of the exclusive hiring hall, then the fines served to coerce and restrain them and other employee-members in their employment relationship. Moreover, as the activity of investigating backdooring is a necessary prelude to filing a charge with the Board, the internal union charges and trials, if based upon such conduct, would unlawfully impede an employee's free access to the Board.

Based upon the findings I have made, including those involving Johnson, and the entire record, I find that Respondent's motivation in instituting the charges against Lathan and Schubert and in subjecting them to the trials of September 24, 1981, was because they had filed NLRB charges against Local 450 on June 8, 1981. Accordingly, I find that Respondent violated Section 8(b)(1)(A) of the Act by the charges, trials, fines, and expulsions.

I also find that even without regard to motivation Respondent violated Section 8(b)(1)(A) of the Act by instituting the charges, trying, fining, and expelling Lathan and Schubert. Respondent's actions restrain and coerce Lathan, Schubert, and others because it interferes with the employment relationship by penalizing member-employees who seek to have the Union comply with the referral rules of the exclusive hiring hall. *Sachs Electric Co.*, 248 NLRB 669 (1980).

In light of the foregoing, I shall order Respondent to revoke and rescind the internal union charges and trial proceedings in their entirety as to Lathan and Schubert.

#### E. Job Steward Jacka Physically Assaults Lathan

Paragraph 14(b) of the amended complaint alleges that about December 3 Respondent, through job steward Dean Jacka, threatened and physically assaulted Lathan because of the NLRB charges Lathan had filed earlier.

On December 1, 1981, Lathan was dispatched to J. W. Bateson Company, Inc., at Interstate 10 and Eldridge in Houston (G.C. Exhs. 17-12 and 10-16). The jobsite is about 160 acres in size and it is the location for Conoco's world headquarters. In December there were about 400 workers on the site in the process of constructing seventeen 3-story buildings for Conoco. Clearly it is a long-term job.

Dean Jacka testified that he was the job steward at the Conoco project and that he was the first operating engineer on the job. He was referred to the job on July 28. Between 1 and 4 months later, M. L. Jackson was designated the operator foreman.<sup>67</sup>

<sup>67</sup> Jacka placed Jackson's designation as being about 4 months after July 28. Jackson testified that he arrived about late August as a working foreman operating a crane.

Jacka testified that as steward he checked "referrals" (the dispatch slips). He conceded that when Lathan was referred to the job Jackson brought Lathan to Jacka so the steward could check his union book and referral slip. He admitted that, while he did not know Lathan personally, he knew of him.

Lathan credibly testified that when he showed his union book to Jacka the steward stated he did not know what Lathan was doing there because Jacka had been in a meeting just a month earlier where Lathan's book had been taken and therefore Jacka should not let him stay on the job. However, Jacka gave Lathan's book back to him and the latter went to work.<sup>68</sup>

A couple of days later, on December 3, Lathan and Jacka had an argument in the operators' change shack around 1 p.m. when Lathan left a hole, or elevator pit, where he had been attending water pumps and went to the operators' change shack to put up his thermos bottle. Jacka was there and told Lathan to get back down in the hole. Lathan walked outside and on seeing the foreman, Jackson, reported the matter to the foreman who, as will be discussed later, told Lathan he had to lay him off in any event.

According to Jacka, Lathan was drinking coffee in the shack and Jacka merely tried to explain to him that under the contract there were no coffeekicks. Operators may drink coffee at their work stations. Lathan made the more believable witness and I credit his testimony.<sup>69</sup>

Jacka further testified that around 3 p.m. Foreman Jackson came to him and said that Lathan was on the office telephone reporting to the union hall that operators on the job were telling him that Jacka was going to run Lathan off the job. Jacka admitted that this upset him and that he went to the office from where he called Jackson and told the foreman to take him off the clock. The shift ended at 3:30 p.m.

Jacka conceded that he then confronted Lathan, they argued, and "I lost my temper" and told Lathan "I think you need a good ass kicking." At that time they were on a sidewalk on the outside of the fence to the project. Lathan supposedly said, "I don't think you can do it." They debated that subject. It ended with Lathan purportedly stating that he would meet Jacka in the street after the other men had left. Jacka testified that he returned to work for 15 minutes or so. Jackson did not recall Jacka's returning to work after the early punchout. No timesheets or other payroll documents were offered in evidence on this subject.

Admitting that he lost his temper because Lathan "kept getting up in my face," Jacka reported the matter to Johnson by telephone. Johnson reprimanded Jacka for engaging in such conduct while a steward.

Lathan testified that after his layoff discussion with Jackson he went to pick up his check. It was not ready

<sup>68</sup> Jacka presumably was referring to the September 24 trial, for there is no evidence that Lathan has turned over his union book to the Union. Indeed, in view of Lathan's appeal of his conviction, it appears that there has been no final change in his membership status.

<sup>69</sup> Like Lathan, Jacka initially placed Jackson's layoff notice to Lathan on this occasion when they left the shack and met the foreman, but Jacka subsequently vacillated and stated that he was not sure. Jackson, however, testified that they were two events separated by some time.

so he made a 5-minute telephone call on the pay telephone. In seeking to get his check after the call, Lathan was told by the timekeeper that Jacka had picked it up and would give it to Lathan outside the trailer-office. When Lathan stepped outside and asked Jacka if he had his check, the steward answered affirmatively but he said he had some other business with Lathan first. Jacka thereupon grabbed Lathan's lapel, hit Lathan in the chest, and said he was "sick and tired of Lathan's god-damn bullshit" of filing charges on the Union and "causing us a lot of trouble."<sup>70</sup>

Lathan said he had come out there to work, not to fight. He stated that Jacka had been backdoored to the job and had been working steady for several months while Lathan had to accept 1- and 2-day jobs because he was not one of the favored few and not related to one of the business agents. Jacka responded that backdooring did not exist. They argued about this until they reached the fence, at which point Jacka gave Lathan his two checks. He told Lathan he was going to whip anyone who filed charges against the Local and if Lathan would wait until Jacka got off from work they would settle the matter. Some other people came up for Jacka and Lathan departed.

I credit Lathan who was the more persuasive witness. Lathan's description of Jacka as being about 15 years younger than Lathan seems accurate, and it is highly unlikely that Lathan, in light of his head injury in February 1981 and his greater age, would have been willing to fight Jacka. To the extent that Lathan made any remark about fighting after the other men left, I find that it would have been nothing more than a stall by Lathan in attempting to escape his predicament. Notwithstanding the possibility that a minor point or two of Jacka's version perhaps occurred in fact, I credit Lathan's testimony that job steward Jacka, at the very least, pulled Lathan off the porch for the express reason that Lathan had filed NLRB charges against Local 450 and that Jacka threatened to whip anyone who filed such charges.<sup>71</sup>

In light of the foregoing, I find that Respondent violated Section 8(b)(1)(A) of the Act as alleged in complaint paragraph 14(b).

#### *F. Lathan Terminated From the Conoco Job*

As we saw in the previous section, on December 1, 1981, Lathan was referred to work for the J. W. Bateson Company at the jobsite of Conoco's world headquarters. Two days later, on December 3, Lathan was laid off by Foreman Jackson. Complaint paragraph 10(b) alleges that such layoff violated Section 8(b)(1)(A) and (2) of the Act.

<sup>70</sup> In his pretrial affidavit of December 7, 1981 (Resp. Exh. 3), discussed in more detail in the next section, Lathan asserts that Jacka "grabbed me by the collar and pulled me off the porch." Nothing is mentioned about Jacka's striking him in the chest. The forceful touching, of course, constituted a battery regardless of whether it was a mere grabbing or whether it included a hit.

<sup>71</sup> I need not resolve whether Jacka was off the clock at the time of the incident or whether they were on or off the jobsite, for in either event Local 450 is responsible for its steward's actions. Agents and supervisors cannot insulate their superiors from the consequence of actions undertaken during a "King's X" or time-out period.

Lathan's termination came about as a result of a work force reduction ostensibly caused by the elimination of one foreman's position. Lathan was bumped.

Job steward Jacka testified that in early December the job went to three shifts for the dewatering system. Foreman Jackson testified that he made an error in applying the contractual ratio of foremen to operators. He testified that, once the operators reach 14, "you get an assistant foreman." Section 15(e) of the contract's working conditions, page 38, prescribes:

When as many as fourteen (14) or more Operating Engineers are employed on any one job, an additional Foreman shall be required.

Jackson testified that he made a "tentative" agreement with the job superintendent that he needed another foreman, so Jackson requested Curtis Roberts as an assistant foreman.<sup>72</sup> Jackson testified that he requested Roberts because the latter was a good crane operator and Jackson saw the need for a crane operator in a few days, and, indeed, Roberts did work on a large crane.<sup>73</sup>

The testimony of Jackson and Jacka is quite clear that the total number of operators reached 14 on December 1. This included Roberts and Lathan on the day shift, Bill Sowder on the second or evening shift, and Perry Dueitt on the third, or night, shift. From that point the testimony is hopelessly confusing for any attempt to match names to numbers on the second and third shifts which supposedly had two operators each. Both Jackson and Jacka gave the names of at least one other operator, Bobby Loomis, who seemingly came to work after Lathan. For example, Jacka described checking the union book of Loomis the day Lathan was terminated. In short, one could conclude that there was a total of 16, not 14, operators on the job. However, as Jackson testified that there was some turnover, and in the absence of more specific evidence, I shall proceed on the basis that the addition of Dueitt to the third shift made 14 operators.<sup>74</sup>

It appears that when Roberts showed up on December 1 to be an assistant foreman the contractor, J. W. Bateson Company, took the position that only the day-shift operators could be counted under the contract in determining the ratio of foremen to operators. As Roberts and Lathan increased the day shift's total to 12, it meant, at the least, that Roberts would not be an assistant foreman if the contractor's interpretation prevailed.

Business manager Renaud testified that Dick Lewis, a representative of the AGC, contacted him on the matter and that Renaud agreed with the AGC's interpretation.<sup>75</sup> Renaud dispatched business agent Lester Dennis,

<sup>72</sup> Although the work order form of December 1 shows only that Roberts was requested as an operator (G.C. Exh. 6-19), the referral slip of December 1 discloses that Roberts was dispatched as "oper. Foreman" (G.C. Exh. 10-15).

<sup>73</sup> Although it would appear that Roberts was to be a working foreman rather than a walking foreman under this description, Johnson testified that an assistant foreman is a walking foreman.

<sup>74</sup> Dueitt's referral slip reflects that he was referred on "request" at 11:40 a.m. (G.C. Exh. 10-16; Resp. Exh. 12).

<sup>75</sup> The basis of this interpretation is not described in the record.

who had geographical jurisdiction, and Johnson, Renaud's assistant business manager, to the job to investigate and resolve the matter. It is unclear exactly when Renaud received the call, for he was out of town when he had the telephone conversation with Lewis. In any event, it was not until shortly after noon on December 3 that Johnson and Dennis arrived at the jobsite. They conferred in the operators' change shack with Jackson and Jacka.

Lathan had just emerged from the elevator pit<sup>76</sup> and was walking to the change shack to pick up his thermos bottle when Johnson and Dennis drove by on the way to the shack. When Lathan walked in moments later, he exchanged no conversation with Johnson, Dennis, Jackson, or Jacka. On leaving the shack, Lathan overheard some of the group's conversation. Jackson was complaining about the "cheap" New York contractor trying to remove Curtis Roberts from the job as an operator foreman.

Jackson testified that the discussion in the change shack by the Johnson-Dennis-Jackson-Jacka group centered on cutting back the work force to meet the AGC's position on the foreman-operator ratio.<sup>77</sup> According to Jackson, names of operators on the job were not mentioned, and after Johnson and Dennis left it was Jackson alone who made the decision to lay off Lathan. No one had suggested that Lathan be selected. Jackson then went to Lathan, informed him of his layoff, explained the reason, and told him that Roberts was being retained in order to operate a crane.<sup>78</sup> Lathan, Jackson testified, did not protest, and even commented that he had worked for Roberts and that he was a fine man. Jackson admitted that Jacka might have been present, but testified that he thought that he had called Lathan off to the side to give him the word. Jacka testified that he was present when Jackson informed Lathan of his layoff and that Lathan did indeed protest.

As earlier discussed, when Lathan left the change shack he met Jackson and complained to him that job steward Jacka had no business telling him what to do and asked whether Jackson or Jacka was running the job. We know from Jacka's testimony that the steward followed Lathan out of the shack and gave his own version to Jackson. Lathan credibly testified that Jackson told him that he was running the job, and that he was going to have to lay Lathan off. Observing that he was not the last operator on the job, Lathan asked why he was being laid off.<sup>79</sup> Jackson replied, "Joel, you need to

get your business with the Union straight." Jackson went on to explain that the cutback resulted from having to reduce the operator force by one because a second foreman was not justified under the contract, and that Lathan could pick up his check about 2:45 p.m. and leave early.

When asked at the trial whether he made any comment to Jackson when the latter told him he needed to get his business with the Union straight, Lathan gave a rather unnatural answer of "No." However, in his pre-trial affidavit of December 7, 1981, Lathan recorded the matter differently.<sup>80</sup> At pages 4-5 of this affidavit given by Lathan a mere 4 days after the event, Lathan states that, about 5 minutes after Johnson and Dennis left, Jackson informed him that he was being laid off.<sup>81</sup> Lathan asserted that Jackson had 15 operators and why was he picking on him. Jackson replied that Lathan was the last man to be hired in. Lathan said that "Perry DeWitt" was the last man hired on December 1, that he had arrived about 11 p.m., and that he, as Lathan, was assigned to tending the water pumps. According to Lathan, "Jackson said I needed to get my business straight with the Union. I told him he knew he wasn't doing me right. He told me to pick up my check from the time-keeper about 10 until 3 p.m."

In view of the foregoing corroborating contents of the affidavit, I find that Jackson did remark that Lathan should get his business straight with the Union, and I further find that Lathan replied that Jackson knew he was not doing Lathan right. Although Lathan's reply falls short of a question of what his business with the Union had to do with his layoff, or a protest that he should not be punished because he had filed NLRB charges, it can be expected that someone receiving news of his layoff will not always have the presence of mind to marshal all his legal arguments and advance them on the spot. It is sufficient here, however, to note that Lathan did respond that Jackson knew he was not acting with justice toward Lathan. The relevance of this is that it bears upon the resolution of credibility as to whether Lathan's version of his conversation with Jackson is the correct one. I find that it is.

Jacka admitted that he called Johnson that afternoon and told him that Lathan had been laid off, and he admitted being at the internal union trial in September in which Lathan was expelled from membership. The General Counsel argues that Jacka, in making his call to

<sup>76</sup> His job was tending the pumps removing water from an elevator pit.

<sup>77</sup> Jacka's testimony, a little more specific, was to the same effect. He testified that the conference lasted about 15 to 30 minutes and that Johnson and Dennis said an operator had to be laid off. Johnson did not address this in his testimony and Dennis did not testify.

<sup>78</sup> Although Jackson's version on direct examination implied that he notified Lathan immediately after the group meeting, on cross-examination he asserted that it was not until nearly 2 p.m. that he gave Lathan the news.

<sup>79</sup> Steward Jacka acknowledged that the standard practice in a work force reduction is to select the last operator on the job, with an exception for an operator needed to run a specialty crane. While it is clear that Lathan was the last operator hired for the day shift, it is equally clear that two others, Bill Sowder and Perry Dueitt, were hired after Lathan even though they all reached the job on December 1. Lathan could not

recall the name of Dueitt at the trial, but testified that he did give Jackson the name of the last man hired. In his December 7, 1981, pre-trial affidavit (Resp. Ex. 3), Lathan records at p. 5 that he did give the name of "Perry DeWitt."

<sup>80</sup> Although Respondent used the affidavit (Resp. Ex. 3) to identify a letter attached to it, the affidavit itself was offered and received without limitation. It therefore constitutes substantive evidence.

<sup>81</sup> At the trial Lathan testified that his layoff occurred about 30 minutes after his first visit to the shack. On his second visit, he returned to the shack to deposit his thermos bottle. In his pre-trial affidavit, he places the departure of Johnson and Dennis at or about 12:30 p.m. He does not say whether he was watching their departure from a distance, but that is a likely possibility. Five minutes later he returned to the shack as stated. At the trial he placed their arrival at or about 12:30 p.m. and their departure as 30 minutes later. It thus appears that Lathan was consistent regarding his time intervals although inconsistent as to the starting and stopping times.

Johnson, simply was reporting that the termination of Lathan had been consummated as ordered by Johnson that day at noon. He further argues, "The demeanor of Jacka at the trial reveals that he had sufficient animus to see that Master Mechanic Jackson carried out the wishes of the officials of Respondent in getting rid of Lathan." The obvious problem with these arguments is that there is no direct evidence that Johnson ordered Jackson to lay off Lathan or that Jacka saw to it that Jackson implemented any such order.

Jackson admitted that it is the duty of only the foreman to give the final paycheck to an operator, and that neither the steward nor the timekeeper is to do so. Contrary to the testimony of both Lathan and Jacka, Jackson testified he gave Lathan his final paycheck. The General Counsel argues that the very fact that Jackson did not give Lathan his check, in view of his knowledge that Jacka had asked to be taken off the clock at the time the checks were ready, demonstrates "that Jackson wished to wash his hands of the the termination and let Jacka be responsible to carry out the direction of Respondent."

The General Counsel argues that Jackson's testimony that he kept Roberts rather than Lathan because Roberts was a good crane operator begs the question since the last operator on the job was not Lathan but Dueitt.

Jackson testified that Lathan was the last to be hired on the day shift. When asked why he did not lay off Sowder or Dueitt from the evening or night shift, respectively, and move Lathan to replace the one laid off, Jackson, in a rather dissembling fashion, testified, "Well, it is just not done that way." He stated that his prime purpose was to keep all the good crane operators, that he would have had to wait until the third shift to lay off Dueitt, and that he was not certain of the sequence they were referred from the hall, although he admitted that Sowder and Dueitt arrived on the job after Lathan.<sup>82</sup>

In his brief, the General Counsel argues that no layoff was needed,<sup>83</sup> that there is not a scrap of evidence that the contractor ordered the layoff of an operator, and that the Union seized upon the opportunity to punish Lathan for his protected activities by causing him to be terminated from a long-term job.

#### Conclusions

The General Counsel's articulation of his theory that Respondent caused the contractor, through Jackson, to select Lathan for layoff for unlawful reasons relies to some extent on circumstance and inference. There is no direct evidence that an agent of Local 450 urged the contractor to lay off Lathan for any reason, much less for the reason of his protected activities. The contractor is not a respondent here, and the fact that Jackson selected Lathan rather than Dueitt for layoff seemingly falls short of an action chargeable to the Union. Even if I find that Jackson chose Lathan rather than Sowder or Dueitt in order to punish Lathan for his protected activities, it must be noted that Jackson, as the contractor's foreman,

<sup>82</sup> There is no contention that Lathan was deficient in his work in any respect.

<sup>83</sup> The basis of this statement is not articulated. A layoff of one person would be needed if Roberts was going to be retained as the 14th operator.

is not alleged to be an agent of Local 450. Aside from a *res gestae* theory, therefore, Respondent would not be charged with Jackson's remark to Lathan about getting his business straight with the Union in the absence of Jackson's being an agent of both Respondent and the employer-contractor.<sup>84</sup>

As earlier noted, the change shack conference broke up about 12:30 or 1 p.m. Five minutes later Lathan returned to deposit his thermos bottle, and was told by Jacka to return to the elevator pit. Stepping outside, Lathan met Jackson.

Jackson's remark to Lathan about straightening out his business with the Union therefore occurred about 6 minutes or so after the conclusion of the conference in the change shack. I deem Jackson's remark to be competent evidence by being part of the *res gestae* under Rule 803(1) of the Federal Rules of Evidence. Rule 803 declares a list of matters as not falling within the hearsay exclusionary rule, including subsection (1) on "Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." (Emphasis supplied.) In any event, the Board has held that "it is not bound to apply strictly the Federal Rules of Evidence concerning hearsay." *Rubber Workers Local 878 (Goodyear Tire & Rubber Co.)*, 255 NLRB 251, fn. 1 (1981), citing *Alvin J. Bart & Co.*, 236 NLRB 242 (1978). In the circumstances of this case, there is a great deal of circumstantial evidence supporting the reliability of this finding.

Johnson clearly harbored animus toward Lathan because of the latter's protected activities.<sup>85</sup> Johnson and Dennis concededly went to the job at noon on December 3 to explain to Jackson and Jacka why there could not be a second foreman. I do not credit Jackson and Jacka in their testimony that no names were mentioned in the conference as to who would be laid off, and I find that in fact they did discuss that subject and Johnson told Jackson it should be Lathan. Not only was the demeanor of Jackson and Jacka unpersuasive, but to say that the group did not say who would get the ax strains against the natural reaction of people. Having found the testimony of Jackson and Jacka to be false, I am authorized to infer, and I do, that Lathan was selected out of the customary layoff sequence,<sup>86</sup> and at the demand of

<sup>84</sup> Such dual agency was found in *Fruin-Colnon Corp.*, 227 NLRB 59 (1976), *enfd.* 571 F.2d 1017 (8th Cir. 1978), although one distinguishing factor there was that the union had authority under the local contract to appoint foremen and general foremen. The Board recognizes that in the building and construction industry individuals may be employed as rank-and-file workers on one job and supervisors on the next. *Plumbers Local 137 (Hames Construction)*, 207 NLRB 359 (1973). I find it unnecessary here to reach the question of dual agency.

<sup>85</sup> I do not overlook the fact that on April 28, 1981, Johnson wrote a "To whom it may concern" letter, at Lathan's request, stating in part that Lathan "has worked for various contractors on various pieces of equipment, and has proved to be a dependable and reliable worker." Whatever view might be taken of that letter in April 1981, by December 1981 many intervening events had occurred.

<sup>86</sup> The General Counsel showed that the customary layoff sequence was the last person hired. If this custom has an exception applicable when there is more than one shift, so that the sequence is applied on a shift basis, Respondent had the burden of going forward and producing evidence of that exception. This it failed to do.

Johnson, because of his protected activities of protesting backdooring and filing NLRB charges against Respondent. *General Thermo*, 250 NLRB 1260, 1262 (1980); *Louisiana Council No. 17, AFSCME*, 250 NLRB 880, 886, fn. 38 (1980).

In light of the foregoing, and the entire record, I find that as alleged in complaint paragraph 10(b) Respondent violated Section 8(b)(2) of the Act by causing J. W. Bateson Company, Inc., to terminate Lathan from the Conoco job on December 3, 1981.

### G. The Specific Referral Allegations of Paragraph 11

#### 1. Introduction

Complaint paragraph 11, as amended before and at the trial, contains 35 subparagraphs, (a) through (ff), alleging that the many (some subparagraphs cover more than one date or referral) referrals described were made in violation of Section 8(b)(1)(A) and (2) of the Act because they are examples of Respondent's backdooring practice. Some of these 35 subparagraphs are grouped for discussion.<sup>87</sup>

#### 2. Law applicable to paragraph 11

##### a. In general

Reiterating a settled rule, the Board in *Operating Engineers Local 460 (Ford, Bacon & Davis Construction)*, 262 NLRB 50, 51 (1982), stated:

The Board has held that any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function.

When, therefore, the General Counsel shows such a departure he has made a *prima facie* case, and the burden of going forward with rebuttal evidence shifts to Respondent with the General Counsel retaining the overall burden of persuasion. *Sheet Metal Workers Local 20 (Employers Assn. of Sheet Metal Workers)*, 253 NLRB 166, fn. 1, 169, fn. 5 (1980). The extent to which any unjustified departure resulted in a loss of earnings is a matter to be resolved in the compliance stage.

The foregoing principles apply to complaint paragraph 11 generally, and they particularly govern the analysis which must be made regarding the Union's testimonial explanations that apparent departures from the rules were in fact referrals where operators had been requested by name or the like. In addition to the requested by name situations, some of the referrals made the subject of complaint paragraph 11 pertain to an appointment of

stewards. As previously noted, the referral by request and by appointment as steward are exceptions to the requirement to refer by the numerical sequence of the o-w-l. To the extent noted later herein, whether Respondent's practice respecting the referral system and the steward appointment system is unlawful will be considered in the discussion of complaint paragraph 10(a). Therefore, where a subparagraph of complaint paragraph 11 is dismissed because it involves a referral by request, or by appointment of the steward, the evidence relating to that subparagraph will be evaluated in the consideration of complaint paragraph 10(a) which contains the general allegation of backdooring.<sup>88</sup>

##### b. Respecting appointment of stewards

The collective-bargaining agreement's working conditions state in section 20(i), page 43, that "[t]he steward shall be the representative of the Union on the job." The same subparagraph provides:

The Steward shall be appointed by the Business Representative from the men on the job and he shall be the last man to be laid off, provided that in the opinion of management, he is qualified to do the work available.

As most of the steward appointments under review here involve initial manning of the jobs, and in light of the exclusive hiring hall arrangements with the affected employers, it seems clear that Respondent possessed the power to appoint stewards from among the operators referred from the union hall. Moreover, business agent Johnson testified that ordinarily the first operator dispatched to a job is designated the steward. As the record amply demonstrates, Respondent frequently appoints operators as stewards without regard to their numerical standing on the o-w-l. As Respondent argues, where there is a steward preference clause in the context of an exclusive hiring hall, such a procedure regarding stewards is not tainted by a presumption of illegality absent a showing that the steward selections were made for reasons, such as nepotism, which are arbitrary, invidious, or irrelevant to the Union's legitimate interest of assuring effective administration of the contract. *Teamsters Local 959 (Ocean Technology)*, 239 NLRB 1387, 1398 (1979).

The question under complaint paragraph 11 in the steward situations is whether the General Counsel established a *prima facie* case that any or all such appointments were invalid because of nepotism or other invidious reasons and whether Respondent rebutted any such showings. Whether the steward appointment practice constitutes backdooring because of a nepotistic "buddy" system is a matter referred to in the discussion below of paragraph 10(a) of the complaint.

<sup>88</sup> As noted earlier in fn. 6, in the context of an exclusive hiring hall, "backdooring" may be defined as a union giving unlawful preference to one or more users of the hiring hall over other unfavored users who, typically because they hold a higher standing on an out-of-work list, should be referred first.

<sup>87</sup> There are 32 lettered subparagraphs, but at the trial par. 11(q) was divided into four separate allegations and designated 11(q)(1) through (4) as shown in G.C. Exh. 11.

### 3. The 35 specific allegations

In his brief, the General Counsel concedes that no evidence was offered for complaint paragraphs 11(d), (e), and (s), and in its brief Respondent moves that these subparagraphs be dismissed. I shall grant Respondent's motion and dismiss these three subparagraphs.

#### a. Paragraph 11(a)

Paragraph 11(a), as amended, alleges that on February 2 and 16 Respondent dispatched members Lloyd Risinger and Curtis Roberts to work for Babcock & Wilcox Company (B & W herein) on a turnaround job at the ARCO refinery when Lathan and Schubert were higher on the o-w-l.

The evidence reflects that Risinger was dispatched to the B & W job at ARCO on February 2 as the steward (G.C. Exh. 10-1). Risinger discovered that it was not a turnaround, but simply was a job unloading material. He quit that job after about 2 weeks and returned to his former job.<sup>89</sup> The job superintendent asked Risinger if he could get a qualified operator to replace him. Risinger recommended Curtis Roberts. Presumably the superintendent accepted the recommendation and asked Risinger to request Roberts, for Risinger testified that he did call and request Roberts.

On the o-w-l for February 2,<sup>90</sup> Schubert appears in place 43 and Lathan in 48. Risinger appears between 91 and 92.<sup>91</sup>

The General Counsel argues that Risinger was selected for referral out of sequence because he is "an official of the Union functioning as a delegate for District One since 1965 and that Respondent has shown no business or compelling reason for choosing Risinger over any other member to be sent out as steward. Additionally, Risinger was the Vice-Chairman of the Local."

Risinger testified that for his delegate function he receives payment equivalent in amount to 40 hours at the rate of an operator, or about \$450.<sup>92</sup> The delegate, Johnson testified, is an elected position representing the District on the executive board of the Union. The vice chairman position appears to be an unpaid one.

The work order to Curtis Roberts on February 16 (G.C. Exh. 6-4) reflects that Risinger *requested* him for the ARCO job on that date. The referral slip of such date does not show a request (G.C. Exh. 10-2).<sup>93</sup> The

<sup>89</sup> Risinger's testimony is confirmed by the pension report which reflects that he worked 80 hours that month for B & W (G.C. Exh. 26-3; Resp. Exh. 13).

<sup>90</sup> In their briefs, the parties refer to the o-w-l of February 2. That list, however, was not prepared until after the 8 a.m. rollcall on Monday, February 2, and the dispatches are made an hour earlier. Risinger received his referral slip for the 7:30 a.m. shift (G.C. Exh. 10-1). The difference is immaterial, however, inasmuch as the relative standings are the same whether the list of January 26 or that of February 2 is used.

<sup>91</sup> Through an inadvertent oversight, the General Counsel asserts at p. 16 of his brief that Risinger does not appear on the February 2 o-w-l.

<sup>92</sup> The Union's LM-2 for the year ending June 30 reflects in schedule 10 that Risinger received \$1,103 for his services as a delegate. No information is given as to whether that covered more than 1 week. I note that under art. XVIII, sec. 1, of Local 450's bylaws Risinger, as a member of the executive board, is to be paid "at least one week's paid vacation per year."

<sup>93</sup> The pension report reflects that Roberts worked 64 hours for B & W in February 1981 (G.C. Exh. 26-2; Resp. Exh. 13).

General Counsel points to a referral slip of February 16 which reflects that Roberts had initially been referred to a job for Manhattan Construction Co. as the steward there. The slip has "Void" written across its face (G.C. Exh. 10-2). Johnson testified that Johnson apparently did not want the steward position at the Manhattan job.

On the o-w-l for February 16, Schubert is shown as 32, Lathan as both 33.5 and 34.5,<sup>94</sup> and Curtis Roberts in position 109.

As the record reflects, the standard practice of Local 450 is to select or appoint a man to be steward when hiring for a job is first occurring. The steward, therefore, is the first operator sent to the job. The General Counsel argues that Risinger remained on the B & W job at ARCO only until Roberts came out, and Risinger was therefore steward of himself and no one else.

"This is the type of procedure," the General Counsel argues, "which allows the Union to select their favorites and send them to a job over and above anyone on and off the out-of-work list. When one looks at General Counsel's Exhibit 26-3 [the pension report for Risinger], it is readily apparent that Risinger had worked [2] full weeks for 80 hours for Babcock & Wilcox in February of that same year." The General Counsel argues further that the voiding of the February 16 referral of Roberts to Manhattan as steward demonstrates, in part, that Respondent's recordkeeping "becomes suspect and it would appear that both Risinger and Roberts were in fact dispatched from the hall in violation of the Union's rules."

I find that the evidence fails to reflect any deviation from the referral rules as alleged in paragraph 11(a) or as litigated. Accordingly, I shall dismiss paragraph 11(a).

#### b. Paragraph 11(b)

As amended at the trial, complaint paragraph 11(b) alleges that on March 10 member Lloyd Risinger was sent to work for Algernon-Blair at Champion Paper Company even though Risinger's name was not on the o-w-l. In fact Risinger signed the list in position 66 on the o-w-l for March 9, 1981.<sup>95</sup> Schubert is at 20 and Lathan appears at 21.

Business agent Bill Barker testified that he received the Algernon-Blair call about midmorning. At that time the only person at the hall was one traveler. When Risinger walked in about then, Barker designated him as the steward and referred him to the job. Although he had never previously designated Risinger as a steward, Barker testified that he felt comfortable in doing so because he had known Risinger for several years, knew of his ability, and knew that Risinger had been steward on other jobs with no problems. The work order (G.C. Exh. 6-7) and the referral slip (G.C. Exh. 10-33) reflect that Risinger was dispatched as the steward.

<sup>94</sup> His name appears both before and after 34. Johnson testified that Lathan probably worked that Monday, his name was left off the list, and when he returned on Tuesday the secretary restored his name but apparently wrote it in at an incorrect position the first time.

<sup>95</sup> The fact that Risinger's name was not one of the 65 typed names indicates that he was not at the March 9 rollcall. When he did come in to register on the o-w-l, he was the first to sign. The list eventually reached some 92 names on the o-w-l that week. Of course, some were referred.

In his testimony Risinger confirmed the manner of his appointment as steward.<sup>96</sup> Risinger was the only operator who worked for Algernon-Blair. Business agent Barker testified that there were three or four operators on the jobsite at the time working for a subcontractor. Member Jim Flanary testified that operators for a subcontractor check in with the steward for the general contractor if he is there. Johnson testified that if the subcontractor is on the job first then he, Johnson, puts a steward with the subcontractor until the general contractor arrives. Johnson's practice is to maintain a steward on the payroll of the general contractor because of a clause in the contract relating to subcontracting, and as far as he knows this is consistent with the policy of Local 450. The implication of this combined testimony is that Risinger did have other operators to represent in his steward capacity.

As the record reflects, Risinger is over 60 years of age, has been a member of Local 450 since 1946, and has extensive experience in operating heavy equipment.

The referral and pension records disclose that Schubert was employed for 1 day of work on March 11 for one contractor and on March 13 he was referred to Aztec Industries for a job which lasted several weeks. Such records show that in March 1981 Lathan worked a total of 122 hours for a series of contractors on jobs generally lasting 1 to 2 days.

The General Counsel argues that the fact Risinger's name was added at position 66, showing that it was after the rollcall, "gives strong indication that he was added thereto *after* he was selected to be 'steward' because of his personal and professional relationship with those individuals assigning the work in question." The evidence does not show anything improper. Accordingly, I shall dismiss paragraph 11(b).

*c. Paragraph 11(c)*

Paragraph 11(c) alleges that on March 12 Local 450, "without announcing the job at Respondent's second floor hiring hall facility," dispatched member Gerald Cheeney, then number 45 on the o-w-l, to a job for H. A. Lott, Inc., in the medical center in Houston at a time when Lathan was 16 on the list. As the referral and pension records disclose, Lathan was dispatched on March 10 for, it turned out, 4 hours of work for Philips Crane. Lathan's place on the list was therefore "saved," for he worked no more than 2 days. On March 13 he was referred to the McGregor Construction Company where he worked 16 hours.

The pension record for Cheeney discloses that he worked 121.50 hours for H. A. Lott, Inc., in March and 47 hours in April (G.C. Exh. 27-5). The work order card (G.C. Exh. 6-8(a)) reflects that Cheeney was *requested* on the Lott job by Buddy Goodwin at 7 a.m., although the

<sup>96</sup> Risinger testified that on about 10 percent of his jobs he has been designated and dispatched as steward and that the Algernon-Blair job was the last occasion of his being appointed to be a steward. The pension report reflects that Risinger worked on the Algernon-Blair job for 84.50 hours in March, 193.50 hours in April, and 100 hours in May (G.C. Exh. 26-3; Resp. Exh. 15). While such a job, nearly 10 weeks, may not be called "long-term," it certainly is more desirable than occasional jobs of 1 to 2 days.

referral slip (G.C. Exh. 10-3), signed by business agent Lester Dennis, does not have "request" written on it. Although Johnson was not the person who handled the referral and filled out the card, at the trial he identified them and testified they reflected that Cheeney was requested. Lester Dennis did not testify.

As we have seen, Schubert was number 20 on the o-w-l and Lathan was number 21 as of Monday morning, March 9, following the 8 a.m. rollcall (G.C. Exh. 8). Cheeney, the exhibit reflects, was in position 61. Lathan testified that Cheeney had not accepted a job "upstairs" at the second floor job call the morning of March 12 and that he saw Cheeney later downstairs receiving a union dispatch slip between 7:30 and 8 a.m. Lathan testified that he investigated the matter, learned that Cheeney had gone to Lott's jobsite, and followed Cheeney there to confirm the matter.

On brief the General Counsel argues, "The records, therefore, in this instance establish clearly a case of back-dooring in violation of the law. Sonny Johnson's testimony that Cheeney was called for by name should be discounted in its entirety." I am unpersuaded by the General Counsel's argument. While Local 450, to be prudent, should endeavor to see that the referral slip, as well as the work order, bears the word "request" or some word so indicating, an occasional failure to achieve perfection does not rise to the level of even a *prima facie* violation of the Act. I shall dismiss paragraph 11(c) because Cheeney was requested.

*d. Paragraph 11(f)*

Complaint paragraph 11(f)<sup>97</sup> alleges that during the approximate period of May 8 to 29, 1981, Respondent "dispatched Ed Willis and his son-in-law, a nonmember, to the Bickerton Company at Morgan's Point, Texas despite the fact that there were qualified individuals higher on the out-of-work list which individuals were not given an opportunity to select a job at the Bickerton Company."

Reference has been made to this allegation earlier. Lathan and Schubert testified concerning their visit to the job as part of their investigating suspected back-dooring.

Business agent Barker testified that the Bickerton firm requested Ed Willis based on the fact Willis had worked for it a couple of times in the past. The pension report (G.C. Exh. 26-6) so records and the work history record (G.C. Exh. 17-29) for Willis reflects one occasion in 1979. I find that Ed Willis was requested. The work order of May 18 so indicates (G.C. Exh. 6-5), although the referral slip (G.C. Exh. 10-4) of May 18, signed by Barker or on his behalf, bears no notation indicating that Willis was requested.<sup>98</sup>

<sup>97</sup> As noted at the beginning of this section, I have granted Respondent's motion that pars. 11(d) and (e) be dismissed for lack of evidence.

<sup>98</sup> The General Counsel's argument on this subparagraph hinges, at least in part, on the assertion that the work order was not furnished at the trial by the Union. This is an inadvertent oversight, for the work order is in evidence as G.C. Exh. 6-5 and shows that Willis was requested.

Several days later, as shown by a work order dated May 27, Ed Willis called requesting Roy Willis, and a referral slip of that date to Roy Willis (G.C. Exh. 10-5) bears the notation "Request." The referral was signed by Barker or by someone in his name. Barker testified that Ed Willis and Roy Willis are brothers. Barker testified further that he understood that a person referred to the job as an oiler on permit is a son-in-law of Roy Willis. Whether the man who was on permit is Michael F. Cook shown on Bickerton's fringe report for May 1981 (Resp. Exh. 18) is not clear. One Mike Cook is shown in position 71 on the o-w-l for May 11, 1981. On the May 18 list he is shown as being referred on May 27.<sup>99</sup> The sheet of referral slips containing General Counsel's Exhibit 10-5 reflects that on May 27 Mike Cook was referred to the Westheimer yard—a different job from Bickerton's.

On the May 11 o-w-l Ed Willis is 69 and Roy Willis is 82. Neither name has a date after it to suggest that he was referred, and both names are scratched, thereby indicating that neither was present when that list was used for the rollcall of Monday May 18. Neither is shown on the May 18 o-w-l. Johnson testified that even a person requested *should be* on the o-w-l to be referred. However, Johnson testified that it is part of the "honor" system that the operator receiving a referral be on the o-w-l and that the business agents do not have time to check the o-w-l to make sure the operator has signed or require him to sign before the operator gets a referral slip on request.

As an example of how an oversight could occur, Johnson described the situation in which an operator has been working for several days or weeks on one job which is ending when he learns that his "buddy" is going to request him on a different job the next day. The following morning the operator goes to the union hall to pick up his referral slip under the "request" system, but he fails to sign the o-w-l and the business agent (or office secretary) fails to check the o-w-l. There is no evidence here that Ed Willis had just come from another job before taking the referral to Bickerton's.

Clearly the system failed here and there was a deviation from the established referral rules in referring Ed Willis and Roy Willis to the Bickerton job when neither was registered on the o-w-l. No specific explanation was offered by Respondent at the trial. Nevertheless, no one was denied employment when Ed Willis was referred because he was sent by *request*. The same holds true for the May 27 referral of Roy Willis, for Roy was requested by his brother, Ed Willis.

Ed Willis was not shown to be the foreman on the project, nor was it demonstrated that he was carrying out a request of Bickerton's management. Although business agent Barker testified that Ed Willis told him he was being paid foreman's wages to advise supervision where to obtain equipment and supplies, it does not appear that Bickerton designated Willis to be foreman. Under section 15(a) of the contract's working rules, a contractor is not required to appoint a foreman until there are at least four operators on the job. Barker testi-

fied that nothing prevents a contractor from paying an operator more than the contract requires, and, while Local 450 "does not condone it," the Union apparently takes no action when such occurs.

I attach no significance to the extra pay Ed Willis was receiving because the nature of the extra money is disputed, and by hearsay evidence at that. The version of Lathan and Schubert is that Ed Willis told them the extra money he was receiving was, in effect, to compensate him for operating extra equipment so as to avoid hiring one or two additional operators—in contravention of the contract. I make no findings regarding this collateral dispute.

Although Roy Willis was requested by his brother, and there is no sufficient explanation of how Ed Willis came to be the one requesting Roy Willis, the fact remains that both were requested. Whether the request system is structured along unlawful lines is a matter for later consideration. I therefore shall dismiss paragraph 11(f).

*e. Paragraphs 11(g) and (k)*

I shall treat complaint paragraphs 11(g) and (k) jointly. In paragraph 11(g) the General Counsel alleges that on or about July 6 Respondent dropped Lathan to the bottom of the o-w-l "after he had been on a job for portions of three successive days, even though Respondent had earlier permitted member Dennis Kemper to work on a job in Sugarland, Texas, for approximately two weeks without losing his standing on the out-of-work list."

Complaint paragraph 11(k) alleges that on or about July 8 Respondent "maintained Clyde Green as number 7 on the out-of-work list even though Green had been working for the Bickerton Company at Morgan's Point for the two weeks prior thereto."

On Tuesday, June 23, Lathan was referred to work for a contractor named Spaw-Glass at Interstate 10 and Ella Boulevard (G.C. Exh. 17-12). He testified that he worked the first day, was rained out the second day (although he either worked 4 hours or received 4 hours' pay), worked the third day, and was rained out the fourth day, although again he worked 4 hours. On the morning of the fourth day, which would have been Friday, June 26, Lathan went to the hall and discovered that his name, typed at position 43 on the o-w-l of June 23, had been scratched. The date of June 23 appears beside his name, as does the notation "worked 2 1/2 days."<sup>100</sup> Lathan's name also appears in handwriting at number 74 followed by the notation "(Saved R.L.J.)." This obscure notation, unexplained at the trial, evidently did not mean that Lathan's place at 43 was to be saved, for Lathan's name is typed at position 63 on the very next o-w-l of June 29.<sup>101</sup> By Monday, July 6, Lathan had moved up to number 53.

<sup>100</sup> Under the referral rules, the operator loses his place on the o-w-l once he works over 2 days.

<sup>101</sup> From which he was referred on July 2. As the date is marked through, it means that the job lasted no more than 2 days. Lathan's work history record discloses that on July 2 he was referred to work for the

*Continued*

<sup>99</sup> Johnson testified, and the parties stipulated, that a new list was not prepared for the Memorial Day holiday of May 25 and that the prior list, added to, was called that week.

Lathan asked Johnson why his name had been taken off the list since he had not worked 3 days. Johnson replied: "Well, you are watching us, so we are going to watch you." Lathan said that the Union was letting other people ride the list when they were working, and he named Clyde Green as an example.

Green, Lathan told Johnson, had "vacation" by his name on the o-w-l yet he was working for Bickerton Iron Works at Morgan's Point.<sup>102</sup> Questions to Lathan about the o-w-l of June 15 showing Clyde Green's name appear irrelevant, for it is clear from the o-w-l and Green's work history card (G.C. Exh. 17-7) that he was referred for no more than 1 or 2 days on June 10 and again on June 26. On Monday, June 29, Green was referred on request (of Ed Willis) to Bickerton Iron Works at Barbour's Cut—not Morgan's Point—as the work order (G.C. Exh. 6-10) and referral slip (G.C. Exh. 10-7) show.

On the o-w-l for the week of June 29, Green's name appears at position 8 followed by three notations. The first seems to be a date which is blotted out. The second notation, appearing above the blotted out date, is the date of "6-29." The third notation reads "vacation 2 weeks." Lathan is 63 on this list. On the o-w-l for July 6, the typed name of Green has been scratched. Under the scratch one can read the word "(Vacation.)" Beginning on June 29, and for 140 hours thereafter, or about 3.5 weeks, Green worked for Bickerton Iron Works, and his name should *not* have been typed on the o-w-l of July 6 with the notation of "vacation."

Business agents Barker and Johnson conceded that a mistake was made in maintaining Green on the list as being on vacation and that he should have been scratched. Barker admitted that Lathan called this fact to his attention on July 6. Barker had just returned from a 2-week vacation. After checking on the matter, he scratched through Green's name.

The evidence shows nothing more than an oversight regarding Green by Respondent's agent and secretaries—accompanied by Green's failure to notify the Local that his name should be scratched.

Lathan's pretrial affidavit of July 6 (Resp. Exh. 4) reveals what complaint paragraph 11(g) no doubt is actually based on. At page 16-17 Lathan records:

I last worked on 6/30 for 8 hrs. and 7/1 and 2 for 4 hrs. each because we were rained out. Today I was dropped to the bottom of the list. I had been #42 when I went to the Spaw-Glass job at Ella & 610.

At first I questioned Sonny about being dropped to the bottom of the list. He said that they were watching me just like I was watching them. I reminded him that Dennis Kemper had worked at Sugar Land for about 2 weeks and didn't lost his

standing on the list. Sonny didn't deny it and they do it all the time.

Neither the trial nor pretrial mention of Lathan being dropped to the bottom of the list makes sense. The trial version possibly could be a reference to the o-w-l of June 22 where his typed name at 43 is scratched and written in at 74 with Johnson's "saved" notation. If so, the timing does not match that of the pretrial affidavit of July 6 which describes an event occurring *that very day* concerning one Dennis Kemper. If the affidavit version is correct, it fails to accord with the o-w-l of either June 29 or July 6, for Lathan's typed name is not scratched from either list and it is not written in among the handwritten names on either list.

I conclude that the evidence, as presented, is insufficient to support paragraph 11(g), and I shall dismiss it.

Respecting paragraph 11(k) the General Counsel argues on brief:

The gist of the violation is the fact that, as set forth in the argument above under subparagraph (g), the Union was making a special effort to watch Lathan because he had filed charges with the Board and was apparently making no effort to police the hiring hall procedures insofar as anyone else [was] concerned. We submit, therefore, that the Union, under the circumstances, was culpable for permitting Green to remain on the list after he had been dispatched by them to Bickerton and it is no defense to assert that Green was merely trying to pull a fast one.

This argument relies to a large extent on the testimony of Lathan that Johnson said, "[W]e are going to watch you." Lathan's uncontradicted testimony regarding Johnson's "we are going to watch you" remark, if credited, would be relevant on the issue of Respondent's animus and motivation toward Lathan. Lathan's demeanor was not unpersuasive on the matter, and it could well be that at some point in that general time frame Johnson did make such a statement. However, due process would seem to require more accuracy in the corroborating facts than we have here. Especially is this so where the evidence departs more than a little from the facts alleged in the complaint. Under all the circumstances, I find that the testimony of Lathan attributing the "we are going to watch you" remark to Johnson, although uncontradicted by Johnson at the trial, is rendered unreliable by positive discrepancies in the contextual facts. I therefore shall not rely upon this remark in assessing Respondent's motivation toward Lathan.

There is no evidence that Green "pulled a fast one" by deliberately failing to remind the Local to scratch his name. And certainly there is no evidence that he sought to cheat by returning to the hall after 3 days of work and securing another referral based on the high standing which should have been scratched on the third day. Under all the circumstances, I also shall dismiss paragraph 11(k) on the basis that the deviation regarding Green was credibly explained as a mistake by Respondent. Respondent's mistake, not evidencing a pattern of

Spaw-Glass firm at 1400 Allen Parkway—a location different from Interstate 10 and Ella. The work order card and referral slip issued to Lathan for this assignment are not in evidence.

<sup>102</sup> Lathan could not recall the circumstances when he complained to Johnson about Dennis Kemper, and was uncertain whether it was Kemper or Green he mentioned on this occasion to Johnson. In any event, the evidence offered in support of the "on or about July 6" allegation is that based upon the conversation of June 26 with Johnson.

negligence, does not rise to a violation of the Act even if Lathan or others had lost employment by virtue of Green's name remaining on the o-w-l. In any event, it has not been shown that this oversight caused anyone to be denied a referral.

*f. Paragraphs 11(h) and (i)*

Paragraphs 11(h) and (i) will be treated jointly. The General Counsel alleges in complaint paragraph 11(h) that on or about June 22 Respondent permitted members Lloyd Risinger and Curtis Roberts to maintain their standing on the o-w-l "even though they failed to show up for roll call and Roberts was actually working for an employer through the hiring hall at that time."

In paragraph 11(i) it is alleged that on or about July 6 Respondent permitted members Risinger and Roberts to remain on the o-w-l "even though they were not present for roll call and at a time when Curtis Roberts was working for the American Bridge Company at the United States Steel mill in Bayton, Texas."

Lathan testified that, as he recalled, on the two successive rollcalls the Mondays of June 22 and July 6 (of course June 29 was an intervening Monday) neither Risinger nor Roberts answered when his name was called, yet his name was not removed. Lathan protested to business agent Barker, and told him that Roberts was being permitted to ride the o-w-l even while working for American Bridge. Barker said he would look into Lathan's allegation. Lathan later observed that Roberts' name had been scratched, but he was uncertain whether Risinger's name had been marked off. Neither Barker, Risinger, nor Roberts addressed the foregoing subject in their testimony.

We should recall that the list actually used at the Monday rollcall is that from the previous week. On the June 15 o-w-l, Lathan is at place 52, Risinger at 56, and Roberts at 70. This general sequence was carried forward to the June 22 list where Lathan is shown at 43, Risinger at 47, and Roberts at 57.

None of the three is shown on the June 15 list as having been referred, but the June 22 o-w-l bears the notations of "6-23" and "worked 2 1/2 days" previously discussed regarding Lathan. Risinger's name has the date of June 23 after it and a line is drawn through both the name and the date—indicating that he worked more than 2 days on the job he was referred to on June 23 and was therefore marked off the list.<sup>103</sup> Roberts' name is marked through—indicating that he did not answer at rollcall. The mark-out can also indicate that he worked more than 2 days if, by mistake, a referral date has not been placed after his name.

Notwithstanding the fact that Roberts' name was marked through on the June 22 list, he did not lose his standing on the o-w-l, for he appears in position 46 on the list of June 29. Risinger's name appropriately does not appear on the June 29 o-w-l. The date of June 29 is entered after Roberts' name on the June 29 list and his

<sup>103</sup> The work order (G.C. Exh. 6-9) and the referral slip (G.C. Exh. 10-6) reflect that Risinger was requested to the Four Seasons Hotel job. Risinger testified that James Robinson, the foreman, requested him. His pension report (G.C. Exh. 26-23) confirms his testimony that he worked for about 10 months on that job.

typed name at position 46 is scratched, indicating that he worked more than 2 days on his June 29 referral.<sup>104</sup> As earlier noted, Lathan, at position 63 on the June 29 o-w-l, received a referral for 1 or 2 days on July 2 to a Spaw-Glass job. Therefore, if Respondent improperly carried Roberts' standing to the June 29 list, it worked to the disadvantage of Lathan and other employees.

On the July 6 o-w-l Lathan appears at position 53, but Risinger's name is not shown. While Roberts' name is not one of those typed, he did sign the list at position 88. He could have signed as late as Friday, July 10. Thereafter, a line was drawn through his name. Normally the 85.50 hours would represent 2 weeks of work, for the contract discourages overtime work except where necessary.<sup>105</sup>

While not all of Lathan's testimony or description is supported by the evidence, the record shows that, after scratching Roberts from the June 22 list for (apparently) failure to answer the rollcall, Respondent typed his name in position 46 on the June 29 o-w-l even though Roberts had not signed at the bottom of the June 22 list. It was improper for Local 450 to carry Roberts' name onto the June 29 list, even maintaining his standing, in the absence of a legitimate basis for doing so.<sup>106</sup> Respondent offered no explanation. Accordingly, I find that Local 450 violated Section 8(b)(1)(A) and (2) of the Act by this deviation from the established hiring hall rules as alleged in complaint paragraph 11(h) respecting Roberts. Whether Lathan is entitled to any backpay, and the amount of such, shall be determined in the compliance stage.<sup>107</sup>

I shall dismiss paragraph 11(i). While there is no explanation about how Roberts would have been in a position to sign the o-w-l, or have his name written in, while he was working for American Bridge, there is no showing that the appearance of his name at position 88 on the o-w-l of July 6 worked to the detriment of any other operator *that* week, for only four others signed in after him.<sup>108</sup>

*g. Paragraph 11(j)*

Complaint paragraph 11(j) alleges that on or about July 8 Respondent, "without announcing the job at Re-

<sup>104</sup> I find that the referral was to the American Bridge Division of U.S. Steel in accordance with his work history card (G.C. Exh. 17-23) and his pension report (G.C. Exh. 26-2) as well as the o-w-l notation. Although the months were sliced off the work history card in the photocopying process, the remaining date of "29-81," in conjunction with the pension report showing that Roberts worked 85.50 hours for American Bridge in July plus Lathan's testimony, supports this finding. The pension reports frequently record hours as falling in the next month when the referral is at the end of the previous month. The work order and referral slip were not offered in evidence. Thus, if they reflect that Roberts was requested, the record evidence does not show it.

<sup>105</sup> Sec. 20(x) of the working rules, p. 47, provides, "Where unusual circumstances demand overtime, such overtime will be kept at a minimum."

<sup>106</sup> There is no testimony that Roberts' position was "saved" because he had car trouble or some other recognized excuse.

<sup>107</sup> The compliance investigation should obtain and review all the medical and insurance records in determining whether Lathan in fact was available for work.

<sup>108</sup> On the o-w-l for July 13, he is typed in at position 85 and was referred on July 20. A total of 105 names are typed or signed on the July 13 list, and several of those appearing after Roberts did not obtain referrals.

spondent's second floor hiring hall facility, dispatched a member named Rigsby to a job for Manhattan Construction Company in the 18000 block of Memorial Drive in Houston, Texas even though Rigsby was number 55 on the out-of-work list and Charging Party Joel Lathan was number 53 on the list." The o-w-l referred to is that for July 6 and the position numbers are as alleged.

At page 19 of his brief the General Counsel acknowledges the referral records disclose that H. D. Rigsby was requested for the job to which he was referred on July 8, and he concedes that he is "unable to sustain the burden to show that Rigsby was not requested specifically for the job and therefore the evidence is insufficient to reveal that the Union did other than follow its standard operating procedures."

Lathan was not referred that week. He testified that on July 8 he observed "Tom" Rigsby, following the upstairs job call, come out of the *back room* with a dispatch slip in his hand. It is not clear that "Tom" Rigsby is H. D. Rigsby. While the two may well be the same, I shall dismiss this paragraph, and I shall not consider the evidence here in discussing the request system under paragraph 10(a).

#### h. Paragraph 11(l)

In paragraph 11(l), the General Counsel alleges that on or about July 23 Respondent backdoored Curtis Roberts, then number 88 on the o-w-l, "to a job at the Weber Drilling Company on the H. C. Beck Company job across from the Four Seasons Hotel in downtown Houston, Texas," at a time when Lathan was 52 on the list.

Lathan testified that a little before the 7 a.m. job call on Thursday, July 23, he observed Curtis Roberts obtaining a dispatch (referral) slip at the dispatcher's desk. Lathan's name is written in at position 35.5 on the July 20 o-w-l, and Roberts' name is typed at place 46.<sup>109</sup> The date of July 20 appears after Roberts' name, and then a line has been drawn through both—indicating that Roberts worked more than 2 days. Johnson testified that Roberts was referred on July 20 to work for Weber Drilling Company, a company which has changed its name to Three D Drilling, Inc.

The General Counsel's various arguments on this allegation are misplaced apparently because of certain inadvertent oversights. He thus contends, at page 20 of his brief, that the July 20 o-w-l does not contain Roberts' name. Yet it does, at position 46.<sup>110</sup> While the General Counsel appears to contend that Respondent offered no explanation for its referring Roberts ahead of Lathan,<sup>111</sup>

<sup>109</sup> The numbers set forth in the complaint allegation almost conform to the positions shown on the o-w-l of July 6 where Lathan's name is typed as number 53 and Roberts' is written at position 88. Lathan moved up to 44 and Roberts to 85 on the July 13 list.

<sup>110</sup> Inadvertent oversights such as these make it easier to appreciate the task facing Local 450. Occasional mistakes by the Union are bound to occur when processing so many people and in attempting to keep the various records cross-checked for accuracy.

<sup>111</sup> The referral and pension records show that Lathan was referred to a series of 1-day jobs that week, but that his first referral was not made until July 22, whereas Roberts was referred on Monday, July 20.

in fact Johnson testified that he designated Roberts as the job steward. Johnson did not modify this testimony when the General Counsel showed him the referral book (G.C. Exh. 7-3) containing a carbon copy of the referral slip. If the slip did not support Johnson's testimony, presumably the General Counsel would have offered the document as an exhibit.

Based on the foregoing, I shall dismiss paragraph 11(l).

#### i. Paragraphs 11(m) and (o)

By paragraph 11(m) the General Counsel alleges that during the week of July 13 Respondent "allowed member Mike Tolopka to work for three days at a job for Miner-Dederick Construction Corp. at the 5000 block of Richmond in Houston, Texas, without removing his name from the out-of-work list."

Treated with the foregoing allegation is paragraph 11(o) in which the General Counsel alleges that on or about July 24 Respondent "dispatched member Mike Tolopka, Jr. to a job for H. A. Lott, Inc., on Westheimer Street in Houston, Texas, at a time when Tolopka should have been on the bottom of the out-of-work list because he had just worked four days for the Miner-Dederick Construction Corp. at the 5000 block of Richmond."

Paragraph 11(m) involves another request and I would dismiss the allegation without further ado but for one deficiency. Number 50 on the July 13 o-w-l, Mike Tolopka, Jr.,<sup>112</sup> was referred on July 14 to Miner-Dederick. He worked there 3 days and his name, contrary to the allegation in paragraph 11(m), was marked out, as Johnson testified. When he was referred on Friday, July 17, it was by the request of Buddy Goodwin as shown by the work order (G.C. Exh. 6-11), the referral slip (G.C. Exh. 10-8), and Johnson's testimony. Johnson identified Buddy Goodwin as Lott's general foreman.

The date of July 24 alleged in paragraph 11(o) is incorrect, and in support of this allegation the General Counsel relies on the evidence pertaining to the July 17 referral described above.

The one deficiency I mentioned earlier is the fact that Tolopka did not sign in at the bottom of the July 13 o-w-l the morning of July 17 before accepting the dispatch from business agent Barker reflecting that Tolopka was requested on the H. A. Lott job for the 7 a.m. shift that day. This appears to be another oversight situation. At the same time, the effect of such oversights on those operators waiting hopefully at the upstairs job call must be considered, particularly as referral by request and by steward appointment is not announced upstairs—a process which can only breed suspicion, distrust, and dissension.<sup>113</sup> The problems are compounded where, as here, the operator referred is not even registered on the o-w-l.

As described elsewhere herein, Johnson testified that an operator who has been working over 2 days and

<sup>112</sup> His name is correctly spelled as shown. There is only one Tolopka involved in the evidence, Mike Tolopka, Jr., notwithstanding that the complaint erroneously names his father who, Johnson testified, is also a member of Local 450.

<sup>113</sup> Lathan testified that "quite a few members" watch through the venetian blinds covering the dispatcher's window and observe the business agents giving out dispatch slips in the morning before the 7 a.m. job call.

whose job is ending may be informed by a friend that the friend will request the operator the next day.<sup>114</sup> The operator goes to the union hall the next morning to pick up his "request" referral slip.

Johnson testified that the operator is expected to sign the o-w-l when he comes in under the "honor" system, "and if I had to check for every man . . . and make sure that he signed it, that is the only thing I would have time to do. I couldn't answer the phone or nothing else." At another point Johnson testified:

But we have much more important jobs to do than to police that out-of-work list. We have grievance procedures; we have problems on jobs; we have safety problems on jobs. We can't just sit there and police that out-of-work list. That is why we try to ask our members, you know, to be honest with us, tell us what is going on with this out-of-work list.

Johnson further testified that other than Mondays "there is only one business agent in that office in the mornings as a rule. The rest of them are out on their jobs."

The secretary who does dispatching, Eddie Carter, arrives about 7 a.m. Between 6 and 7 a.m., Johnson testified, the business agent on duty takes the work orders and dispatches (issues referral slips) to the operators on request who wish to leave early in order to beat the Houston traffic. With possibly a few exceptions, the requests are distributed downstairs and are not called out upstairs on the second floor where the 7 a.m. calls are handled because Johnson, as he testified, does not define a request as a job order.

In evaluating this allegation, it should be noted that Lathan described Tolopka as a member who normally receives his jobs at the *upstairs* job calls. This is a factor supporting a finding of good-faith oversight.

Under the applicable law set forth in the quotation from *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50, respondent must show that "any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant . . . was necessary to the effective performance of its representative function." As Tolopka was referred on request, there was no denial of employment to Lathan or any other operator, and Tolopka's failure to sign at the bottom of the July 13 o-w-l before accepting the referral appears to be but a good-faith oversight. I therefore shall dismiss paragraphs 11(m) and (o).

j. *Paragraph 11(n)*

Paragraph 11(n) alleges that on or about July 24 Respondent "permitted Bill Wheelis to remain on the out-of-work list, even though he had worked for three days for the McGregor Construction Company at a job on Wesleyan at U.S. Highway 59."

Wheelis was referred twice the week of July 20 when he was number 18 on the o-w-l. As he worked only 2 days from his July 20 referral his place was saved and he was referred on Wednesday, July 22, to work for

<sup>114</sup> Johnson testified that the operators appear to do a lot of telephoning at night but that such is not considered "soliciting" a job.

McGregor as alleged. As the pension report does not list that referral (G.C. Exh. 26-10), the exhibits do not show the hours or days Wheelis worked on the job. However, Johnson testified that Wheelis worked the 3 days of Wednesday through Friday. There is no dispute that his name should have been marked off the o-w-l of July 20. It was not. Consequently, he was carried over to the new o-w-l of July 27 in position 15. There are 59 typed names on that list, with Lathan being number 30, and an additional 21 signed names, making a total of 80. If Wheelis had gone to the bottom of the o-w-l on Friday afternoon or Monday morning, it is obvious that he would have been far below Lathan and others on the July 20 o-w-l.

How did Wheelis' name not get marked off the July 20 list? The only explanation appears in the testimony of Johnson who gave seemingly contradictory versions. In one version he explained that Wheelis later advised him that he had telephoned Eddie Carter, the dispatcher, on Friday afternoon (July 24) telling her that he was through with his job and to put him back on the list. Carter, in this explanation, understood Wheelis to say that he had worked only 2 days, so she "saved" his place.<sup>115</sup>

In his other explanation, Johnson asserted that this is an example of where Wheelis, as some others have done, beat the system by lying to and cheating his brother-members. The implication in this position is that Wheelis deliberately told Carter that he had worked only 2 days when he in fact had worked 3 days. The later version seems more logical, for there is no evidence that Wheelis, in accepting a referral the next week from position 15, announced that there must be some mistake in that he had lost his standing on the o-w-l of July 20 by working the 3 days of Wednesday through Friday. Instead, he took a referral on July 30 from position 15 while many below him were never referred that week.<sup>116</sup>

In his brief the General Counsel contends that Respondent cannot escape responsibility for the violation by blaming Wheelis. For its part, Respondent does blame Wheelis, and contends that Lathan's testimonial description of Wheelis as a friend of his disproves the general allegations of Lathan and Schubert "that the Union afforded preferential treatment to the friends and relatives of the Business Agent."<sup>117</sup>

In evaluating this allegation, I note Lathan's testimony that Wheelis receives his jobs upstairs. Furthermore, I find that the failure to mark through Wheelis' name on Friday, July 24, did not result from any improper action by Local 450. Accordingly, I shall dismiss paragraph 11(n).

<sup>115</sup> The July 20 o-w-l shows the typed name of Wheelis not marked out, reflects that the two referral dates of July 20 and 22 are scratched, and has "(Saved)" after the marked out dates.

<sup>116</sup> It is not clear why he waited until Thursday to accept a job. Even Lathan was referred earlier that week to a series of short jobs. Nevertheless, we must recall that an operator does not have to accept a job. Wheelis could have been out of the hall most of the week following the Monday rollcall. Such an inquiry is immaterial in any event.

<sup>117</sup> Although Lathan did testify that Wheelis is a friend, he also accused Wheelis again of riding the o-w-l, while working, even as Lathan testified. Indirectly, of course, Lathan was accusing Local 450 of permitting Wheelis to ride the o-w-l. This additional matter was not litigated.

## k. Paragraph 11(p)

Paragraph 11(p) alleges that on or about July 27 or 28 Respondent, "without announcing the job at the Respondent's second floor hiring hall facility, dispatched member Dick Moore, whose name was near the bottom of the out-of-work list," at a time when Lathan was "considerably higher than Moore on the list."

There are 59 typed names on the o-w-l of July 27. Lathan is shown as 30 and Moore as 36. Both were referred on July 27. Lathan was referred to a series of short jobs that week, whereas Moore's job lasted longer than 2 days because his name is marked off the list. Although the work order card for Moore is not in evidence, the referral slip is (G.C. Exh. 10-24), and it reflects that Moore was referred at 7:35 a.m. on "Request" to C.M.G. at Texas and Milam Streets. The dispatch slip is signed by Lester Dennis. Moore's work history record (G.C. Exh. 17-16) reflects that he was referred to C.M.A. at Texas and Milam Streets. As neither this contractor, nor that for his August 17 referral, is shown on Moore's pension report (G.C. Exh. 26-11), it may be that the hours he worked for these contractors were not reported.<sup>118</sup> The 128 hours shown for July and the 95.50 hours reported for August are for contractor number 203 which, according to the pension report for June 1981, is Turner Construction Co.

There is virtually no other evidence on this allegation. Lathan merely testified that on July 27 he observed Moore's name near the *bottom* of the list, and that he did not recall whether Moore's name had been marked off later. Although there is no direct evidence that Respondent failed to announce the specific job upstairs that Moore received at C.M.A. (or C.M.G.), I infer, and find, that it was not announced upstairs. This is based on Johnson's testimony that requests are not announced upstairs. Lathan's referral slip reflects that he was not dispatched on July 27 until 9:30 a.m. (G.C. Exh. 10-25), and that was to a 1-day job, for the o-w-l reflects that he was referred again on July 28, and a third time on August 3. The pension report also discloses that the first job was for 8 hours.

Relying on the fact that R. W. "Dick" Moore is Johnson's brother-in-law,<sup>119</sup> the General Counsel argues, "Though certainly not conclusive, this type of disparity in the length of job assignments reflects on the ability of the Union to control a member's wages by sending him to either long term or short term jobs."

Contending that no evidence was submitted in support of this averment, Respondent moves that the allegation be dismissed.

Although Moore is Johnson's brother-in-law, the evidence reflects that Moore was requested. In accordance with the Union's normal procedure involving any request, it dispatched Moore without reference to his standing on the o-w-l. I therefore shall dismiss paragraph 11(p).

<sup>118</sup> It also is possible that hours worked for a subcontractor are sometimes listed under the general contractor's name.

<sup>119</sup> Johnson testified that his sister is married to Dick Moore.

## l. Paragraph 11(q)

Noted earlier is the fact that at the trial complaint paragraph 11(q) was divided into four subsections (G.C. Exh. 11).

In paragraph 11(q)(1) the General Counsel alleges that on or about July 27, 1981, Respondent dispatched member M. F. "Buddy" Moseley to the Miner-Dederick Co. "without announcing the job at Respondent's second floor hiring hall facility." The work order itself (G.C. Exh. 6-16) shows that Moseley was referred to be an oiler for 1 day. His pension report shows he worked 8 hours for Miner-Dederick in July (G.C. Exh. 26-12).

Lloyd Risinger and James Robinson testified that oilers are the apprenticeship classification. Under article VII of the contract, apprentices receive less pay than operating engineers, as do oilers. It is not clear from the collective-bargaining agreement that oilers and apprentices are one and the same, for they are referred to independently in that document.<sup>120</sup>

As we have seen, Lathan was in position 30 on the o-w-l of July 27. M. F. Moseley was at 54. Moseley was referred three times that week, and Lathan twice. Johnson testified that the oilers are called from a separate list, and the referral lists (G.C. Exh. 8) so reflect. This lends support to a finding that the oilers do receive less pay than operators.

The General Counsel's theory on this allegation is unclear, and I shall dismiss paragraph 11(q)(1).

Paragraphs 11(q)(2), (3), and (4) will be treated together to some extent. In all these subparagraphs the General Counsel alleges that on or about July 28 Respondent dispatched three different members to jobs "without announcing the job at Respondent's second floor hiring hall facility." Paragraph 11(q)(2) alleges that M. F. "Buddy" Moseley was dispatched to Turner Construction Company; 11(q)(3) alleges that Dean Jacka went to the J. W. Bateson job; and 11(q)(4) asserts that Curtis Roberts was sent to a B. B. Weber job.

Lathan testified that about this time he observed Moseley, Jacka, and *Glen Wolcik* coming from the back of the (first floor) dispatch office before 7 a.m. with referral slips in their hands.<sup>121</sup> Lathan asked dispatcher Carter about the matter and she told him that Jacka had been requested at J. W. Bateson,<sup>122</sup> and Wolcik had been re-

<sup>120</sup> Also, under the wage article, light equipment operators earn a lower rate than do heavy equipment operators. Lathan frequently operates light equipment. However, A. Frank Goodwin testified that, by virtue of a certain arrangement on grouping of equipment, a light equipment operator draws the same pay as a heavy equipment operator.

<sup>121</sup> The referral slips, identified momentarily, bear the notations that they were issued between 7:10 and 7:15 a.m.

<sup>122</sup> Both the work order card (G.C. Exh. 6-34) and the dispatch slip (G.C. Exh. 10-25) reveal that Jacka was requested. Johnson testified that John Ellis, shown as making the request, was not a member of Local 450 and apparently was part of Bateson's management.

quested at Weber Drilling,<sup>123</sup> but he could not recall what she said about Moseley.<sup>124</sup>

It appears that Lathan worked as much as, or even more than, either Moseley or Wolcik that week. Jacka is a different matter. His work at J. W. Bateson at Dairy Ashford Road and Interstate 10 in Houston is the Conoco jobsite that Lathan was referred to in December where Jacka was steward. Jacka testified that he was the first operator on the Conoco job and that he was the designated steward.

I shall dismiss subparagraphs 11(q)(2) and (3) because Moseley and Jacka were requested. Respecting 11(q)(4), there is no explanation in the record of how Curtis Roberts, while the job steward, requested an operator. Roberts gave no explanation when he testified. Actually, Roberts denied that he was the steward on the job, saying that another man was the steward.<sup>125</sup> There is no evidence that Roberts was the foreman, or that he was calling on behalf of the foreman or on behalf of a member of management. While that fact may indicate a discrepancy of some kind, the evidence adduced in support of the allegations litigated fails to establish that Lathan or any operator was improperly denied employment through the actions of Local 450. Accordingly, I shall dismiss paragraph 11(q) in its entirety.

*m. Paragraph 11(r)*

As amended at the trial, paragraph 11(r) alleges that on or about July 14, "without announcing the job at the Respondent's second floor hiring hall facility," Respondent "dispatched member Fred Tillery to a job for the H. C. Beck Company at San Felipe and Loop 610 in Houston, Texas, at a time when Tillery was lower on the out-of-work list than was charging party Joel Lathan."

On the July 13 o-w-l, Lathan appears at position 44 and F. R. Tillery at 90. As the list reflects, Lathan was referred to jobs on July 14,<sup>126</sup> 16, and 17, and F. R. Tillery was referred on July 14. Lathan was unable to recall the details pertaining to this allegation.<sup>127</sup>

The work order card (G.C. Exh. 6-14) for Tillery's job reflects that the call was not received from the H.C.B. representative until 8 a.m. on July 14.<sup>128</sup> Tillery was dis-

<sup>123</sup> The work order card (G.C. Exh. 6-35) discloses that Curtis Roberts requested Wolcik on the Weber job for 1 day, and the referral slip shows that Wolcik was requested (G.C. Exh. 10-25). Johnson testified that Roberts had been referred to the same job on July 20 as the steward. Roberts, however, denied that he was the steward on that job. Complaint par. 11(q)(4) erroneously has Roberts rather than Wolcik as the operator referred on July 28.

<sup>124</sup> The work order reflects that a Turner Construction Co. representative requested "Buddy" Moseley for a 1-day job (G.C. Exh. 6-33), although the referral slip fails to reflect that Moseley was requested (G.C. Exh. 10-25). Johnson testified that "Buddy" is the nickname of M. F. Moseley.

<sup>125</sup> As earlier noted, sec. 20(v), p. 47, of the contract provides that stewards "shall exercise no supervisory functions."

<sup>126</sup> Although the o-w-l shows July 14, the referral slip in evidence reflects July 15 (G.C. Exh. 10-10).

<sup>127</sup> That fact is noted simply as part of the summary. As I stated at the hearing, it is unlikely that any witness could recall all the referral dates, jobs, standing sequences, and similar items involved in the many allegations.

<sup>128</sup> Johnson testified that H.C.B. is the new name of H. C. Beck Company.

patched at 8:35 a.m. according to the referral slip (G.C. Exh. 10-11). Thus, this job could not have been announced at the 7 a.m. job call on July 14 because Respondent did not yet have the order. There is no evidence concerning how the job order was filled, and business agent Lester Dennis, who signed the referral slip, possibly went looking for someone in the hall. Lathan did not testify that he was present at the hall between 8 and 8:35 a.m. on July 14. Accordingly, I shall dismiss paragraph 11(r).<sup>129</sup>

*n. Paragraph 11(t)*

Paragraph 11(t) alleges that on or about November 20, 1981, Respondent bypassed Schubert "who was No. 17" on the o-w-l and dispatched Dick Moore and William Moore "to the J.A. Jones job at Post Oak and West Alabama in Houston, Texas at a time when neither of the Moores was on the out-of-work list."

On the November 16 o-w-l Schubert is written in at position 58, W. M. Moore is written in at 60 and again at 83, and Dick Moore is written in at 71.<sup>130</sup> Schubert's name has no referral date and is not marked through, and the same is true for W. M. Moore's name at position 83. However, W. M. Moore at 60 and Dick Moore at 71 are lined through with no referral dates.

Lathan testified that he was referred on November 20 to an overtime job involving a concrete pour at the J. A. Jones project, and that he worked with William Moore on the job.<sup>131</sup> Lathan testified that the job William Moore took was not called out at the 7 a.m. job call when Lathan claimed his own job. The referral slip to W. M. Moore, showing that he was requested for referral to Baker Concrete, is dated November 19 (G.C. Exh. 10-13). However, the job or work order card, showing that W. M. Moore was requested, is not dated until November 20 (G.C. Exh. 6-17).<sup>132</sup> Moore's work history record reflects that he was referred to Baker Concrete on November 20 (G.C. Exh. 17-15). It therefore appears that the date of November 19 was inscribed rather than November 20 by virtue of an inadvertent oversight.

The November 20 work order card (G.C. Exh. 6-18) and referral slip (G.C. Exh. 10-14) of the same date to Dick Moore reflect that he was sent to the same jobsite on request by Pat Cook of Hercules Concrete Pumping Company as a foreman. Johnson testified that Cook, an assistant to the owner of Hercules, is not a member of Local 450.

Schubert testified that, pursuant to a telephone call from Lathan, he went to the jobsite where he met Wil-

<sup>129</sup> It will be recalled that I have granted Respondent's motion to dismiss par. 11(s) for lack of evidence.

<sup>130</sup> There are 56 typed names, with Lathan being number 15. His name is not scratched and there is no referral date after his name. In fact, as we shall see, Lathan was referred on November 20 to the job in question.

<sup>131</sup> Lathan's work history record shows that he was referred to Baker Concrete Co. on November 20, 1981 (G.C. Exh. 17-12). The job order card and referral slip for Lathan to this job are not in evidence.

<sup>132</sup> Johnson testified that "Tody," who called in the request for W. M. Moore, is a member of Local 450, and Johnson was uncertain whether Tody was the steward or the foreman but he was one or the other. As the job fell under the territorial jurisdiction of Lester Dennis, Johnson was testifying from information gathered in his investigation of the allegation.

liam Moore and saw Dick Moore working on the job.<sup>133</sup> Schubert testified that he did not get a job on November 20. The o-w-l for that week, with no date shown after his name, and his work history record (G.C. Exh. 17-25) confirm the fact that Schubert was not referred that week to any job.

This allegation, therefore, is simply another one involving requests. Based upon Local 450's procedure of not announcing jobs upstairs for which requests have been made, as confirmed by Lathan's testimony regarding the November 20 job call, I find that the two requests-jobs involved here were not announced upstairs, and that they in fact were claimed downstairs.<sup>134</sup>

According, I shall dismiss paragraph 11(t).

*o. Paragraph 11(u)*

Paragraph 11(u) alleges that on or about December 1 Respondent dispatched Curtis Roberts to J. W. Bateson Company at Interstate 10 and Eldridge in Houston when Roberts was number 90 on the o-w-l, "thereby bypassing others with greater seniority on the list."

The November 30 o-w-l has 78 typed names. Handwritten names bring the total for that week to 105.<sup>135</sup> Lathan first appears at position 14, with the date of "12-1" and "Save" after his name with his name and the notations being marked out.<sup>136</sup> Schubert appears at position 39 with no referral date after his name, and his name remains unscratched—indicating that he was not referred that week.

Curtis Roberts appears as number 71 with the date of "12-1" after his name and both thereafter scratched. Lathan's handwritten name, apparently inscribed on his return from the Conoco jobsite, is at position 97.<sup>137</sup>

The pertinent work order of December 1 reflects that M. L. Jackson requested Roberts for an operator position (G.C. Exh. 6-19). We know that Jackson was the operator foreman on the job. This leads back to the matter of Jackson believing that with 14 operators on three shifts he was entitled to an assistant foreman. Roberts was to be the assistant foreman, and his December 1 referral slip, signed by Lester Dennis, reflects that he was dispatched as an operator foreman (G.C. Exh. 10-15).<sup>138</sup>

<sup>133</sup> Lathan testified that he did not think the two Moore's are related.

<sup>134</sup> All jobs are dispatched downstairs. The difference is that jobs not on request must be claimed at the 7 a.m. upstairs job call, whereas the job orders on requests are distributed downstairs and the requested operator walks the job order over to the dispatcher's desk and secures his referral slip, frequently before 7 a.m., if the operator wants to beat the Houston traffic rush.

<sup>135</sup> When the signing process involves an operator who has been on a job over 2 days but less than a full week, it means that the 105 total, as here in the case of Lathan, contains the same individual twice.

<sup>136</sup> We know from the earlier discussion of complaint par. 10(b), alleging that Respondent unlawfully caused Lathan to be terminated from the Conoco job, that Lathan was referred to work for the J. W. Bateson Company at the Conoco jobsite on Tuesday, December 1, 1981, and that he was terminated from the job on his third day there, Thursday, December 3, 1981.

<sup>137</sup> The reference in the complaint allegation to number 90 is an inadvertent error.

<sup>138</sup> The General Counsel argues that the different job descriptions on the work order and referral slip, plus the position standing on the o-w-l, prove that "the Union violated 8(b)(1)(A) and (2) of the Act by dispatching Curtis Roberts on December 1, 1981."

Jackson also testified that he requested Roberts because he knew that Roberts was a good crane operator and that Jackson could see that within a few days he would need a crane operator. Jackson and Dean Jacka testified that Roberts worked a few days on the job Lathan was terminated from,<sup>139</sup> and then Jackson assigned Roberts to operate a 150-ton<sup>140</sup> crane with a boom of 230 feet. Lathan testified that because of his head injury in February 1981, resulting in some dizziness and loss of equilibrium when he looks up, he has avoided jobs on cranes having long booms such as this one.

As Curtis Roberts was referred on request, I shall dismiss this allegation.

*p. Paragraphs 11(v) and (w)*

Paragraphs 11(v) and (w) shall be considered together. Paragraph 11(v) alleges that on or about January 21, 1982, Respondent "referred C.J. Wilson and W.R. Burnett to a shut-down job being performed by Babcock & Wilcox for Arco Refining at a time when Charging Party Lathan was No. 40 and Charging Party Schubert was No. 25 on the out-of-work list and Burnett was lower in standing."

The position numbers alleged are not quite accurate. The January 17, 1982,<sup>141</sup> o-w-l has 76 typed names, with signed names bringing the total to 92 or more (some are interlined). C. J. Wilson is number 22, Schubert is 25, W. R. Burnett is at 38, and Lathan is in place 49. Wilson is marked through with no date. Schubert has "Save" after his name. Burnett, with no date, is marked through, and Lathan's name, as with Schubert's unmarked one, has "Saved" noted after it.

Paragraph 11(w) alleges that after January 21, 1982, Respondent referred additional operators, including "Dale H. Oldham," to the B & W job at ARCO when "all or most of whom were of lower standing" on the o-w-l than either Lathan or Schubert. The "Dale H. Oldham" apparently is a reference to Doyle Oldham who is 92, or the ultimate position, on the January 17 list.

The evidence discloses that on January 11, 1982, Burnett was referred to B & W at ARCO as the *steward* (G.C. Exh. 10-17). There is no explanation for the presence of his name on the January 17 o-w-l. Indeed, Johnson testified, and the work order card (G.C. Exh. 6-21) reflects, that it was Burnett who called on January 25 requesting C. J. Wilson on the B & W job at ARCO. Wilson was referred on this *request* (G.C. Exh. 10-18).

On January 27, 1982, Doyle Oldham was referred from position 65 on the o-w-l of January 25. The work

<sup>139</sup> Presumably Jackson knew, as Johnson testified, that an assistant foreman is a *walking* foreman. Jackson's full intentions on this were not fully developed at the hearing, and Jackson perhaps actually planned for Roberts to operate a crane despite the fact he could or would be a walking foreman. The record is not entirely clear as to what Roberts did on the job before Lathan's termination, but he apparently served as a walking foreman. Dean Jacka, the job steward, testified that Roberts came out as the assistant foreman, and that when Roberts took over Lathan's job he left the position of "walking assistant foreman."

<sup>140</sup> The tonnage refers to the lifting capacity. Jackson testified.

<sup>141</sup> As January 17, 1982, was a Sunday, the typist obviously should have used the date of January 18, 1982. To avoid confusion, however, I shall use the date of January 17, 1982.

order card shows that he was *requested* by C. J. Wilson on that date at the B & W job (G.C. Exh. 6-22), and the referral slip shows that he was dispatched by *request* to that job (G.C. Exh. 10-19). Johnson testified that Wilson was the operator foreman when he made the request.

The General Counsel describes the requests and referral sequence here as a "bootstrapping" technique whereby Respondent manned the job through its handpicked steward. Thus, "by doing by indirection that which it would be precluded from doing by direction," Respondent is "in violation of the Act." To the extent the "hand-picked" contention is an argument that Respondent's steward appointment system is inherently discriminatory because it enables the Union to man jobs on the basis of nepotism or other arbitrary considerations, I find later herein that such a broad attack was neither alleged in the complaint nor litigated at the hearing. The General Counsel has not shown that the requests here, even that by the steward, violate the established referral procedures. Moreover, I note that Wilson actually was higher on the January 17, 1982, o-w-l than either Lathan or Schubert, Burnett had been on the job since January 11 as the steward, and Oldham was requested by Wilson. I shall dismiss paragraph 11(v). I also shall dismiss paragraph 11(w) to the extent I do not find merit in that allegation in the discussion which follows.

q. *Paragraphs 11(w) and (x)*

Bearing on allegations in paragraphs 11(w) and (x) is Lathan's testimony that about mid-January 1982 he went to business agent Barker and volunteered for picket duty at Houston Export and Crating Company. He testified that he already had served picket duty of 1 week there some 3 to 4 weeks earlier, and that on this occasion in January 1982 he walked picket for the 3 days of Wednesday-Friday.<sup>142</sup> Local 450, Lathan explained at the trial, has a standing rule whereby anyone who walks picket is placed at the top of the o-w-l for 1 week. Rule 6 of the referral rules, quoted earlier, recites:

6. If a member agreed to walk a picket line, his name was placed at the top of the list.

The picket list, Lathan testified, is a separate document from the regular out-of-work list.

The following Monday Lathan noticed that his name was not read from the picket list at the 7 a.m. job call. Afterwards he went to Barker and asked him what had happened to the picket list. Barker replied, "Well, we took it down." Lathan inquired whether the Union had removed the list in order to keep him from going on the B & W shutdown job.<sup>143</sup> Barker denied the assertion, saying simply that as the picketing was over the picket list had been taken down. Persisting in his effort, Lathan removed the referral rules<sup>144</sup> from the bulletin board

<sup>142</sup> Presumably these were the dates of January 13, 14, and 15, 1982, for Lathan's work history card and pension report reflect that he was not working at this time. He was number 60 on the January 11, 1982, o-w-l, 49 on the January 17, 1982, list, and 40 on the January 25 list.

<sup>143</sup> Lathan testified that on shutdown jobs operators work 60 hours a week rather than 40. In short, an operator is paid 20 hours at the over-time rate.

<sup>144</sup> In his testimony, Lathan erroneously called them the bylaws.

and showed them (rule 6) to Barker. Barker responded that Local 450 could take the picket list down at any time the business agents chose to do so. That apparently ended the conversation. Business agent Barker did not address the foregoing during his own testimony.

There is one operator, Ronnie Daniel, who was referred on January 27 whose name does *not* appear on the o-w-l of January 25, 1982. On that list Lathan is 40 and Schubert is 23. It appears that Lathan and Schubert were referred on January 28 for 1 or 2 days to the Lefco yard. Schubert was referred on February 1 to D. L. Ryan where he worked for 74 hours. The referral records do not disclose that Daniel was requested (G.C. Exhs. 6-23, 10-19, and 17-4), and there is no testimony that he was requested. His pension report reflects that he worked 189.50 hours for B & W in February (G.C. Exh. 26-25). After 120 hours at Self Pay he returned to B & W where he worked 228 hours in March and, by the closing date of the exhibit, another 156 hours in April. It is possible, even likely, that Daniel's return to B & W was based on the fact he was referred there on January 27, 1982—when he was not even on the o-w-l but at a time when Schubert and Lathan were. The referral of Daniel rather than Schubert or Lathan, in the absence of a legitimate reason, violated Section 8(b)(1)(A) and (2) of the Act as alleged in paragraph 11(w).

Respondent referred several operators to the B & W job on February 1, 1982, with only a couple being requested. Lathan was not sent there despite his standing at position 35 on the regular o-w-l of February 1. The others, however, held a higher standing than Lathan. Thus, Gary Popham was 5, Kenneth Putnam was 10, Homer Pierce was 20.5, and L. W. Hinsley was 22. From the list of Monday, February 15, 1982, the General Counsel proved that W. D. Davis and A. W. Norris were referred to the B & W job whereas neither Lathan nor Schubert was referred there. Yet Davis at 23 and Norris at 64 were higher than Schubert at 65 and Lathan at 79.<sup>145</sup>

In paragraph 11(x) the General Counsel alleges that Respondent violated the Act by abolishing the picket list "on or about February 8, 1982," which list would have accorded preference in referrals to Lathan and others. The problem with this allegation is that it varies significantly from the evidence. Lathan testified about picketing in mid-January. The referrals of Popham, Putnam, Pierce, Hinsley, Davis, and Norris (none of whom was requested) occurred in February. Under the picket list rule, Lathan would have gone to the top of the January 17 o-w-l for 1 week only. By removing the picket list on or after January 25, Barker acted properly. Accordingly, I shall dismiss paragraph 11(x).<sup>146</sup>

<sup>145</sup> As is obvious, "higher" and "lower" are just the reverse of the numbers. To have a "high" standing on the o-w-l is to be near the top of the list with a low number. High standing, as Lathan explained, "doesn't pay any of your bills," and is useful only as a means of obtaining a long-term job.

<sup>146</sup> There is no picket list in evidence for the week beginning Monday, January 11, 1982, or the weeks thereafter. There is a picket list attached to the o-w-l of December 21, 1981, but Lathan's name is not included among the 17 operators listed. Two names have the date of "1-4" after

*Continued*

*r. Paragraphs 11(y) and (z)*

Paragraphs 11(y) and (z) are related. The former alleges that on or about February 10, 1982, Respondent referred Jim Flanary to T & R Contractors, Inc., at the Linbeck jobsite at Louisiana and Pease Streets in Houston, Texas, when Flanary "was two names below Charging Party Lathan on the out-of-work list."

Paragraph 11(z) alleges that on or about February 15, 1982, Respondent maintained Jim Flanary's name on the o-w-l "even though he had been dispatched to the job for T & R Contractors, Inc., on February 10, 1982, and worked a sufficient number of days thereafter to require his name to be removed from the said list in accordance with the standard operating procedures of Respondent's hiring hall."

The o-w-l of February 8, 1982, shows Lathan at position 28 with his name lined out followed by the date of "2-10." His work history card and the previous o-w-l reflect that he was referred on Monday, February 8, also. Flanary is in position 45 with a line drawn through his name. On February 10 Lathan was referred to the same T & R Contractors job (G.C. Exh. 17-12) to which Flanary had been referred the day before (G.C. Exhs. 6-36 and 10-26).

At the trial Johnson credibly explained, as earlier noted, the context in which Flanary was referred to the job by request after Johnson had recommended Flanary to the contractor's representative.

The General Counsel argues that there is no evidence establishing Flanary to be any better at operating the equipment on the job than was Lathan,<sup>147</sup> "and the selection of Flanary was thus an arbitrary one in violation of the hiring hall procedures and contrary to the Act."

Lathan testified that he observed the equipment Flanary was operating and that he, Lathan, could operate it and also the 75-S.

Aside from the question of whether a business agent may recommend one operator over another, it appears from Lathan's work history card and his pension report that he worked 2 days for Miner-Turner beginning February 8, 1982. Thus, he was working on February 9 when Flanary was referred to the job in question. As Lathan was not out of work at the time Flanary was referred by Ty Bloodworth, Local 450's president who also serves as a business agent, I shall dismiss paragraph 11(y).

Despite the extensive testimony covering paragraph 11(z), the crux of the matter is simply that Flanary's name was not marked off the o-w-l of February 8, 1982, until Barker did so as he was calling the 8 a.m. roll on Monday, February 15, when he observed it there, yet Lathan's name was marked off before rollcall when Flan-

them, and it therefore appears that the list was used in early January 1982 as well as mid-December 1981. In the absence of testimony by Barker contradicting Lathan, I find that the absence of Lathan's name from the picket list in evidence and the absence of a mid-January 1982 picket list do not establish that no such picket list ever existed or that Lathan never served picket duty in either December 1981 or January 1982. I have credited Lathan's testimony that he did so serve.

<sup>147</sup> Johnson testified that the contractor explained that he wanted an operator who could operate the new tractor, known as a 75-S, on a slope. It is undisputed that the 75-S was not on the job and regular equipment was used.

ary told Barker that Lathan had worked over 2 days the previous week. Barker admitted that he scratched Lathan's name from position 28 and entered it (at number 102) at the bottom.

Lathan testified that he had complained to Barker about Flanary's name after Lathan discovered that his own name had been scratched. He further testified that Flanary's name was not marked off the list until after rollcall, and that his displeasure goes to the disparate manner in which the situation was handled.

I credit Barker on this issue and I shall dismiss paragraph 11(z).

*s. Paragraph 11(aa)*

Paragraph 11(aa) alleges that on or about March 29, 1982, Respondent referred Dick Moore to work for Gotell Foundation Company in Houston when Lathan was 52 on the o-w-l "and Moore was No. 80 or lower on that list."

Aside from the fact that Moore was requested on the job in question (G.C. Exh. 6-37), the allegation does not match the evidence, for Moore was number 70 on the o-w-l of March 22 whereas Lathan was 104.<sup>148</sup> I shall dismiss this paragraph.

*t. Paragraph 11(bb)*

As amended at the trial, paragraph 11(bb) alleges that on or about March 22, 1982, Respondent "referred Charles Haak to the Chicago Bridge and Iron Company job at Crown Refinery at a time when Charging Party Lathan was No. 70 on the out-of-work list and Haak was not even registered on the said list." At 7 a.m. on Monday, March 22, 1982, Charles Haak was referred to C.B.&I. at the Crown refinery (G.C. Exhs. 6-38 and 10-27). The referral date appears after his name on the March 15 o-w-l and his name is marked out at position 76.<sup>149</sup> Lathan is number 44 on that list, and his name also is marked out with his last referral date shown to be March 15.

The General Counsel argues that "there is no evidence that Lathan was not available for the job on March 22, which was preferentially afforded to Haak." But there is such evidence. Lathan's work history card (G.C. Exh. 17-12) reflects that he was referred on March 16 to Ebasco and his pension report (G.C. Exh. 6-4) discloses that in March 1982 he worked 109.75 hours for Ebasco Services, Inc. Lathan is shown at number 104 on the March 22, 1982, o-w-l, which could indicate that he started to work at Ebasco on Tuesday, March 16, and worked the rest of that week and most of the next before completing his job there and signing the March 22 list at number 104. That list has 79 typed names and handwritten names bring the total to 115.<sup>150</sup>

<sup>148</sup> The relative positions are substantially the same even if the March 29 list is used where Moore is 63 and 70 and Lathan is 113.

<sup>149</sup> As the referral was made before the rollcall of March 22, the March 15 list is the correct one.

<sup>150</sup> It appears that frequently the handwritten names are not the signatures of the operator but instead are the handwriting of the dispatcher or other secretary at Local 450.

As it appears that Lathan was working for Ebasco when Haak was referred to C.B.&I., I shall dismiss this allegation.

*u. Paragraph 11(cc)*

Paragraph 11(cc) alleges that on or about April 5, 1982, Respondent "referred Grant Miller to a job, the name and location of which are presently unknown to the Regional Director but well known to Respondent, at a time when Miller was No. 80 or below on the out-of-work list and Charging Party Lathan was No. 75 on the said list."

The General Counsel concedes that Miller was requested for this job and that "there would be no violation of the hiring hall procedure even though Lathan was high on the out-of-work list at the time." While I shall dismiss this allegation, I do so not on the basis that a request was involved, but on the basis that, while Lathan is shown in position 72, Miller appears at position 67.5. There is no evidence that his name, so interlined between typed names, is not properly there. As Miller held a higher standing on the list, he appropriately was referred ahead of Lathan. I therefore shall dismiss paragraph 11(cc).

*v. Paragraph 11(dd)*

Paragraph 11(dd) alleges that on or about April 19, 1982, Respondent "dispatched John Alexander, who was No. 92 on the out-of-work list, and Ed Rohrback who was No. 94 thereon, at a time when Charging Party Lathan was No. 62 on the said list."

The o-w-l of April 12, 1982, reflects that Lathan is 51, Alexander 91, and Rohrback number 92. Alexander was requested on his job. However, the referral records do not reflect that Rohrback was requested (G.C. Exhs. 6-21 and 10-32). Rohrback was referred on April 15, 1982. His pension record (G.C. Exh. 26-27) shows that in April he apparently worked on two different jobs for Turner Construction Company, at one for 85.50 hours and at the second for 22.50 hours. The evidence shows that Lathan was available and qualified for referral on April 15 to the job Rohrback received.

Respondent offered no justification for this bypassing of Lathan. Accordingly, I find that Respondent violated Section 8(b)(1)(A) and (2) in bypassing Lathan on April 15, 1982. The backpay, if any, due Lathan shall be determined in the compliance stage. The allegation is dismissed as to Alexander.

*w. Paragraphs 11(ee) and (ff)*

Paragraph 11(ee) alleges that on or about April 21, 1982, Respondent "unlawfully solicited Martin Rodriguez of Timmins Equipment Company to write a letter requesting that Charging Party Lathan not be referred to Timmins' job at the Houston Oil Show even though neither Respondent nor Timmins Equipment Company had just cause to deny employment to Charging Party Lathan."

Paragraph 11(ff) is closely related to the foregoing allegation and in this final subsection of paragraph 11 the General Counsel alleges that on or about April 22, 1982,

Respondent, "by its agent Lester Dennis, refused to send Charging Party Lathan to the Houston Oil Show job for Timmins Equipment Company on the basis of the letter referred to in subparagraph (ee), immediately above."

Business agent Johnson testified that on either June 19 or 20 he received a letter from Timmins Equipment Company stating that at the customer's request the Union should not refer either Lathan or Billy Wheelis to the Offshore Technology Show. Dated April 19, 1982, the letter reads as follow (G.C. Exh. 13):

TO: International Operating Engineers - Local 450

As per our recent conversation with our customer we request that the following operators not be assigned to work the "OTC" Show for various reasons.

Thank You,  
/s/ Martin Rodriguez

Martin Rodriguez  
Timmins Equipment Company

Billy Wheelis  
Joel Lathan [sic]

Johnson testified that a day or two before he received the letter Rodriguez telephoned him. They have known each other several years. In the telephone conversation they discussed, among other things, the request not to send Lathan and Wheelis. Johnson testified that the grounds for the request not to send Wheelis involved a lawsuit stemming from a man injured on the job by Wheelis the year before. Johnson, however, had no firsthand knowledge regarding the complaint involving Lathan. Rodriguez did not identify the customer, and Johnson testified that he did not ask for any details nor did he investigate the complaint of the customer of Rodriguez. Johnson testified that the customer probably was Sullivan Transfer Company. Johnson testified that he has not had time to investigate the allegations submitted by Rodriguez.

After receiving the foregoing letter, Johnson called Timmins and told a receptionist, in Rodriguez' absence, that if Rodriguez wanted him to honor the request he would have to get the correct information. This pertained to the fact that Lathan's name was misspelled. A second letter, dated April 22, 1982, was sent addressed to Local 450 over the name of Rodriguez, but unsigned. The text of the message reads (G.C. Exh. 14a):

As per our recent conversation with our Customer. We request the following not be assigned to work the "OTC SHOW." "For various reasons." Jack Lathan and Bill Wheelis.

While the second letter corrected the spelling of the name of Wheelis and the surname of Lathan, it misspelled Lathan's given name.

Lathan testified that on April 22, 1982, he was in the hiring hall when a job was called out for the Offshore Technology Conference (OTC herein). A driver position was available and Lathan bid on it, but business agent Lester Dennis said that he could not go. When Lathan

asked why Dennis replied that the Union had a letter downstairs stating that they did not want Lathan out there that year. Lathan replied that the Union should dispatch him anyway and let the employer tell Lathan that he was not wanted. Dennis repeated his statement and Lathan said that he was asking as a member of the Union on the out-of-work list to be dispatched and to let the employer give him the reason. Dennis, according to Lathan's undisputed testimony, "got up in my face" and said, "[G]oddamnit I said you ain't going. You understand that?" Lathan presented no further argument, but he did request to see the letter. Dennis agreed to show it to him and they went downstairs. Dennis obtained the key to Johnson's office from dispatcher Eddie Carter, went to Johnson's office, and returned with the letter. Dennis held the letter while Lathan read it. According to Lathan, the date was September 21. After examining General Counsel's Exhibits 13 and 14a, Lathan testified that neither is the one Dennis showed him. Lathan again asked for a copy but was refused. Lathan testified that the letter he read was on the same stationary as General Counsel's Exhibit 13, the letter dated April 19, 1982, in evidence, and was about the same length with Lathan's name being the only operator mentioned. Lathan testified that he read the letter carefully, and he did not see the name of Billy Wheelis in the letter.<sup>151</sup>

Lathan testified that he had worked as a driver for Timmins at the OTC Show 2 years earlier, as well as at some equipment shows in years past. The only criticism he ever received was at one of the equipment shows, not the OTC Show, when he was operating a 75-ton P & H Crane. He had a front-end man from Texas City and two union ironworkers. They sat there all morning without seeing anyone to give them directions. About 11:30 a.m. the two ironworkers left for lunch and about 20 minutes later Lathan and his front-end man left. Rodriquez criticized Lathan for leaving early. After Rodriquez made that criticism he said nothing further.

On cross-examination Lathan testified that he tried to telephone Rodriquez after reading the letter Dennis showed him, but was unable to reach him. He wanted to find out why Rodriquez had waited 2 years to send the letter if he was so displeased. Lathan testified that he did not work at the OTC in 1981 because he was working on the Four Seasons Hotel job in May 1981 when the OTC job is usually held.

Lathan testified that he told Rodriquez at the time the latter criticized him for leaving early that there was nothing the operators could do once the ironworkers left. On this occasion the operators were taking down the equipment for the OTC Show which had just been completed. Rodriquez made no remark about Lathan working or not working for the company in the future. The front-end man was from the Texas City district.

Although I credit Lathan's testimony as set forth above, it appears that there is some factual basis, however slight, to support the letter presented to Johnson, and, in the absence of any evidence indicating that Johnson solicited the letter, I shall dismiss complaint paragraphs 11(ee) and (ff).

<sup>151</sup> While I credit Lathan concerning this matter, it seems clear that even the letter he read requested that Local 450 not refer him.

#### H. *The General Backdooring Allegation in Paragraph 10(a)*

Paragraph 10(a) of the complaint reads as follows:

Commencing on or about January 1, 1981, and continuing to date, Respondent, pursuant to the employment agreement, arrangement, understanding or practice, and in the operation of its exclusive hiring hall, as described above in paragraphs 7 and 9, has maintained a practice known as "backdooring," whereby certain members of Respondent were, and are, accorded preference in referral to jobs over other members and nonmembers, even though such unfavored members and unfavored nonmembers have an earlier registration on the out-of-work list.

Although one could argue that the foregoing allegation is broad enough to encompass the theory that Respondent's *request* and *steward* appointment systems violated Section 8(b)(1)(A) and (2) of the Act because they are nepotistic,<sup>152</sup> the General Counsel makes no specific argument in this respect. Moreover, as the concept was not sufficiently litigated at the hearing, it cannot be said that Respondent was ever put on notice that its basic operation of these two systems was under attack or that Respondent impliedly consented to trial of the issue by fully litigating it. I therefore shall make no findings on this matter.

However, Respondent's failure to announce "upstairs" that orders have been filled by request and by designation of stewards has been raised as an unlawful departure from the established hiring hall rules, this matter has been sufficiently alleged and litigated, and I shall make findings as to that practice. As to this matter, I find that Respondent's admitted practice of failing to announce at the daily 7 a.m. job calls which jobs have been filled by requests and steward appointments deviates from the established rules of the exclusive hiring hall and constitutes a violation of Section 8(b)(1)(A) and (2) of the Act.

Respondent's justification for this practice, that the requests are not job orders and that stewards may be appointed, without announcement, because they are representatives of the Union, are unavailing. Johnson's definition of the requests as not being job orders self-destructs on the very job order forms on which Local 450 marks "request" by the operator's name. As for the steward ap-

<sup>152</sup> For example, at one point business agent Johnson conceded that the requests frequently are based upon an operator foreman calling for his "buddy." In fairness, however, it should be noted that Johnson also testified that operators are requested because they have done good work in the past and are therefore requested because of their reputation for quality and dependability. And Lathan admitted that he had been requested on about 5 percent of his jobs and that such requests were based upon the fact that he had done good work in the past for the contractors. Lathan testified that he would have no complaint about the request system if it were managed fairly. As to the instant concept of a nepotistic superstructure, the question arises as to which came first, experience-goodwork or the friendship. In other words, did the request system come into being by friends requesting friends and relatives so that eventually the friends and relatives became skilled and thereafter were requested because of their experience and skill? If so, then it all began because friends requested friends and relatives and not because of the experience and skill factor. Under the posture of this case, however, that question is not presented for resolution here.

pointments, the issue of Respondent's right to designate its representatives is not in issue. What is in issue is the question of whether the failure to announce their appointments significantly deviates from the objective hiring hall standards. Clearly the answer is in the affirmative.

As earlier noted, any deviation from established referral rules "which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function." *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB at 51.

With some exceptions, whether employment was denied returns to the nature of the request system. But the question of whether specific employment was denied is but one possibly inquiry. Board Decisions also establish the principle that a union must operate its exclusive hiring hall on objective standards. *Laborers Local 394 (Building Contractors of N.J.)*, 247 NLRB 97, fn. 2 (1980). The request and steward appointment systems, even if presumed to be objective standards, must be utilized as part of the established referral rules. In practice this means that requests and steward appointments must be announced "upstairs" at the second floor hiring hall when the daily 7 a.m. job call is made. Not only does the private distribution of job orders downstairs for requests and steward appointments breed suspicion, distrust, and dissension, it creates conditions which enable business agents, if they are so minded, to abuse the statutory rights of employees by issuing referrals out of sequence with the established out-of-work list.

Indeed, in this very case I have found that Respondent, even without reference to motivation, violated the Act in bypassing Charging Party Lathan in some of the alleged instances of "backdooring." Accordingly, I find that Respondent has violated Section 8(b)(1)(A) and (2) of the Act by failing to announce at the daily second floor job call which jobs have been filled by requests and steward appointments and the names of the operators so requested and appointed.

#### CONCLUSIONS OF LAW

1. Houston Chapter, Associated General Contractors of America, Inc. (AGC), and Construction Employers' Association of Texas (CEA) are Texas corporations representing their members in respect to negotiating and policing collective-bargaining agreements, labor relations, and related matters.

2. Certain members of the AGC and CEA are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. International Union of Operating Engineers, AFL-CIO, Local Union 450, is a labor organization within the meaning of Section 2(5) of the Act.

4. At all relevant times Local 450 and various employer-members of the AGC and CEA have had an exclusive hiring hall arrangement and practice whereby such em-

ployers hire their employees engaged as operating engineers through the exclusive hiring hall operated by Local 450.

5. Respondent has violated Section 8(b)(1)(A) of the Act (a) by business agent R. L. "Sonny" Johnson's May 25, 1981, threatening to remove Charging Party Joel Lathan from a job if he filed charges with the Board, (b) by Johnson's July 9, 1981, instructing Charging Party Joel Lathan to cease his protected activity or end up dead, (c) by Local 450's filing internal union charges against Charging Parties Joel Lathan and Larry Schubert in July 1981, subjecting Lathan and Schubert to trial, fining each the sum of \$1,000, and expelling them from membership in Local 450 on September 24, 1981, because Lathan and Schubert had engaged in the protected concerted activity of investigating potential backdooring, because they had discussed filing charges with the Board over such perceived backdooring, and because they filed such charges with the Board on June 8, 1981, and (d) by Job Steward Dean Jacka's December 3, 1981, assault and battery of Charging Party Joel Lathan.

6. Respondent has violated Section 8(b)(1)(A) and (2) of the Act since on or about January 1, 1981, (a) by failing to announce at its daily 7 a.m. job calls at its second floor hiring hall which jobs have been filled by requests and steward appointments and the names of the operators so requested and appointed, (b) by certain instances of deviation from the sequential referral from out-of-work lists, as alleged in complaint paragraphs 11(h), (w), and (dd), and (c) by causing the December 3, 1981, discharge of Joel Lathan from the employment of J. W. Bateson Company, Inc., at the Conoco job in Houston, Texas.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

I have found that Respondent unlawfully bypassed Charging Parties Joel Lathan and Larry Schubert in referral to certain jobs, and I have further found that Respondent has acted unlawfully in failing to announce which jobs have been filled by requests or steward appointments. To remedy these violations of the Act, it is recommended that Lathan and Schubert be made whole for any loss of earnings they may have suffered by reason of the discrimination against them.<sup>153</sup> Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>154</sup>

As the internal union charges and trial, fines, and expulsion from membership in Local 450 were unlawful, I shall recommend that Respondent be ordered to declare

<sup>153</sup> To the extent consistent with the findings I have made, and with Board law, the compliance investigation will consider Lathan's physical ability in relation to work available in the make-whole determination.

<sup>154</sup> See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

each proceeding a nullity, to expunge from its records all references to such proceedings, and to notify Lathan and Schubert in writing that it has done so. Because it does not appear that either Lathan or Schubert has paid the fine assessed him, there is no reason to order that such money be reimbursed, with interest.

Because of the publicity within Local 450 of the internal union charges and trials of Lathan and Schubert, I shall recommend that Respondent be ordered to read the notice to employees and members, attached to this Decision, at a regular membership meeting as part of its compliance with the Order I recommend.

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

#### ORDER<sup>155</sup>

The Respondent, International Union of Operating Engineers, AFL-CIO, Local Union 450, Houston, Texas, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Coercing or restraining employees, members, job applicants, or registrants by threatening to remove them from jobs if they file charges with the National Labor Relations Board, by threatening them with death if they do not cease their protected activity of investigating perceived backdooring, and by committing assault and battery upon any individual who engages in protected activity.

(b) Operating its exclusive hiring hall and referral system in a discriminatory manner by failing to announce at the 7 a.m. job calls at its second floor hiring hall facility which job orders have been filled by request and by appointment of stewards and the names of the operators so requested and appointed, and by failing to follow the sequential referral of registrants from the out-of-work list without such deviation being necessary to the effective performance of its representative function and also without the reason for any such deviation being announced at the pertinent 7 a.m. job call.

(c) Bringing internal union charges against members and subjecting them to trial, fines, and expulsion from membership in the Union because such members engage in the protected concerted activity of investigating potential backdooring, because they discuss filing charges with the National Labor Relations Board over such perceived backdooring, or because they in fact file such charges with the Board.

(d) Causing or attempting to cause employers to discriminate against Joel Lathan, Larry Schubert, or any other employees, members, job applicants, or registrants by discriminatorily failing and refusing to refer them to various employer-members of the AGC and CEA pursuant to the operation of its exclusive hiring hall and referral system.

<sup>155</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) Causing J. W. Bateson Company, Inc., or any other employer, to discharge Joel Lathan or any other employees, members, job applicants, or registrants because they have engaged in protected concerted activity including, but not limited to, filing charges with the National Labor Relations Board against Respondent.

(f) In any like or related manner restraining or coercing employees, members, job applicants, or registrants in the exercise of their rights guaranteed by Section 7 of the Act.

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

(a) Make Joel Lathan and Larry Schubert whole for any loss of earnings and benefits they may have suffered by reason of Respondent's unlawful operation of its hiring hall and the December 3, 1981, termination of Joel Lathan from the employment of J. W. Bateson Company, Inc.

(b) Declare the July 9, 1981, internal union charges and the September 24, 1981, internal union trials, fines, and membership expulsion of Joel Lathan and Larry Schubert to be nullities, expunge from its records all references to such charges, trials, fines, and expulsions, and notify Lathan and Schubert in writing that it has done so.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all hiring and referral records of hiring hall users, including work order cards, referral books, out-of-work lists, steward reports, pension and benefit reports, work history records, and other documents necessary to analyze and compute the amount of backpay due Joel Lathan and Larry Schubert under the terms of this Order.

(d) Post at its first floor business office and second floor hiring hall copies of the attached notice marked "Appendix."<sup>156</sup> Copies of said notice, on forms provided by the Regional Director for Region 23, after having been duly signed and dated by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Sign and return to said Regional Director sufficient copies of the attached notice marked "Appendix" for posting by employer-members of the AGC and CEA, if said employers are willing, in conspicuous places, including all places where notices to their employees are customarily posted.

(f) Read the attached notice to employees and members to all members attending a regular membership meeting as part of the compliance with this Order.

<sup>156</sup> 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."

(g) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint is dismissed except for the specific violations found.