

**Dravo Corp. and Marvin W. Brown  
United Association of Journeymen and Apprentices  
of the Plumbing and Pipefitting Industry of the  
U.S., AFL-CIO, Local 96 and Marvin W.  
Brown. Cases 11-CA-10827 and 11-CB-1169**

14 February 1984

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

On 26 August 1983 Administrative Law Judge Claude R. Wolfe issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent Employer filed a motion to dismiss the Charging Party's exceptions and a brief in support of the judge's decision, and the Charging Party filed a response to the Respondent Employer's motion to dismiss.<sup>1</sup>

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 briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> In light of our agreement with the judge's finding of no violation, we find it unnecessary to pass on the Respondent Employer's motion to dismiss the Charging Party's exceptions as untimely. Contrary to his colleagues, Chairman Dotson would grant the motion and strike the exceptions as not being timely filed. In all other respects the Chairman joins the majority in its disposition of this proceeding.

<sup>2</sup> The Charging Party 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.

**DECISION**

**STATEMENT OF THE CASE**

CLAUDE R. WOLFE, Administrative Law Judge: This proceeding was tried before me in Charlotte, North Carolina, on June 22, 1983, pursuant to charges filed and served on March 17, 1983, and complaint issued May 6, 1983, and amended June 15, 1983. The complaint alleges that United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S., AFL-CIO, Local 96 (the Union), failed and refused to permit Marvin W. Brown to register on an out-of-work list; threatened not to refer Brown for jobs because he was delinquent in the payment of union fees; and refused

to refer Brown to work at Dravo Corp. (Dravo or the Company) because he was not a union member. The Company further alleges that Dravo, by acting pursuant to an exclusive referral agreement with the Union, failed and refused to hire Brown, and thereby violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (the Act). Both Respondents deny they committed unfair labor practices.

Upon the entire record and my observations of the witnesses' demeanor as they testified before me, and after considering the post-trial briefs of the parties, I make the following

**FINDINGS AND CONCLUSIONS**

**I. JURISDICTION AND LABOR ORGANIZATION**

The pleadings establish (1) that it is appropriate for the Board to exercise jurisdiction in this matter because Dravo, a fabricator of pipes, meets Board and statutory standards and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and (2) that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Evidence and Discussion**

Dravo and the Union are party to a collective-bargaining agreement containing an exclusive hiring agreement reading, in relevant part, as follows:

The Union agrees to furnish to the Employer, Journeymen Plumbers, Pipefitters, Registered Apprentices, and Worker Trainees as required by the Employer. The Union shall select applicants for employment without discrimination against such applicants by reason of or in any way affected by Union, membership, by-laws, rules, regulations, constitutional provision, or any other aspect or obligation or Union membership, policies or requirements. Further, there shall be no discrimination because of race, creed, color, sex, or national origin.

Applicants shall register on an appropriate out-of-work list at the Local Union office, and applicants will be furnished by the Union to the Employer on a "first-in"—"first-out" basis without regard to any other condition, except:

Request by the Employer for certain applicants as key men shall be honored.

Requests by the Employer for certain applicants with special skills or on the basis of previous employment shall be honored.

The Employer retains the right to determine competency and to reject any applicant.

The Union and the Employer agree to post a copy of this procedure in places where notices to employees and applicants for employment are customarily posted.

If, upon request, the Union is unable within 36 hours to supply journeymen and apprentices . . .

the Employer may secure employees from any source.

The following notice was posted on the bulletin board at the union hall throughout the period encompassing the events herein:<sup>1</sup>

Applicants shall register on an appropriate out of work list at the Local Union office, and applicants will be furnished by the Union to the Employer on a "first-in," "first-out" basis without regard to any other condition, except:

Request by the Employer for certain applicants as key men shall be honored

Requests by the Employer for certain applicants with special skills or on the basis of previous employment shall be honored.

The Employer retains the right to determine competency and to reject any applicant.

Brown paid an initiation fee to the Union in 1981, but did not become a union member.<sup>2</sup> As a permit man, he did however pay a working assessment of \$4 a week. He was laid off by Dravo on March 5, 1982.

During the week after his layoff Brown went to the union hall where he met with Tony Kiriakos, the Union's business manager. Brown's testimony with respect to this meeting is that they discussed the continuing layoff at Dravo, and during this conversation Kiriakos said he did not consider Brown a union member because he had not fulfilled his membership obligation. Whereupon Brown asked about the initiation fee he had paid, and was told that it had been put in a working assessment account. Brown continues that Kiriakos told him they did not send permit men out of the jurisdiction, but "if anything happened around Charlotte or Dravo opened back up that he'd get in touch with me." Brown concedes that Kiriakos did not say he would not refer to him to work within the Union's jurisdiction.

Kiriakos testified that Brown said he wanted to pay \$250 on his back working assessments, and asked Kiriakos to backdate the receipt to December 1981 so it would be deductible from his income tax. According to Kiriakos, he first refused but then, after Brown's continued requests, gave him a receipt dated in December and gave the \$250 to his secretary who wrote on the Union's official records that it was received the last of February because the February 1982 books had not been closed. Kiriakos agrees that if asked he would have told Brown he was not a member, and might have told him there was work outside the Union's jurisdiction. Kiriakos denies telling Brown that he would refer him to Dravo if work became available.

Called as a rebuttal witness, Brown testified that he paid the \$250 on past due assessments in December 1981, and thereafter the assessments were deducted from his pay pursuant to a checkoff arrangement. The receipt

<sup>1</sup> Although it would seem probable that a copy of the procedure was also posted at Dravo, Brown denies this was so, and there is no evidence to the contrary.

<sup>2</sup> Union membership is not required as a condition of employment. North Carolina is a right-to-work State. The parties have all proceeded on the premise Brown is not a union member.

signed by Kiriakos shows \$250 received December 30, 1981, for "union dues." On cross-examination, Brown reluctantly conceded he signed a checkoff authorization on September 11, 1981, but then asserted it did not take effect until January 1982.

The conflict between the testimony of Kiriakos, a sometimes forgetful witness, and that of Brown, whom I find incredible on other matters elsewhere in this decision, neither of whom had superior testimonial demeanor, is obvious. There is, however, no logical reason for Kiriakos to fabricate his testimony with respect to the \$250 for purposes of this proceeding. Moreover, it seems highly improbable that a checkoff signed in September would not be effective until the following January. On the other hand, Brown's testimony that "If I had known I was being laid off, they wouldn't have got no \$250.00 out of me" is not unreasonable. On the whole, I cannot say that either Kiriakos or Brown seemed the more credible on the content of this meeting. Accordingly, I do not find that the testimony of Brown, the General Counsel's witness, is entitled to more weight than that of Kiriakos except to the extent I conclude that Kiriakos did tell Brown he was not a member and that permit men were not referred to points outside the Union's jurisdiction.<sup>3</sup>

The testimony of Kiriakos and Moose that the local business manager has no authority to refer permit men to jobs outside the local union's jurisdiction is credited.

Brown returned to the union hall in April 1982, talked to Kiriakos, discovered the work situation was the same, and left. At no time did he ask Kiriakos to be put on the out-of-work list.

James Richard Moose was elected union business manager replacing Kiriakos effective July 17, 1982. Although not yet in office, he was filling in for Kiriakos on July 12, 1982, when Brown came to the hall. It is probable, as Brown testified, that he asked if any work was available. I do not, however, credit his testimony that Moose said he would send Brown to work in Augusta, Georgia, if he found Brown was in good standing. Moose was a more impressive, natural, and believable witness in general, and I credit him that he did not know of Augusta work and made no such statement on July 12, 1982. Moreover, as I have earlier noted, the business manager has no authority to refer permit men outside his local union's jurisdiction. Moose credibly testified that Brown asked him to check his (Brown's) status with the Union, and Moose advised the local record showed Brown owed past assessments<sup>4</sup> and had not fulfilled membership terms. Brown responded that he had a \$250 receipt. Moose then told Brown that he would check with Kiriakos, Brown should bring his receipt in, and Moose would straighten the matter out if there was a mistake.

Brown did not again contact the Union until August 24, 1982, when he wrote Moose the following letter:

I am more than concerned as to why you have not wrote and told me concerning my status with

<sup>3</sup> Compare *Blue Flash Express*, 109 NLRB 591 (1954).

<sup>4</sup> The record is not clear with respect to the exact state of assessments paid by or due from Brown.

the Union. Since I first contacted you in early July, after the election for B.A., I have not heard anything from you since. I am further concerned that the company (Dravo) in which the union represents laid me off with the belief that Plant 6 would be closed and it has, but also that no one would be transferred from Plant 6 to Plant 5, when you and I know that Journeymen and apprentices alike would be transferred where ever the work load is as a common practice of the Company. While sitting at the football game on August 15, 1982, I learned, from a fellow Journeymen employee that is still employed at the Company, that there are at least 7 Journeymen with less seniority than I still on the payroll. So much for that.

Yours truly,  
/s/ Marvin Brown  
Marvin W. Brown

P. S. Need to hear from you very soon concerning a job placement.

Moose replied by letter of August 25, 1982, as follows:

In early July you came by my office. At that time we discussed your returning to the office at a later date when you had more time to discuss your standing with the Local. I have been unable to reach you by phone.

As you know Dravo Plant 6 has closed and to my knowledge no Journeymen or Apprentices were transferred from Plant 6 to Plant 5. There were several Journeymen laid off at Plant 6 and were called, by name, to Shop 5.

Since that time Shop 5 has laid off approximately 20 Journeymen and closed the 2nd shift completely leaving only one shift in operation.

Being familiar with our contract you must realize we have no seniority system in our working agreement.

I would be delighted for you to come by the office at your convenience to discuss your standing with the Local.

On September 17, 1982,<sup>5</sup> Brown returned to the union office. Moose asked if he had brought his receipt and wanted to examine the union records. Brown said he would come back when he had more time. On this occasion Moose told Brown that he had heard there was work at Augusta, Georgia, for minorities and if Brown were interested he should contact the business agent of the Augusta local, and he might get hired. Moose denies, and I credit his denial, that he told Brown he would not

<sup>5</sup> Moose's daily log shows September 17, 1982, which is more persuasive than Brown's general date of October 1982. Moose seemed a candid witness, gave prompt answers, and was believable. Brown, on the other hand, left the distinct impression he was a calculating witness making a distinct effort to fortify his case. On the basis of comparative demeanor Moose was the more believable witness, and his testimony seemed uncontrived and truthful. Where their testimony in the record conflicts, I credit Moose in any instance where Brown's testimony is not supported by other credible evidence.

be referred out until he straightened out his payments to the Union.

Brown neither visited Moose nor showed him his receipts until March 1983, but he did telephone Moose at his residence one night in December 1982 or January 1983. Brown commenced the conversation by saying a little bird had told him that if he paid his back assessments and got a membership card Moose would refer him to Dravo. Moose asked Brown who told him that. Brown refused to say, whereupon Moose stated he did not know who told Brown that, but whether or not Brown was a member had nothing to do with him going back to Dravo and Moose had no calls for men to go to Dravo. Moose repeated his earlier advice that Brown might get on at Augusta if he contacted the local business agent there.

Brown then wrote the following letter to Dravo on January 28, 1983:

After being laid off for eleven months, and not being on the union hall directory because of an error in their bookkeeping as of March 8, 1982, I find it necessary to advise the company of my availability for work. Please advise me by correspondence.

Dravo, by its employee relations manager, replied on February 21, 1983, as follows:

As you know, we are in the process of rehiring a few people for our Charlotte operation. As you also know, we do our hiring through the Local 96 Hiring Hall per the conditions listed in the existing union, management labor contract.

In order to be assured of a referral, you should follow the out of work practice of signing the out of work list at the local union office.

On March 4, 1983, Brown took his \$250 receipt and the February 21 letter from Dravo to the union hall. He showed them to Moose. He also told Moose that he knew he could not get on the out-of-work list because he was not a member. Moose retorted that Brown knew better because he was not a member when the Union originally sent him to the job. At this point Bobby Fowler, Ironworkers' business agent, entered to go to lunch with Moose. Prior to and for a time during his employment at Dravo, Brown had been a member of the Ironworkers' union local for which Fowler is the agent. After Fowler's entry, Moose asked Brown if he had ever asked anyone in the union office to put his name on the out-of-work list. Brown said, "No." Moose then turned to Fowler and related that Brown had said he knew he could not get on the list because he was not a union member. Fowler turned to Brown and said, "Bull . . . . You signed my list for years before you was a member. You know how the hiring hall works. You come up when you get off and ask to get on the list or sign the list and, when the next available job comes up and your

name comes up, you get referred out." Brown's only response was, "Oh, I didn't think. I didn't think."<sup>6</sup>

Following this colloquy, Moose again asked Brown if he had ever asked to be on the list. Brown said he had not, and then requested to be on it. Moose immediately entered his name and the date on the list. Moose explains that after the charges were filed he gave Brown a date of August 24, 1982, on the list and so advised him in writing as follows on April 28, 1983.

Enclosed please find a copy of page 6 of the contract between this local union and Dravo Corporation among others. Please read this enclosure carefully. Should you desire a copy of this entire contract, please come by the office, or I can, upon your request, mail you a copy. Also enclosed please find a copy of the document which has been continuously posted on this Union's bulletin board since at least July 1, 1981, for all persons to see, read and take notice of. Please read this document very closely also. It is up to each person to specifically request that his or her name be placed on the out of work list.

You wrote me a letter dated August 24, 1982. In this letter, you, as a post script, wrote "Need to hear from you very soon concerning a job placement." Then on March 4, 1983, you told me for the first time you wanted your name placed on the out of work list.

In an effort to settle any controversies I am effective immediately putting your name on the out of work list as if your name had been placed on this list on August 24, 1982, the date of your letter to me about job placement. I am very hopeful that you can be referred to a job within the near future. Additionally, if you change your mind and want to be informed of possible places out of North Carolina where you might find work, please let me know immediately.

I request that in the future if you want your name on the out of work list, that you make your request that your name be placed on the list very clear.

Both Kiriakos and Moose testify that an employee must affirmatively indicate he wants to be on the out-of-work list before he is placed on it. This is consistent with the express language of the contract, but I find it difficult to believe and do not credit testimony that this procedure is rigidly adhered to in each and every instance regardless of the circumstances.

Brown concedes that he never asked to be put on the out-of-work list prior to March 4, 1983, but claims he knew of no such list and was unaware of any requirement that it was necessary to be on it to secure job referral. I do not credit his claims of lack of knowledge of the list or its use. The contractual requirement of regis-

<sup>6</sup> Brown asserts an inability to remember what Moose said to him because "My mind doesn't carry back that far as to whether he said that or not," and only recalled, in response to a leading question by the General Counsel, that Fowler acknowledged Brown had been a member of his union. Moose's version reported in the body of this decision was straightforward, detailed, and essentially uncontroverted.

tration on the out-of-work list at the union office was posted on the Union's bulletin board which Brown passed each time he visited the union hall. His denial that he did not see this is not credited. He remembers seeing announcements of jobs in various parts of the country, and I am persuaded his purported lack of recollection of anything else is of a piece with his evasive testimony with respect to the use of an out-of-work list by the Ironworkers' union to which he previously belonged.<sup>7</sup> This testimony is at odds with Brown's statement in a sworn pretrial statement that "This Ironworker local did refer me to jobs off the out-of-work list," and with his acquiescence to Fowler's March 4, 1983, statements to him, credibly related by Moose, with respect to Ironworker hiring procedures when Brown was a member. Moreover, Brown's January 28, 1983, letter to Dravo refers to his not being on "the union hall directory." In the absence of any evidence of any other "directly," I conclude Brown was referring to the out-of-work list, and thereby clearly indicating his awareness of the existence of such a list and the absence of his name from it. In short, I am persuaded Brown knew of the contractual requirements of registration from the date of his layoff, but fashioned his testimony to conceal such knowledge. I am also persuaded that the Union knew Brown was looking for work. The Union also knew all referrals would be from the list. The failure to put Brown on the list is attributed by the Union to his lack of diligence in requesting it be done. As I have noted, I place little reliance on the Union's insistence that every employee who wants to be on the out-of-work list must explicitly so advise. Yet it cannot be ignored that Brown, despite his unconvincing protestations to the contrary, was aware of the existence and utilization of an out-of-work list in referring employees to work, but made no particular effort to get his name on it until March 4, 1983, and then only after expressly pressed by Moose to do so. I am persuaded that Brown, knowing of the list, elected to rely on the probability of recall on the basis of seniority because he believed that he might be recalled on that basis, and because he also believed, as demonstrated by his testimony and his telephone call to Moose in December 1982 and opening remarks to Moose of March 4, 1983, that he would not be referred from the list because he was not and is not a member of the Union. In passing, I find that the December phone call and the March 4 opening comment were ploys designed to elicit admissions from Moose that Brown was not referred because he was not a member. Moose did not oblige.

<sup>7</sup> Brown's testimony referred to above as evasive reads:

Q. Do you know whether or not a work list was used?

A. Well, when I got—working with the Ironworkers you're frequently out of work, unlike working in a fabrication shop. But to get back to the Ironworkers, when we're out of work or the job is coming to a close, we just simply call the business agent say, "What have you got next?" And he'll tell you what he's got or he'll send you somewhere. It wasn't a matter of ever signing or going in to sign an out-of-work list or such a thing. We'd just simply call the business agent.

### B. Conclusions

The General Counsel contends that had not the Union refused to place Brown on the out-of-work list in March 1982 he would have been referred to Dravo prior to employees Wylie and Ratteree, who got on the list in July 1982. The General Counsel further asserts that before I can find an unlawful refusal to refer on March 29, 1983, the date Wylie and Ratteree was referred, I must find that the Union unlawfully refused to put Brown on the list in March 1982. This latter assertion reveals the General Counsel's basic contention to be that Brown was unlawfully denied registration on the out-of-work list in March 1982, and therefore all succeeding failures to refer him to work in accord with a March 1982 registration are unlawful because such failures are unlawfully motivated ab initio. I do not agree.

The record fairly indicates that Brown was aware of the requirement that referrals would be made from the out-of-work list; did not seek to be or even particularly care if he were on the list until advised by Dravo it was a sine qua non, but chose to rely on the job seniority until disabused of that notion; and then sought to manufacture a no-referral because of nonmembership reason by tactics designed to that end.

Neither Kiriakos nor Moose told him that he would not be referred to Dravo, which is all he was seeking, because he was not a member. Their failure or refusal to refer him to work out of their jurisdiction was justifiably grounded on a lack of authority to so refer permit men, which Brown certainly was.

Kiriakos' advice to Brown in March 1982 that he was not a member and thus not referable outside the local's jurisdiction was a plain statement of fact and contained no unlawful element. Kiriakos neither promised nor refused to put Brown on the out-of-work list, although he in fact failed to do so, and Brown did not at that time or ever press to be placed on the list even though he well knew of its existence and utilization. It might have been better, in hindsight, for Kiriakos to have put Brown on the list, but the evidence simply does not warrant a finding he did not do so because Brown was not a union member. Other nonunion persons got on the list and returned to Dravo. There is no apparent reason for Kiriakos to discriminate against Brown. The requisite unlawful hostility is totally absent. In addition to all this discussion, the plain fact is that Brown knew of the list from the outset and further knew he was not on it, for reasons previously set forth, and therefore may not be accorded the advantage of the exception to Section 10(b) of the Act set forth in *Plumbers Local 40 (Mechanical Contractors Assn.)*, 242 NLRB 1157 (1979), because that case deals with the instance wherein an employee only becomes aware of the discrimination more than 6 months

after it happened. There is no convincing evidence Kiriakos unlawfully excluded Brown from the list; and Brown knew of the list, and had reason to believe he was not on it, and made no effort to get on it. Accordingly, even assuming arguendo Kiriakos acted unlawfully, Brown was aware of that action early in 1982 and Kiriakos' conduct may not now be resurrected as a basis for the complaint herein because such a resurrection goes beyond an attempt to shed light on matters occurring within the limitations period and becomes the foundation for the complaint.<sup>8</sup>

As to events within the 6-month period preceding the filing of the charge in the instant case, I specifically find that Moose did not threaten to fail or refuse to refer Brown because he was delinquent in the payment of union fees or not a member, even though enticed by Brown to so threaten or state, and the evidence does not preponderate to a conclusion that the Union, within the statutory limitations period, failed or refused to refer Brown because of his lack of union membership or other unlawful reason.

This is a simple case of an employee with knowledge of the established lawful procedure failing to take advantage of it, and then attempting to manufacture an unfair labor practice to compensate for his own lack of diligence. The complaint must therefore be dismissed.

Inasmuch as the evidence does not preponderate in favor of a finding the Union violated the Act, I need not reach the issue of Dravo's responsibility for the Union's conduct by virtue of its being signatory to the collective-bargaining agreement.

### CONCLUSIONS OF LAW

1. Dravo is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has failed to sustain his burden of proof for any allegation in the complaint, as amended.

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

### ORDER<sup>9</sup>

The complaint is dismissed in its entirety.

<sup>8</sup> See, e.g., *Evening News Assn.*, 258 NLRB 88 (1981), particularly the discussion at 91.

<sup>9</sup> 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.