

**Glaziers Local Union 558 (PPG Industries) and  
Kenneth Orr. Case 17-CB-2578**

31 July 1984

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
HUNTER AND DENNIS**

On 31 March 1983 Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(b)(2) and (1)(A) of the Act by initiating a walkout by the Employer's employees 7 January 1982 to cause or attempt to cause the Employer to lay off employees Kenneth Orr and William Gooch Jr. The judge concluded that the Respondent did not violate the Act, and recommended that the complaint be dismissed. We find merit in the General Counsel's exceptions to the judge's decision.

**I. FACTS**

The following statement of facts is based on the judge's findings, supplemented by undisputed testimony, the credited witnesses' additional testimony to which the judge does not explicitly refer, and the Respondent's agents' testimony.

The Employer, PPG Industries, manufactures, sells, and installs glass products, and maintains a construction office in North Kansas City, Missouri. Through Mo-Kan, a multiemployer bargaining association, the Employer entered into a series of collective-bargaining agreements with the Respondent. The most recent agreement was effective from 1 October 1980 through 30 September 1983, and contained a union-security clause which required employees to become union members after 7 days.<sup>1</sup> Although the contract contained no hiring hall provisions, the Employer followed Mo-Kan employers' practice and hired its glaziers from those

<sup>1</sup> Such clauses are common in the construction industry and are authorized by Sec. 8(f)(2) of the Act.

referred by the Respondent.<sup>2</sup> When the Respondent was unable to find glaziers for referral, the Employer, like other Mo-Kan members, resorted to direct hires. The Respondent gave permits to the direct hires, allowing them to work without having to comply with the contract's union-security clause. The Respondent's business agent, Jack Zander, explained that the permit is a document showing that the holder (1) has been to the Union, (2) is to work as a glazier, and (3) is not a union member.

In June 1981<sup>3</sup> the Employer began preliminary work on the North Supply job in Gardner, Kansas. When the regular glass installation work began in August, the Employer's construction manager, William Gooch Sr., requested additional glaziers from Zander. When Zander reported that he was unable to locate additional journeymen glaziers, Gooch hired seven or eight individuals directly, including Charging Parties Kenneth Orr and William Gooch Jr.<sup>4</sup> The Employer referred the individuals to the Respondent for their permits.

At different times during October, Zander and assistant union business agent Charles Foland asked Gooch to replace the permit employees with glaziers who had become available. Foland once explicitly directed Gooch to "get rid of" the permit employees. Gooch refused each time, explaining that the Employer was satisfied with its present employees, and could not legally bump the permit employees to give jobs to the union glaziers. Zander complained that the Employer's retention of the permit employees was "not fair to the apprentices and the way the apprenticeship program [had] been run in the past."

At some point between late October and early January 1982, Zander spoke briefly at the jobsite with James Davis, an employee and union member. Davis expressed some resentment over the Employer's failure to hire available journeymen and said that he and other employees "didn't want to put up with it and they were going to walk off." Zander explained that such a "walk off" would violate the contract, and "it just couldn't happen."

The permit employees' continued employment was the topic of at least two union meetings, one in October and one in December. At each of the meetings, members expressed concern about the Employer's refusal to continue the traditional priority accorded to journeymen over permit employ-

<sup>2</sup> The Respondent's business agent, Jack Zander, testified that glaziers were not required to use the hiring hall, but could go directly to any employer and seek work.

<sup>3</sup> All dates are in 1981 unless otherwise indicated.

<sup>4</sup> William Gooch Jr. is the son of William Gooch Sr., the Employer's construction manager.

ees. Zander testified that he told the employees that if they did not like the working conditions on that job that the only thing they could legally do was tell the Employer they were quitting and would seek employment elsewhere. Zander stated that the Union would be liable for causing a walk-out, and that he would prefer charges against any member who tried to instigate a walkout. Responding to questions, Zander explained that the bylaws made it possible for members to be fined for working with permit employees, but added that neither he nor the Union's officers would prefer charges for working with permit employees. He also stated, however, that another member could "get a little upset" and prefer charges.

By early January 1982, the Employer's crew consisted of about 14 employees: journeymen, apprentices, "waiting apprentices" (who had not yet been formally enrolled in the apprenticeship program and were working with permits), and Orr and Gooch Jr.

During the 1982 New Year's holiday weekend, Foland again telephoned Gooch to inform him that qualified glaziers were available for approximately 4 to 6 weeks. Gooch reconfirmed his earlier expressed disinterest in the additional help.

The judge generally credited Ernie Kraner, the Employer's project manager, who testified that he spoke with shop steward Paul Serna during the first week of January 1982.<sup>5</sup> According to Kraner, Serna said that the Employer had permit employees on the job while journeymen glaziers were available for work. Serna indicated that the employees, several of whom were standing nearby, did not think the situation was right, and added that he thought it should be altered. Kraner told Serna that the Employer was not going to change employees, and that the men currently on the job were doing good work. Kraner stated that he and Serna had essentially the same conversation 2 days later.

Serna, another witness whom the judge credited, testified that the employees had been "after [him] . . . wanting to know if the situation had been resolved, [and] what we were going to do . . ." At some point during the day on 7 January 1982, Serna telephoned the union hall, but received no answer. Questioned about the results of the call, Serna remarked that no one was there and told the employees that "there was nothing the men—the union could do." But, he also said, "[L]ike they told us at the meeting the other night, we could be subject to a fine if some other member presses charges."

<sup>5</sup> No party filed an exception to the judge's finding that Serna was the Respondent's agent.

Serna also spoke on the telephone that day with Foland about the glaziers who were then available for work. Foland told Serna that they had not found work, and that the Employer had refused Foland's specific request to hire them.

Later that day, Serna spoke with Kraner, who confirmed the Employer's decision not to hire the additional glaziers or terminate the permit employees. Serna indicated that he did not think the employees would work "under those conditions," and stated his intention to finish the day and quit. He asked Kraner to mail him his final check because he did not want to return to pick it up.

By the end of the day, there were indications that Serna was not the only employee who intended to leave the job. Two apprentices left before the end of the shift, and Working Foreman Arthur Jackson told Kraner and General Foreman and union member Jack Griffin that he intended to "quit" or be "sick" if the problem with the permit employees was not rectified. That evening, Griffin called Kraner and asked for vacation time the next day.

Zander testified that Serna and Jackson called him about 5 p.m. on 7 January 1982, saying that they had quit. Several other PPG employees came to Zander the next day also looking for work. Zander testified that he did not ask the employees why they left because he knew the answer based on the previous discussions. Zander testified that he ultimately referred almost all the employees to new jobs.

On Friday, 8 January 1982, only Orr and Gooch Jr. reported for work.<sup>6</sup> Kraner told them to start, and he went to discuss the situation with Gooch Sr. They decided that Kraner should discharge the permit employees and try to recall the former crew.

On Sunday night, 10 January 1982, Kraner called Orr and Gooch Jr. and told them that the Employer was terminating them. Kraner testified that the Employer took the action because "[i]t look like the only way [the Employer would] get people to build the job." Kraner then called General Foreman Griffin and Working Foreman Jackson to see if they would return and told them the permit employees had been terminated; Griffin and Jackson responded that they would ask the other employees to return to work.

Zander testified that the first communication he had with the Employer occurred around 12 January 1982 when Gooch called him. Gooch asked if there was any way to get the glaziers back to

<sup>6</sup> Waiting apprentice Cliff Williams also came to work, but left by 9 a.m.

work. Zander told Gooch that most of the employees had other jobs, but Gooch could call them if he so desired. Zander testified that he played no part in contacting any of the glaziers to urge them to return to work. Zander also testified that he received a call on Tuesday, 12 January 1982, from Griffin.<sup>7</sup> Griffin asked if Zander knew where some of the employees were then working, explaining that they were being called back to work.

Zander testified that he received calls from several of the employees on Tuesday and Wednesday, 12 and 13 January 1982. Zander told them that the matter was being "straightened out," and that, as far as the Respondent was concerned, they could return to work.

Jackson was one of the employees who called the union hall. He testified that he called to see if the Union was monitoring the matter, and that Zander told him "I think we got things straightened out. But what I want you to do is . . . wait on a call from [the Employer] to make sure." Jackson also testified that when he spoke with Zander later that evening, Zander told him things were "squared away" and he could return to work for the Employer. Zander explained that the Employer had fired the permit employees.<sup>8</sup>

## II. THE JUDGE'S DECISION

The judge dismissed the complaint. He found no persuasive evidence that the Respondent had caused the Charging Parties' discharges by prompting the walkout. The judge concluded that the Respondent's statements to employees about quitting were no more than explanations of the employees' rights, and that the statements about the possibility of fines could not under the circumstances be presumed to have a coercive impact and were not shown directly to have influenced the decisions of the employees who left the job. Alternatively, the judge found that, even if the Respondent had caused the walkout, membership considerations were essentially irrelevant, and the Respondent's motive was to cause the Employer to adhere to the legitimate traditional practice of displacing temporary permit employees with journeymen whenever the latter became available for referral. Accordingly, the judge concluded that the Respondent's actions were justified because they were directed toward furthering statutorily legitimate goals and were necessary for the effective performance of the Respondent's representative function.

<sup>7</sup> Zander's testimony is inconsistent about whether he spoke first with Griffin or Gooch. This inconsistency is immaterial.

<sup>8</sup> Zander did not dispute Jackson's version of these conversations. He only denied that he had placed a call to Jackson on the evening of Tuesday, 12 January 1982. We find the dispute on this minor point immaterial.

## III. CONCLUSIONS

Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization, inter alia, to cause or attempt to cause an employer to discriminate against an employee to encourage or discourage membership in any labor organization. Section 8(b)(1)(A) makes it an unfair labor practice to restrain or coerce employees in the exercise of their Section 7 rights. As the Supreme Court stated in *Radio Officers v. NLRB*, 347 U.S. 17, 40 (1954): "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus, [Sections] 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."

The Board presumes that a union acts illegally any time it prevents an employee from being hired or causes an employee to be discharged because by such conduct a union demonstrates its power to affect the employee's livelihood in so dramatic a way as to encourage union membership among employees.<sup>9</sup> A union may, however, rebut this presumption "by evidence of a compelling and overriding character showing that the conduct complained of was referable to other considerations, lawful in themselves, and wholly unrelated to the exercise of protected employee rights or to other matters with which the Act is concerned." *Carpenters Local 1102 (Planet Corp.)*, 144 NLRB 798, 800 (1963).<sup>10</sup>

Accordingly, the first question is whether the Respondent caused or attempted to cause the Charging Parties' discharges. Unlike the judge, we find ample evidence to answer affirmatively.

It is clear that the Respondent informed the Employer in no uncertain terms of its desire to have the permit employees replaced with unemployed journeymen. During the fall, the Respondent's agents, Zander and Foland, repeatedly requested the Employer to "get rid of" or replace the permit employees. Again in January 1982, Foland "informed" the Employer that there were glaziers available for work, implicitly requesting the Employer to hire at least some of them. Shortly before the 7 January walkout, the Respondent's agent, Serna, told the Employer that the employees did not think it was right for permit employees to be

<sup>9</sup> *Operating Engineers Local 18 (Ohio Contractors)*, 204 NLRB 681 (1973), enf. denied on other grounds 496 F.2d 1308 (6th Cir. 1974).

<sup>10</sup> The typical justifications offered to overcome this adverse presumption are that the action was pursuant to a valid union-security clause or was necessary to preserve legitimate hiring hall procedures. See *Ohio Contractors*, supra, and *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432 (1983). Neither of these justifications is asserted in this case.

working while journeymen were unemployed, and that the situation should be changed. On the morning of the walkout, Serna confirmed the Employer's decision not to hire the unemployed journeymen and told Kraner that he did not think the employees would work "under those conditions." The Respondent thus repeatedly sought to have the permit employees replaced with employees it wished to refer.

In a continuing effort to secure compliance with its demands, the Respondent informed the employees it could not lawfully act to secure the dismissal of the permit employees, that the employees themselves would have to act, i.e., quit, if they did not like the "working conditions." The Respondent then encouraged employees to do just that by telling them that they could be fined if another member became "upset" about their working with nonmembers. The Respondent reiterated this threat on the morning of the walkout when Serna, who testified that the employees had been "after . . . [him] . . . wanting to know . . . what we were going to do . . ." reminded employees that they "could be subject to a fine if some other member press[ed] charges." In the face of such threats, it is no small wonder that the employees acceded to the Respondent's desires and "quit" their jobs with the Employer. See *Marble Polishers Local 31 (Standard Art)*, 258 NLRB 1143, 1146 (1981); *Bricklayers Local 6 (Linbeck Construction)*, 185 NLRB 756, 760 (1970), enfd. 447 F.2d 484 (5th Cir. 1971).

Furthermore, the Respondent's conduct after the walkout shows that it ratified the employees' action. Zander testified that on the evening of the walkout, he knew why the employees left. Yet, he made no effort to refer anyone to fill the vacated jobs, even though his past practice was to contact the Employer whenever there were employees to refer, without regard to the existence of vacancies. Here, Zander *knew* there were jobs available, and knew *why* those jobs were available; he nonetheless chose not to alleviate the economic pressure on the Employer caused by the walkout.<sup>11</sup>

Zander's discussions with employees after the Employer had discharged the permit employees confirms the Respondent's continuing role in the pressure brought to bear on the Employer. For example, Zander told Jackson to wait for definite word that the problem was "straightened out" before returning to work, and later explained that things had been "squared away" and that Jackson could return to work. See *Sheet Metal Workers Local 28 (Diesel Construction)*, 196 NLRB 1065,

<sup>11</sup> The record establishes that there were individuals available to refer; the fact that union glaziers were unemployed prompted the events giving rise to this proceeding.

1067-68 (1972); *Glaziers Local 513 (Linclay Corp.)*, 191 NLRB 461, 465 (1971).

In light of the evidence, we find that the Respondent caused the Employer to discharge the permit employees as alleged in the complaint, raising the inference or presumption that the Respondent acted illegally.

Having found causation, we turn to the remaining issue in this case: whether the Respondent established by compelling and overriding evidence that its conduct was based on lawful considerations. Again contrary to the judge, we find the Respondent has not met its burden.

As we noted above, the judge essentially found that the Respondent's actions were justified because they were motivated by a desire to secure the Employer's compliance with the traditional bumping preference accorded to journeymen over permit employees. While it may be true that the Respondent was motivated by such a desire, we disagree with the judge that it constitutes sufficient justification. The practice consists of nothing more than the Respondent's demanding that employers replace nonmember employees with other individuals. There is no evidence of any objective basis supporting the decisions to refer or displace particular employees or of any lawful obligation on the Employer to acquiesce in such a referral. *Bricklayers Local 7 (Masonry Builders)*, 224 NLRB 206 (1976), enfd. 563 F.2d 977 (9th Cir. 1977).<sup>12</sup> Accordingly, we find that the Respondent has not met its burden and has violated the Act as alleged. *Planet Corp.*, supra, 144 NLRB at 800.

#### CONCLUSIONS OF LAW

By causing the Employer to lay off or discharge Kenneth Orr and William Gooch Jr. on 10 January 1982, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(2) and (1)(A) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(b)(2) and (1)(A) of the Act, we shall order it to cease and desist and to take certain af-

<sup>12</sup> The Respondent's bare assertion that it referred "more qualified" individuals is insufficient to support its practice.

We also reject the judge's finding that the practice of displacing permit employees with "qualified" glaziers is authorized by Sec. 8(f)(4) of the Act. That section provides, inter alia, that it will not be unlawful for an employer engaged in the construction industry to enter into a contract with a labor organization which "specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based on length of service with such employer, in the industry or in the particular geographical area." This section is inapplicable because there is nothing in the record to indicate that the Employer had a contract with the Respondent which set such qualifications.

firmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make Kenneth Orr and William Gooch Jr. whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, by paying to them a sum equal to the amount they would normally have earned from the date of their discharges until they are reinstated by the Employer to their former or substantially equivalent positions or until they obtain substantially equivalent employment elsewhere, less net interim earnings.<sup>13</sup> The loss of earnings shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>14</sup>

We shall also order the Respondent to notify the Employer, in writing, with a copy to Kenneth Orr and William Gooch Jr., that it has no objection to their employment and to request the Employer to reemploy them. Further, we shall require the Respondent to remove from its files any references to these employees' unlawful discharges and notify these employees, in writing, that such action has been taken and that the discharges will be not used against them in any way.

#### ORDER

The National Labor Relations Board orders that the Respondent, Glaziers Local Union 558, Gardner, Kansas, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause the Employer to lay off or discharge Kenneth Orr and William Gooch Jr., or any other employee, because they are not members of the Respondent.

(b) 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 necessary to effectuate the policies of the Act.

(a) Make Kenneth Orr and William Gooch Jr. whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Notify PPG Industries in writing, with copies furnished to Kenneth Orr and William Gooch Jr., that it has no objection to their employment and request PPG Industries to reemploy them.

(c) Remove from its files, and ask the Employer to remove from the Employer's files, any reference

to the unlawful discharges and notify the employees in writing that it has done so and that it will not use the discharges against them in any way.

(d) Post at its business office copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, 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 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.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by PPG Industries, Gardner, Kansas, if willing, at all places where notices to employees are customarily posted.

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

<sup>15</sup> 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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT cause or attempt to cause PPG Industries to lay off or discharge Kenneth Orr and William Gooch Jr., or any other employee, because they are not members of the Union.

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.

<sup>13</sup> *Sheet Metal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773, 774 (1981), enfd. in relevant part 716 F.2d 1249 (9th Cir. 1983).

<sup>14</sup> See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

WE WILL make Kenneth Orr and William Gooch Jr. whole for any loss of earnings and other benefits resulting from their discharges, less net interim earnings, plus interest.

WE WILL notify PPG Industries in writing, with copies furnished to Kenneth Orr and William Gooch Jr., that we have no objection to their employment and WE WILL request PPG Industries to reemploy them.

WE WILL remove from our files, and ask PPG Industries to remove from its files, any reference to the unlawful discharges and WE WILL notify the employees in writing that we have done so and that the discharges will not be used against them in any way.

## GLAZIERS LOCAL UNION 558

### DECISION

#### STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. This proceeding<sup>1</sup> arose when Kenneth Orr, an individual, filed timely unfair labor practice charges on February 18, 1982, against Glaziers Local 558 (the Union) with the Regional Director for Region 17 of the National Labor Relations Board (the Board). After an investigation, the Regional Director issued a complaint and notice of hearing against the Union on March 30, 1982.

The complaint alleges, in substance, that the Union violated Section 8(b)(2) and, derivatively, Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by causing its members employed by PPG Industries (PPG) to walk off a PPG jobsite in order to force PPG to fire Charging Party Kenneth Orr and another employee, William Gooch Jr., all because Orr and Gooch Jr. were not members of the Union.

The Union duly answered, admitting facts warranting the Board's exercise of jurisdiction over this controversy, and admitting that certain named officials were its agents, but denying that its on-the-job steward, Paul Serna was its agent. The Union further denied that it caused a walkoff on the PPG job or that it engaged in any of the substantive wrongdoing alleged in the complaint.

I heard the matter in trial at Kansas City, Kansas, on December 14 and 15, 1982. I have considered the timely posttrial briefs filed by the General Counsel and Counsel for the Union.

<sup>1</sup> Initially, the above-captioned case was consolidated for trial with an additional case (Case 17-CB-2668). At the outset of trial proceedings, however, I granted the General Counsel's motion to sever that latter case and to remand it to the Regional Director for purposes of approving the request by the Charging Party therein to withdraw the underlying charge.

### THE ISSUES

The central issues under Section 8(b)(2) of the Act<sup>2</sup> are:

1. Did the Union cause, or is it otherwise responsible for, a walkout of employees beginning on January 7, 1981, which, in turn, caused PPG to terminate the employment of Orr and Gooch Jr.?

2. If so, was its motive in doing so unlawfully discriminatory?

On the entire record, I make these

### FINDINGS OF FACT

#### A. Background and Overview

PPG, a Pennsylvania corporation, manufactures, sells, and installs glass products and maintains, inter alia, a "shop" warehouse and a construction office headquarters in North Kansas City, Missouri.<sup>3</sup> PPG was involved from roughly June 1981 to March 1982<sup>4</sup> in the installation of window glass for an office building at Gardner, Kansas, called the "North Supply job." It was in connection with this project that the complained-of events took place.

Central to this case is the reaction of the Union and its jobsite members to PPG's refusal on the North Supply job to adhere to a traditional industry practice of allowing available journeymen to "bump" employees known as "permit men," who are hired directly by employers during periods when the Union is unable to locate and refer journeymen. Pertinent details of the labor relationship and traditional hiring practices between PPG and the Union are set forth below.

In its role as a Kansas and Missouri-area construction industry employer, PPG was party to a collective-bargaining relationship with construction trade unions, including the Union, through the medium of a multiemployer bargaining association known as "Mo-Kan." PPG and the Union have been parties to a series of Mo-Kan labor agreements, including one which was in effect during material periods and which was applicable to the North Supply job. That agreement, by its terms, seems to recognize only two classes of glaziers "journeymen" and "apprentices."<sup>5</sup> It also contains a conventional

<sup>2</sup> Sec. 8(b)(2) of the Act provides in pertinent part that a union commits an unfair labor practice when it acts "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [i.e., generally, to encourage or discourage union membership]."

<sup>3</sup> PPG annually purchases goods and receives services valued in excess of \$50,000 directly from outside Missouri and also sells goods and furnishes services valued in excess of \$50,000 directly to customers outside Missouri.

<sup>4</sup> The main events of this case occurred in that period and it will therefore be evident below from the month reference which calendar year is involved.

<sup>5</sup> The copy of the agreement received into evidence usually makes general reference only to "glaziers," and only occasionally employs the terms "journeymen" or "apprentices." The latter are employed pursuant to a formal industry apprenticeship training program which is the subject of a separate agreement which is incorporated by reference in the Mo-Kan agreement, but whose terms are not a matter of record. There is only one wage rate set forth in the agreement.

union-security clause requiring employees to become or remain members of the Union after a grace period, and a commitment not to strike over disputes about the interpretation or application of the labor agreement.<sup>6</sup>

The Mo-Kan agreement does not specify how, or according to what priority, employees are to be referred or hired on construction jobs. Despite this, it is undisputed that the practice within the industry (i.e., at least among the Mo-Kan employers) has been for the employers to use the Union as the primary referral source for glaziers. When the Union is unable to locate glaziers for referral, however, the Mo-Kan employers will resort to direct hiring. When direct hiring is resorted to, it has been the custom for the employer to refer the employee thus hired to the Union to obtain a "permit"—an informal term used by all parties to describe a certificate used by the Union, *inter alia*, to show that the "permit man" has been hired with the knowledge and acquiescence of the Union and to insulate him from potential harassment on the job from employees in other trades or from union representatives policing compliance with union-security requirements. In this regard, it is the apparent practice not to enforce contractual union-security requirements as to permit men. This is seemingly because the permits issued by the Union usually contain a time limit of 30 days, or the duration of the job, whichever is the shorter period, and it has been the admitted traditional practice of the Union and the employers to treat permit men as, essentially, "temporary" help, having job tenure only until the Union is again able to refer a "journeyman"—a term which generally denotes substantial qualifying experience in all phases of a recognized trade. On this record, the parties' usage strongly suggests, moreover, that the term "permit man" connotes an employee with little or no qualifying experience or training, as I discuss next.

The record nowhere discloses exactly how an employee comes to be qualified as a "journeyman," but the usage of the attorneys and witnesses for both parties generally equates "journeymen" with the terms "qualified" or "experienced." And the presumption that journeymen are generally "more qualified" than permit men is literally built into the examination of the witnesses.<sup>7</sup> Moreover, especially where it has been shown that the relationship between the Union and PPG (and the Mo-Kan group generally) includes a formal apprenticeship training program, I must infer that the term "journeyman" implies not only the possession of substantial qualifying experience<sup>8</sup> but also the satisfaction of a rather specific

set of criteria which distinguish apprentices from journeymen and which results in some sort of formal certification of journeyman status. In addition, I note Construction Manager Gooch's testimony referring to the fact that some of the permit men on the North supply job were awaiting entry into the formal apprenticeship program. From all of this, I find that it was the traditional industry practice to employ certified journeymen glaziers, normally referred by the Union at the request of employers. I find also that limited numbers of less experienced employees were allowed to be hired and trained through a formal industry-sponsored apprenticeship program which permitted them eventually to be certified as journeymen. I further find, against this background, that the use of permit men was historically recognized as a temporary stopgap, with permit men being viewed as having little or no trade experience and less expectancy of future regular employment even than persons formally enrolled in the apprenticeship program.

In summary then, Mo-Kan employers, including PPG would, as a matter of historical practice, replace permit men with journeymen as soon as the Union was again in a position to refer such journeymen.<sup>9</sup> And it was PPG's abandonment of this practice on the North Supply job by refusing to replace permit men Orr and Gooch Jr. after journeymen became available for referral which ultimately triggered a decision by other employees to leave that job. This action by employees, in turn, caused PPG to discharge Orr and Gooch Jr., all as is detailed next.

#### *B. Events Leading to PPG's Decision to Terminate Orr and Gooch Jr.*

PPG began preliminary work at the North Supply job in June 1981, initially using a small crew of experienced persons. By August, however, regular installation work began and PPG, through Gooch, sought the Union's assistance in referring journeyman glaziers. At a certain point in August, the Union's business representative Jack Zander told Gooch that he was unable to locate additional journeymen. In turn, Gooch or his agents began to hire several persons directly from other sources, including Orr and Gooch's son, William Gooch Jr. Orr had worked in an unspecified capacity for PPG in Kansas City between July 1980 and January 1981. He was working as a sign hanger for an unrelated firm in mid-September 1981 when he was asked to work for PPG at the North Supply job. Gooch Jr. who was then employed in an unrelated trade was also hired in mid-September. He had never before worked for PPG nor elsewhere in the glazing trade so far as this record shows. In all, about seven or eight persons were thus hired directly and each was referred by Gooch to the union hall for permits, according to the traditional practice.

<sup>6</sup> This conclusion is not materially affected by Gooch's rather vague suggestions that PPG would reserve the right to reject specific journeymen for referral because, based on prior experience with them, PPG agents believed that they were "not able to get along with our system" or because "we mutually don't get along." No specific historical instance was cited by Gooch in which PPG had refused to displace a permit man with a journeyman referral. Gooch, often an uncomfortable witness who tended to testify in generalities, appeared to be speaking hypothetically in the quoted instance.

<sup>6</sup> The "no-strike" language states in pertinent part: "In the event there shall be any controversy or dispute as to the meaning, or application, of the provisions of this Agreement, there shall be no stoppage of work."

<sup>7</sup> See, e.g., the examination by the General Counsel of Construction Manager Gooch about the preference accorded "journeymen" over "permit men" wherein the quoted terms are regularly used and are linked to the notion that permit men are used when the Union cannot locate "qualified help" (Tr. 19:18-19) and that PPG would "replace" permit men "with more qualified help" (Tr. 65:9) when the latter became available. See also the testimony of the Union's business representative Zander that he could not "recall when a company would refuse to replace a permit man with a qualified journeyman glazier. It's just not economical in the first place, and . . . since 1974 . . . to my knowledge, there has never been an instance until this one with PPG."

<sup>8</sup> The undisputed testimony of apprentice John Fuchs shows, and I find, that the apprenticeship indenture is of 4 years' duration.

At various points between mid-October and the end of that month, agents of the Union (either Zander or the assistant business representative Charles Foland) notified Gooch that there were again journeymen available for referral to the North Supply job. In each case, Gooch replied that he had no need for additional help and that he did not intend to bump the permit men in order to make room for the out-of-work journeymen. When pressed on the subject, Gooch claimed that he felt that the permit men were able to do the work, and also that he had received advice that it would be illegal to bump the permit men.<sup>10</sup> Gooch also testified, and I find, absent any contradiction in the record, that Zander expressed concern in a related pair of conversations on this subject to the effect that "that's not the way that this thing has been operated" and also that Gooch would "destroy the apprenticeship program" and that his use of permit men was "not fair to the apprentices and the way that the apprenticeship program has been run in the past." Similarly, Foland spoke with Gooch in the late October period, again informing Gooch of the availability of journeymen and suggesting that the permit men be bumped to make room for the journeymen. When Gooch reiterated his refusal to bump the permit men, however, Foland did not pursue the point, simply advising Gooch that he wanted Gooch "to know that people are available."<sup>11</sup>

The record does not disclose that there were any further discussions on the subject of displacing permit men between the Union's agents and agents of PPG until January. By the end of December, moreover, PPG's crew at the North Supply job had been cut back to about 14, and several of the permit men who had been hired in August had already been laid off. More specifically, Gooch testified without contradiction that by early January, the reduced crew of about 14 employees consisted of a group of journeymen, a group of persons formally enrolled in the apprenticeship program, a group of persons hired as permit men (but who were by then "waiting apprentices" and were not formally enrolled in the apprenticeship program)<sup>12</sup> and 2 others—Orr and Gooch Jr.

<sup>10</sup> Gooch never identified more particularly how this advice was communicated. Moreover, it appears from his testimony (at Tr. 23 and 49-51) that Gooch assumed, without ever being expressly so told by the Union's agents, that the journeymen whom the Union wished to refer in the period around mid-October were employees of local auto glass firms who were then on strike. It is clear from Gooch's testimony that he regarded such "inside" auto glass employees as unsuitable for work on his construction project on two related grounds; that they would require a training period before they could perform the construction site work, and that they would return to their former auto glass shops as soon as the strike was over, thus making it uneconomical for PPG to take them on for an uncertain—but inevitably "temporary"—period. If it were necessary to the outcome herein to determine Gooch's motives for then refusing to bump the permit men, I would find that the latter considerations were more important than any abstract advice about the legalities. Moreover, as is shown below, the ultimate confrontation in January on the issue of the displacement of permit men by journeymen did not involve attempts to refer striking auto glass workers.

<sup>11</sup> Findings about the series of "permit man" discussions between the Union's agents and Gooch are a composite derived from the essentially harmonious testimony of the participants.

<sup>12</sup> A status which is not explained on this record, except as implying some intention on the holder's part to remain in the trade and to undergo formal training to eventually obtain certification as a journeyman.

During the period between late October and early January, Zander admittedly had at least one jobsite discussion with a journeyman and member of the Union, James Davis. Zander recalls that he visited the jobsite in connection with a then-unresolved jurisdictional dispute with the ironworkers. While there, however, he acknowledges having spoken briefly with Davis during which Davis expressed resentment over PPG's failure to hire available journeymen, and Davis also said that he and other workers "didn't want to put up with it and they were going to walk off." Zander states that he advised Davis that such a "walk-off" would "jeopardize the Union" and would be "in violation of the contract" and "it just couldn't happen."<sup>13</sup>

Alleged discriminatee Orr offered different testimony about this same exchange between Zander and Davis, claiming to have overheard Zander say, inter alia, "it looked like they was going to have to close down the job to get PPG to take action. And [Zander] told Davis to spread it around to the rest of the men." According to Orr, this took place around October 1, shortly after Orr had asked Zander directly to "renew" his permit and Zander had replied that he "wasn't renewing any permits at the time because they had a dispute with the company." Zander, by contrast, recalls only that he told Orr that his current permit had not yet expired. On cross-examination, Orr diluted his version of the Zander-Davis exchange, acknowledging that what Zander had said was that the Union "couldn't get involved" in any walkout action because the Union could "get in trouble" and that "all the members would have to decide to do it on their own."

Neither Zander nor Orr struck me as being fully candid, each displaying a tendency to embellish in ways which they viewed as being in accord with obvious self-interest. Based on essentially undisputed testimony about other events below, however, I doubt that Zander ever directly urged Davis to act as an intermediary in a plan to "close down the job." Moreover Davis was no longer employed at the time of the complained-of events in January. Given Orr's backpedaling on further examination, I do not rely on his testimony,<sup>14</sup> except insofar as it suggests, consistent with Zander's, that Zander sought to emphasize that the Union would not urge or condone a concerted walkout over the issue.

There is no dispute that the subject of PPG's retention of the permit men came up in at least two membership meetings at the Union's offices—one in October, and an-

<sup>13</sup> Davis, who did not recall any such conversation, did testify that he had finally become personally outraged after learning that PPG had refused to hire two journeymen from out of the area who had come directly to the jobsite seeking work and that he then formally quit his job in protest. From other testimony, I find that this occurred in late October or early November. The next day, states Davis, whom I credit, he withdrew his quit after learning that the journeyman travelers had found other work. No other workers joined him in this particular action.

<sup>14</sup> Similarly, Orr's testimony about his discussion with Zander regarding renewal of his permit seems improbable (and Zander's seems likely) in view of the fact that Orr's permit was only 15 days old at the time and, as Orr admitted, was facially "valid" until mid-October. I therefore credit Zander on this point.

other in December.<sup>15</sup> Blending the harmonious testimony of the participants who were called as witnesses, I find that in each meeting members expressed concern and/or outrage at PPG's refusal to adhere to the traditional bumping priority accorded to journeymen over permit men. In each case, Zander stressed that the Union was powerless to act and could not call a strike nor condone a walkout or other similar action. Indeed, I credit Zander's testimony that he told members at the meetings that the Union would be liable for damages for causing a walkout and that Zander would personally prefer internal disciplinary charges against any member who sought to instigate a walkout. Zander acknowledged that the possibility was also discussed of fines against members who continued to work alongside the permit men. I credit Zander that he replied to a question on this subject by saying that neither he nor the Union's officers would themselves prefer charges against any member for that reason, but that he was powerless to prevent a rank-and-file member from preferring such charges.<sup>16</sup>

Matters continued in this unsettled state, finally coming to a head on New Years Eve when a Kansas City firm, Atlas Glass, laid off "12 qualified journeymen," with the expectation that this layoff would last 4 to 6 weeks.<sup>17</sup> Assistant business representative Foland called Gooch over the weekend to advise Gooch of the availability of the Atlas employees, for "an extended period of time." Gooch replied that he was "not interested in additional help" and Foland did not press the matter further.

Within a day or two after this, shortly before Thursday, January 7, PPG's North Supply project manager Ernie Kraner was approached at the jobsite by job steward Paul Serna.<sup>18</sup> Apparently speaking in private, Serna told Kraner<sup>19</sup> that the "men" on the job "did not think

[it] was right" that permit men were working while "journeyman glaziers" were not. Serna stated that "he felt that it should be changed." Kraner replied that he did not believe that anything was going to be changed and that he felt that the men currently on the job were needed. About 2 days later, an essentially similar exchange took place between Serna and Kraner.

On Thursday, January 7 (within the same week as the previous Serna-Kraner exchanges), several incidents occurred involving Serna. That morning, on learning that apprentice John Fuchs intended to call assistant business representative Foland on an apprenticeship-related issue, Serna went with Fuchs to a jobsite telephone so that he could speak with Foland about the simmering permit man problem. Serna had heard earlier that day that there were now journeymen from Atlas Glass available for referral. After Fuchs had concluded his telephone business with Foland, Serna then took the line and asked whether the journeymen from Atlas Glass had located other work. Foland told Serna that they had not and also that PPG had refused Foland's specific request to employ the Atlas men. Nothing else of substance was said.<sup>20</sup>

At least one conversation took place later that day between Serna and Kraner. Their versions differ somewhat, but on immaterial points. Based on probabilities and the points of harmony between the two witnesses' recollections, I find that Serna confirmed through Kraner that PPG had firmly decided not to hire any additional help or to terminate the permit men, that Serna stated that he believed that the "men would not work under those conditions," and that Serna stated that he intended to "finish out the day" and then to "quit," expressing a desire to have Kraner mail his final paycheck to him, since Serna would not return to the jobsite. Kraner acknowledged this, saying that "a man has to do what he has to do" and that PPG would finish the job "with you or without you."

Orr testified that he noticed Serna addressing a group of employees about 2 p.m., causing Orr and his working partner Arthur Jackson to join the group to see what was happening. Orr states that he heard Serna tell Jackson that Serna had "just talked to Jack Zanders [sic] and that . . . they had a choice, the company had made a decision. They either had to leave the job or stay and be fined a thousand dollars a member." Orr states that he promptly left the group after hearing this.

Serna flatly denied saying anything of the sort—particularly denying that he had either talked to Zander or that he had told others that he had done so, or that he had mentioned a specific fine amount, or threatened that a fine would necessarily be levied against members who stayed on the job. In substance, Serna states that he merely discussed with other employees what the options were, commenting that there was nothing that the Union could do, and that he intended to quit, because "one of these days it could be me looking for a job." He states he told others that they would be "on their own" if they wanted to "do something," and that "It cannot be a union action." Serna states that others responded joking-

<sup>15</sup> Crediting Zander and the probabilities, the subject came up incidentally in a general membership meeting in October, and was the main subject in the later December meeting, called at the express request of job steward Serna in order to respond to reported continuing unrest and confusion among the members at the North Supply job.

<sup>16</sup> The Union's bylaws governing internal disciplinary action were not offered into evidence, but uncontradicted testimony establishes that such internal charges would be heard by an executive board which would decide whether discipline should be imposed for a breach of a membership rule and, if so, the form it should take.

<sup>17</sup> I rely on the credibly uttered and uncontradicted testimony of assistant business representative Foland for these and related findings below.

<sup>18</sup> Serna's alleged status as the Union's "agent" is denied. I conclude to the contrary. In the light of my ultimate recommended disposition, I simply summarize my rationale for this conclusion: By the terms of the Mo-Kan agreement, the steward "shall be an agent of the Union in the absence of the Business Representative." The parties further stipulated, inter alia, that Serna "possessed the normal range of union steward duties including bringing to management's attention and to the attention of union representatives . . . complaints of jobsite employees, alleged violations of the collective-bargaining agreement." As such, and on the facts elsewhere noted herein, Serna was cloaked with apparent authority to speak for the Union and the Union may not disavow any actions which Serna himself may have urged other employees to take. I find below, however, that Serna did not communicate any different information to jobsite employees than did admitted union agents.

<sup>19</sup> Crediting Kraner, whose testimony was not disputed by Serna on this and related discussions below.

<sup>20</sup> To this point, I credit Serna's testimony, corroborated by Foland.

ly that they might be sick the next day, but that no specific common plan was even discussed, let alone agreed upon. As to any reference to "fines," Serna states that he had said earlier in the day to a group of employees that "we could be subject to a fine if some other member presses charges," but that he never specified the amount of the fine which might potentially be imposed.

Other employees<sup>21</sup> involved in the events on January 7 tend to corroborate Serna and to contradict Orr. There is utterly no corroboration of Orr's statement that Serna threatened a specific fine amount, or that any express threat of a fine was even made. Significantly, even fellow permit man and alleged discriminatee Gooch Jr. tends to contradict Orr's claim that Serna was threatening the other employees either to leave the job or face fines by the Union. Thus, Gooch Jr. recalls overhearing Serna speaking to Jack Griffin and explaining to Griffin that Serna intended to leave because "That's just the way I feel." This is more harmonious with Serna's testimony and that of other jobsite employees that Serna told the others what he intended to do and left it up to others to decide what they would do.

Because of this, and because I find it doubtful that Orr would "happen" to be present on two different occasions at precisely the point when the Union's agents supposedly made plain statements which, if true, would clearly establish the "union causation" element in this case,<sup>22</sup> I discredit Orr and I credit Serna's account.

#### *C. Aftermath: PPG's Termination of Orr and Gooch Jr. and its Rehiring of the Other Employees*

By the end of the workday on January 7, there were indications that Serna was not the only employee who intended to leave the North Supply job.<sup>23</sup> Two apprentices, Fuchs and Launchbough, left the site without explanation before the end of the shift. That evening Kraner was called at home by his General Foreman Jack Griffin (a member of the Union, but one who worked in a supervisory capacity at the North Supply job). Griffin advised Kraner of his intention to take a "day of vacation" the next day. Kraner acquiesced in this. Arthur Jackson had told both Kraner and Griffin on January 7 of an intention to "quit" (and/or be "sick") if the matter of the permit men was not straightened out.

By the next morning, the staffing picture became more clear. The only employees to appear for work were Orr, Gooch Jr., and a "waiting apprentice," Cliff Williams. Williams disappeared from the site by about 9 a.m., leaving only Orr and Gooch Jr. This caused Kraner to leave the jobsite to confer with Gooch at the Kansas City construction office. A decision was reached by Gooch that Kraner should discharge Orr and Gooch Jr. and "get the job manned." According to Kraner, the only feasible

means of re-manning the job was to try to get the former glazing crew to return to the job. Kraner ruled out the possibility of seeking new referrals from the Union or of hiring new employees from other sources due to the economic impracticality of "retraining" any such new personnel. After consultation with Gooch, it was therefore decided that Kraner would attempt to locate the former crew members to see if they would return. In this regard, Gooch instructed Kraner to make contact with General Foreman Jack Griffin and with "working foreman" Arthur Jackson (also a member of the Union) first "to see if they would come back" and then to have those individuals try to make contact with the remainder of the former glazing crew to see if they would return.

At least some of the former glazing crewmembers (i.e., Serna and Jackson) had located other employment promptly after leaving the North Supply job. At least one other (Fuchs) had registered with the Union for referral to other employment. The process of making contact with the crew members and inducing them to return took several days. As Kraner put it, they "dribbled" back to the job during the first few days of the following week. The record does not show that any of the "available journeymen" (from Atlas Glass or elsewhere) were ever hired to replace Orr or Gooch Jr. Rather, it seems that the matter ended with the discharge by PPG of those permit men.

#### *Analysis and Conclusions*

##### *A. Introduction*

The General Counsel has tended to limit litigation and briefing efforts to an attempt to establish that the Union "caused" or was "responsible for" the employee walkout which, in turn, caused PPG to fire Orr and Gooch Jr. For reasons set forth below, I do not find any persuasive evidence that such was the case. As I further discuss below, however, the question of the Union's motivation (and its legitimacy), even assuming that the Union caused the walkout by jobsite employees, is at least as important to the ultimate resolution of this case as is the question of union causation. And, for the reasons detailed below, it is my ultimate conclusion that even if the Union were responsible for the jobsite walkout, the record would show, nevertheless, that its motivation was not to cause PPG to favor "members" of the Union over "non-members." Rather, its motivation was to cause PPG to adhere to the traditional practice among the parties of displacing "temporary" permit men with journeymen whenever the latter became available for referral. Allied to this conclusion is the corollary finding below that the nonmembership of the permit men was essentially irrelevant to the actions of the Union and those of the jobsite employees in seeking to have Gooch Jr. and Orr removed from the North Supply job. A further allied conclusion is that the undisputed record suffices to establish that the Union's actions (continuing the assumption, arguendo, of the Union's responsibility for the walkout) were directed toward the furtherance of statutorily legitimate goals and were necessary to the effective per-

<sup>21</sup> Fuchs, Jackson, and to some extent Gooch Jr.

<sup>22</sup> Recall here that Orr also "happened" to be within hearing range during an earlier discussion between Zander and Jim Davis when, Orr says, Zander clearly issued instructions to Davis to "spread the word" that a walkout should take place.

<sup>23</sup> I have found, and it is not disputed, that Serna formally communicated to Kraner an intention to "quit" the job. Consistent with this, he gathered his tools from a jobsite storage area and took them with him when he left at the end of the shift on January 7.

formance of its function in representing its constituency generally.

### B. The Question of Union Causation

The question is not free from doubt, but were it necessary to decide, I would find, preliminarily, that the Union's agents (including, arguendo, job steward Serna), did not intend by any of their actions found above to cause jobsite employees to engage in concerted "strike" action to obtain the removal of Orr and Gooch Jr. from the North Supply job. Whether rightly or wrongly, the Union's agents assumed that the Union would be in breach of the labor agreement (and vulnerable to damage suits) should a concerted work stoppage be called.<sup>24</sup>

It is important to add, moreover, that strike action does not contemplate any severing of the employment relationship. To the contrary, it presupposes continued status by the striker as an "employee," albeit one who is withholding his services in an effort to compel a change in conditions of his employment. By contrast, quitting one's employment, with no present intention to return to that job, is not a "strike," whether done individually, or in concert with others.<sup>25</sup> The testimony of the employees and the Union's agents shows, and I find, that the Union's agents strongly opposed strike activity, and that their references to the employees' options to "quit" were no more than explanations of employees' rights.<sup>26</sup> And it seems equally clear from the uncontradicted record that at least *some* of the employees who left the job intended by their actions fully to sever their employment ties with PPG (or, at least, that they recognized that they had no reemployment "rights" after taking the action of leaving).

There is, of course, always a potential for a union coyly to evade responsibility for a strike by making statements "for the record" that it opposes such action. But on this record, there is no clear evidence that the Union's stated opposition to strike activity was accompanied by any figurative "wink."<sup>27</sup>

Arguably, the question of the Union's responsibility for the actions of the jobsite employees does not turn solely on the intentions of the Union's officers and agents. Viewed this way, the question is still doubtful. Initially, I find utterly unpersuasive the General Counsel's reliance (Br. 7) on the fact that "Zander repeatedly told the members that they could quit,"<sup>28</sup> failed to tell the

members that PPG was legally entitled to retain Orr and Gooch, Jr.,<sup>29</sup> failed to reprimand any of the members because of their actions, and failed to attempt to send any replacements to the job when it became apparent that the jobsite employees had left."

As to the latter points, it is not clear from her brief by what process of reasoning or pursuant to what legal authority the General Counsel derives the presumed duty of the Union to "reprimand" its members for leaving the job or for failing, spontaneously, to send "replacements" to the job.<sup>30</sup> I have found that the Union did no more than to advise its members of their right to "quit" (with the attendant necessary consequence that their employment rights with PPG would be forfeited) and that PPG neither asked the Union to send "replacements" nor was it even interested in that possibility (see findings above linked to Kraner's testimony). I have further suggested that it would be difficult, in the light of the peculiar wording of the no-strike clause, to find even that a strike over the permit man issue would be contractually unprivileged. These are formidable obstacles to the General Counsel's theory. For the presumed "duty" of the Union to "reprimand" its members and promptly (and without even being asked) to refer "replacements" to the job is necessarily linked to the supposition that the action of the glazing crew in leaving the job was an unprivileged "strike," rather than a "quit" and was, therefore, an action which the Union was under some obligation to curb.

Even if the job action were deemed a "strike," however, it would not necessarily follow that the Union had some affirmative "duty" to intervene to end the strike; for:

[T]here is no general federal anti-strike policy; and . . . strikes which . . . are breaches of private contracts, do not threaten any additional public policy. . . . [*Buffalo Forge*, supra, 428 U.S. at 409, citations omitted.]

Union's "repeated" actions in explaining to members that they had a right to quit as evidence that the Union was *exhorting* them to take *strike* action.

<sup>24</sup> Here one must ask: In what sense was PPG "legally entitled" to keep Orr and Gooch Jr.? If the General Counsel believed that the question of PPG's "right" in either a contractual or statutory sense to retain permit men was litigated in this proceeding, then she is simply mistaken. And if, more probably, the General Counsel means here that the Union had no "legal" right to seek to have PPG replace permit men with journeymen, then she is simply begging a central question at issue. See discussion in the next section.

<sup>30</sup> The General Counsel repeatedly seems to treat as authority for these and related factors the Board's supplemental decision and order in *Plumbers Local 83 (Power City Plumbing)*, 238 NLRB 499 (1978) (and the General Counsel especially cites that portion of the administrative law judge's analysis therein at 504). But that supplemental decision followed a court remand. *Glen L. Mullett v. NLRB*, 571 F.2d 1292 (4th Cir. 1978). And the General Counsel neglected to mention that the Board had rejected that very analysis in its original decision in *Power City*, supra (228 NLRB 216 (1977)), and that, in the cited supplemental decision, the Board merely treated the court's remand as "law of the case." 238 NLRB at 499. The Board never adopted the analysis in question. Accordingly, that case is not *Board* authority on these points, which are, in any event, of no significance within this distinguishable setting.

<sup>24</sup> It is unnecessary to decide—and I therefore do not do so—whether the Union was correct in this assumption. There are, indeed, substantial grounds for a contrary conclusion—particularly under circumstances where the labor agreement is silent on the question of hiring priorities as between journeymen and permit men and the "no-strike" clause facially applies only to disputes "as to the meaning, or application, of the provisions of this Agreement." Cf. *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976).

<sup>25</sup> See, e.g., the recognition of this distinction in *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 266 (1965), cited by counsel for the Union on brief (at 13). See also *Crescent Wharf & Warehouse Co.*, 104 NLRB 860, 861 (1953).

<sup>26</sup> See, e.g., *Tampa Building Trades Council (Tampa Sand)*, 132 NLRB 1564, 1565–1566 (1961).

<sup>27</sup> Cf. *Tampa Sand*, supra, 132 NLRB at 1566.

<sup>28</sup> As noted, supra, "quitting" is different from a concerted withholding of services to achieve a change in working conditions, and it involves a certain circularity of reasoning for the General Counsel to rely on the

Accordingly, qua "strike," the *employee* action was not statutorily illegal. And, contrary to the reasoning relied on by the General Counsel, but rejected by the Board in *Power City Plumbing*, supra, there is no uniform, established authority for the proposition that union officials have some general, affirmative obligation under Federal labor policy (as opposed to that grounded in a specific contractual commitment) to take steps to end even a contractually unprivileged strike by employees. *NLRB v. Babcock & Wilcox Co.*, 697 F.2d 724 (6th Cir. 1983), enf. 249 NLRB 739 (1980), contains an instructive analysis in this regard. There, the court concluded, in agreement with the Board, that it is an "error of law" to suppose that union officials have some general duty to end "illegal" (i.e., contractually unprivileged) strikes "absent clear language to the contrary in the collective bargaining agreement." (112 LRRM at 2720.) And the Sixth Circuit's analysis of holdings in other circuits reveals that, at best, the issue is one on which there is division of opinion among the circuits. Where, as here, the contract binding the Union and PPG contains no such affirmative requirement, there is no evident basis for the General Counsel's reliance on Zander's failure to "reprimand" members who left the jobsite for their actions as tending to show that the Union was "responsible" for their actions.

Finally, *Sachs Electric Co.*, 248 NLRB 669 (1980), cited by the General Counsel, is not at all apposite here. There, the Board found that the union violated Section 8(b)(1)(A)—not 8(b)(2)—by "coercion" directly aimed at nonmember "travelers" causing them to leave their jobs "involuntarily" to make room for local "members."

To find that the Union bears some responsibility here for the actions of the jobsite employees in leaving the job, therefore, I must look beyond the factors which the General Counsel has relied on and which I regard, essentially, as makeweight. In doing so, I have considered the fact, admitted by Zander and Serna, that some mention was made by each about the possibility of fines (or at least disciplinary action) if some rank-and-file member were to lodge internal union charges against someone who stayed on the job alongside the permit men. I note first, however, that these references were casual and were not shown directly to have influenced the decisions of the men who left the job. Neither, under the circumstances do I believe that those references may be presumed to have "coercive" impact.<sup>31</sup> Zander, at least, made it clear that he would not himself prefer such charges, thereby removing any suggestion that such charges would have official union sanction.

Moreover, the Board has held, with court approval, that the mere act by a union of "processing" an internal charge against a member, or sitting in a "quasi-judicial capacity" to hear such a charge, will not constitute un-

<sup>31</sup> The General Counsel has stated on brief (at 6) that a union "violates the Act if it coerces employees previously referred out of the hiring hall into quitting their jobs, based upon . . . union membership of other employees or any other arbitrary, invidious or irrelevant considerations" (emphasis added, citing the same cases cited by the Board in *Sachs Electric*, supra, 248 NLRB at 670). Setting aside that the General Counsel appears to be relying on an inapplicable strain in the law, the operative term in counsel's statement is "coerce."

lawful coercion even if the attempt to "enforce" a subsequently arrived-at disciplinary decision would amount to unlawful coercion.<sup>32</sup> And it is therefore extremely difficult to construe as "coercive" Zander's and Serna's mere references to the possibility that internal charges could be filed by another member against any members who might remain working at the jobsite with the permit men.<sup>33</sup>

Summarizing, it has not been adequately demonstrated either that the jobsite employees engaged in some kind of concerted "strike" (as opposed to making a variety of individual choices to quit the job), or that the Union played a causative or responsible role therein even assuming that the employees' actions properly may be labeled a strike. It may be that the Union's agents "telegraphed in some subjective, subliminal way"<sup>34</sup> their support for a concerted withholding of services by the jobsite employees which did not contemplate a full severance of their employment ties with PPG, but the General Counsel has not presented credible evidence which would provide substance to such a conclusion. On this record, therefore, it would be no more than impermissible speculation to find that the Union in any way "caused" PPG's decision to fire Orr and Gooch Jr. And even if the Union bears responsibility for their discharge, I would not find on this record that it was acting improperly in so doing. This latter issue requires inquiry at two levels, which I pursue next.

### C. The question of the Union's Motivation

The complaint alleges an 8(b)(2) violation expressly linked to a claim that the Union was moved to cause the termination of Orr and Gooch Jr. because they "were not members of [the Union]." In *Teamsters Local 357*<sup>35</sup>

<sup>32</sup> *Musicians (Don Glasser)*, 165 NLRB 798, 800-801 (1967), aff'd. in pertinent part sub nom. *Don Glasser v. NLRB*, 395 F.2d 401, 404-405 (2d Cir. 1968).

<sup>33</sup> Necessarily, of course, for there to be any legal possibility whatsoever that Zander's and Serna's references to internal fines arising from charges filed by a member against another member would violate the Act, it would have to be found that the ultimate enforcement action would be unlawful. The proviso to Sec. 8(b)(1)(A) of the Act generally insulates a union from liability under the Act when it engages in attempts to discipline members for violating internal rules. The general limitations on a union's right under the proviso to take such internal disciplinary action has been expressed by the Supreme Court as follows:

Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. [*Scofield v. NLRB*, 394 U.S. 423, 430 (1969).]

Accordingly, before deciding whether the Union would violate the Act even by an ultimate attempt to discipline members for working alongside permit men, one would have to determine whether, under *Scofield*, its application of internal discipline was in pursuance of a "legitimate interest" which did not "impair . . . policy . . . in the labor laws." It would therefore involve a kind of tail-chasing to assert, a priori, that the Union would have no right to threaten to discipline members for working with permit men under these circumstances, even if I had found that such "threats" were made. In any case, the analysis in the following section would be material to any resolution of the merely hypothetical question whether the Union could properly discipline members for working alongside permit men.

<sup>34</sup> *Babcock & Wilcox*, supra, 697 F.2d 724.

<sup>35</sup> *Teamsters Local 357 v. NLRB*, 365 U.S. 668 (1961).

the Court emphasized that, under Section 8(b)(2), read together with Section 8(a)(3):

It is the "true purpose" or "real motives" in hiring or firing that constitutes the test. [365 U.S. at 675]

It is therefore necessary to test the General Counsel's theory of violation by examining the record for evidence of the Union's true purpose in expressing a desire to have Respondent replace permit men when journeymen become available for referral.

It is hard to detect evidence in this record which would support the General Counsel's threshold claim that it was a simple matter of the Union's desire to favor members over nonmembers which accounted for the Union's conceded desire to displace permit men after journeymen became available for referral. And, I note that the General Counsel's brief devotes relatively little—and then somewhat generalized—attention to the point. In addition, the record simply does not support the few specific assertions in the General Counsel's brief to the general effect that their nonmembership (rather than their lack of journeyman status) was the *admitted* concern of the Union's agents over the retention of the permit men once journeymen became available for referral. Thus, the General Counsel attributes<sup>36</sup> to the Union's agent Foland testimony to the effect that Foland "felt that PPG was not operating in accordance with . . . the practice, that is, the permit men were to be 'bumped' when journeymen or members . . . became available." (Emphasis added.) Regrettably, however, the record passages relied on by the General Counsel do not contain any reference by Foland to "members." There, Foland's testimony was couched solely in terms of the "practice" of "replac[ing] temporary help with qualified mechanics." Also regrettably, the testimony of job steward Serna relied on by the General Counsel does not support her claim on brief<sup>37</sup> that Serna "recalled" that Zander had stated that the Union had exhausted all efforts to "seek the employment of *union members*" (emphasis added). The phrase "union members" is not in Serna's testimony at the cited passage. An even greater departure from the record is indulged by the General Counsel when she states on brief<sup>38</sup> that "it was Respondent's policy, as voiced by its agents, and the conviction of the general membership, that *nonmembers* should not work when *members* were 'on the bench'" (emphasis added).

These and related instances in which it is claimed by the General Counsel that "membership" considerations were paramount in the Union's actions all appear to be linked to mere assumptions by the General Counsel for which there is no direct support in the record. More important, they involve the blurring-over of the critically important distinction between the admitted traditional industry practice of favoring journeymen (who, incidentally, may be members of the Union) over permit men, and a supposed practice of favoring journeymen over permit men *because* the former are members and the latter are

not. It seems sufficient to point out here that it was never demonstrated by the General Counsel that the journeymen who traditionally received bumping preference over permit men were always members of the Union.<sup>39</sup> More fundamentally, however, it is unreasonable to presume from the mere probability that the journeymen were members of the Union that it was this feature of their status which caused not only the Union, but also the industry employers, including PPG, traditionally to accord to journeymen a bumping preference over permit men.

A more obvious explanation for this traditional practice in the industry would appear to be the one implicit (and sometimes explicit) in the testimony of Zander, Foland, and Gooch; that is, the traditional desire of employers to have qualified and experienced glaziers, coupled with the Union's interest—a traditional one for unions representing construction trades—in regularizing the employment process by establishing and enforcing employment priorities ensuring a fair distribution of work opportunities among the qualified jobseekers constituting the Union's constituency.<sup>40</sup> Indeed, it seems clear on this record, despite the General Counsel's conclusionary contrary claims, that membership in the Union was not the basis on which the actors in this case were moved to seek the replacement of permit men by journeymen. For if this were the sole or main concern of the Union and its jobsite members, it could have been dealt with more readily merely by a demand to apply the union-security clause in the labor agreement to those permit men, who, by January 7, had long since exceeded the 7-day "grace period" applicable to new hires. As noted above, however, and consistent with the traditional treatment of permit men as "temporaries," the Union never sought to apply the union-security clause to Orr and Gooch Jr. or any other permit men. More realistically, therefore, the fact of their nonmembership was merely incidental to a more fundamental concern of the Union and its members on the North Supply job; that is, that PPG's retention of Orr and Gooch Jr. (and other permit men) was a threat to the traditional bumping preference accorded by the parties to the Mo-Kan bargaining relationship to available journeymen and a traditional practice of treating as "temporary" any permit men hired during periods when journeymen were not available for referral.

Accordingly, were it necessary to the proof of a violation to demonstrate that the Union was motivated to act against Orr and Gooch Jr., because of their lack of membership in the Union, I would be compelled to dismiss the complaint on the simple ground that such nonmembership was not shown to have been a factor in the

<sup>36</sup> G.C. Br. 3, citing to Tr. 227, 229.

<sup>37</sup> At 4, citing to Tr. 260.

<sup>38</sup> At 6, without citation to the record.

<sup>39</sup> At best, one might assume that many, if not most, of those journeymen would be members, as counsel for the Union has acknowledged on brief (at 2). Such an assumption would be warranted for no other reason than that there are a large number of Mo-Kan association employers employing persons who would, by natural operation of the union-security clause in the Mo-Kan labor agreement, acquire membership in the Union in the normal course of acquiring enough experience in the industry to qualify as journeymen.

<sup>40</sup> See, e.g., discussion in *Plasterers Local 299 (Wyoming Contractors)*, 257 NLRB 1386, 1394-1395 (1981).

events leading to their discharge. Even though the General Counsel has rested her case at this inadequate level, the issues raised by this record cannot be so readily disposed of, however; for the Board has taken pains to avoid such a *per se* approach in cases where a union has caused an employee's discharge, as I discuss next.

The clearest exposition of main principles in this area is found in *Operating Engineers Local 18*<sup>41</sup> wherein the Board stated:

The Administrative Law Judge's decision rests on the rationale that a violation of Section 8(b)(2) occurs whenever a union interferes with an employee's employment status for reasons other than the failure to pay dues and initiation fees or other forms of service fees uniformly required for the use of a hiring hall. This *per se* approach derives from a misconception of the law and is clearly at odds with Board precedent.

When a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power. But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.

The Board subsequently adopted the view in *Painters Local 487*,<sup>42</sup> that a union's "burden of rebuttal" under *Local 18*, supra, is met when it is shown that the union's actions are "reasonably designed to preserve the integrity of contractually prescribed referral practices"<sup>43</sup> even though those actions bring changes in job status to individual employees," 226 NLRB at 301. See also, e.g., *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432, 433 (1983), and cases cited therein. Moreover, "What is reasonable . . . is not to be narrowly construed in matters of this sort." *Ibid.* And, "there is no violation if a union can show that it 'was acting out of a legitimate concern for the other unit employees . . . its action in taking its position was not arbitrary, irrelevant, or invidious.'" *Id.*

<sup>41</sup> *Operating Engineers Local 18 (Ohio Contractors)*, 204 NLRB 681 (1973), *revd.* on other grounds 496 F.2d 1308 (6th Cir. 1974).

<sup>42</sup> *Painters Local 487 (American Coatings)*, 226 NLRB 299 (1976).

<sup>43</sup> Although, in the context of that case, the "referral practices" in question were "contractually prescribed," it cannot be maintained that the existence of written contractual authorization for a referral practice, *per se*, confers any particular legal favor on the practice. Rather, whether written into contract or not, it is the *practice* which must stand or fall on its own legal merits. See, in this regard, the language in *Local 357* quoted next in the main text, which refers more generally to "activities of the employer and union." (Emphasis added.) Accordingly, for purposes of subsequent analysis, I do not find it to be significant in this case that the industry practice of allowing journeymen to bump permit men was never expressly written into a labor agreement.

Finally, the analytical approach to the question of the legitimacy of union-caused adverse treatment of employees mandated in *Local 18*, supra, must be understood in the light of the Court's interpretations of the statutory provisions implicated herein. It is thus pertinent to this analysis to note Justice Harlan's concurring remarks, joined in by Justice Stewart, in *Teamsters Local 357* supra, that

. . . the Act was not intended to interfere significantly with those activities of employer and union which are justified by nondiscriminatory business purposes, or by nondiscriminatory attempts to benefit *all* the represented employees.<sup>44</sup>

The precedents are, therefore, clearly harmonious on this point: When a union has been shown to have acted in good faith to further hiring and referral practices which are of general benefit to its constituency as a whole and which only incidentally work to the employment disadvantage of particular individuals, the union has rebutted any presumption that it has committed a violation of Section 8(b)(2).

It must be acknowledged, however, that no authority has been called to my attention, nor has my own research disclosed any, in which it has been squarely held that construction industry employers and unions *may* engage in the kinds of practices involved herein, whereby persons hired during periods when the union is unable to locate qualified journeymen are subject to displacement by journeymen who become available for referral later on. A case which is obliquely instructive, however, is *Wisner & Becker Contracting Engineers*, 228 NLRB 779 (1977), *remanded* 603 F.2d 1383 (9th Cir. 1979), supplemental decision 251 NLRB 687 (1980), *enf. denied* 654 F.2d 731 (opinion not published) (9th Cir. 1981). There, the Board found that the union and the employer violated, respectively, Section 8(b)(2) and Section 8(a)(3) by agreeing to discharge certain "direct hires" and to replace them with persons whom the union wished to refer from its hiring hall. The employer had engaged in the direct hiring at an earlier point when, to pressure the employer to alter certain jobsite conditions, the union was refusing, in violation of its referral commitment in the applicable labor agreement, to refer qualified persons through its hiring hall. The applicable contract permitted the employer to engage in direct hiring when the union was unable to locate qualified help, but provided also that such direct hires would be treated as "temporary," and would be subject to later "replacement" by "qualified individuals" from the hiring hall, *unless* the direct hires themselves possessed sufficient experience to qualify in one of the contractually prescribed referral categories. The Board, in finding unlawful discrimination in the replacement of the direct hires by the union referrals, specifically found that the record showed that the direct hires satisfied the contractual "experience" requirements and thus observed that there was no justification under

<sup>44</sup> 364 U.S. at 682. The Board embraced these concurring remarks in *Miranda Fuel Co.*, 140 NLRB 181 at 187 (1962).

the contract for treating them as "temporaries." 228 NLRB at 780-781.

There are many features which distinguish *Wismer & Becker*, supra, from this case. What is significant for purposes of the present discussion however is the absence of any direct attack in *Wismer & Becker* on the contractual scheme which authorized a practice of treating as "temporary" persons hired when a union was unable to refer qualified referrals from the union hall. Thus the Board appears to have rested its holding in *Wismer & Becker* on the fact that the contract was ignored when direct hires were replaced despite their eligibility for retention under the governing contractual arrangement. Implicitly, therefore, the Board appears to have assumed that there was nothing unlawful, per se, about a construction industry practice in which qualified individuals are given the right to "bump" less qualified employees hired during periods when a union is unable to refer qualified help. And, coupling the principles already discussed to the additional considerations below, I reach the conclusion that the Union did not commit a violation of Section 8(b)(2) even if an attenuated analysis might lead to the conclusion that the Union bears legal responsibility for the January 7 walkout of jobsite employees.

It is significant, first, that the General Counsel has never directly contended that the traditional "bumping" practice was per se unlawful under Section 8(b)(2). Rather, the prosecution theory has been that the "real purpose" of the Union and its jobsite loyalists in the complained-of instance was to cause the discharge of permit men because they were not members of the Union. The absence of any direct challenge by the General Counsel to the traditional industry practice in this regard is an apparent concession that such general practices do not, per se, violate the Act.<sup>45</sup>

<sup>45</sup> Moreover, this issue was highlighted in my remarks at the conclusion of the trial wherein I specifically requested that the parties address on brief the question whether the Union's actions in pursuing the traditional "bumping" practice might be deemed legitimate, applying the analysis in *Operating Engineers Local 18*, supra, even if I were to find that the Union was responsible for the January 7 jobsite walkout. The General Counsel's brief is nevertheless silent on the point—a silence which, especially in this context, invites the conclusion that the General Counsel

Independent of that apparent concession by the General Counsel, I would be hard-pressed on this record to fault the traditional industry practice. On this record, the practice involved a hiring priority linked to the presumed greater training and experience of journeymen over permit men.<sup>46</sup> As such it was an unremarkable practice in the construction industry; indeed, it is one which the Act expressly authorizes. Thus, Section 8(f)(4) states in pertinent part:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement . . . with a labor organization . . . because . . . such agreement specifies minimum *training or experience* qualifications for employment or *provides for priority* in opportunities for employment *based upon length of service for such employer, in the industry or in the particular geographical area.* [Emphasis added]

Accordingly, where, as here, the bumping "priority" for journeymen is facially linked to their presumed greater training and experience "in the industry or in the particular geographical area" and where the General Counsel has not shown that the actual motive of the Union or that of the jobsite employees who left the job was to cause PPG to discriminate against permit men on the ground that they did not hold membership in the Union, I conclude that the General Counsel has not sustained the prosecutor's burden of establishing the alleged violation of Section 8(b)(2), even assuming that the threshold "causation" burden has been met.

[Recommended Order for dismissal omitted from publication.]

would not challenge the traditional "bumping" practice as, per se, violative of Sec. 8(b)(2).

<sup>46</sup> As noted in my findings, supra, this record contains no reliable basis for any finding that permit men generally, or Gooch Jr. and Orr particularly, possessed greater training and experience, as glaziers than did the available journeymen which the Union and the jobsite employee had asked PPG to employ in the place of those permit men. Cf. *Wismer & Becker*, supra. The absence of such evidence at least makes it impossible to find that the Union was acting in bad faith in seeking, as Foland put it, to "replace temporary help with qualified mechanics."