

Local Union No. 277, International Brotherhood of Painters and Allied Trades (Polis Wallcovering Co.) and Edward W. Pygatt and Jennings V. Love. Case 4-CB-4170

29 June 1984

SUPPLEMENTAL DECISION AND ORDER

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

On 27 July 1982 the National Labor Relations Board issued a Decision and Order in this proceeding¹ in which the Board found that the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended, by maintaining an exclusive hiring hall whereby employment referrals were made without reference to objective considerations and violated Section 8(b)(1)(A) and (2) by refusing to refer applicant Edward W. Pygatt for employment because he engaged in conduct viewed by the Respondent as disloyal.²

On 19 September 1983 the United States Court of Appeals for the Third Circuit on petitions for review and a cross-application for enforcement of the Board's Order granted enforcement in part and remanded the matter in part to the Board for further consideration.³ In its opinion the court enforced that part of the Board's Order concerning the Respondent's hiring hall procedures lacking objective considerations in violation of Section 8(b)(1)(A). The court however set aside those portions of the order pertaining to the refusal to refer Pygatt and directed the Board to determine whether the Respondent had carried its burden of proving there were no requests for employees in Pygatt's job classification from employers who would accept Pygatt if he were referred.⁴

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

In accord with the opinion of the court of appeals which the Board has accepted as the law of the case and after a careful review of the record we find for the following reasons that the Respondent violated Section 8(b)(1)(A) and (2) by refusing to refer Pygatt for employment.

As found by the Board in our previous consideration of the case and by the court of appeals on enforcement the record establishes that the Respondent's refusal to refer Pygatt after June 1980 was motivated by its hostility to Pygatt's criticism of the Respondent. The court of appeals concluded however that under the rule of *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983), the Respondent was entitled to prove as an affirmative defense the claimed unavailability of employers willing to hire Pygatt even if he were referred.⁵

Our review of the record reveals that during the period in which the Respondent declined to refer Pygatt, a paperhanger, for employment it referred paperhangers to numerous contractors. Thus, by specific reference to a list of local area contractors utilizing the Respondent's hiring hall⁶ the General Counsel elicited from the Respondent's business manager James T. Brennan the admission that numerous area contractors identified by Brennan at the hearing received referrals for paperhangers from the Respondent subsequent to June 1980. In the rebuttal to the General Counsel's case-in-chief the Respondent presented Brennan who testified that the Respondent refused to refer Pygatt during this period because of Pygatt's allegedly proven incompetence and therefore, according to Brennan, notwithstanding the availability of positions for paperhangers "there was no place to send him." Brennan's proffered explanation for refusing to refer Pygatt to any of the available positions however was specifically discredited by the administrative law judge who found Brennan's testimony in this regard not worthy of belief. 262 NLRB at 1342.⁷ This is the full extent of the evidence presented by the Respondent in support of its affirmative defense.⁸ In our original decision in this pro-

⁵ As directed by the court of appeals we accept as the law of the case that the rule of *Transportation Management* is applicable herein to alleged violations of Sec. 8(b)(1)(A) and (2).

⁶ G.C. Exh. 22.

⁷ Although Brennan testified generally that no area contractors would employ Pygatt he was able to identify only a few such contractors specifically by name. Two of these contractors indicated to the Respondent by letter that Pygatt was unacceptable. The Respondent however presented no credible evidence concerning referrals to numerous other contractors who had work available for paperhangers and had received referrals for paperhangers from the Respondent's hiring hall subsequent to June 1980.

⁸ The Respondent requests that the Board conduct a new hearing to give the Respondent an opportunity to submit additional evidence in support of its defense. The General Counsel has opposed this request. In its request the Respondent does not indicate what additional evidence it seeks to present nor does it explain why such evidence was not presented previously. Further, the Respondent makes no contention that it was denied an opportunity at the original hearing to litigate fully all matters pertaining to the refusal to refer Pygatt as alleged in the complaint. Indeed the record demonstrates that the Respondent did in fact submit evidence in support of its defense. Accordingly we deny the Respondent's request for a new hearing.

¹ 262 NLRB 1336.

² The Board dismissed other allegations that the Respondent violated the Act by refusing to refer applicant Jennings V. Love for employment. The Board also dismissed in its entirety the complaint in Case 4-CA-11875 alleging that certain employer-respondents violated Sec. 8(a)(3) and (1) with respect to the employment of Love and Pygatt.

³ 717 F.2d 805.

⁴ The court also denied the petition of employee Love to set aside the Board's Order dismissing the allegations pertaining to his job referrals and denied Love's petition to set aside the Board's refusal to reopen the record.

ceeding we affirmed the judge's findings in this and all other pertinent respects and we find no basis to now alter those findings. Accordingly, inasmuch as the Respondent presented no credible or probative evidence demonstrating that referring Pygatt would have been futile because no area contractors with jobs available would have hired him, we find that the Respondent failed to carry its affirmative defense. Because the General Counsel has demonstrated that Pygatt's criticism of the Respondent was a motivating factor in its refusal to refer Pygatt and the Respondent has failed to carry its affirmative defense in response to that showing we shall reaffirm our original decision in this proceeding that the Respondent violated Section 8(b)(1)(A) and (2) by refusing to refer Pygatt for employment and we shall issue an appropriate order.

ORDER

The National Labor Relations Board orders that the Respondent, Local Union No. 277, International Brotherhood of Painters and Allied Trades, Atlantic City, New Jersey, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause discrimination against Edward W. Pygatt by refusing to refer him to work available under its exclusive referral procedure, or by otherwise causing discrimination against him for reasons proscribed by the Act.

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

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

(a) Make whole Edward W. Pygatt for any loss of earnings he may have suffered as a result of the discrimination against him by payment of a sum of money equal to that which he normally would have earned as wages from the date of the discrimination against him until such time as he is referred to employment in a nondiscriminatory manner, with interest to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).⁹

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all hiring hall records, dispatch lists, referral cards, and other documents necessary to analyze

the amount of backpay due under the terms of this Order.

(c) Post at its office and hiring hall in Atlantic City, New Jersey, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 4, 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 or applicants for referral are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

¹⁰ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO 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 cause or attempt to cause employers to discriminate against Edward W. Pygatt or any other applicant for employment for reasons proscribed by the National Labor Relations Act.

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

WE WILL make whole Edward W. Pygatt for any loss of earnings he may have suffered by reason of the discrimination we caused against him, with interest.

LOCAL UNION NO. 277, INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES

⁹ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).