

Ohio Valley Carpenters' District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Catalytic, Inc.) and Rick Lindberg, Case 9-CB-5322

15 September 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 5 April 1983 Administrative Law Judge Phil W. Saunders issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

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, Ohio Valley Carpenters' District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Cincinnati, Ohio, its officers, agents, and representatives, shall take the action set forth in the recommended Order, as so modified:

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

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

"(a) Refer Rick Lindberg to jobs on a nondiscriminatory basis and make him whole in the manner set forth in the section of this Decision entitled 'The Remedy.'"

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

¹ 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent has excepted solely to the Administrative Law Judge's findings that Respondent violated Sec. 8(b)(1)(A) and (2) of the Act by refusing to refer Rick Lindberg for employment through its job referral system because of his filing an unfair labor practice charge against the Union or because of his campaign activities in an internal union election.

² We will modify the Administrative Law Judge's recommended Order to conform it to the violations in his Conclusions of Law.

APPENDIX

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

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

WE WILL NOT maintain or operate our exclusive job referral system in such a manner as to select and refer applicants for jobs solely on the basis of subjective criteria.

WE WILL NOT maintain or operate our job referral system in a discriminatory manner, to retaliate against members who have engaged in protected concerted activity.

WE WILL NOT cause nor attempt to cause Catalytic, Inc., or any other employer to discriminate against Rick Lindberg in violation of Section 8(a)(3) of the Act.

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

WE WILL operate our exclusive hiring hall and referral system for the referral of employees in a nondiscriminatory manner based on objective criteria or standards and WE WILL keep and operate an adequate recordkeeping system which will reflect all available jobs and referrals, and make such record or books available to all job applicants.

WE WILL refer Rick Lindberg to jobs on a nondiscriminatory basis upon requests for referrals, and WE WILL make him whole for any losses he may have suffered as a result of our discrimination against him.

OHIO VALLEY CARPENTERS' DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

DECISION

STATEMENT OF THE CASE

PHIL W. SAUNDERS, Administrative Judge: Based on charges filed on certain dates in July and September 1982,¹ by Rick Lindberg, an individual, and herein Lindberg or the Charging Party, a complaint was issued on September 8 (amended at the hearing) against Ohio

¹ All dates are in 1982 unless otherwise indicated.

Valley Carpenters' District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein the Respondent, the Union, or the Respondent Union, alleging violations of Section 8(b)(1)(A) and (2) of the Act. The Respondent Union filed an answer to the complaint denying it had engaged in the alleged matter. Both the General Counsel and the Union filed briefs in this matter.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

At all times herein, Catalytic, Inc., herein called Catalytic or the Employer, a Delaware corporation with principal offices at Philadelphia, Pennsylvania, has been engaged as a maintenance contractor at the Zimmer Nuclear Power Station at Moscow, Ohio, herein called the Zimmer jobsite.

During the past 12 months, a representative period, Catalytic, in the course and conduct of its business operations at the Zimmer jobsite, performed services valued in excess of \$50,000 in States other than the State of Pennsylvania.

At all times material herein, Catalytic is, and has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Respondent Union is an organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

It is alleged that, in or about September 1981, Catalytic and the Respondent Union entered into an understanding and practice requiring that the Union be the sole and exclusive source of referrals of carpenter employees to employment with Catalytic and various other employers in the Greater Cincinnati area for work at the Zimmer jobsite; that, since on or about February 1, the Respondent Union has operated its exclusive hiring hall without any objective criteria or standards for the referral of employees to Catalytic and other employers; that, since on or about February 1, the Union has failed to maintain permanent referral records from which carpenter applicants may reliably ascertain whether their referral rights to said employers are being protected; that, since on or about March 5, the Respondent Union has failed and refused to refer Lindberg to available employment with Catalytic at the Zimmer jobsite, or to any other employment with signatory employers; and that the Respondent Union engaged in the above conduct because Lindberg engaged in protected activity including, *inter alia*, filing charges with the Board (in 1981) and campaigning against an official of the Respondent Union during an in-traunion election campaign, and for reasons other than

Lindberg's failure to tender periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Respondent Union.

The Union has approximately 2,500 members in the 6 construction locals in the Metropolitan Cincinnati area, including several counties in northern Kentucky. It appears that carpenters are referred to jobs by the Union or, under certain local circumstances and situations, can solicit jobs on their own. With large national contractors, such as Turner, *Catalytic*, Kaiser, and others, there are national agreements signed by the International Union, and one of these agreements is the "General President's Project Maintenance Agreement" which is used for out-of-town construction companies, like Catalytic, performing work within the Union's jurisdiction. This General President's Agreement incorporates by reference the Local Carpenters agreement, and in this agreement there is a provision relating to a referral of employees. The testimony of business agent Arthur Galea was that some of the national contractors follow the referral while others hire people directly on their own and without reference to the union hall.

It appears that, prior to January 8, the Union did maintain an out-of-work book wherein members were required to personally sign such book when they applied for work, and at the time of signing this book the carpenter would also indicate the areas of his competence. When contractors called the Union for workers, the business agent then consulted the out-of-work book and referred a carpenter who had the qualification but, when a person's name remained on the list 14 days and no referral was made, his name was removed and he then had to sign up again. However, after January 8, the above referral policy of the Union was somewhat modified due to numerous difficulties with it.² The change was duly approved by the delegates to the District Council, and in January 1982 the changes were promulgated to the membership. Business agent Edward Robinson's testimony about this is as follows:

Q. Can you summarize that the reasons were for the delegates voting to change the policy?

A. Yes. Very briefly, there was a consensus of opinion that some of the people weren't really happy with the way the book was servicing the District Council. They felt that there should be a better method. And, in essence, everybody there agreed with them. So this whole year we're in a transitional period of trying to come up with ways to more effectively service our membership. That's why we kicked that book out.

Q. Mr. Robinson, how long have you been a member of the local union in Cincinnati?

A. I have belonged to this District Council since approximately 1965.

Q. Can you recall any period when the unemployment's been as bad as it has been?

A. Not since I've been a carpenter, no.

Q. Okay. And has this serious unemployment caused problems with the referral policy?

² See Resp. Exh. 1.

A. Yes. Yes, I'd have to say that it has.

Q. Okay. Mr. Robinson, once there was a change in the referral policy, and Mr. Rayburn introduced the minutes of the District Council that voted on it, what was your understanding of what the criteria were that the Business Agents were to use in assigning people to work when they had requests for work?

A. Do you mean *after* January the 8th?

Q. Right.

A. Well, the understanding that I had was if you're lucky enough to get a call, try to help those people that were genuinely in need, who had been out of work the longest. So you know, I thought I was complying with the directive of the District Council when I would service a job. Up to and including the point of, before making a selection to send a guy on a job, you know, he's telling me I'm losing my home, the car, the wife left and like that, I would call health and welfare and determine from the hours reported on that man, how many hours he'd actually had to work.

It therefore appears that, after January 8, additional criteria were used other than the placement of a member's name on the out-of-work book; besides position on the out-of-work book, the business agents considered the financial need of the carpenters and, according to Robinson, the business agents were able to ascertain the amount of employment the member had received in the last period by reference to the health and welfare records which showed paid-in contributions for hours worked for the past year.

During the late summer or fall of 1982, changes were again made in the referral policy. This latest referral policy provided "first-in, first out" dependence on the signing of the out-of-work book. Other qualifying measures were also added such as retaining one's position on the book if he worked less than 3 days, and the elimination of the name if the member carpenter refused to take a job that was offered. This referral policy was adopted replacing the January policy by a vote of the delegates to the District Council.³

The Union maintains that it has *not* operated an exclusive hiring hall in law or in fact relative to referring carpenters to their jobs. Counsel for the Respondent Union points out that while the Carpenters International Union signed Catalytic and other contractors to the General President's Agreement containing a provision that the Union refer people to the job—nevertheless, the testimony of business agent Arthur Galea indicated that many contractors working under this agreement did not call the Union for jobs and hired directly off the street, and further points to testimony by Galea to the effect that 98 percent of the carpenters in the Union obtained their work through means other than the Union's referral book, and that this kind of situation is different from that cited in the cases where the Board has found there was an exclusive hiring hall. In essence, counsel for the Union maintains that contractors are not required to call

the hall and the Union does not attempt to force contractors to call the hall for its workers.

Counsel for the General Counsel contends, however, that with respect to certain employers, and specifically *Catalytic, Inc.*, the employer named herein, the Union has an exclusive hiring hall arrangement both by contract and practice.

As pointed out, Catalytic, Inc., is signatory to the Union's General President's Agreement, and this agreement provides, at article III, the following:

The Unions are recognized by the Contractor as a source of employment referrals. The appropriate Unions will be contacted and shall refer all applicants for employment to this project according to the standards or criteria uniformly applied to any maintenance project in the area.

This article goes on to state, at paragraph C, that:

The above shall not restrict the Contractor from soliciting and hiring qualified personnel from any source, provided the Unions are unable to fulfill manpower requirements within forty-eight hours, emergencies excluded.

As indicated, it is clear from the contract provisions that Catalytic, Inc., and other employers who are signatory to the agreement, must first contact the Union for referrals before having the option of hiring from other sources and, although employers under the President's Agreement may ultimately hire employees from other sources, they may only do so if the Union is "unable to fulfill manpower requirements within forty-eight hours, emergencies excluded."

In fact, the chief executive officer of the District Council, Joseph Rayburn, testified, in part, as follows:

Q. Okay. Now Mr. Rayburn, there seems some confusion this morning relative to a hiring—scratch that, to a referral policy for contractors who work solely under the local collective bargaining agreement versus other contractors. Can you explain that to the court please?

A. Well, in our local contract there's a section in there that covers the contractor, inasmuch as he can hire and fire at his own discretion. It's somewhat that way with any contract, whether it be the president's agreement or the general contractor or whatever, the international agreement, they still have the prerogative if the man can't perform the work to lay him off or discharge him. But most of the international contractors that have international agreements are like the company we're dealing with now—

Q. Catalytic.

A. They go from locality to locality, wherever the work is. If they have this General President's Agreement it makes it easier for them. The only difference is, if we have a reference book or referral book or whatever, *those contractors are obligated to call our Hall for the people.* [Emphasis supplied.]

³ See Resp. Exh. 2.

This record also establishes that by practice the employers here involved have utilized the union hall as an exclusive source of employees. David Hyster, Catalytic's site manager on the Zimmer project, testified that *all* of the employees hired by Catalytic since beginning work at the Zimmer Nuclear Power Station in September 1981 have been hired through the hiring hall, and that such practice is a result of the referral policies in their agreement with the Union.⁴ Additionally, Union President Rayburn testified and acknowledged that those contractors who are signatory to the General President's Agreement—international contractors like Catalytic—are required to contact the Union for employees.

As noted, the Board has frequently held that where "it is the consistent practice of (employers) to hire those cleared or referred by [the Union], and [the union] is aware of this practice," an exclusive hiring hall arrangement exists.⁵ Such an arrangement is even more apparent where, as here, the relevant collective-bargaining agreement mandates that employers first seek employees through the union hall. In accordance with the above, I have found that Catalytic was required by contract to call the Union for its carpenters, and in practice did so with full acknowledgment of the Respondent, and therefore the Union operated an exclusive hiring hall under the controlling factual situation and circumstances here as pertaining to Catalytic and other national signatory contractors.

It is also the contention of the General Counsel that the Respondent Union operated its hiring hall without the use of objective criteria or standards for referral, and it failed to maintain adequate and permanent referral records.

Counsel for the Respondent points out that the Union did have a referral book which out-of-work members were required to sign, and that only carpenters on the book were referred to jobs, but that the criterion for referring members was not merely the placement of a name at the top of the list, but another factor that was considered was the economic plight of the member such as whether he was about to lose his house, or whether he needed a few more hours to qualify for unemployment or medical insurance, and such. The overall criteria were explained by business agent Edward Robinson, as aforesaid.⁶

In essence, counsel for the Respondent maintains that in January when the Union changed its referral policy in response to the poor economic times, it acted in accord with the law, and when the change provided that the job referral should be made partly on the basis of economic need, or need to qualify for hours for unemployment or medical insurance, these standards were objective

⁴ Hyster also credibly testified that to his knowledge no carpenter initially hired by Catalytic was requested by name, and on subsequent rehiring only two carpenters were recalled specifically by name—Reuscher and Campbell. It is noted that neither of these two individuals was involved in the March 5 layoff.

⁵ *Plumbers Local 17 (FSM Mechanical Contractor)*, 224 NLRB 1262 (1976).

⁶ The standards or criteria in this proceeding relate mainly to the procedure adopted in January by the delegates to the District Council, as previously pointed out herein.

enough to comply with the law. Moreover, there was no evidence that the Union did not keep the proper records.

In *Teamsters Local 174 (Totem Beverages, Inc.)*, 226 NLRB 690, 700 (1976), the Board held that a union violated Section 8(b)(1)(A) and (2) of the Act by selecting employees for referral in an arbitrary manner "not based on any established standard" and "without any objective criteria . . . for the referral of unit employees."

According to Business Representative Arthur Galea, up until January, the Union used a referral book which rotated on a 14-day basis: If a contractor called the Union to supply carpenter employees, the union agent in charge would go back in the out-of-work book to a date 2 weeks earlier and would then refer to the job the individual at the top of the list that day, if available. As noted, prospective employee members were therefore required to sign up periodically to keep their names active since the Union would not normally go back more than 14 days on the out-of-work list in making referrals. Galea further testified that in January there was a change in referrals, as aforesaid, and the Union used this list only as a "reference book," and that for purposes of new hires, or on employee recalls, such individuals did not have to be at the top of the referral list.

As set forth, the following colloquy explains Galea's version of the referral system in effect after January 8, 1982:

GALEA: Well, the way we did it then . . . [T]here was approximately maybe 50 percent of our people unemployed. And the job that I had was the only job that, you know, could possibly use people. So the business agents had a meeting and I told the guys, look, I'm going to get some calls up there—you know, you pick a man from each local union. And if you'll notice, these guys, they're sprinkled amongst the six carpenters locals. Pick the guy that needs the job the most.

Q. Okay. And this would be more or less somebody you would know or the other business agents would know at the local that's been out of work a long time?

GALEA: Yes, I would say that.

Q. Whether or not the person was . . . on the list for 14 days or on the list for 10 days or not on the list at all, as long as you knew the guy was out of work for a long time?

GALEA: He was going to lose his house or his unemployment was running out, we tried to help those kind of people out.

Q. Okay. And did in fact employees get sent out on that basis after January 8, 1982?

GALEA: I would say that, yes. I would say that.

Similarly, union business agent Robinson testified that in making job referrals after January 1982 he would "figure out . . . which one may have been in the most financial difficulty or whatever . . . I've even taken into consideration, you know, how many children he's got; what his financial plight is; and, you know, just a number of things there." Although Robinson indicates that he tried to go "from the top down" on the out-of-work list,

he explains that the list or book was really only a "ready reference" to give the Union some idea which of their members were out of work.

Although, on the surface, as fully detailed in the argument by the General Counsel, this "method" of referral may appear to be a logical one, it is clearly lacking in the objectivity necessary to allow prospective employees any opportunity to determine for themselves whether or not they and other individuals are being properly and fairly referred.

The Board, in *Laborers Local 394 (Building Contractors Assn. of New Jersey)*, 247 NLRB 97, 97 fn. 2 (1980), stated:

[W]e find that Respondent violated Sec. 8(b)(1)(A) and (2) of the Act by operating its exclusive hiring hall without any objective criteria or standards for the referral of employees. In finding the violation, one of the factors we rely upon is that Respondent used no written standards or rules for referrals, thus leaving the operation of its hiring hall within the unbridled discretion of a few union officials

In the instant case, the Union, after January 1982, and until it instituted a new referral system in late 1982, as aforesaid, made referrals on the basis of the subjective determinations by its business agents as to which individuals "needed" jobs the most, and about the only "objective" standard used by business agents were health and welfare benefits lists indicating how long employees had been out of work, and this information was then somehow joined with other information regarding individuals who may have house payments they could not meet, or who had several children to feed. Obviously, such a "system" invites abuse as it is very unlikely for a business agent to know the intimate financial details and family circumstances of each of the Union's 2,500 members. Nor would there be any effective means by which prospective employees could determine how or why referrals were being made, and Board law demands that "objective" standards be used in determining referrals.

Counsel for the General Counsel concludes his well-reasoned argument this way, "Is there any way objectively to determine which individual's house payments must be met or whose children should eat how much?" Clearly, a business agent's determination as to who "needs" a job the most is by nature a subjective one. Moreover, it is an *unwritten* standard which could easily be used to justify the referral of union agents' friends, relatives, or others who might not otherwise have been referred under an impartial system. While counsel for the General Counsel does not assert that a union must refer by means of an out-of-work register, it must use a system more objective than choosing whomever a business agent determines to be the "neediest" job applicant. It is thus contended that the Union's method of referral from January 1982, when it introduced a new referral system, violated Section 8(b)(1)(A) of the Act.⁷

⁷ While written rules, records, or standards for the actual referral of employees are relevant evidence as to whether the Union used objective criteria, it is conceivable that by other means a union could prove that it had consistently used objective standards for referrals without having es-

In the instant case, it is readily apparent that during a large part of 1982 the Respondent Union made referrals in an arbitrary manner without specific objective standards or criteria for referral.

I turn now to the allegation that since March 5 the Union failed to refer Rick Lindberg to available employment with Catalytic, or to other signatory employers, because he engaged in protected union activity.

Lindberg testified that in 1981 Arthur Galea was a candidate in a local union election for business agent, and that he (Lindberg) campaigned actively against Galea and for another candidate by the name of John Clark. In addition to talking to other employees on Clark's behalf and passing out pro-Clark cards, Lindberg on the day of the election, in June 1981, specifically told Galea that he was voting for Clark.⁸

On November 13, 1981, Lindberg filed an NLRB charge against the Union in a prior case (later withdrawing) alleging that the Union had unlawfully refused to refer him to employment.⁹ It was 10 days or so after the filing of this charge when Lindberg was referred to Catalytic in late November 1981.¹⁰

Counsel for the General Counsel contends that the reason Lindberg was not referred back to Catalytic or any other job (prior to the November 1982 settlement attempt) was because of his campaign activity against Galea in June 1981, and his previous Board charge against the Union in a prior case, as aforesaid.

Lindberg, along with seven other carpenters, was laid off from the Catalytic job due to a lack of work on March 5. It appears that at least five of the carpenters laid off on this date were later recalled during the spring or summer of 1982, but Lindberg was not one of them.

When Lindberg was laid off from Catalytic in early March, he immediately, on the same day and without going to the union hall to sign the out-of-work book, approached another signatory contractor at the same site, Kaiser Construction, and asked if there was any work available. According to Lindberg, he was then told by Superintendent Henry Pruitt that he could have a job if Arthur Galea would approve it.

Later, the same afternoon, Lindberg telephoned Galea, and informed him he had been laid off by Catalytic, but that Henry Pruitt, at Kaiser, had indicated that he could go to work Monday with Kaiser if it was all right with him. Galea responded that the Union had a lot of other people out of work. Lindberg then told Galea that he had found his own job and he wanted to go to work. Lindberg testified that about this time in their conversation Galea informed him that "after what [Lindberg] had done [he] wasn't going to work in Cincinnati again," and

established any written rules or kept any written records. Therefore, I would not find that a union's failure to use specific written rules would, standing alone, constitute a violation of Sec. 8(b)(1)(A) and (2) of the Act. See *Laborers Local 394, supra*.

⁸ Galea testified that the support which Lindberg gave Clark in the election, or charges filed by him, never influenced him in referring Lindberg for employment.

⁹ G.C. Exh. 5.

¹⁰ Lindberg was also referred to a job by the Union in November 1982, but the Union admits that this referral was merely part of an attempt to settle the instant case.

that "he might as well pack his suitcase and leave town." Further testimony by Lindberg reveals that he then told Galea he would get a job through another union business agent, but Galea replied that all the agents were "in his pocket" and that if Lindberg went to work for any other company he would "shut the job down until [Lindberg] got fired." Galea then hung up, and when Lindberg called back about 15 minutes later they had a similar shorter conversation, but again assurances were given by Galea that Lindberg was not going to work in Cincinnati.

Galea stated that, in their telephone conversation on March 5, he informed Lindberg that he was not going to send him to the Kaiser job because Lindberg's name was not on the out-of-work book, and that Henry Pruitt of Kaiser could not authorize any hiring on the Zimmer job. Moreover, he told Lindberg that if a proper request came in, and if his name was on the book, then Lindberg would be sent out. Galea also acknowledged that a little later he received a second call from Lindberg, and he again told him that he was not going to send him to Kaiser until he had a proper requisition for him. Galea testified that he never did receive any request from Kaiser, and Galea denied stating that he would see to it that Lindberg never worked in Cincinnati again, or any words to this effect.

Counsel for the Union maintains that the objective factors in this record show Galea's testimony to be the more credible, that Lindberg admits to having several beers on March 5 before he called Galea, and that when a person has had several beers it affects one's judgment and memory. Moreover, as further support for the credibility of Galea, there is the Lindberg claim that Galea was acting against him because he had been active for Clark in the campaign for business agent the past year when Galea had defeated John Clark, as aforesaid. However, argues the Respondent, even assuming Lindberg's claim that he was active in supporting Clark, there still is no credible evidence to show any discrimination or any threat to discriminate—that the people most active in John Clark's campaign for business agent were himself and his brother Mike—that Mike was his campaign manager and went to all the locals in the area working on behalf of his brother, but that Galea (after the election) referred Mike Clark to the Catalytic job and where he worked from November 11, 1981, until September 1982. And as to John Clark, his opponent, Galea made him a steward on a job shortly after he was elected as business agent, and when the employer attempted to lay John Clark off Galea frustrated the attempt and kept him on the job. Counsel for the Respondent points out that, if business agent Galea was going to punish his opponent and the opponent's friends, he would have started with John and Mike Clark, but both fared well when Galea became the business agent. Furthermore, there is no reason to think that Galea would treat the Clarks so well and then retaliate against somebody like Lindberg whom Galea indicated he never saw even campaign for Clark.

In making my final conclusions here, it is difficult, first of all, to ascertain from this record the exact reasons for the status and increased responsibilities of the two Clarks

following John Clark's defeat while running against Galea for business agent. It might be that Galea was mending fences in preparations for future confrontations, or that he was hoping to solicit their support in subsequent elections. In fact, it might well be the latter as Galea freely admitted that, if Mike Clark had been the candidate against him, the election could have turned out quite differently because he (Mike) was "a hell of a campaigner." However, in the final analysis, I have credited the statements of Lindberg in situations where there is a basic conflict in the testimony. Lindberg strikes me as a straightforward-type of an individual and who revealed a really honest and sincere demeanor during his consistent and specific testimony before me. On the other hand, Galea was inconsistent, confused, and evasive on certain occasions in his attempts to explain what had taken place. Moreover, Galea admitted that his second telephone conversation with Lindberg on March 5 was quite heated, that both of them were "hollering and yelling," and that it was not the kind of language you would want your grandchildren to hear. It appears to me that, if Galea's responses were as he testified, then there would have been no need for the "hollering" and the "yelling."¹¹

I am in agreement that these telephone conversations on March 5 show an animosity by Galea toward Lindberg which, on the basis of the credited evidence, can only be explained by Lindberg's activity in campaigning against Galea and by his filing of the 1981 unfair labor practice charge, as aforesaid. As pointed out, Galea's threatening statement that Lindberg would never work in Cincinnati again goes far beyond any concern Galea may have had for other members who were also out of work, and which concern Galea indicated was his reason for not approving Lindberg's referral to Kaiser on March 5. Moreover, as also noted, Galea carried through on this threat in May and June 1982, when five employees who had been laid off on March 5 were recalled to work by Catalytic. In fact, all of the employees who had previously been laid off on March 5 were recalled by Catalytic except for Lindberg, Atkins, and Sebastian.¹² Atkins, however, had another job when the other employees laid off on March 5 were referred back to Catalytic, and Sebastian was in a minority classification as a black person so his work status at the time of the summer recall is not clearly indicated in this record.

The Board has consistently held that to establish an 8(b)(1)(A) and (2) violation it is unnecessary to show that jobs were available at the time of the request for referral. *Utility & Industrial Construction Co.*, 214 NLRB 1053 (1974). The only requirement is that the alleged discrimi-

¹¹ It should be noted that all facts found herein are based on the record as a whole and on my observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the logic and probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction of the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was in and of itself incredible and unworthy of belief. *All testimony has been reviewed and weighed in the light of the entire record.*

¹² See G.C. Exh. 4.

minatee show that he requested referral during the relevant period.¹³ In this regard, the evidence in this record shows that Lindberg signed the Union's out-of-work book seeking work several times after March 5, when he was laid off by Catalytic, and thereafter no attempts were made to contact him. Moreover, the evidence indicates that employees were referred to Catalytic after March 5, as aforesaid and, specifically, General Counsel's Exhibit 4 further shows that numerous other employees not hereto mentioned were also hired or recalled by Catalytic through the union hall between the dates pertinent hereto and, other than Campbell and Reuscher, none of the employees was rehired by name; rather, Catalytic simply called the Union to supply any qualified employee or former employee to fill the jobs.

To deny referral to Lindberg because of his having filed an unfair labor practice charge, or because he opposed a fellow union member or official in intraunion political activity, violates Section 8(b)(1)(A) and (2) of the Act. *Teamsters Local 174 (Totem Beverages)*, supra, 226 NLRB at 700.

CONCLUSIONS OF LAW

1. The Respondent Union is a labor organization and the Employer is engaged in commerce, all within the meaning of the Act.

2. The Respondent and the Employer have been parties to a collective-bargaining agreement whereby the Union operates an exclusive hiring hall and referral system for the referral of employees by the Union to work at the Employer's Zimmer jobsite.

3. By maintaining and operating its exclusive job referral system since on or about January 8, 1982, in such a manner as to select and refer applicants for jobs solely on the basis of subjective criteria without the use of objective criteria or standards, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. By maintaining and operating its exclusive job referral system since on or about January 8, 1982, in a discriminatory manner, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

5. By discriminatorily failing and refusing to refer Rick Lindberg to jobs through its exclusive job referral system since on or about March 5, 1982, in retaliation for having engaged in protected concerted activities, the Union violated Section 8(b)(1)(A) and (2) of the Act.

THE REMEDY

Having found that the Respondent Union has engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act, it will be recommended that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

¹³ More recently, the Board has pointed out that "the burden of negating the General Counsel's *prima facie* case of discrimination in hiring referrals falls on Respondent as the sole custodian of the hiring hall records. Its failure to do so creates an adverse inference that such evidence in its possession is not favorable to Respondent's case." *Seafarers Union (American Barge Lines)*, 244 NLRB 641, 642 (1979).

Having found that the Respondent unlawfully caused Rick Lindberg to be denied referral to work from and after March 5, 1982, it will be recommended that the Respondent be ordered to make him whole for any loss of earnings suffered as a result of the discrimination against him by payment to Lindberg of a sum of money equal to that which he normally would have earned as wages from the date of the discrimination against him until such time as the Respondent properly refers him to employment, less net earnings during such period. Backpay is to be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See also *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Finally, I shall recommend, if not already implemented, that the Respondent Union be directed to maintain and operate its exclusive job referral system in a nondiscriminatory manner based on objective criteria or standards, and that an adequate recordkeeping system be used which will reflect all available jobs and referrals.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, I hereby issue the following recommended:

ORDER¹⁴

The Respondent, Ohio Valley Carpenters' District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Operating an exclusive hiring hall and referral system without any objective criteria or standards and in a discriminatory manner.

(b) Failing and refusing to refer Rick Lindberg to jobs through its exclusive job referral system without any objective criteria or standards and in a discriminatory manner, thereby causing or attempting to cause employers to deny employment to Lindberg.

(c) Warning or threatening prospective employees that they will never be hired in the Cincinnati area.

(d) In any like or related manner restraining or coercing employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Make whole Rick Lindberg in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Maintain and operate its exclusive job referral system in a nondiscriminatory manner based on objective criteria or standards.

(c) Initiate and maintain, if not already in use, a recordkeeping system which will reflect all available jobs and referrals and which will fully disclose the basis on

¹⁴ 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.

which each referral is made, and make such records available to job applicants to enable them to determine for themselves that their referral rights are protected.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all hiring hall records, dispatch lists, referral cards, and other documents necessary to analyze and compute the amount of backpay due under the terms of this Order.

(e) Post at its main hall or office in Cincinnati, Ohio, and its meeting places for members or applicants for referral, copies of the attached notice marked "Appendix."¹⁵ Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be

maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent Union has taken to comply herewith.

¹⁵ 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."