

The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 232, AFL-CIO (The John G. Ruhlin Construction Co.) and Steve Cordle, Case 9-CB-5011

9 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 30 September 1982 Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, the Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 232, AFL-CIO, Ashland, Kentucky, its officers, agents, and representatives, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they 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 the findings.

The judge found that the Respondent's referral records revealed that some seven members requested by name were referred to the requesting contractors during the period extending from 16 April to 20 May 1981. However, examination of these records reveals that only three members were requested by name and referred to the requesting contractors during that time. We hereby correct this error.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge: Upon a charge filed by Steve Cordle, an individual (herein called the Charging Party), the Regional Director for Region 9 of the National Labor Relations Board (herein called the Board) issued a complaint on September 14, 1981, alleging, in substance, that The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 232, AFL-CIO (herein called the Respondent or Local 232), violated Section 8(b)(1)(A) of the Act on or about May

14, 1981,¹ by failing and refusing to refer the Charging Party to employment with the John G. Ruhlin Construction Co. (herein called Ruhlin), which had requested him by name, for reasons other than his failure to pay periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership in the Respondent.

The case was heard in Ashland, Kentucky, on June 29, 1982. Upon the entire record in the case, and from my observation of the witnesses while they testified, I make the following

FINDINGS OF FACT

I. JURISDICTION

Ruhlin, an Ohio corporation, with an office and place of business in Akron, Ohio, is a general contractor in the building and construction industry. During the 12-month period preceding issuance of the complaint, it purchased and received at a waste water treatment jobsite located in Ashland, Kentucky, goods and materials valued in excess of \$50,000 directly from points located outside the Commonwealth of Kentucky. It is admitted, and I find, that Ruhlin is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

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

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Facts

The Respondent is a relatively small union which has 50-60 members who are primarily engaged in cement finishing. Its jurisdiction covers some 4 counties in Ohio, and some 21 counties in Kentucky. While it does not operate an exclusive hiring hall, it is signatory to a collective-bargaining agreement with the Tri-State Contractors Association and Related Contractors Associations which provides, *inter alia*:³

16. During the progress of any and all jobs, fifty (50) percent of the Cement Masons or Operative Plasterers employed by the employer, plus the odd man, if any, shall be referred to the employer by the local union office, or Local Union Business Representative. The balance of the work force may or may not be residents of the area.

¹ All dates herein are 1981 unless otherwise indicated.

² The Respondent's answer admits, and I find, that Eric Risner, its business agent, is, and has been at all times material, an agent of the Respondent within the meaning of Sec. 2(13) of the Act. The record reflects that George Clay is the Respondent's recording secretary and that he accepted orders for employees from contractors and referred members to employment while Risner was in the hospital during the week of May 11, 1981. I find that Clay was an agent of the Respondent during the week beginning May 11, 1981.

³ See G.C. Exh. 2, p. 23.

Eric Risner, Local 232's business representative, indicated the Respondent has no hiring hall as such, but he receives phone calls from contractors requesting men at his home and he attempts to fill such requests by recording the names of members who have contacted him to report they are out of work and referring those individuals to work as the requests for help come in. Risner testified that he inspects monthly reports submitted by contractors who are signatory to the above-described contract when they forward trust fund moneys provided for in the agreement to remain generally familiar with the numbers of hours each member has worked during the preceding 3 or 4 months to assist him in determining who should be referred to employment as requests come in. Utilizing this loose system, he attempts to equalize the amount of work the members receive. Risner indicated during his testimony that his task of attempting to equalize the work performed by members is difficult as approximately 80 percent of the work performed by his members is on 1- or 2-day jobs and, during the course of a year, a member may work for as many as 25 contractors.

Although the above-described collective-bargaining agreement permits signatory employers who are performing work that falls within the craft jurisdiction of Local 232 within the Respondent's territorial jurisdiction to obtain half of their cement finishers from sources other than the Respondent, the record reveals that the Respondent's business representative, Eric Risner, prefers that such contractors obtain all their cement finishers through the Respondent. Thus, the record reveals that one signatory employer, Ross Brothers Construction Co., performed work at two jobsites within the Respondent's territorial jurisdiction during calendar years 1980 and 1981, and in both instances it informed Risner that it would employ only certain named members of Local 232 on its jobs,⁴ and that while Risner testified that he engaged in no reprisals against members who were called to work directly by Ross Brothers or its foreman, Ozzie Reeves Sr., he admitted he was unhappy with the manner in which that company obtained its Local 232 workmen. In that regard, Reeves testified that on several occasions in 1980 and 1981 he called Risner to request that additional men be referred to Ross Brothers' jobs and on each occasion Risner refused to send additional men, indicating that, if Ross Brothers called some of their men without going through the hall, they could get all their men that way.⁵ According to Reeves, he told Risner in late 1980 that he had called Steve Cordle to a Haverhill job being performed by Ross Brothers and Risner informed him if they got their jobs that way they could get them all from then on; that the Union would not send them out.⁶

⁴ See, for example, R. Exh. 1, a letter from Ross Brothers to Risner dated June 15, 1981, which indicates it would utilize, among others, Rocky Cordle, Steve Cordle, Ozzie Reeves Jr., and Ozzie Reeves Sr.

⁵ While Risner testified he did not refuse to refer men to Ross Brothers, he admitted he told Reeves he should obtain any additional help needed by calling members Ross Brothers had indicated it would use.

⁶ Risner did not deny the remarks attributed to him by Reeves. On the occasion under discussion, Steve Cordle called Risner to ask if he should go to the Haverhill job. Risner told him it was up to him; that he was not referring anyone to Ross Brothers.

At some unstated time, presumably in 1980, Ruhlin commenced work on a waste water treatment plan in Ashland, Kentucky. Ruhlin is signatory to the above-described collective-bargaining agreement and has, according to Risner, obtained all of its cement finishers through Local 232. The Charging Party, Cordle, worked on Ruhlin's Ashland jobsite for 7-8 months in 1980, until he was laid off in November of that year.

During the week of May 11, 1981, Risner was hospitalized and the Respondent's recording secretary, George Clay, acted as business agent. Clay indicated that he worked at the trade while he substituted for the regular business representative, but he went to Risner's home each evening and listened to tape recordings of phone calls from contractors and thereafter sought to fill their requests for employees by contacting members who were out of work and directing them to report to the contractors who had requested help. Clay testified that before Risner went to the hospital he gave him a list containing the names of 8-12 members who were out of work, indicating how long each had been unemployed. The names of Steve Cordle and his brother, Rocky Cordle, appeared on the list.⁷

On May 13, Clay was asked by Baker Construction Company to refer five men to its Piketon, Ohio jobsite the following day. To fill the request, Clay called Donald Lansing and Joe McNeal, who lived in Portsmouth, Ohio. He then called Ozzie Reeves Sr., who lived in Ashland, Kentucky, and asked if Reeves and two additional Kentucky members would go to the job. Reeves indicated that he, his son Ozzie Jr., and Steve Cordle, who had been working with them, would go. Reeves thereafter contacted Steve Cordle, Rocky Cordle, and Estell Ellis in attempt to obtain a third Kentucky man to fill Baker's request. All three individuals indicated they would not go to the Baker job. Consequently, at 11:30 p.m. on May 13, Reeves telephoned Clay and informed him that Steve Cordle had refused referral to the Baker job.⁸ On May 14, the two Reeves, Lansing, and McNeal reported to the Baker jobsite. Lansing worked, but the Reeves and McNeal refused to work because they felt there was too much work for four cement finishers.⁹

On May 14 or 15, Jim Shott, Ruhlin's superintendent on the Ashland waste water treatment plant job, called Risner's home, indicating that a man then employed by Ruhlin was retiring and he would like to have Steve Cordle referred to the job on Monday, May 18. As Risner was to be out of the hospital then, Clay informed

⁷ The list was not produced at the trial. Risner testified such notes are routinely destroyed when they are no longer useful. Clay and Risner failed to indicate the names of the persons on the list in question or the length of time such persons had been out of work as of May 11. Clay indicated he selected men for referral by taking men at random from the list, rather than in some particular order.

⁸ My findings concerning what was said during the two telephone conversations between Reeves and Clay are based on Clay's testimony. Reeves claims he did not tell Clay during the first conversation that he would attempt to cause Steve Cordle to go to the Baker job, and he did not recall whether he called Clay to tell him Cordle would not accept the referral. Clay was the most impressive witness, and I credit his testimony fully.

⁹ See R. Exh. 2.

Shott that the regular business representative would handle the request. Thereafter, on Sunday, May 17, Risner decided to refer Rocky Cordle rather than his brother Steve to the Ruhlin job. Steve Cordle and his father, also a member and past officer of Local 232, telephoned Risner when they learned that Rocky rather than Steve was being sent to the job in question. Risner informed them he was sending Rocky rather than Steve because Steve had refused a job and it was not his time to go. Steve Cordle protested, indicated he had not refused a job because he had not been called by the Union, and he threatened to sue Risner and the Local for failing to refer a man who had been requested by a contractor by name.

Through the testimony of Ozzie Reeves Sr. and Glen Cordle, the General Counsel sought to show that the Respondent uniformly referred members requested by name to the contractors making such requests. Thus, Reeves testified that prior to May 1981 he had been a foreman on a number of jobs and had requested that Risner refer named individuals to such contractors and his requests had never been refused. Cordle testified, without contradiction, that, at a Local 232 membership meeting held in November or December 1980, a member asked Risner why certain men got more work than others and that Risner replied some members got more work because contractors had requested them by name and the Local had to honor such requests to avoid being sued.

During their testimony, both Clay and Risner denied that contractors' requests for the referral of named members are uniformly honored. They both indicated that the Respondent attempts to equalize the number of hours worked by members and claimed that when an out-of-work member was requested by name, his standing among others then out of work would be considered.

At the conclusion of the trial, the Respondent placed certain documentary evidence in the record in attempt to show it had not treated Steve Cordle discriminatorily. Thus, it placed in the record as Respondent's Exhibits 2 and 3 notes made by Risner during the period extending from April 16, 1981, to May 20, 1981, regarding referral information. These documents, as I interpret them, show, inter alia: that Charles Boldman and John Penwell were requested by and were referred to a contractor at an A plant on April 22; that Ronald Blevins was called back to an A plant on April 22; that Bechtel Corp. requested H. Strickland by name and he was referred to an A plant pursuant to request on April 28; that Rocky Cordle and Steve Cordle were called by David and Burton to work at Kentucky Electric on the night shift on April 28; that Bechtel requested that 13 men be sent to an A plant on April 29 and that 13 named individuals were referred and Birmingham and Jack Dermont would not go; that on April 30 Sherman R. Smoot called Leon France back to work; that on May 1, when Bechtel requested three men, Havens refused to go to an A plant because it was too far to drive; that on May 8 Leon France was called by Sherman R. Smoot to an A plant; that on May 14 Ozzie Reeves Jr., Ozzie Reeves Sr., Steve Cordle, Joe McNeal, and Lansing were referred to Baker Cement—that Lansing worked but the remaining four showed up

on the job and would not work¹⁰; that on May 15 Hilterbrand, Hall, R. Cordle, and Glenn Shaggs were referred to Dimaco at Armco Steel and Hilterbrand and Hall did not show up; that Ruhlin placed a call for one cement mason at the Ashland sewer plant to take Jock Frazer's place (he had had a heart attack) and Rocky Cordle was referred on May 18; that on May 20 Ross Brothers' superintendent called Ozzie Reeves Sr., Ozzie Reeves Jr., and Steve Cordle to work with a notation that "Ossie [sic] Reeves, Sr called me and told me that Ross Brothers Superintendent had called him and Ossie Reeves, Jr. & Steve Cordle to come to work for them at Ashland Oil I subed from Proton on 5-21-81. Also said he wanted 1 more man. I told him that Ross Brothers had never called the Hall for men, and that if he called the (3) men he could also called the Fourth man, and I told Ossie Sr. that they were not supposed to go on jobs where contractors called the men and did not call the Hall. Had not Had pre-job conference for this job"; and that May 20 Alonzo Nelson called Dick Strickland to work for Ferguson Construction Co. at an A plant.

After placing the above-described referral records in the record, the Respondent was permitted, over the General Counsel's objection, to place a composite exhibit in the record which reveals the number of regular hours worked by Local 232's 56 members at various times during the period May 1, 1980, through May 31, 1982.¹¹ While that exhibit will not be described in detailed fashion here because many of the figures are of limited relevance, I note the exhibit reveals that during the 12-month period preceding May 1, 1981, Steve Cordle worked 1038 regular hours and his brother, Rocky, worked 785 regular hours.¹² It further reveals that, during the first 4 months of 1981, Steve Cordle worked 134 hours (Jan.—58, Feb.—32, Mar.—20, and Apr.—24) while Rocky Cordle worked 258 + 1/2 hours (Jan. 41-1/2, Feb.—65, Mar.—56, and Apr.—96.)

B. Analysis and Conclusions

The sole issue in this case is whether the Respondent violated Section 8(b)(1)(A) of the Act by refusing to refer Steve Cordle to employment at Ruhlin after he had been requested by name.

Section 8(b)(1)(A) provides, in pertinent part, that:

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7

In turn, Section 7 of the Act provides, in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and

¹⁰ Risner testified that before he referred Rocky Cordle to the Ruhlin job on Sunday, May 17, he learned from men on the job that Steve Cordle had not appeared at the job.

¹¹ See R. Exh. 4.

¹² The Respondent's records do not reveal the overtime hours worked by members as trust fund moneys are only remitted by contractors for regular hours worked.

[they] shall also have the right to refrain from all such activities

In the instant case, the General Counsel contends, in effect, that the Respondent punished the Charging Party on May 17 by refusing to refer him to employment with Ruhlin, which had requested him by name, because Cordle had previously obtained most of his own work and he had elected to accept a direct offer of work from Ross Brothers, both being contrary to the business representative's desire that all contractors obtain workmen through the Respondent's hiring hall and that all members accept work from only contractors who obtained their Local 232 workmen by going through the Respondent's hiring hall.¹³

During the presentation of his case, the General Counsel adduced evidence to show: (1) That the Respondent operates a nonexclusive hiring hall and contractors who are signatory to its standard agreement are required to obtain 50 percent of their cement masons through the Respondent's hall; (2) that prior to mid-May 1981, Steve Cordle obtained most of his own work; (3) that during 1980 and 1981, Ross Brothers, a signatory contractor, obtained its own Local 232 workmen by calling members directly rather than requesting them through the Respondent; that the Respondent's business agent, Risner, repeatedly refused to refer additional men to Ross Brothers because they called their men directly; that Risner stated on one occasion in later 1980 that he would not refer Steve Cordle to employment because he elected to accept work with Ross Brothers; that Risner informed members at a membership meeting held in late 1980 that some men had worked more than others because they had been requested by name and the Union referred them to avoid being sued; and that the Respondent refused to refer Steve Cordle to employment at Ruhlin on May 17 despite the fact that he had been requested by name. I find that by eliciting the testimony described, the General Counsel has established, prima facie, that the Respondent violated Section 8(b)(1)(A) of the Act.

The Respondent contends, in effect, that it lawfully refused to refer Steve Cordle to employment at Ruhlin because such action was necessary to the effective performance of its function of representing its constituency. Specifically, it contends that Risner refused to refer the Charging Party to employment at Ruhlin on May 17 because he had refused a referral to Baker on May 13 and, in any event, he was not next in line for referral on May 17 because it follows a policy of attempting to equalize the amount of work performed by members and such policy dictated that Rocky Cordle, Steve's brother, be referred to Ruhlin on May 17. For the reasons set forth below, I find that the defenses interposed by the Respondent are pretexts offered to mask an unlawful reason for the refusal to refer Steve Cordle to the Ruhlin job.

¹³ Citing *Operating Engineers Local 18 (William F. Murphy)*, 204 NLRB 681 (1973), the General Counsel claims I should conclude he proved a prima facie violation of Sec. 8(b)(1)(A) by showing that Risner refused to refer Cordle to Ruhlin after he had been requested by name and the refusal was not based on Cordle's failure to satisfy his financial obligations to the Respondent. As this is an 8(b)(1)(A) rather than an 8(b)(2) case, I find that the *Local 18* case is inapplicable.

While the refusal to accept a referral defense has some surface appeal, no evidence other than Risner's bald assertion that this was a reason for his refusal to honor Ruhlin's request that Steve Cordle be sent to the job on May 18 was offered by the Respondent. Moreover, the very records offered by the Respondent appear to belie the claim. Thus, the Respondent's Exhibits 2 and 3 reveal that no less than nine members (excluding Steve Cordle) either refused referrals to employment, accepted referrals and failed to show up, or accepted referral and failed to work during the period extending from April 29 to May 15. Conspicuously, the record fails to reveal that any of those members suffered any adverse consequences as a result of their actions.

In sum, the record reveals that members can refuse referral for valid reasons; that Steve Cordle was not asked why he refused the May 13 referral; and that nine other members were shown to have refused referrals or have refused to work after accepting referral during the short period extending from April 29 to May 13 and the record fails to reveal that they were punished in any way. In the circumstances described, I find that the Respondent has failed to establish that it has a policy of limiting a member's referral rights because that member refused a referral or refused to work after accepting the referral.

Similarly, Risner's claim that he referred Rocky Cordle rather than Steve Cordle to the Ruhlin job because Rocky had worked less than Steve does not withstand scrutiny. As noted, supra, the so-called list left by Risner with Clay during the week beginning May 11 was not produced at the trial. Consequently, the record fails to reveal which brother was ahead of the other on the list. Moreover, as noted supra, Risner's testimony was to the effect that he inspected fund reports received shortly before the referral situations to determine who should be sent out and the compilation he prepared for trial reveals that, during the first 4 months of 1981, Rocky had worked in excess of 100 more regular hours than Steve. The above observations, considered with the testimony of the General Counsel's witnesses which reveals that members requested by contractors by name were uniformly referred to such contractors and the fact that the Respondent's records reveal that some seven members requested by name were referred to the requesting contractors during the period extending from April 16 to May 20, cause me to conclude that the Respondent had failed to show that the Respondent's work equalization policy required that Rocky Cordle rather than Steve Cordle was entitled to refusal to the Ruhlin job on May 17.

In sum, I find, for the reasons indicated, that the Respondent has offered insufficient evidence to rebut the General Counsel's prima facie showing that the Respondent's failure to refer Steve Cordle to the Ruhlin job on May 17, 1981, violated Section 8(b)(1)(A).

CONCLUSIONS OF LAW

1. The John G. Ruhlin Construction Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 232, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to refer Steve Cordle to employment at John G. Ruhlin Construction Co. after he had been requested by name, because he chose to accept employment with a contractor who obtained its workmen by direct contact with employees rather than through the Respondent's nonexclusive hiring hall, the Respondent violated Section 8(a)(1)(A) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

I shall recommend that the Respondent be ordered to make Steve Cordle whole for any loss of earnings he may have suffered as a result of the discrimination against him with interest thereon computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).¹⁴

On the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended

ORDER¹⁵

The Respondent, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 232, AFL-CIO, Ashland, Kentucky, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Coercing or restraining Steve Cordle or any other employee utilizing Local 232's nonexclusive hiring hall by refusing to refer employees to employment with contractors who have requested them by name because they have chosen to accept employment with contractors who obtain their workmen by direct contact with employees rather than through the Union's hiring hall.

(b) In any like or related manner coercing or restraining employees 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 Steve Cordle for any loss of earnings suffered by reason of the discrimination against him with interest in the manner described in the section of this Decision entitled "The Remedy."

(b) Post at its business office, hiring hall, and meeting place, copies of the attached notice marked "Appendix."¹⁶ Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's official representative, shall be posted by it immediately upon receipt and maintained 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.

(c) Mail to the Regional Director for Region 9 additional copies of the attached notice for posting by the John G. Ruhlin Construction Co., if Ruhlin is willing.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁶ If 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."

APPENDIX

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

WE WILL NOT coerce or restrain Steve Cordle or any other employees utilizing Local 232's nonexclusive hiring hall by refusing to refer employees to employment with contractors who have requested them by name because they have chosen to accept employment with contractors who obtain their workmen by direct contact with employees rather than through the Union's hiring hall.

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

WE WILL make Steve Cordle whole for any loss of earnings suffered by reason of the discrimination against him with interest.

THE OPERATIVE PLASTERERS' AND
CEMENT MASONS' INTERNATIONAL ASSO-
CIATION OF THE UNITED STATES AND
CANADA, LOCAL UNION 232, AFL-CIO

¹⁴ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.