

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO-CLC, Local No. 198 (Jacobs/Wiese) and James L. Brewer. Case 15-CB-2594

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 9 June 1983 Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Respondent Union filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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, and conclusions¹ and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO-CLC, Local No. 198, Baton Rouge, Louisiana, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and re-letter the subsequent paragraphs.

"(c) Expunge from its files any reference to the discrimination against James L. Brewer, and notify

¹ In agreeing with the judge's conclusion that the Respondent Union's failure to use objective criteria or standards for referral of employees violated Sec. 8(b)(1)(A) and (2) of the Act, we find it unnecessary to rely on his citation of *Painters Local 1178 (Roland Painting)*, 265 NLRB 1341 (1982).

Because we agree with the judge that *Boilermakers Local 154 (Western Pennsylvania Service Contractors Assn.)*, 253 NLRB 747 (1980), is controlling and that *Longshoremen ILA Local 851 (West Gulf Maritime Assn.)*, 194 NLRB 1027 (1972), is inapposite, we do not reach the issue of *West Gulf Maritime's* continuing validity. In accord with *Boilermakers Local 27 (Daniel Construction Co.)*, 266 NLRB 858 (1983), and *R. H. Macy & Co.*, 266 NLRB 858 (1983), we shall require Respondent to expunge from its records references to the unlawful discrimination against Brewer, and to notify him in writing that this has been done and that evidence of the unlawful discrimination will not be used as a basis for future action against him.

² In accord with *Boilermakers Local 27 (Daniel Construction Co.)*, 266 NLRB 602 (1983), and *R. H. Macy & Co.*, 266 NLRB 858 (1983), we shall require the Respondent to expunge from its records references to the unlawful discrimination against Brewer, and to notify him in writing that this has been done and that evidence of the unlawful discrimination will not be used as a basis for future action against him.

him in writing that this has been done and that evidence of the unlawful discrimination will not be used as a basis for future actions against him."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT inform any employee-applicant that we are refusing to refer them for employment with Jacobs/Wiese, or with any other employer contractually bound to use our referral system in obtaining employees, because of failure to pay union-imposed fines levied against them.

WE WILL NOT refuse to refer James L. Brewer for employment in his rightful order of priority on the out-of-work list because of his failure to pay a union-imposed fine levied against him, and WE WILL notify him of this in writing.

WE WILL NOT, in the operation of our exclusive referral system, cause or attempt to cause any employer to discriminate against James L. Brewer, or any other nonmembers or travelers similarly situated, in violation of Section 8(a)(3) of the National Labor Relations Act, because of their lack of membership in Local 198, or because of any other unfair labor or arbitrary consideration.

WE WILL NOT fail to use objective, consistent standards in making referrals for employment through our exclusive referral system.

WE WILL NOT, upon request, fail to furnish printed information concerning our referral system rules to work applicants at our exclusive hiring hall.

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

WE WILL make whole James L. Brewer, with interest, for our failure to refer him for employment from 2 December 1981 through 5 January 1982, because of his failure to pay a union imposed fine levied against him.

WE WILL expunge from our files any reference to the discrimination against James L. Brewer, and WE WILL notify him in writing that this has been done and that evidence of the unlawful discrimination will not be used as a basis for future actions against him.

WE WILL make whole, with interest, James L. Brewer and all other nonmember and traveler work applicants similarly situated for any loss of earnings they may have suffered by reason of our discrimination against them because of their lack of membership in Local 198.

WE WILL notify James L. Brewer in writing that we have no objection to referring him for employment through our exclusive hiring hall in his rightful order of priority, without regard to any unpaid fines we may have imposed against him.

WE WILL keep and retain for a period of 2 years permanent written records of our hiring and referral operations which will be adequate to disclose fully the basis on which each referral is made and, on the request of the Regional Director for Region 15, or his agents, make available for inspection, at all reasonable times, any records relating in any way to the hiring and referral system.

WE WILL submit four quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter subsequent to the issuance of this decision, concerning the employment of the above-named employees and those nonmember and traveler applicants subsequently found to have been similarly situated. Such reports shall indicate the date and number of job applicants made to us, the date and number of our actual job referrals, and length of such employment during such quarter.

WE WILL place the referral registers for a period of 2 years on a table or ledge in our hiring hall for easy access and inspection by all applicants as a matter of right, upon the completion of each day's entries in such registers.

WE WILL cause this notice to be printed, at our expense, in the newspaper of general circulation in Baton Rouge, Louisiana.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO-CLC, LOCAL No. 198

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge: The hearing in this case, closed by Order, dated January 17, 1983, was held on October 12, 13, 14, and December 7, 1982,¹ in Baton Rouge, Louisiana, pursuant to charges filed by James L. Brewer, an individual,² and

a complaint issued on June 3. The complaint, as amended at the hearing, alleges that United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO-CLC, Local No. 198, herein the Respondent or the Union, in the operation of its exclusive hiring hall, violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended, herein the Act, by informing Brewer³ that the Respondent was filing internal union charges against him for working for a nonunion contractor, by threatening to refuse to refer him for employment because he was considered an "habitual offender" who had not paid fines previously imposed by the Respondent, and by informing Brewer that he was being denied referral for employment because he had not paid such fines. The complaint further alleges that the Respondent has violated Section 8(b)(1)(A) and (2) of the Act by refusing to refer Brewer for employment because he had not paid an outstanding union fine; by discriminating against Brewer and other travelers and nonmembers in the making of work referrals because of lack of membership in the Respondent; by failing and/or refusing to make its hiring hall work rules available to all applicants; and by failing to use objective standards in referring nonmember and traveler work applicants. The Respondent, in its answer, denies the commission of any unfair labor practices.

All parties were present, the Respondent was represented by counsel, and all were given full opportunity to participate in the hearing. Briefs, filed by the General Counsel and the Respondent, have been carefully considered.

Upon the entire record⁴ of the case and my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE LABOR ORGANIZATION INVOLVED

The Respondent is admitted and found to be a labor organization within the meaning of Section 2(5) of the Act.

II. JURISDICTION

Jacobs/Wiese, a Louisiana corporation with an office and place of business in Baton Rouge, Louisiana, where it is engaged in the construction business, is signatory to a collective-bargaining agreement with the Respondent.

During the 12 months preceding issuance of the complaint in this matter, a representative period, Jacobs/Wiese, in the course and conduct of its business operations, purchased and received goods and materials

³ Brewer, who is not a member of the Respondent, has applied for work through the Respondent's exclusive hiring hall as a member of a sister plumbers' local. Such work applicants are termed "travelers." Applicants who belong to no union are called "nonmembers."

⁴ Unopposed posthearing motions by the Respondent to correct p. 6, l. 7, of its brief, and by the General Counsel for the substitution of updated and corrected documents for those previously received as G.C. Exhs. 18, 19, 20, and 21 are hereby granted. Certain obvious corrections to the transcript record will be set forth in Appendix A [omitted from publication] to this Decision.

¹ All dates hereinafter are within 1982 unless otherwise specified.

² The original and first amended charges were filed on April 19 and 22, respectively.

valued in excess of \$50,000 directly from points located outside the State of Louisiana.

Upon the foregoing undisputed facts, I find that Jacobs/Wiese is now, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Alleged Discrimination in Work Referrals*

It is undisputed that, during all relevant times, the Respondent Union, comprised of approximately 4000 members, has operated an exclusive work referral system, or hiring hall, in its area of geographic jurisdiction which encompasses Baton Rouge, Louisiana, and environs extending eastward halfway to New Orleans. The Respondent's business manager and senior official is J. C. Hicks. Robert O. Anderson, Jr., Louis LeBlanc,⁵ Gene Pourciau, and Bob McLaughlin are assistant business agents. It is agreed and found that all of the foregoing are agents of the Respondent within the meaning of Section 2(13) of the Act.

1. The work referral system—facts

The Union, either as immediate signatory or as subscriber to contracts executed by its parent International Union jointly with other unions, is party to a series of collective-bargaining agreements with employer associations acting on behalf of employer-members, or with various separate employers pursuant to which it is recognized as the exclusive referral source for relevant employees. In most, but not all of these agreements, employers have reserved the right to hire independently if the Union cannot refer sufficient numbers of suitable employees within 48 hours of request.

These exclusive hiring hall provisions are included in the following construction agreements: Steamfitters and Plumbers, Local Union No. 198, Baton Rouge, Louisiana, and Vicinity, Building and Construction Trades Branch Master Working Agreement, effective May 1, 1981, through April 30, 1984; the Nuclear Power Construction Stabilization Agreement, effective April 1, 1978 through December 31, 1979, and continued on a year-to-year basis thereafter;⁶ National Industrial Construction Agreement, effective May 1, 1980, to April 30, 1982, and continued on a year-to-year basis thereafter; the Respondent's Building and Construction Trades Branch Master Working Agreement with the Associated Mechanical Contractors of Baton Rouge, Inc., effective, retroactively, May 1, 1981, through April 30, 1984. The Respondent refers employees to maintenance jobs under the general president's Project Maintenance Agreement (the Orange Book), effective as revised, since September 1956.

⁵ LeBlanc's first name appears as corrected in conformity with the record.

⁶ Of the four corporations, signatory to the Nuclear Power Construction Stabilization Agreement, only Stone & Webster Engineering Corporation is involved in a nuclear powerhouse construction project within the Respondent's territorial jurisdiction.

The rules governing the Respondent's referral system do not appear in or arise from the above contracts, but were codified by the Respondent as part of its working rules-bylaws. These rules have remained essentially unchanged for at least the past 7 years. Article VII of the working rules-bylaws establishes the Union's referral system as the sole and exclusive source for referral of applicants for employment. While employers have the right to reject any applicants for employment, rejected applicants have a right to demand reasons and to pursue a grievance-arbitration procedure if aggrieved.

Under the rules, the hiring hall shall be open "for signing out of work list from 7:00 A.M. to 4:40 P.M. Monday through Friday, exception being regular meeting night from 6:30 P.M. to 8 P.M." Applicants for work must sign and date the appropriate out-of-work list according to their established trade classifications, and, under the rules, will retain their places on the list until dispatched to employment. As will be discussed, it is particularly significant that the referral rules require that all applicants be present at the hall when referral is made.

The following two separate out-of-work lists are maintained for group A and group B work applicants, as respectively defined in the working rules-bylaws:

GROUP A

All qualified journeymen in the appropriate classification who have been employed for at least four (4) years in the past five (5) years by an employer signatory or abiding by an agreement with this Local Union or under training in a formally approved program and who have lived for at least five (5) years within the geographical area constituting the normal local construction labor market.

GROUP B

All qualified journeymen in the appropriate classification who have been employed for at least four (4) years in the past five (5) years by a contractor signatory to a pipefitting or plumbing agreement in the private construction plumbing and pipefitting industry and whose services have proved satisfactory. All persons qualified to be registered in Group B on the out of work list shall sign the appropriate list each day in order to be eligible for a referral to work.⁷

With reference to groups A and B, above, article VII (F) of the working rules-bylaws provides as follows:

All applicants shall be registered in the highest priority group for which he qualifies and shall be sent out from that group chronologically in the order which they register. Those in Group A shall be referred first and when this Group is exhausted, Group B.

⁷ Although the working rules-bylaws also provide for groups C and D, these are not applicable as only groups A and B, as defined above, have been in use for more than the past 7 years.

The General Counsel, while recognizing that the group A and B classifications, distinguished principally on the basis of the applicant's residency within the Respondent's geographical area, were not, per se, discriminatory, asserts that these separated groupings were administered discriminatorily in that the Respondent restricted the group A classification to its members and that travelers and nonmembers, regardless of their respective qualifications and periods of residency, were placed in group B and referred only to those jobs which the Respondent was unable to fill from its "A" list.

Accordingly, the General Counsel argues that the Respondent's exclusive hiring hall was unlawfully operated in that referrals were preferentially granted on the basis of membership in the Respondent. The General Counsel contends that as the group B out-of-work list was deliberately suspended during certain periods and, as efforts were not made to ascertain the skills and residency of "B" applicants, the Respondent has operated without objective criteria or consistency and in substantial disregard of the written rules purporting to govern its hall which provide for the uninterrupted maintenance of such out-of-work lists.

The record reveals that, customarily, separate out-of-work lists were maintained at the Respondent's hall for group A and group B job applicants, respectively.⁸ The "A" book, or out-of-work list, was located outside the office of assistant business agent Bob McLaughlin in the Respondent's hall with a label attached to the cover which, according to Everson and Brewer, read:

U.A. LOCAL 198
A MEMBERS ONLY
A BOOK⁹

The following sign also was posted on the door outside McLaughlin's office in the immediate vicinity of the "A" book:

ONLY 198 A MEMBERS
SIGN A BOOK
ALL NON-MEMBERS
SIGN B BOOK

THANK YOU,
J.C. HICKS

Anderson conceded that, in practice, only the Respondent's approximately 4000 members and 250 apprentices signed the "A" book, while travelers and nonmembers who sought work through the Respondent's referral system were required to register in the "B" book. In addition, as prescribed in the above-quoted group B

⁸ The following description of the operation of the referral system is principally based on the testimony of the Respondent's assistant business agent, Robert O. Anderson, Jr., as corroborated in part by group B job applicants Wilbur Thomas, Frederick J. Everson, Jr., and the Charging party, James L. Brewer.

⁹ Although Anderson testified that the label on the "A" book cover, as introduced at the hearing, which was headed "Group A" followed by the above-quoted definition of that group as it appears in the working rules-bylaws, had been in use rather than the briefer legend restricting access to the Respondent's members, Everson and Brewer are credited as the evidence shows that the restrictive label language was consistent with the way in which the Respondent's referral system was run.

definition in the working rules-bylaws, group B applicants had to sign their out-of-work book each day to qualify for referral while group A members were obliged to sign but once, when first recording their availability for referral-on the completion of a job, or otherwise. The group B book was situated in the lobby of the union hall. In this book, applicants entered their names, local union numbers, if any, and job classifications.

During a typical day in the operation of the referral system, the union hall would open at 7 a.m.,¹⁰ at that time the "A" and "B" books were put out. At around 8 a.m., the group A applicants, only, entered an auditorium off the union hall lobby to be told by the Respondent's assistant business agents, usually Anderson, what jobs were available. A sign outside of the auditorium read, "Local 198 members only," and Anderson testified that an effort was made to clear the auditorium of all individuals who were not members of the Respondent. Nonmembers, in fact, were asked to leave. When the auditorium was cleared of all nonmembers and travelers, the auditorium door was closed and the available positions were read and flashed on a screen for the members to read for themselves. The group A members then were given referrals to the available positions.

When referral of the group A applicants was completed, Anderson and other participating assistant business agents, left the auditorium, took the "B" book from the large foyer, and referred the group B applicants to the remaining available positions. When no work was left for the "B" group after the "A" applicants were referred, Anderson would so inform them and attempt to answer any questions about future employment prospects.

Generally, requests for employees received from prospective employers after the morning referrals are saved for the next day when the above-outlined procedure is again utilized. Accordingly, when the hall opens, all referrals to be made that day are in hand unless relating to emergencies. To meet those situations, the Respondent maintains an emergency list from which it calls the first-listed qualified individuals, even if not in the union hall at the time. During the 6 months before the hearing, the Respondent received approximately 12 calls for emergency referrals, all of which went to the Respondent's members, the only job applicants whose addresses are on file with the Union.¹¹

As a result of a subpoena enforcement proceeding brought by the General Counsel to require the production of certain of the Respondent's work referral system records, it first was learned that the "B" registration book had been suspended and access to that book denied to work referral applicants from October 1, 1981, through February 19, 1982, and again from September 30, 1982, to the time of the hearing. During those periods, no records of "B" registrants were kept and none

¹⁰ The work rules bylaws specify that the hiring hall shall be opened for signing the out-of-work list on Monday through Friday, from 7 a.m. to 4:30 p.m.

¹¹ Although the Respondent contends that in some more recent period before the start of the hearing, it, for the first time, attempted to record "B" applicants' addresses, the effectiveness, of this effort was diminished by the suspension of use of the "B" out-of-work list, described infra.

were permitted to register. Thus, it was discovered that the Respondent had kept no group B referral records for approximately 10 months of the 14-month period covered under the subpoena.

Although membership in group A required employment "for at least four (4) years in the past five (5) years by an employer signatory or abiding by an agreement with" the Respondent, Anderson knew of no instance where an individual who had become a member of the Respondent Union had been removed from the "A" list because of failure to continue to meet the prerequisite employment requirement. It is noted that a substantial number of the Respondent's members who admittedly had not worked through the Respondent's hall during the past 2 years were maintained on the "A" list, in derogation of its referral rules concerning employment.

J. C. Hicks, the Respondent's business manager, and assistant business agent Anderson explained that the use of the "B" book had been suspended during the two indicated periods for opposite reasons. The "B" register was discontinued from October 1981 to February 1982 as that had been an interval of peak employment. There had been no need for "B" applicants to sign the register as all who came to the hall were readily referred. On the other hand, the "B" book has been suspended since September 30 because there hardly has been any work and, according to Hicks, almost 1900 "A" members were idle at the time of the hearing. To have put out the "B" book in these circumstances would merely have served to provide potential "B" applicants with false encouragement and mislead them as to their employment prospects.

"B" applicant Wilbur Thomas, corroborated by fellow traveler Frederick Everson, testified that, under the Respondent's hiring hall policy, he was prevented from registering in the "A" book, from being in the auditorium when "A" members received work referrals, and consigned, with other "B" applicants, to whatever work remained. Thomas has not received work through the Respondent's hall since April 22, 1982, although he has signed the "B" book 25 to 30 times. Everson registered at the Respondent's hall four or five times without referral after his March 30 layoff from his last Respondent-referred job, after which he gave up.

The General Counsel, in his brief, provided statistical analyses, supported by the record, which illustrate the impact of the Respondent's referral practices on group B nonmembers and travelers. From October 19, 1981, through October 27, 1982, 7171 Local 198 journeymen fitters and welders were referred to work in comparison to 845 referrals for nonmember and traveler journeymen fitters and welders, or a group B referral rate of 11.8 percent. Excluding the month of March 1982 from this computation,¹² the referral percentage rate for nonmembers and travelers for the remaining 11-month interval is reduced to 8 percent. In this period, as noted, from October 19, 1982, to February 19, 1982, and again, since September 30, 1982, no referral records of nonunion members and travelers were kept as use of the "B" registry

¹² In March, three times as many nonmembers and travelers were referred than in the next highest month of that period.

book was suspended.¹³ While the "B" book was thus suspended, the Respondent's records show that over 1600 fitters and welders were referred for work. From February 19 through September 30, there also were 63 additional days when travelers and nonmembers who were journeymen fitters and welders were not referred, while members in those categories received work.

Between April 22 and September 30, the Respondent referred 894 member pipefitters and 492 member welders in comparison to the 5 pipefitters and 127 welders referred from group B.

While the overwhelming majority of travelers and nonmembers who signed the "B" book on and after April 22 did so from one to three times,¹⁴ a number registered there repeatedly. Frederick Everson related that he had signed the "B" book on but four or five occasions between June 4 and July 6, but the records show that Wilbur Thomas registered his availability for work 29 times. Neither was referred following these registrations. Other of the more frequent "B" book registrants who were not referred include Richard Anhorn, who signed 24 times between April 22 and August 12; Chuck Benesta, with 14 entries between May 11 and August 12; John C. Calhoun, 19 entries between May 13 and August 16; Mike Dahm, 25 entries between May 24 and August 16; C. Petrocelli, 28 entries between April 26 and July 16; and Leonard Zair, 34 entries between April 22 and August 16.

The Respondent, in turn, from its compiled records of every individual referred from the Respondent's hall between October 1981 and October 1982, showed that group B referrals in that period represented the following monthly percentages of the totals sent out:

Oct. 1981	9.6
Nov.	11.9
Dec.	1.3
Jan. 1982	5.3
Feb.	13.5
March	27.1
Apr.	14.1
May	8.7
June	6.5
July	6.1
Aug.	.0
Sept.	0.5
Oct.	0.3

The Respondent also identified approximately 63 travelers of the approximately 1000 pipefitters and welders referred to the Stone and Webster Engineering Corporation nuclear powerhouse project within the Respondent's territorial jurisdiction during the 2-1/2 years before the hearing and were employed there at the time of the hearing.

¹³ Overall, the Respondent kept no referral records for travelers and nonmembers during the following periods: October 1, 1981, through February 3, 1982; February 8-18, 23, and 26; March 10-12, 15-17, 22, and 31; April 7-9, 12-16, and 19-21, June 2 and 30, July 23 and 29, August 3, 17-20, 23-27, 30, and 31; September 1-29; and October 1 through December 7, 1982.

¹⁴ Most travelers and nonmembers signed the "B" book only once.

The Respondent argues that the above figures show that, rather than having discriminated against nonmembers and travelers, it followed a practice of referring them for work, curtailed only because of severe unemployment which had developed in the industry since the summer of 1982. The Respondent finds nothing unlawful in its policy of maintaining separate out-of-work lists for members and for nonmembers and travelers, respectively, and of referring the "B" group for work only to those jobs which could not be filled from the group A members' registry. The Respondent finds justification in requiring group B job applicants to sign their out-of-work list daily while member-applicants need only register once to be referred on the ground that nonmembers and travelers, unlike members, are not a stable part of the area work force with established addresses within the Respondent's territory, but, most often, merely are passing through in search of work. As they might not return to the hall for work on the next day, it is necessary to have them reregister daily to determine the active composition of the "B" book at any given time.¹⁵

The Respondent further explains that any propensity to favor members over nonmembers and travelers merely reflects its view that members, because of their training and experience, are more qualified to perform the referred work than nonmembers and travelers. In this regard, the Respondent argues that its members generally have received formal apprenticeship training,¹⁶ while nonmembers and, even travelers from sister locals, typically have not. The Respondent, therefore, concludes that, in this sense, at least, its motives were based on objective considerations and not on membership.

2. Hiring hall operation—discussion and findings

It is established that where a union, in operating an exclusive hiring hall, grants job referral preferences to work applicants because they are its members it does so arbitrarily and invidiously in violation of Section 8(b)(1)(A) and (2) of the Act.¹⁷ While the collective-bargaining agreement does not on its face provide for a discriminatory referral system, I find that the Respondent's exclusive job referral system has been so structured and operated as to necessarily favor its members over nonmembers and travelers because of membership in the Respondent.

The situation here is quite analogous to that in *Boilermakers Local 154 (Western Pennsylvania Contractors)*, supra, where violations of Section 8(b)(1)(A) and (2) were found. There, in operating an exclusive hiring hall, the respondent union maintained two separate card racks for work applicants, one containing the cards for each of the Respondent's more than 800 members and the other holding cards for approximately 100 nonmembers. The Respondent also maintained an inconsequentially regard-

¹⁵ The Respondent's point that "B" book applicants frequently apply at the hall but once without returning is supported by the record.

¹⁶ The Respondent participates in an apprenticeship training program which, assertedly, includes stringent examinations to establish qualifications.

¹⁷ *Ironworkers Local 480 (Building Contractors Assn.)*, 235 NLRB 1511, 1513 (1978); *Boilermakers Local 154 (Western Pennsylvania Contractors)*, 253 NLRB 747 (1980).

ed out-of-work book for other nonmembers who applied at the hall. Nonmembers were required to sign the out-of-work book each day, but the Respondent's members, as in the present case, did not have to sign the out-of-work register daily. In the *Western Pennsylvania Contractors* case, the members' cards would be returned to the racks, indicating availability for new referral, after stewards called in their names to the hall when their jobs were concluded. There, as with the books in the present case, work referrals were made first to members with cards in the members' rack, then to nonmembers with cards in their special rack, with any remaining work being made available to those who had signed the out-of-work book or who otherwise were in the union hall that day.

In commenting on the use of separate card racks, analogous to the separate out-of-work books, for members and nonmembers in making referrals, Administrative Law Judge Davidson in his Board-approved decision in *Western Pennsylvania Service Contractors*, supra, noted:¹⁸

... the very maintenance of separate racks warrants an inference of discrimination against the nonmembers with cards, for nothing in the system warranted or required separate racks. Indeed, maintenance of separate racks could only make operation of a nondiscriminatory referral system more difficult, and it cannot be assumed that Respondent maintained separate racks for no purpose. In the absence of any indication or suggestion of a legitimate business purpose for maintaining separate card racks for members and nonmembers, I find the maintenance of separate racks evidence of an intent to give different treatment to the two groups.

The significance here of the separately maintained group A and group B out-of-work books, separating members from nonmembers and travelers, is more clearly established than in the matter before Judge Davidson, where there was no direct evidence as to how the separate card racks were used and the finding of illegality was deduced from other evidence. In the present matter, the evidence of use is direct as assistant business agent Anderson testified that the Respondent's members were listed for referral in the group A book, while the applicant nonmembers and travelers were consigned to the "B" book, and that in rigidly separated referral proceedings, "B" book job applicants received only such work as could not be assigned each day from the "A" book. No legitimate purpose was shown for the separate out-of-work lists. Rather, such lists, of necessity, institutionalized a referral system which necessarily favored the Respondent's members, also preferred as to emergency referrals.¹⁹ As only the group A members' addresses had been systematically recorded by the Respondent, all of the approximately 12 referrals made by the Respondent during the 6 months before the hearing in response to

¹⁸ 253 NLRB at 757.

¹⁹ See *Ironworkers Local 373 (Building Contractors)*, 235 NLRB 232, 239 (1978).

emergency requests were given to members of that group.²⁰

Although the Respondent would justify its requirement that only "B" applicants reregister each day to maintain referral eligibility as necessary to enable the Union to keep an accurate current list of travelers and nonmembers, many of whom are transient strangers to the area who may not be available for work on the following day, this argument lacks validity as the work rules require that applicants from either group be present at the hall in order to be referred. Accordingly, to gain employment, all applicants must physically demonstrate their availability for referral by being in the hall when their names are called. Accordingly, eligibility is not wholly an exercise in recordkeeping. Currentness is self-sustaining—those who are not there are not supposed to be referred. Article VII(D) of the working rules-bylaws, which sets forth this referral prerequisite, also provides that "all applicants for work must sign and date the appropriate out-of-work list. . . and will retain their place on the list until . . . dispatched to a job." As the foregoing provision specifically preserves the "B" applicant's place on the list pending referral, as with "A" applicants, the requirement that group B applicants also sign the out-of-work list each day is inconsistent and places an additional burden neither shared by group A applicants nor required by administrative concerns.

The Respondent has made much of formal qualifications, including the work experience and area residency which, it asserts, distinguish the "A" group. Yet, under the Respondent's referral system procedures, no effort was made to learn the job qualifications of "B" applicants, how their work experience or even how their residency in the Respondent's area compared with those of the favored "A" members.

Moreover, during the two principal periods when access to and use of the "B" book was formally suspended, from April 1, 1981, through February 18, and from September 1 through to the time of the hearing,²¹ the Respondent asserts that it continued to refer nonmembers and travelers, particularly during the first suspension period when work was readily available. However, as noted the group B book was not used during other intervals as well. The Respondent's failure to regularly utilize a systematized, unbiased out-of-work list in making referrals, the arbitrary suspensions and restorations of the "B" book in breach of the hiring hall rules, while referrals

²⁰ Although, according to Anderson, the Union has sent travelers on emergency referrals in the past, this generally occurred when they already were in the hall and the Union could not readily obtain anyone else.

²¹ As noted, the Respondent explained that the "B" book was suspended during the earlier interval because registration was unnecessary as so much work was available. The "B" book was suspended during the later period for completely opposite reasons—there was so little employment available that the book was not put out in order to avoid misleading "B" applicants as to their prospects. In each instance, decisions to suspend or restore the "B" book were made internally by the Respondent's officials, contrary to the Union's work referral rules which provide for the continued use of these out-of-work books, and without recourse to the procedures necessary to change the rules in that respect. The rule-changing process includes the noticing and conduct of special membership meeting at which a two-thirds vote of the members is required.

were being made,²² and its failure to ascertain the qualifications and local residency of group B applicants before automatically deferring their work opportunities to the group A membership revealed an absence of "any objective criteria or standards for the referral of employees' and an attendant arrogation of 'unbridled discretion' by those to whom the system is entrusted." This alone establishes a violation of Section 8(b)(1)(A) and (2).²³

The impact of these flaws in the Respondent's referral system operation are reflected in the statistical evidence discussed above, which indicates the very disparate treatment afforded nonmembers and travelers in comparison to members. While the Respondent has established that travelers and a lesser number of nonmembers have been referred for work, the issue is not whether travelers and nonmembers were referred at all or even, whether they, occasionally, were sent out in large numbers. Rather, the question is whether the Respondent so operated its work referral hall as to discriminate against those who did not hold membership.

In the present matter, the Respondent resisted producing certain hiring hall records subpoenaed by the General Counsel, with respect to the group B book. Production of the subpoenaed documents before me was opposed essentially on grounds that the General Counsel was on an improper "fishing expedition" in seeking to obtain the identities of other possible group B discriminatees besides the Charging Party, James L. Brewer,²⁴ and that it would not otherwise be appropriate to expand this proceeding to encompass other as yet unidentified possible discriminatees. However, as the uncontradicted record shows, it was not until after the U.S. district court subsequently ordered compliance with the subpoena, and the institution of contempt proceedings because of continued noncompliance, that the Respondent, for the first time, conceded that no group B records had been maintained from October 1, 1981, through February 19, 1982, again, since September 30, 1982, to the time of the hearing,²⁵ and at other times described above. The

²² The unilateral suspensions of the "B" book without recourse to the established procedure for changing the hiring hall operation as embodied in the Respondent's working rules-bylaws, described above, were not the only departure from the referral system rules revealed in the record. The Respondent also failed to enforce the employment requirement of its grouping classifications with the result that members who had achieved group A status but who thereafter failed to maintain the requisite standards of employment and residency, nonetheless, lost neither membership nor group A status with the Respondent. This further illustrated the synonymous nature of membership in group A and in the Respondent.

²³ *Painters Local 1178 (Roland Painting)*, 265 NLRB 1341 (1982). While the Union's failure to keep written records concerning the operation of its exclusive hiring hall throughout the relevant period does not per se violate Sec. 8(b)(1)(A) and (2) of the Act, those provisions are contravened by the Respondent's operation of its exclusive hiring hall without any objective criteria or standards for the referral of employees. The Respondent's failure to maintain written records for group B referrals during substantial periods was the one of several noted factors evaluated in determining whether objective standards had been used. See *Laborers Local 394 (Building Contractors Assn.)*, 247 NLRB 97 fn. 2 (1980).

²⁴ Only Brewer was specifically alleged by name as a discriminatee in the complaint.

²⁵ Accepting the Respondent's representations as to the extent of its recordkeeping, the General Counsel agreed to discontinue the subpoena enforcement contempt proceeding before the U.S. district court.

Respondent's failure to maintain and produce such records for the periods shown and the obstacles it interposed before making known the gaps in its hiring hall recordkeeping, warrants a finding that its failure to uniformly maintain such records as required by its hiring hall rules, was deliberate, and an inference that had such records been kept during the missing periods and produced, they would not have aided the Respondent's cause.²⁶

The Respondent's contention that, if its hiring hall operation did result in referral preferences for group A members over group B nonmembers and travelers, this was justified as its members were more qualified to meet their work responsibilities because of their training and experience, is without merit. No evidence was adduced to show how many of the Respondent's members had completed training programs, and, as found above, the Respondent neither ascertained the work experience of "B" applicants nor enforced the defined employment standards for group A.²⁷ Therefore, I find that no legitimate justification has been presented for the Respondent's otherwise unlawful conduct in providing referral preferences for its members.

Finally, contrary to the Respondent, I find that the Respondent should be required to make whole all nonmember and traveler applicants for referral, rather than limiting the make-whole order merely to those individuals who have filed charges or who could be identified as discriminatees in the complaint or at the hearing.²⁸

In summary, I find that the Respondent has operated its exclusive hiring hall so as to regularly afford referral preferences to its members over nonmembers and traveler applicants on the basis of membership, that it has operated its referral system without objective criteria and consistency and in disregard of written procedures in-

tended to govern its operation. Accordingly, I find that in the operation of its hiring hall, the Respondent has caused employers to discriminate in hiring against nonmembers and travelers in favor of members, thereby violating Section 8(b)(1)(a) and (2) of the Act.²⁹

B. *The Failure to Publish Hiring Hall Rules—Facts and Conclusions*

James L. Brewer, the Charging Party, testified that on about December 5, 1981, he went to the Respondent's hall and requested a copy of the constitution and bylaws, having been informed that the Union's hiring hall rules were therein contained.³⁰ Brewer was told that there were no copies.³¹ As a result, Brewer did not see the Respondent's published work rules until 2 days before the hearing.

Assistant business agent Anderson described the Respondent's policy and practice concerning distribution of its referral system rules. Although the referral rules had been posted in the past, this no longer was true and, presently, the rules are embodied only in booklets containing its working rules-bylaws, which are given, upon request, to signatory contractors, to members, or to travelers. No nonmember has ever received the rules because, according to Anderson, none had ever asked for them. Anderson explained that he would have been glad to discuss the rules with any nonmember who requested same, but with more than 4000 members and contractors, the printing costs of also accommodating nonmembers would be too great. Accordingly, the Respondent has not furnished copies of its referral system rules to nonmember applicants at its hall.

From Anderson's testimony, in distributing its work referral rules the Respondent distinguishes between members and nonmembers. Although Anderson described a willingness to furnish copies of these rules to travelers if asked, the travelers who testified on this matter, Brewer and Everson, had been unsuccessful in obtaining copies. The Respondent's restrictive policy tends to corroborate their testimony that travelers, too, may not receive copies.

The Board has held that a union's duty to represent work applicants fairly in the exclusive operation of its hiring hall includes an obligation to keep them "informed about matters critical to their employment status,"³²

²⁶ *Boilermakers Local 154 (Western Pennsylvania Contractors)*, supra, 253 NLRB at 757. Also see *Stage Employees IATSE Local 592 (Saratoga Performing Arts Center)*, 266 NLRB 703 fn. 2 (1983).

²⁷ *Ironworkers Local 480 (Building Contractors Assn.)*, 235 NLRB 1511, 1513 (1978).

²⁸ See *Boilermakers Local 154 (Western Pennsylvania Contractors Assn.)*, supra, 253 NLRB at 748 fn. 4, which distinguished Longshoreman Local 851 (West Gulf Maritime Assn.), 194 NLRB 1027 (1972), cited by the Respondent. In *West Gulf Maritime Assn.*, supra, the Board, in denying backpay for "all other applicants for employment" in addition to the named discriminatees, specifically noted that although the Union had discriminated against nonmembers "through its classification system for referrals," there was no evidence that persons other than the discriminatees had attempted to use the referral system. In *Western Pennsylvania Contractors Assn.*, supra, the General Counsel established that nonmember applicants as a class were discriminatorily refused referral. Here, the General Counsel established that both nonmembers and travelers were similarly deprived and that Thomas and Everson and other above-named individuals who had applied at the hall were among the travelers discriminatorily treated. There is no foundation for the Respondent's argument that the General Counsel was estopped from using the testimony of Everson and Thomas as both previously had withdrawn unfair labor practice charges filed against this Respondent pursuant to settlements of their claims. The General Counsel refrained from questioning both witnesses about events leading to or concerning their earlier unfair labor practice charges and limited examination to their efforts at obtaining referrals from the Respondent's hall in the time following withdrawal of their charges. Also see *Ironworkers Local 373 (Building Contractors Assn.)*, 232 NLRB 504, 506 (1977), and 235 NLRB 232, 233-234 (1978), where the Board ordered a remedy not only for identified discriminatees, but also for other nonmember applicants similarly situated who had not been specifically named in the complaint.

²⁹ *Boilermakers Local 154 (Western Pennsylvania Contractors Assn.)*, supra, 253 NLRB at 760 fn. 20. As in the foregoing case, at 747-748, 764, it is appropriate to leave to the compliance stage of this proceeding determinations as to the identities of similarly situated nonmember and traveler applicants, their abilities and qualifications for referral on particular dates, and what their backpay entitlements, if any, may be. Also see *Ironworkers Local 433 (AGC of California)*, 228 NLRB 1420, 1440-41 (1977), enf'd. 600 F.2d 770, 779 (9th Cir. 1979).

³⁰ The Respondent's working rules-bylaws, which contains the rules governing the Respondent's referral system, internally refers to itself as a constitution. As noted, the referral system rules are set forth in this document as opposed to the Respondent's various collective-bargaining agreements.

³¹ As noted, Brewer, as a member of the sister local, sought work from the Respondent's hall as a traveler. Traveler Frederick Everson also described his inability to obtain copies of the Respondent's hiring hall rules.

³² *Operating Engineers Local 406 (Ford, Bacon & Davis Construction Corp.)*, 262 NLRB 50 fn. 6 (1982).

whether the referral procedure is specified by contract or, as here, is self-imposed.³³ In *Bacon & Davis Construction Corp.*, supra, the Board held that a union's failure to give timely notice of any significant change in its referral procedures to those who use its exclusive hiring hall is arbitrary, breaches its above duty of fair representation, and is in violation of Section 8(b)(1)(A) of the Act. Accordingly, inherent among the duties assumed by the Respondent to those who use its exclusive hiring hall is the obligation to provide, or make public for ready examination, copies of its referral system rules without regard to the union membership of those who seek access to same. The Respondent's admitted failure to do so with respect to nonmembers and, apparently, travelers, is violative of Section 8(b)(1)(A) of the Act.³⁴

*C. Alleged Discrimination Against James L. Brewer—
Facts and Conclusions*

James L. Brewer³⁵ testified that since 1973, while living with his father within the Respondent's jurisdiction, he has sought work through the Respondent's hall intermittently and has received various referrals. One of the Union's officials who had given him referrals in the past, Herschel Meares, the Respondent's financial secretary, also had been his high school science teacher and athletic coach.

On September 9, 1980, the Respondent, through Meares, filed an internal disciplinary charge against James Brewer for "working out of jurisdiction while travel card is in Local 198." On July 16, 1981, Brewer, after an appeal, paid a \$250 union-imposed fine.

Thereafter, James Brewer obtained a referral from Boilermakers Local 582, in Baton Rouge, for a pipefitting job with H. Wiese, at Borden Chemical. Brewer related that on August 25, 1981, as he walked toward the gate to report to work on what was to have been his first day on that job, two of the Respondent's assistant business agents, Louis LeBlanc and Gene Pourciau, approached and asked where Brewer was going. When Brewer replied that he was going to work, the Respondent's representatives asked him not to man this job because the Respondent did not have the contract. In asking him to leave, they reminded Brewer that he already had paid one fine and that he was going to pay out of his pocket again if he went to work at this location. Brewer, accordingly, did not go to work that day but returned on the following day, August 26.

LeBlanc and Pourciau, however, were at the jobsite on August 26 when Brewer arrived. As Brewer walked through the gate, LeBlanc told him, "We see you going

there, you'd better get rid of the powder in your pocket book." Brewer went in to work without replying.

Brewer remained at the Borden Chemical jobsite until the end of November 1981, when his work there was completed.

Brewer related that during the first 2 days of December 1981 he went to the Respondent's hall with his father, E. L. Brewer, to seek a work referral. In so doing, he went to the office of assistant business agent Anderson. Also present were LeBlanc and Pourciau. Anderson asked Brewer to be seated and declared that charges were being filed against him for having worked at Borden Chemical. Anderson wanted to know what Brewer had been doing there and how he had been referred to the job. Brewer answered that he had been told that it was an "U.A."-approved job³⁶ and that he had received the referral from Boilermakers Local 582. Anderson told Brewer that the Borden Chemical job had not been U.A.-approved, that the Respondent was not manning it, and that Brewer had not seen any of the Respondent's men there. Brewer replied that he had seen men at the Borden Chemical facility whom he also had seen at the Respondent's hall.

Anderson announced that Brewer was going to be fined \$250 and asked if he was going to pay the fine. Brewer declared that he was not going to pay the fine; he had been told that the job was U.A.-approved and would appeal the fine. Anderson then stated that he was not going to give Brewer a referral until he paid his fine, unless J. C. Hicks³⁷ told him to do so.

According to James Brewer, toward the end of this conversation, his father joined the group in Anderson's office in time to hear Anderson say that he was not going to send James Brewer out until he paid his fine.³⁸

James Brewer testified that he next returned to the Respondent's hall on about February 15, having again been brought there by his father. He had learned that some work referrals would be made to travelers and hoped to receive one. On that day, he signed the group B out-of-work list.

When the union officials emerged from the auditorium after making the group A referrals, they went to their offices. About 10 minutes later, Anderson called James Brewer into his office, where Brewer again also found Pourciau and LeBlanc. Anderson asked if Brewer was going to pay the union fine assessed against him. James Brewer reiterated that he had been told that the job in dispute had been U.A.-approved, that his fine was under appeal, and that he was not going to pay until he heard from Washington on the appeal. Anderson again declared that he was not going to send Brewer out to work unless he paid his fine. Brewer informed Anderson that

³³ Ibid.

³⁴ Contrary to the Respondent's argument that the printing costs would be prohibitive were it compelled to prepare sufficient copies of its working rules bylaws to accommodate all group B applicants who request the referral rules contained therein, there are alternative, less expensive ways of separately reproducing the referral rules without that more comprehensive booklet.

³⁵ Brewer, a member of Plumbers and Steamfitters Local 654, a sister local to the Respondent based in Abilene, Texas, obtained his card as a journeyman pipefitter from that local through a family connection with its business agent without completing an apprenticeship training program. His father, Elber L. Brewer, has been a member of the Respondent for about 7 or 8 years.

³⁶ "U.A." is an abbreviated reference to the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, the Respondent's parent union.

³⁷ Hicks is the Respondent's business manager and senior official.

³⁸ E. L. Brewer only partially corroborated his son concerning what he had heard in Anderson's office during that interview. E. L. Brewer recalled only that in response to his inquiry as to whether Anderson would refer his son to work, Anderson had replied that he would not do so unless Hicks told him to. His testimony concerning that meeting did not relate to a fine.

Bob McLaughlin³⁹ had not seen that it mattered whether he paid his fines as long as the fines were under appeal. McLaughlin, according to Brewer, had not found any reason why Brewer could not get a work referral. LeBlanc interjected that this was a lie and not what McLaughlin had said. Anderson agreed, stating that McLaughlin, rather, had stated something like if Brewer paid his fine he probably would get a work referral. LeBlanc rejoined that that was exactly what McLaughlin had said.

Brewer repeated that he was not going to pay his fine until he heard from the U.A. Anderson responded that he was not going to give Brewer a work referral unless J.C. Hicks told him to.

Brewer then left Anderson's office, located his father elsewhere in the hall, and described what had occurred. Brewer then accompanied his father to Business Manager Hicks' office, where they met with Hicks.

James Brewer testified that E. L. Brewer had asked if Hicks was going to give his son a work referral. Hicks asked if James Brewer had paid his fines. E. L. Brewer replied that the fines were under appeal. Hicks said that he would have to check and left the office, returning with the record of the first fine. When told that that fine already had been paid, Hicks located the record of the second fine, for James Brewer's work at Borden Chemical. In the discussion that followed, James Brewer told Hicks that Anderson, LeBlanc, and Pourciau had said that he had lied about what Bob McLaughlin had told him. Hicks replied that he did not have any control over his business agents who considered James Brewer to be an habitual offender as far as travelers went. He also did not have any control over who received work referrals.⁴⁰ However, Hicks stated that, if Brewer paid his fine, he would give him a work referral if there were any work orders left. Hicks then asked LeBlanc to check whether there were any remaining work referrals. However, it was Anderson who returned and announced that there were none.⁴¹

James Brewer, again corroborated by his father, denied that he had rejected any referrals from the Respondent from December 1981 to the time of the hearing.⁴²

Hicks recalled that the Brewers visited his office on March 5 rather than mid-February. On that day, E. L. Brewer told Hicks that he had had some trouble having his son dispatched by some of the other business agents. Hicks opined that perhaps it was because of a fine that he owed. However, Hicks continued, the fine was irrelevant and there was no choice but that the Union had to refer James Brewer to work. Hicks told E. L. Brewer, in effect, that he was the boss and would send James Brewer out. The father rejoined that he knew that Hicks was boss and could send James Brewer out if he wanted

to. Brewer Sr. told Hicks that the fine had been paid. Hicks checked and found that, although one fine had been paid, another was still pending against his son at the time.

Hicks testified that during that conversation he offered James Brewer a pipefitting job on a construction site with Toomer Electric, contractor on a project at C.F. Industries, which Brewer turned down. Hicks explained that a construction job, such as had been offered Brewer on March 5, was particularly desirable as it paid \$2.25 per hour more than maintenance jobs also covered by the Respondent's referral system. When he offered James Brewer the Toomer Electric job, he showed him the Respondent's dispatch record which indicated that the position had a duration estimate of 3 to 4 weeks, which was considered very good.⁴³

Hicks also recalled that, earlier, on January 5, James Brewer also had declined a referral offer by the Respondent to a job with H.E. Wiese at the Dow Chemical Company premises.⁴⁴

Hicks' account of his March 5 meeting with the Brewers⁴⁵ was essentially confirmed by Albert LaCasse, Jr.⁴⁶ LaCasse related that in early March he had visited the Respondent's hall to talk to Hicks and McLaughlin, fund trustees, about the agenda for an upcoming meeting. As he entered Hicks' office, he recognized E. L. Brewer⁴⁷ and James Brewer in the office with Hicks and heard Hicks tell the younger Brewer that he was sorry about the way he had been talked to. Hicks declared that he was boss, was the business manager, and was the one who is going to send Brewer out. Hicks then offered James Brewer a maintenance job⁴⁸ with C.F. Industries, telling Brewer that although the job was in the vicinity of Donaldsonville, Louisiana, there was nothing closer and nothing better. James Brewer objected to the job as it was located down river. He declared that he would not take the job and would wait for something else, something better to come up.

⁴³ The Respondent's dispatch record is a sheet posted on the bulletin board indicating all work orders received from prospective employers for that day, and showing the number of vacancies for each job classification at the various locations and the approximate periods the jobs should last. Each vacancy on the dispatch record was represented by a color-coded dot, the color indicating whether the job was in maintenance or construction. The dispatch record also was projected on a screen in the Respondent's auditorium every morning while the group A members were being referred so that they might see for themselves what work was available.

⁴⁴ This job offer was noted in a letter, dated April 22, from Hicks to the Respondent's attorney after Hicks had been advised by counsel to start documenting jobs offered to certain individuals. Use of the group B book was restored at that time, also pursuant to the advice of counsel.

⁴⁵ The March 5 date appears to be correct as James Brewer last signed the group B list that day, establishing that he had visited the hall. Also, everyone who signed the "B" book on March 5 was referred, except him.

⁴⁶ LaCasse, the administrative manager for the Plumbers and Steamfitters Local 198 Health and Welfare, Pension and Education Trust funds is employed by the joint labor-management board of trustees of those funds, a position he has held since November 1981. Before assuming this position, he had been a member of the Respondent, working through its hall as a pipefitter.

⁴⁷ LaCasse had worked with Brewer, Sr., several times in the past.

⁴⁸ In describing the proffered job as being in maintenance, rather than construction, LaCasse contradicted Hicks. However, as LaCasse's involvement was casual and his presence coincidental, the difference is understandable.

³⁹ McLaughlin was another assistant business agent.

⁴⁰ Hicks testified that he is rarely involved in the operation of his union's referral system.

⁴¹ E. L. Brewer corroborated his son's account of the mid-February meeting with Hicks.

⁴² Anderson, who testified that he did not know that Brewer had been a long-term resident at the Baton Rouge area, did not deny Brewer's account of their December conversation.

The Respondent, in denying complaint allegations that Hicks had informed James Brewer that he would not be referred for work until he had paid the fine outstanding against him and that Brewer had been denied referrals for that reason, also indicates that both Brewer's father, a member of the Respondent, and his older brother, Larry, had received referrals through the hall.⁴⁹

In resolving this conflict, I found that James Brewer was a singularly evasive and inconsistent witness, repeatedly impeached on cross-examination. Brewer initially was vague as to how he had obtained his membership book in Local 654, "fudged" his qualifications and, in his pretrial affidavit, described himself as a pipefitter-welder, although, in fact, he was only a pipefitter. To have been referred as a welder, Brewer would have been required to pass a test he previously had failed. Also, after consulting his pretrial affidavit, Brewer conceded that, contrary to his earlier testimony, Hicks had not stated during their interview that he would refer Brewer out only if he paid his fine and that his testimony to that effect had been based on an assumption made by him and not on what actually had been said. Although, as found above, the Respondent has seriously violated the Act in operating its referral system as to grant preferential treatment to members over nonmembers and travelers, I find Anderson and Hicks to be more straightforward as witnesses than was James Brewer. The problems with Hicks and Anderson related more to their overt discrimination than to any lack of candor. They openly ran a hiring hall designed to favor members, took care of their own, and were proud of it. They were direct. In this regard, Anderson testified quite openly as to how members were preferred each day over nonmembers and travelers by the separate referral procedures. Hicks, too, appeared forthright and was corroborated as to the events of March 5 by a comparatively disinterested witness, La-Casse, by the fact that Brewer had signed the "B" book that day and was the only one not referred. This shows an availability of work and certain chronological accuracy. In comparison, the credibility of James Brewer, who, as the Charging Party used fluctuating testimony to invoke the Board's processes, suffered. It would not be appropriate in evaluating the facts of this matter to hold the Respondent's officials to a higher credibility standard than their accuser.⁵⁰

As noted in *Carpenters Local 1437 (AGC of California)*:⁵¹

⁴⁹ Larry B. Brewer, although a traveler from the same local as James Brewer, had been referred to the Stone and Webster nuclear powerhouse project where he had been continuously employed since April 1982. Accordingly, the Respondent argues that its good relationship with James Brewer's close relatives, including his father, tends to make less likely the General Counsel's contention that it was discriminating against Brewer.

⁵⁰ While valid questions remain concerning the weight to be afforded Hicks' January 5 letter to the Respondent's counsel concerning the job offer made to Brewer, an internal document which could have been easily prepared in honor of this proceeding, and the fact that the number of vacancies indicated on the Respondent's March 5 dispatch record for C.F. Industries did not correspond to Hicks' testimony, from the overall record, I find the credibility factors adopted above to be controlling.

⁵¹ 210 NLRB 359, 367 (1974).

Section 8(b)(1)(A) and (2) makes it an unfair labor practice for a union, operating an exclusive hiring hall . . . to refuse to refer an employee to employment because membership has been denied to him, or his membership terminated for reason "other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership,"²⁴ it follows that union fines and other penalties 'not being periodic dues' may not be enforced by the union through a threat of loss of employment.²⁵

²⁴ See *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17, 31-33, 41-42.

²⁵ *N.L.R.B. v. Spector Freight System*, 273 F.2d 272, 276 (C.A. 8, 1960), cert denied . . . 362 U.S. 962; *Eclipse Lumber Co., Inc.*, 199 F.2d 684, 485 (C.A. 9, 1960) (payment of a fine "in no event" may be made a condition of employment.) See *N.L.R.B. v. Fisherman & Allied Workers Union, Local 33*, 448 F.2d 255, 257 (C.A. 9, 1971) (union may not condition employment upon payment of "reinstatement fee").

Anderson, unlike Hicks, did not deny James Brewer's testimony that on two occasions he refused to refer Brewer, although requested, because Brewer had not paid the outstanding fine then pending against him.⁵² Accordingly, Brewer's uncontradicted statement to this effect is accepted. However, consistent with the above credibility resolutions, I find that the Respondent did offer to refer Brewer for work with H. Wiese at Dow Chemical on January 5, 1982, and, again on March 5, offered to dispatch Brewer to Toomer Electric for a job at C.F. Industries.

Accordingly, it is concluded from the credited evidence that the Respondent violated Section 8(b)(1)(A) and (2) by refusing to refer James Brewer for employment from December 2, 1981, through January 5, 1982, when he declined the H. Wiese-Dow Chemical referral. Any entitlement Brewer may have to be made whole for this period of unlawful discrimination and any further remedy arising in his favor from the generally illegal operation of the Respondent's hall in preferentially referring members over nonmembers and travelers also should be left to compliance.⁵³

Consistent with the above findings, it is further concluded that the Respondent did not violate Section 8(b)(1)(A) of the Act, as alleged in the complaint, by orally informing James Brewer, through Hicks, that he was being denied referral to available employment because he had not paid his previously imposed fines. The Respondent did violate that section of the Act when Anderson orally informed Brewer during two successive visits to the hall that he would not be referred for work because of an unpaid fine. In this way, the Respondent twice violated Section 8(b)(1)(A) of the Act.⁵⁴

⁵² James Brewer ultimately paid the \$250 fine relating to his work at Borden Chemical on April 30, 1982, after his appeal was unsuccessful.

⁵³ *Townsend & Bottum, Inc.*, 259 NLRB 207, 208 fn. 5 (1981).

⁵⁴ The General Counsel argues in his brief that the Respondent violated Sec. 8(b)(1)(A) and (2) of the Act by refusing to refer Brewer not only because of failure to pay an internal union fine, but also because he had evaded the Respondent's hiring hall to perform nonunion work.

Continued

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set out in section III, above, occurring in connection with the operations described in section II, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. The Respondent, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO-CLC, Local No. 198, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

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

3. The Respondent, either separately or as a subscriber to various collective-bargaining agreements executed by its parent, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO-CLC, with other unions, has been party to various collective-bargaining agreements with employer associations and/or individual employers, including Jacobs/Wiese, which recognize the Respondent as the sole and exclusive source of referral of employees for employment.

4. The Respondent, in the operation of its exclusive referral system, has violated Section 8(b)(1)(A) of the Act by:

(a) Twice orally informing James L. Brewer that he would not be referred for employment because he had not paid an internal union fine levied against him.

(b) Failing to furnish printed copies of the rules governing its referral system, upon request, to work applicants whose employment prospects were affected by operation of its exclusive hiring hall.

5. The Respondent, in the operation of its exclusive referral system, has violated Section 8(b)(1)(A) and (2) of the Act by:

(a) Discriminating against Brewer, and other applicants seeking referral for employment because of lack of membership in the Respondent or because of other arbitrary or invidious reasons, causing contracting employers to discriminate against employees in violation of Section 8(a)(3) of the Act.

(b) Discriminatorily refusing to refer Brewer for employment because he had not paid an internal union fine levied against him.

(c) Failing to use objective, consistent standards in referring applicants for employment.

6. The aforesaid unfair labor practices are unfair labor practices 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 within the meaning of Section 8(b)(1)(A) and (2) of the Act, it is recommended that the Respondent be required to cease and desist therefrom and to take certain actions designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully refused to refer James L. Brewer for employment, specifically between December 2, 1981, and January 5, 1982, and as the Respondent has further violated the Act with respect to Brewer, Frederick J. Everson, Wilbur Thomas, and other nonmember or traveler applicants for employment because they were not members of the Respondent, the Respondent should be required to cease and desist from discriminating against them, as well as all nonmember or traveler applicants similarly situated.

Here, as in *Western Pennsylvania Contractors*,⁵⁵ it would be inappropriate to use the formula in the *Ironworkers* cases⁵⁶ where the average earnings which any discriminatee would have realized absent the discrimination against him was computed by dividing the overall earnings of all applicants (members, nonmembers, and travelers) seeking employment through the respondent's hall by the total number of individuals in their respective job categories who worked out of the hiring hall, taking into account the individual discriminatee's net interim earnings and the inclusion of interest under *Florida Steel Corp.*⁵⁷ In the *Ironworkers* cases, unlike the present matter there was but one job classification involved. For the reasons adopted by Administrative Law Judge Davidson, in his Board-approved decision in *Western Pennsylvania Contractors Assn.*, supra, I would not apply the *Ironworkers* formula and would leave the backpay determinations to the compliance stages of this proceeding.

Accordingly, the Respondent should be ordered to make whole all nonmembers and travelers for any loss of earnings they may have suffered by reason of the Respondent's discrimination against them, less net earnings, with interest to be computed in the manner provided in

However, in *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432 (1983), which postdates the General Counsel's brief, the Board found that a union may lawfully impose penalties against work applicants to prevent the circumvention of a legitimate exclusive hiring hall and as a means of reducing the potential for abuse of same. In *Envirotech Corp.*, supra, the Board, having found that a work applicant's suspension from the hiring hall referral list for 90 days for having sought work directly with an employer had been ordered for legitimate, nondiscriminatory reasons, declined to scrutinize the harshness of the penalty. Accordingly, as the Respondent could have lawfully penalized Brewer for evading its exclusive hiring hall by denying him access thereto, no finding of violation is based on actions taken to safeguard the Respondent's exclusive hiring hall. Therefore, the General Counsel's motion that Brewer be reimbursed for this fine and that record of this discipline be expunged is denied. Consistent with the above findings, Hicks' statement that Brewer was considered an "habitual offender" is not deemed violative of the Act.

⁵⁵ Supra, 232 NLRB at 765.

⁵⁶ *Ironworkers Local 480 (Building Contractors Assn.)*, 235 NLRB 1511 (1978); *Ironworkers Local 373 (Building Contractors Assn.)*, 235 NLRB 232 (1978) and 232 NLRB 504 (1977); *Ironworkers Local 45 (Building Contractors Assn.)*, 235 NLRB 211 (1978) and 232 NLRB 520 (1977).

⁵⁷ 231 NLRB 651 (1977).

*F. W. Woolworth Co.*⁵⁸ and *Florida Steel Corp.*⁵⁹ The Respondent should further be required, in the manner provided by *F. W. Woolworth Co.*, supra, and *Florida Steel Corp.*, supra, to make whole James L. Brewer for any loss of earnings in the period from December 2, 1981, through January 5, 1982, because of its unlawful refusal to refer him for employment.

The Respondent, additionally, should be obliged to keep and retain for a period of 2 years permanent written records of its hiring hall operations and make those records available to the Regional Director on request. The Respondent should be required to submit to the Regional Director four quarterly reports concerning the employment of Brewer and other nonmember and traveler applicants subsequently found to have been similarly situated as provided, infra, in the Order. The Respondent should be required to keep one referral register for all work applicants, whether or not members, and to place such register, for a period of 2 years, conspicuously within its hiring hall for easy access and inspection by all applicants upon completion of each day's entries in such registers. Finally, in addition to a requirement that the Respondent post an appropriate notice, the Respondent should cause such notice to be printed in a newspaper of general circulation within its jurisdiction area.

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

ORDER⁶⁰

The Respondent, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO-CLC, Local No. 198, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Conveying to James L. Brewer that he would not be referred for employment through the Respondent's exclusive hiring hall system because of his failure to pay a union imposed fine levied against him.

(b) Refusing to refer James L. Brewer, or any other employee, for employment through its exclusive hiring hall because of failure to pay a union-imposed fine levied against him.

(c) Causing or attempting to cause any employers bound to use the Respondent's exclusive hiring hall as a source for employees, to discriminate against James L. Brewer or any other employees and/or work applicants, in violation of Section 8(a)(3) of the National Labor Relations Act, because of their lack of membership in the Respondent, or for other arbitrary or invidious reasons.

⁵⁸ 90 NLRB 289 (1950). The backpay entitlement of Everson and Thomas may be affected by the terms of any prior settlement made with the Respondent.

⁵⁹ 231 NLRB 651. Also see, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

⁶⁰ If exceptions are filed as provided in 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.

(d) Failing to use objective, consistent standards in making referrals of nonmembers and travelers for employment through its exclusive hiring hall.

(e) Failing to furnish printed information, upon request, concerning its referral system rules to work applicants at its exclusive hiring hall.

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

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Notify James L. Brewer, in writing, that it has no objection to referring him for employment through its exclusive hiring hall in his rightful order of priority, without regard to any unpaid union fines imposed against him.

(b) Make whole James L. Brewer, with interest, for any loss of earnings suffered because of the discrimination against him from December 2, 1981, through January 5, 1982, in accordance with the above section of this Decision entitled "The Remedy."

(c) Make whole James L. Brewer and all other nonmember and traveler work applicants similarly situated for any loss of earnings they may have suffered by reason of the discrimination practiced against them because of lack of membership with the Respondent, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Keep and retain for a period of 2 years from the date of this Decision permanent written records of its hiring and referral operations which will be adequate to disclose fully the bases on which each referral is made, and, upon the request of the Regional Director for Region 15 or his agents, make available for inspection, at all reasonable times, any records relating in any way to the hiring and referral system.

(e) Submit four quarterly reports to the Regional Director, due 10 days after the close of each calendar quarter, subsequent to the issuance of this Decision concerning the employment of the above-named employees and other nonmember and traveler applicants subsequently found to have been similarly situated. Such reports shall include the date and number of job applicants made to the Respondent, the date and actual number of actual job referrals by the Respondent, and the length of such employment during such quarter period.

(f) Place the referral register, for a period of 2 years, on a table or ledge in the hiring hall for easy access and inspection by work applicants, as a matter of right, upon the completion of each day's entries in such registers.

(g) Preserve and, upon request, make available to the Board or its agents, for examination and/or copying, all records, reports, work lists, and other documents necessary to analyze the amount of backpay due under the terms of this order.

(h) Post at its office in Baton Rouge, Louisiana, copies of the attached notice marked "Appendix B."⁶¹ Copies

⁶¹ 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."

of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members and work applicants 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.

(i) Cause the attached notice marked "Appendix B" to be printed at its expense in a newspaper of general circulation in Baton Rouge, Louisiana.

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

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.