

Local 2375, Pile Drivers, Bridge, Wharf, Dock Carpenters, Welders, Divers, Rig Builders, Drillers and Rotary Helpers (Offshore Welding and Fabrication, Inc.) and Marvin McElroy. Case 31-CB-4525

24 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
JENKINS AND HUNTER

On 23 February 1983, Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, the General Counsel 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.

We agree with the Administrative Law Judge that Respondent did not violate Section 8(b)(1)(A) when, pursuant to the applicable steward preference clause, it dispatched Jim Strafford as a working steward to the Platform Habitat.² In so doing, however, we do not adopt the Administrative Law Judge's statement that "even if Strafford's participation in the picketing contributed to his appointment as steward, that would not be sufficient to make unlawful the Union's otherwise lawful conduct." Rather, we rely particularly upon the finding, fully supported by the record, that Respondent Union had a "legitimate and valid concern for placing an experienced steward on a potentially troublesome jobsite." *Ashley, Hickman-Uhr Co.*, 210 NLRB 32, 33 (1974). Further, we find, in agreement with the Administrative Law Judge, that Respondent's selection of Strafford as steward was predicated upon its nondiscriminatory determination as to the best available person to serve as steward on the jobsite and that the position was not conferred upon Strafford as a reward for his engaging in picketing on behalf of Respondent. In short, we find that Respondent would have ap-

¹ The General Counsel 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.

² In finding no violation in this case, Chairman Dotson and Member Hunter do not rely on *Painters District Council 2 (Paintsmiths, Inc.)*, 239 NLRB 1378 (1979), enforcement denied 620 F.2d 1326 (8th Cir. 1980).

pointed Strafford as steward whether or not he had engaged in picketing on its behalf.

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 and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: This matter was heard by me in Ventura, California, on November 16, 1982. Marvin McElroy (McElroy) filed an unfair labor practice charge on January 29, 1982, against Local 2375, Pile Drivers, Bridge, Wharf, Dock Carpenters, Welders, Divers, Rig Builders, Drillers and Rotary Helpers (Respondent or the Union). On March 17, the Regional Director for Regional 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent, alleging in substance that Respondent engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (the Act).

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the entire record and from my observation of the demeanor of the witnesses, and having considered the post-trial briefs of the General Counsel and Respondent, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Offshore Welding and Fabrication, Inc., herein called the Employer or OSWF, has been at all times material herein, a California corporation with an office and place of business located in Carpinteria, California, where it is engaged in the repair and maintenance of offshore drilling platforms. The Employer annually sells goods and services valued in excess of \$50,000 to customers within the State of California, which customers themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standard.¹ Accordingly, Respondent admits and I find the Employer to be engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

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

¹ See, generally, *Siemons Mailing Service*, 122 NLRB 81 (1958).

United Brotherhood of Carpenters and Joiners of America (the Brotherhood), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

The Employer and the Brotherhood were, among others, party to a West Coast General Presidents' Off-shore Construction Agreement, herein called the Agreement, effective by its terms from January 1, 1979, to December 31, 1981. The Agreement provided, *inter alia*, "[t]he Employer agrees to recognize and be bound by the referral procedure contained in the local union agreements, providing these procedures are in accordance with State and Federal law." Pursuant to the Agreement, the Employer hires through local union hiring halls, including the hiring hall operated by Respondent. Respondent's hiring hall procedures provide in relevant part:

A workman who is appointed as a steward on a jobsite by the business agent of the Local Union in accordance with the by-laws of the District Council, may be dispatched to a job as a steward regardless as to the workman's position on the out-of-work list.

On October 28, 1981,² Respondent dispatched Jim Strafford, an employee, as steward to a job of the Employer, known as the Platform Habitat. At that time, McElroy, a member of the Union, was number one on Respondent's out-of-work list. The General Counsel, although not attacking the hiring hall procedures which permit dispatch of a steward regardless as to his position on the out-of-work list, contends that the procedure was discriminatorily applied in order to encourage activities on behalf of the Union. Respondent, on the other hand, contends that Strafford was appointed steward for legitimate purposes and that it acted properly in dispatching Strafford to the Platform Habitat.

B. The Facts

As mentioned above, OSWF is a company based in Carpinteria, California, which, among other things, erects scaffolding around offshore oil platforms to be utilized by craftsmen performing work on and around those platforms. One such platform was Platform Habitat which was installed in the ocean near Carpinteria starting about October 8.

On October 2 or 3, Respondent engaged in picketing by boat of the Platform Habitat, assertedly to protest the projected use of foreign workers by Heerema, a Dutch installation subcontractor of Texaco, Inc., the Platform Habitat general contractor. Approximately 15 employer members of Respondent participated in the picketing, including Strafford. McElroy, who was in Michigan at the time,³ was not asked to and did not participate in the picketing.

On or about October 20, Lyle Buckley, OSWF's jobsite superintendent, contacted Robert Schafer, Jr., Respondent's business manager, concerning the Employer's need for workers at Platform Habitat. Buckley told Schafer that OSWF would be erecting scaffolding at Habitat and that the Employer desired that the Union refer workers who had prior experience erecting off-shore scaffolding for the Company. Buckley, who had previously requested that Ed Radcliffe, a former OSWF employee, be dispatched as foreman, requested that Schafer dispatch employees Earl Olson and Dave Wedlake, both former OSWF employees to the Habitat jobsite.⁴ Schafer told Buckley that the Union needed a steward on the job. Buckley answered that he really needed these two men. After some argument, Schafer and Buckley reached a compromise. Schafer would dispatch Olson and Wedlake, however, the next dispatch to the job would be a union steward instead of Buckley's by-name request for Brian Schafer,⁵ a former OSWF employee.⁶

On the evening of October 28, Buckley called Mike Schwab, a business agent for Respondent, whose area of responsibility included the Habitat jobsite. Buckley requested that Schwab have Olson and Wedlake report for work on the Habitat at 6 o'clock the next morning. After receiving Buckley's request, Schwab drove to the union hall and then called Olson and Wedlake that same evening. Schwab told Olson to report to work the following morning. Schwab attempted to contact Wedlake at the two telephone numbers listed for Wedlake at the union hall. However, there was no answer at either number. Schwab then called Strafford. Schwab told Strafford that the employee was being appointed union steward and that he should report to the jobsite the next morning to work as a pile driver/rigger. Schwab further told Strafford that Olson would also be reporting for work and that the two workmen should report to either Buckley or Radcliffe, the foreman. Schwab then called Buckley and Schafer and informed them of his dispatch of Olson and Strafford.

On November 2, Wedlake was dispatched to the Employer's Habitat jobsite. Thereafter, four employees were dispatched to the jobsite as welders. Neither McElroy nor Brian Schafer, both of whom were registered as riggers, were dispatched to the jobsite. Neither McElroy nor Brian Schafer was eligible for dispatch as a welder.

During the week prior to Strafford's dispatch to the Habitat job, McElroy had called the union hall from Michigan on a daily basis. On or about October 23, McElroy called the hiring hall in an attempt to ascertain when OSWF's Habitat job would start. McElroy talked to Schwab who told the employee that the job had been postponed on a daily basis. Thereafter, McElroy talked to Schafer who told the employee that the Union was

⁴ The hiring hall procedures, while generally providing that employees be dispatched in numerical order according to job classification, permit the dispatch of foremen without regard to position on the out-of-work list. Further, an employer may specifically request by name any employee who has worked for that employer within the preceding 3 years.

⁵ Brian Schafer is the younger brother of business manager Schafer.

⁶ The above facts are based on the credited testimony of Schafer. Buckley was not called to testify at the instant trial.

² Unless otherwise stated, all dates hereafter refer to the year 1981.

³ McElroy is a licensed doctor in the State of Michigan.

trying to get Buckley to take next the employee off the top of the out-of-work list. Schafer said that the Employer wanted to rehire former employees without regard to placement on the list and that the Union was arguing for dispatch from the top of the out-of-work list.

McElroy testified that on October 26 he visited the union hall and spoke to Schwab and Schafer. According to McElroy, he viewed the out-of-work list that day and learned that Strafford had been dispatched to the Habitat job.⁷ According to McElroy, he asked Schafer why Strafford had been dispatched when McElroy had been at the top of the list. Schafer answered that the Union owed Strafford a favor for working on the picketing of the Platform Habitat. McElroy said that the union officers should not use their position to do favors for any individual member. Schafer answered that the hiring hall procedures permitted the dispatch of a steward without regard to placement on the hiring hall list. Schafer testified that the reason he gave McElroy for dispatching Strafford was that, "We had been involved with a blockade and . . . he knew what was going on out there, and he was our best candidate for steward." While Schafer's testimony does not materially differ from McElroy's version of this conversation, Schafer placed the conversation sometime after October 29. Based on the Union's records and Schwab's explanation thereof, and the logical probabilities, I find that the conversation could not have occurred until at least October 29.

In support of his contention that Strafford was discriminatorily appointed steward, the General Counsel offered the testimony of employee Earl Olson. Olson testified that he had a telephone conversation with Schafer in which he (Olson) requested dispatch to the Habitat jobsite. Schafer said that the Union wanted Strafford dispatched as steward and that Olson and Wedlake would have to draw straws to determine who would go out in the other position. Olson asked Schafer if the Union's procedures permitted him to be dispatched as a by-name request. Schafer answered that either Olson or Wedlake could be so dispatched but that the Union would require that Strafford be dispatched as steward. Schafer said that the Union owed Strafford a favor for picketing Platform Habitat.⁸ Olson then spoke to Buckley who told Olson that he (Buckley) would try and straighten out the matter with Schafer. As discussed above, Buckley and Schafer reached a compromise providing for the dispatch of Wedlake and Olson and the later dispatch of Strafford. Shortly thereafter, Olson was dispatched to the Platform Habitat.

C. The Union's Defense

In August, the Union learned that Texaco intended to use Heerema, a foreign company, to build Platform Habitat. The Union unsuccessfully sought to require Heerema to utilize United States citizens for its work

⁷ The Union records indicate that Strafford was dispatched on October 29. Schwab testified that he initially wrote 10/28, the date he made the dispatch, but then corrected the notation to 10/29, to reflect the date Strafford reported for work.

⁸ Schafer testified that he told Olson that Strafford "was our best candidate for steward" and that he might have said something to the effect that the Union owed Strafford a favor.

force. When its pleas to Texaco and Heerema proved unsuccessful, the Union commenced picketing the companies. The Union's picketing consisted of union members maneuvering small vessels in a circle around Platform Habitat. Texaco obtained a court injunction against the picketing, and the picketing ceased after 1 day. As mentioned earlier, Strafford participated in the Union's picketing of Platform Habitat.

Schafer testified that if the Union believes that there may be problems on a jobsite, then the Union's business agent may exercise the right under the hiring hall procedures to select an employee to be dispatched as steward to that jobsite. Absent such problems, it is customary for the crew assigned to the jobsite to select their steward from their own ranks. Out of approximately 300 jobs a year, the Union exercises its right to select a job steward on approximately 30 jobsites.

According to Schafer and Schwab, they decided to dispatch a steward to the Platform Habitat job because of problems with Texaco (as a result of the picketing), because OSWF was a double-breasted company (employing both union and nonunion personnel) and because there had been a jurisdictional dispute with another craft union on an OSWF platform jobsite in 1979-80.

According to Schafer and Schwab, they decided against appointing either Wedlake or Olson as steward on this particular jobsite. Wedlake had never been a steward before. While Olson had previously been a steward on an OSWF jobsite, Schafer and Schwab were concerned that he would not aggressively pursue the Union's interest *vis-vis* that of the Employer.⁹ Schafer and Schwab decided to appoint Strafford because the employee had experience working on offshore platforms and was qualified to do rigging work. Further, Strafford was a very experienced steward. Prior to deciding on Strafford as steward for Platform Habitat, Schafer called former OSWF employee Bud Cox and asked Cox if he were interested in being dispatched as steward. Cox declined the offer, telling Schafer that he (Cox) did not want to work for foreman Radcliffe.

D. The Contentions of the Parties

The General Counsel contends that the Union's appointment of Strafford as steward was "arbitrary, invidious and irrelevant to legitimate union interests and thus a mask for discriminatory motivation." Thus, the General Counsel contends that Strafford was rewarded for his picketing activity and that the resultant failure to dispatch McElroy unlawfully encourages union activity in violation of Section 8(b)(1)(A) of the Act.

Respondent, on the other hand, argues that the Union's right to select a steward without regard to the employee's position on the out-of-work list is lawful under Board precedent.¹⁰ Further, the Union argues that

⁹ Olson was steward on an OSWF jobsite at which the Union believed he had not vigorously protected its work jurisdiction.

¹⁰ See *Painters District Council 2 (Paintsmiths, Inc.)*, 239 NLRB 1378 (1979); *United Carpenters Local 49 (Scott & Duncan)*, 239 NLRB 1370 (1979); *Teamsters Local 959 (Ocean Technology)*, 239 NLRB 1387 (1979).

Strafford was appointed steward for legitimate purposes in furtherance of the Union's lawful policy.

Analysis and Conclusions

In *Ashley, Hickham-Uhr Co.*, 210 NLRB 32, 33 (1974), the Board found that a union's reasons in appointing a steward, which resulted in the layoff of another employee, were material and relevant, and critical to the issue of whether it thereby committed an unfair labor practice. The Board held that when the circumstances do not involve an objective of furthering, requiring, or conditioning employment on union membership as such, the illegality, if any, must be found in those actions by a union that impinges upon the employment relationships which are arbitrary, invidious, or irrelevant to legitimate union interests.¹¹

In *Dairyalea Cooperative*, 219 NLRB 656 (1975),¹² the Board held that grants of superseniority to stewards for purpose other than layoff and recall are "presumptively unlawful and the burden is on the union to rebut the presumption." The Board's reason for exempting layoff and recall situations from the scope of the adverse presumption is the desirability of "encouraging the continued presence of the steward of the job," which continuity "further[s] the effective administration of bargaining agreements . . . [and] thereby not only serves a legitimate statutory purpose but also redounds in its effects to the benefit of all unit employees." 219 NLRB at 658.

Thereafter, in *Painters District Council 2 (Paintsmiths, Inc.)*, 239 NLRB 1378 (1979),¹³ the Board held that a union seeking to enforce a steward preference clause in a new hire context acts in furtherance of a legitimate interest in ensuring it would have present on the jobsite a steward who would be more disposed to enforce trade rules and police the contract than one designated from the employer's employee complement. In *Teamsters Local 959 (Ocean Technology)*, 239 NLRB 1387 (1979), the Board held that where the steward preference clause does nothing more than grant the union discretion to send a steward to a job in place of another employee who would otherwise have been entitled to that referral, there is no presumption of illegality. Thus, even after the Board's *Dairyalea* decision, the test remains whether the union's conduct was "arbitrary, invidious, or irrelevant to its legitimate interest." 239 NLRB at 1389. See also *Carpenters Local 49 (Scott & Duncan)*, 239 NLRB 1370, 1371 (1979).

In general, the Board has held that, "in operating an exclusive hiring hall, a union owes a duty of fair representation to all applicants for referral, and it may not act arbitrarily without objective criteria or standards, or in disregard of the provisions of its collective-bargaining agreements." *Boilermakers Local 154 (Western Pa. Service*

Contractors Assn., 253 NLRB 747, 759 (1980); *Iron Workers Local 433 (Associated General Contractors of Calif.)*, 228 NLRB 1420, 1437-40 (1977), *enfd.* 600 F.2d 770 (9th Cir. 1979). More specifically, in *Pattern Makers (Michigan Pattern Mfrs.)*, 233 NLRB 430 (1977), *enfd.* 622 F.2d 269 (6th Cir. 1980), the Board found unlawful a union's practice of giving former business managers and current members of its executive committee referral preference by placing their names at the top of the out-of-work list. First, the benefit conferred by the union in that case went beyond the *Dairyalea* standard of job retention; it granted actual job preference for initial hiring. Second, the preference granted the current members of the executive committee did not bear any direct relationship to the administration of the collective-bargaining agreement on the job. The members of the executive committee performed no steward function at the plant. Third, the preference to former business managers accomplished nothing more than rewarding those individuals for past service to the union. Accordingly, the Board found that the referral preferences in that case served no legitimate union interest.

In *Teamsters Local 282 (Explo, Inc.)*, 229 NLRB 347 (1977), the Board found that the union violated Section 8(b)(1)(A) and (2) when its business agent conferred a steward position and concomitant superseniority on his son-in-law. The Board found the union's defense that the appointment of an experienced steward was necessary to be a pretext. The union's real reasons for the steward appointment were to give the son-in-law a high-paying job and to retaliate against certain employees of the company for their intraunion activities. Thus, the Board found the steward appointment to be arbitrary, invidious, and discriminatory to the union's employee-members and a violation of the union's duty of fair representation to said employees.

Applying the above legal principles to the facts of this case, I find that Schafer and Schwab had a legitimate interest in appointing an experienced steward to this particular jobsite.¹⁴ The jobsite had been at the center of controversy between the Union and Texaco, the general contractor. OSWF, the relevant employees, was a double-breasted company which had previous jobsites where jurisdictional disputes had arisen. Further OSWF had requested the dispatch of a crew consisting of former employees indicating that Olson would again be chosen steward. Schafer and Schwab had doubts as to whether Olson was more loyal to the Employer or to the Union. Further, the Union acted consistently with a policy of appointing stewards on approximately 10 percent of its jobsites.

Next, I find that Schafer and Schwab had a reasonable basis for choosing Strafford as the steward. Strafford had experience with this type of offshore work and was an experienced steward. Further, Bud Cox, a former OSWF employee, was given the first shot at this steward appointment but turned it down. While not trying to second guess the reasons for rejecting Olson and Wedlake for the steward appointment,¹⁵ I find the reasons of-

¹¹ "The test is the true purpose of real motivation of the union in pressing or asking for the action--does it seek thereby, purely and simply, to build up the desire to join or maintain union membership or to adhere to union procedures? And/or is the stated objective of the union's conduct so arbitrary, invidious, or irrelevant as to indicate that it is a mask for encouraging membership or membership regularity?" [citations omitted]. *Musicians Local 10 (Shield Radio & T.V. Production)*, 153 NLRB 68, 84 (1965).

¹² *Enfd.* 531 F.2d 1162 (2d Cir. 1976).

¹³ Enforcement denied 620 F.2d 1326 (8th Cir. 1980).

¹⁴ Cf. *Teamsters (Explo)*, *supra*, 229 NLRB at 350.

¹⁵ See *Carpenters Local 49 (Scott & Duncan)*, *supra*, 239 NLRB at 1371.

ferred by Schwab and Schafer to be reasonable. The Union had some doubts as to whether Olson would be an aggressive steward. Wedlake had not been a steward before and, as discussed above, the Union had reason to want an experienced steward on this particular job.

The fact that Schafer considered Strafford's picketing in making the appointment does not affect the result herein. In finding lawful a union's appointment of a steward without regard to position of the out-of-work list, the Board must have considered that such appointments would go to the more active union members. Thus, even if Strafford's participation in the picketing contributed to his appointment as steward, that would not be sufficient to make unlawful the Union's otherwise lawful conduct.

In cases involving mixed motivation the Board applies the test set forth in its *Wright Line* decision.¹⁶ The General Counsel must make a *prima facie* showing sufficient to support the inference that the unlawful consideration was a "motivating factor" in the respondent's decision. Upon such a showing, the burden shifts to the respondent to prove that the same action would have taken place even in the absence of the unlawful consideration. The *Wright Line* test has been applied in cases involving a respondent union's motivation under Section 8(b)(2) and (1)(A) of the Act.¹⁷

Applying *Wright Line* to this case, even assuming that the General Counsel has established a *prima facie* case that Strafford's picketing activity was a motivating factor in the Union's appointment of Strafford as steward, I find that the Union had good reasons, sufficient in them-

selves, for its action and that the Union would have taken the same action even if Strafford had not participated in the picketing.

CONCLUSIONS OF LAW

1. Respondent Local 2375, Pile Drivers, Bridge, Wharf, Dock Carpenters, Welders, Divers, Rig Builders, Drillers and Rotary Helpers, is a labor organization within the meaning of Section 2(5) of the Act.

2. The Employer, Offshore Welding and Fabrication, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The General Counsel has failed to establish by a preponderance of the evidence that Respondent, as alleged in the complaint, violated Section 8(b)(1)(A) of the Act.

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

ORDER¹⁸

The allegations of the complaint that Respondent, Local 2375, Pile Drivers, Bridge, Wharf, Dock Carpenters, Welders, Divers, Rig Builders, Drillers and Rotary Helpers, has engaged in unfair labor practices having not been established, the complaint is dismissed in its entirety.

¹⁶ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* as modified 662 F.2d 899 (1st Cir. 1981).

¹⁷ See, e.g., *Teamsters Local 287 (Container Corp.)*, 257 NLRB 1255, 1259 (1981); *Soft Drink Employees Independent Union (Chattanooga Coca Cola Bottling Co.)*, 264 NLRB 24 (1982).

¹⁸ 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.