

Plumbers and Pipefitters Local Union No. 520, United Association of Journeymen and Apprentices of the Plumbers and Pipefitting Industry of the United States and Canada, AFL-CIO-CLC (Jesse N. Aycock Inc. and Aycock Inc.) and Kenneth Granger

Plumbers and Pipefitters Local Union No. 520, United Association of Journeymen and Apprentices of the Plumbers and Pipefitting Industry of the United States and Canada, AFL-CIO-CLC (Allis-Chalmers Corporation and Mechanical Contractors Association of Central Pennsylvania, Harrisburg Pennsylvania) and Frederick P. Belair. Cases 4-CB-4948 and 4-CB-4962

17 February 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN AND BABSON

On 4 November 1985 Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the exceptions of the General Counsel.

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,¹ and conclusions and to adopt the recommended Order.²

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's decision, we find it unnecessary to rely on his statement that to require the Union's business manager Hartinger to appoint Belair, his opponent in an internal union struggle, as union steward "would be the equivalent of requiring a Republican president to appoint a Democrat as his most trusted agent solely on the basis of his seniority in the Congress."

² Contrary to our dissenting colleague, we find, in agreement with the judge, that in the absence of evidence establishing that the Union's selection of Gerald Boyer as steward was improperly motivated, the Board should not inquire into the Union's reasons for its choice. Thus, we continue to adhere to the standards set forth by the Board in *Painters District Council 2 (Paintsmiths, Inc.)*, 239 NLRB 1378 (1979), enf. denied 620 F.2d 1326 (8th Cir. 1980); *Teamsters Local Y59 (Ocean Technology)*, 239 NLRB 1387 (1979); *Carpenters Local 49 (Scott & Duncon)*, 239 NLRB 1370 (1979).

As the Board stated in those cases, the union, absent an unlawful motive, has a legitimate objective in selecting whomever it considers to be the best choice to serve as steward and to police its collective-bargaining agreements. We have no reason for substituting our judgment for that of the Union. "It is not up to this Board to determine how best a union should protect its legitimate interests, and we would be intruding too far into its internal union workings were we to do so." *Scott & Duncon*, supra at 1371. There is no presumption of illegality in a union's failure to follow the normal order of referral in the selection of a steward, and we

ORDER

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

CHAIRMAN DOTSON, dissenting.

In their decision today, my colleagues continue to give the Board's approval to a hiring hall practice which allows a union without any compelling reason to disregard the order of referrals and select as steward an employee with less seniority over those with greater seniority on the out-of-work list. I have no quarrel with a union's right to exercise its unfettered discretion and select a steward from those employees working on the jobsite. However, I do not agree with my colleagues that a union may in the process of selecting a steward of its choosing give preference in hire to one employee over another, without demonstrating that its action serves legitimate and substantial union interests. Rather, I reject such blatant discrimination and would overrule those cases under which such practices are found lawful.

Briefly, the undisputed facts are as follows: In October 1984 the Respondent and the Employer, Allis-Chalmers, agreed that the Employer would hire for work at its Safe Harbor jobsite only employees referred through the Respondent's exclusive hiring hall. The Union's usual practice is that the second man referred to a job is appointed steward. However, in November 1984 the Union referred Gerald Boyer to the jobsite as steward, bypassing in the process Frederick Belair whose name appeared higher than Boyer's on the out-of-work list. The Union asserts it had the authority to do so because it reserves the right to select and appoint stewards irrespective of their placement on the out-of-work list if it considers that the employee who is senior on the list is unacceptable as steward. Business Manager Hartinger testified that when he realized that Belair was the next individual to be referred, he skipped Belair's name because he considered the latter an inappropriate selection for steward because he was "hot headed, self-serving and quick to react." Hartinger testified that since the Union had never done business with Allis-Chalmers he wanted to impress the Employer favorably by sending a steward who would be right for the job.

The judge found, and my colleagues agree, that the Respondent was not bound by the out-of-work list when appointing stewards and that the Re-

do not require a union to demonstrate that such action is based on substantial and legitimate considerations. Our inquiry in evaluating the lawfulness of a union's action in this context therefore ends once it is established that the union's conduct was not "arbitrary, invidious or irrelevant" to legitimate union interests. *Ocean Technology*, supra at 1389.

spondent had the right to select Boyer over Belair because it thought Belair was better qualified to be steward.' This finding is predicated on a trilogy of cases in which the Board held that steward preference clauses in collective-bargaining agreements are valid and enforceable, even though the application of such clauses results in the discharge or failure to hire of other employees. *Painters District Council (Paintsmiths, Inc.)*, 239 NLRB 1378 (1979), enf. denied 620 F.2d 1326 (8th Cir. 1980); *Teamsters Local 959 (Ocean Technology)*, 239 NLRB 1387 (1979); *Carpenters Local 49 (Scott & Duncan)*, 239 NLRB 1370 (1979).

I would overrule the *Paintsmiths* trilogy to the extent that these cases permit such unjustified discrimination. There is no question that in an exclusive hiring hall setting if the union in the process of selecting an employee as steward prevents a more senior employee from being hired, it has discriminated against that employee with the consequent result of encouraging union membership.² The union action is acceptable only if it is based on a legitimate and substantial justification.³ Thus, in agreement with the Eighth's Circuit position in *Paintsmiths, Inc. v. NLRB*, supra, I would require the union when it selects as steward one employee over another, in circumstances such as those present here, to demonstrate that its action is based on substantial and legitimate considerations.⁴

It is clear that the Respondent's selection of Boyer over Belair had no objective basis. It is supported with only a vague unsupported assertion that Belair was "hot headed" and "quick to react." Further, there is no showing that Boyer possessed any special qualifications. Nor do I consider sufficient justification a vague explanation by the Respondent that it was concerned with impressing the Employer favorably, particularly when there is

nothing to indicate this two employer jobsite required special attention such that a particular steward needed to be named. Thus, the Respondent has failed to demonstrate that it had a substantial reason for selecting Boyer over Belair.⁵

I fail to understand how in these circumstances my colleagues can continue to allow the Union to run roughshod over an employee's rights. The Respondent's action is inherently destructive of an employee's right not to belong to a union. The clear message to an employee is that if you are a loyal union member your chances for employment are significantly enhanced.

My colleagues' approach gives the Union free rein to discriminate. As Member Penello stated:

All a union need do now is merely claim that having its choice of a steward on the job will, in essence, promote the enforcement of trade rules and policing of the contract. That is where my colleagues would end their inquiry; no further justification need be given, no facts, no "compelling reason" and, more importantly, no connection between the situation on a particular jobsite and the asserted reason of why the union must have its way in this matter need be shown. *Teamsters Local 959*, supra at 1391.

In *Ocean Technology*, supra, and in *Scott & Duncan*, supra, the Board reasoned that the union's purpose in having a designated steward of its choice was analogous to the purpose found lawful in *Dairyalea Cooperative*, 219 NLRB 656 (1975), enf. sub nom. *NLRB v. Teamsters Local 338*, 531 F.2d 1162 (2d Cir. 1976). The Board stated that the nature of the construction industry where workers are employed for the duration of the job rather than on a permanent basis diminishes the concept of layoff and recall, and therefore the interests of the union are served by ensuring on the jobsite the presence of experienced, qualified, and loyal stewards to administer the collective-bargaining agreement.

The reliance on the principles of *Dairyalea Cooperative*, supra, as justification for allowing this type of discrimination by the Union is misplaced. The principles set forth in *Dairyalea* do not permit the Union to exercise total discretion in the application of steward preference rules. At the most, this reasoning only justifies a clause that "empowers the Union to appoint stewards from among qualified members of the employers regular work force."⁶

¹ The judge in his decision cited *Carpenters Local 2375 (Offshore Welding & Fabricating)*, 267 NLRB 320 (1983), and *Carpenters Local 1243 (Artic Slope Alaska Contracting)*, 240 NLRB 1110 (1979).

² *Radio Officers v. NLRB*, 247 U.S. 17, 42-43 (1954).

³ *NLRB v. Great Dune Trailers*, 388 U.S. 26, 34 (1967). In *Offshore Welding & Fabrication*, supra, in which I agreed with the majority that there was no violation the union had demonstrated it had a substantial justification for its action as it needed an experienced steward on the potentially troublesome jobsite. Similarly, in *Teamsters Local 282 (General Contractors Assn of New York)*, 280 NLRB 733 (1986), I agreed with my colleagues that the union was justified for refusing to refer two employees as steward whom the union considered to be disloyal because they had spearheaded a dissident movement within their local for years.

⁴ The facts in *Paintsmiths* involved the layoff of an employee as a result of the union's steward appointment. The Eighth Circuit did not pass on the legality of a union precluding an employee from being hired because it chooses another less senior employee to be steward. I believe, however, that the Eighth Circuit's rationale requiring the union in *Paintsmiths* to demonstrate a substantial and legitimate justification applies equally to the instant case where the Union in selecting its steward prevents the hiring of another employee. In both situations, the union has discriminated against an individual and has affected his employment, either by causing his layoff or preventing his hire, thereby demonstrating its power over the employee's livelihood.

⁵ In finding that the Respondent's reason for referring Boyer over Belair as steward was not substantial and in the absence of an unlawful motive, I find it unnecessary to decide whether the Respondent's asserted justification was legitimate.

⁶ *Paintsmiths, Inc. v. NLRB*, supra.

The Board, by allowing the Union a blanket discretion to bypass the out-of-work list in the selection of a steward, has failed to give the proper weight to the interest of the employee affected by the Respondent's action. I reiterate that I strongly disapprove of the majority's decision as it perpetuates a rule that grants the Union the authority without any compelling reason to discriminate against employees in prejudice of their Section 7 rights.

Accordingly, since the Respondent has not demonstrated that its reasons for selecting Boyer over Belair are legitimate and substantial, I would find that the Respondent's actions violated Section 8(b)(1)(A) and (2) of the Act.

Margaret M. McGovern, Esq., for the General Counsel.
James L. Cowden, Esq. (Handler, Gerber, Johnston, Stroloff & Cowden), of Harrisburg, Pennsylvania, for the Respondent.

DECISION

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on 24 and 25 July 1985, at Harrisburg, Pennsylvania. The original charge in Case 4-CB-4948 was filed and amended on 28 November 1984¹ and 8 February 1985, respectively, by Kenneth Granger, an individual. The original charge in Case 4-CB-4962 was filed and amended on 19 December and 16 January 1985, respectively, by Frederick P. Belair, also an individual. The complaint in Case 4-CB-4948 issued on 28 February 1985. An order consolidating cases (4-CB-4948 and 4-CB-4962), consolidated complaint, and notice of hearing issued 20 June 1985 alleging that Plumbers and Pipefitters Local Union No. 520, United Association of Journeymen and Apprentices of the Plumbers and Pipefitting Industry of the United States and Canada, AFL-CIO-CLC (the Union or Local 520) failed and refused to refer the Charging Parties herein in violation of Section 8(b)(1)(A) and (2) and failed to properly notify job applicants seeking referral of the existence of a steward preference exception to its established referral procedures. In its answer the Union denied the commission of any unfair labor practices.

Representatives of the parties participated fully in the hearing and subsequently both the General Counsel and the Union filed briefs. Based on the entire record including my observation of the witnesses and after due consideration of the briefs,² I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION INVOLVED

The Union admits jurisdiction and that it is a labor organization within the meaning of the Act. I so find.³

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Union had, for years, operated its hiring hall and referral system without the benefit of written records. In 1983 there was an election of new union officers, including Business Manager Hartinger, who thereafter undertook the keeping of records on which to base referrals. Although Hartinger kept referral records and did so in accordance with certain rules, these rules were neither reduced to writing nor posted. However, the parties are in agreement that the rules operate as follows.

The hiring hall maintains a list of Job applicants with each applicant's name accompanied by a date which reflects his last day of work. As jobs become available, the Union refers job applicants to these jobs in accordance with the date they last worked. The individual who has been out of work the longest is at the top of the list and is referred first, provided he has the skills to do the job. An individual whose name is on the list is free to refuse any offer of referral without being penalized for doing so, that is, his name remains on the list exactly where it was before his refusal. However, if an individual accepts a referral and works on that job to which he is referred for more than 28 days, his name is removed from the list. The Union places that individual's name back at the bottom of the list with a new out-of-work date, when he once again becomes unemployed. If an individual accepts referral to a job within the Union's geographical jurisdiction and is laid off before working more than 28 days, he maintains his original place on the seniority list. Similarly, if an individual accepts work outside the Union's geographical jurisdiction, he maintains his position on the list regardless of the duration of the job. The Union removes the name of any individual from the list and places it at the bottom of the list if that individual quits a job, whether the job is a long-term job⁴ or a short-term job.⁵ Foremen are exceptions to these general rules. A foreman is usually selected by the hiring employer or designated by the business manager without regard to the individual's place on the referral list.

A. Kenneth Granger

1. Facts

Kenneth Granger has been a member of the Union for 24 years. In July 1984 Granger asked Charles Llewellyn, Local 520 business agent, to see if he could get him work at the Hope Creek jobsite located near Camden in southern New Jersey.⁶ Llewellyn contacted Local 322 which had jurisdiction over the Hope Creek job. Local 322 informed Llewellyn that it had members of its own unemployed and were not referring members of sister locals to the Hope Creek job at that time. Llewellyn thereafter called Local 9 located in northern New Jersey to find work for Granger and was informed that there were jobs available. He then sent Granger to Local 9's hiring hall where Granger was referred to and accepted a job as a welder at the Hess Refinery job within the

¹ All dates are in 1984 unless otherwise indicated.

² The General Counsel's posthearing motion to correct transcript, being unopposed, is granted.

³ Based on admissions at the hearing and in the answer.

⁴ More than 28 days.

⁵ Twenty-eight days or less.

⁶ Wage rates were higher in New Jersey than in the Harrisburg area.

geographical jurisdiction of Local 9. When Granger arrived at the jobsite he took a welding test but failed. He thereupon returned to Harrisburg, Pennsylvania, the jurisdiction of Local 520.

In late August Granger was employed at Herre Brothers' Conrail jobsite in Harrisburg. Though employed at Herre Brothers for a week, Granger missed work 2 out of the 5 days. He testified that he was dissatisfied with the job and discussed his leaving the job with his foreman, John Schminsky.

Although still employed at Herre Brothers, just before Labor Day, Granger called the hiring hall and again asked Llewellyn if he could get his friend John Litz and himself work in New Jersey. Llewellyn again called Local 322, but was unsuccessful in getting work for Granger. He called Local 9 and was advised that there were openings. Llewellyn, in turn, advised Granger of these openings.

On 31 August, while Granger was still employed at Herre Brothers, Business Agent Rhinehart visited the jobsite. Granger told Rhinehart of his dissatisfaction with the job and once again asked him to see if he could get him a job at Hope Creek so that he could get off the Herre Brothers job. He advised Rhinehart that he was thinking about quitting his job with Herre Brothers and going to work in New Jersey. He told Rhinehart that he had already spoken with Llewellyn and asked him to contact Local 322 on his behalf. He stated that he would be going to New Jersey the following Tuesday, 4 September. Rhinehart cautioned, "I hope you realize what you're doing, knowing its a long term job, you're going to the bottom of the list."

On Tuesday, 4 September, Granger reported to the Local 9 hiring hall where he waited all day to be referred. He did not, however, hear his name called and returned to Harrisburg.

Early Wednesday morning on 5 September, Granger reported to work at the Herre Brothers jobsite. However, John Schminsky, Granger's foreman, advised him that he no longer had a job. Granger replied that if he no longer worked there, then he wanted his money. It is undisputed that Granger was laid off at this point early on the morning of 5 September.

At 8:10 a.m., 5 September, shortly after he was laid off, Granger visited Local 520's hiring hall and told Rhinehart what had occurred the day before. He asked him to call Local 322 and see if he could get him a job. Rhinehart did so but, like Llewellyn, was unsuccessful in getting work for Granger. Rhinehart then called Local 9 and determined that there was still work available within its jurisdiction. He asked Granger if he wanted the work and, when Granger said he did, Rhinehart obtained another referral for him to the Hess Oil Refinery job. Rhinehart credibly testified that at no time during this conversation did Granger mention that he had been laid off earlier that morning or even that he had shown up for work at Herre Brothers. Rhinehart credibly testified that he did not find out about Granger's layoff until several weeks later.

Following their referral to the Hess Refinery job, Granger and his friend Litz began working for that firm, some 170-180 miles from Harrisburg, in Perth Amboy,

New Jersey. Llewellyn and Rhinehart, knowing nothing of Granger's layoff, assumed from the evidence that Granger had quit his job at Herre Brothers in order to work in New Jersey, just as he had stated he would do. Because the referral rules required that any individual who quit a job must have his name removed from the referral list, Llewellyn removed Granger's name from its place on the list and placed it at the bottom.

Granger and Litz continued to work for Hess in New Jersey into October. During this period there was no contact between Granger and the Union. Then, in early October, several employees who had been referred to the Hess Oil job through Local 520 were pulled off that job and sent to set up a new job in Washingtonville, Pennsylvania, where Aycock, Inc. had obtained a contract. When Granger and Litz heard about the new jobs which were about to open up at Washingtonville, they decided to request referral to that project.

On 8 October at 9:47 a.m., Granger, accompanied by Litz, telephoned the union hall from the Hess jobsite and spoke with Business Agent Charles Gross. Granger told Gross that if his and Litz' names were at the top of the referral list, they would like to work on the Washingtonville job. Gross replied that Granger's name was at the bottom of the list because he had quit his last job, meaning the Herre Brothers job. Granger replied heatedly that he had not quit, that he had been laid off and would be coming over to the union hall to find out what was going on.⁷ He then hung up.

On the afternoon of 8 October Granger's superior ordered Granger to perform certain work. He refused on grounds that it was unsafe for him to perform the task by himself. An argument ensued and Hess Oil fired Granger. This occurred at 3:30 p.m.

On 9 October Granger had a telephone conversation with Business Manager Hartinger about his termination the day before. He told Hartinger that Hess had fired him unfairly and that he wanted Hartinger to bring charges against both the general foreman and the steward. Hartinger told Granger that he was uncertain what to do under the circumstances, but would look into it. After hanging up, Hartinger went into Llewellyn's office which adjoined his own and discussed with him the telephone call which had just taken place and which Llewellyn had, in part, overheard. Llewellyn advised Hartinger against filing charges against Local 9 because Local 520 was trying to put its own men to work within Local 9's jurisdiction and suggested that if Granger wanted charges tiled, he should do it himself. At no time during the conversation between Granger and Hartinger did the subject of the Washingtonville job or Granger's place on the referral list arise.⁸

⁷ Granger's out-of-work date, when he went to work for Herre Brothers was 11 May 1984.

⁸ The 8 October telephone conversation was partially overheard by Litz who was standing behind Granger as he spoke with Gross. Immediately on hanging up, Granger filled Litz in about the content of the call and the circumstances surrounding his layoff at Herre Brothers. Although Gross testified about various other matters, he did not testify about his 8 October conversation with Granger. Granger's description of the content of the conversation, being undisputed, is credited.

⁹ Based on Hartinger's credited testimony.

Within a day or two, probably on 11 October," Hartinger called Granger and told him that the Union would not get involved in bringing charges against the Local 9 foreman or steward. Granger testified that the discussion also included references to his position on the referral list. Hartinger could not recall this subject being brought up, in fact denied that it had been. I credit Hartinger.

Between 15 and 25 October, the Union referred 23 applicants to the Washingtonville job along with Belair, the foreman who was requested by name. Granger was not one of these. Of the 23 referrals, 9 men had out-of-work dates earlier than Granger and were therefore higher on the referral list than he would have been had he not been removed therefrom. Two men had the same out-of-work dates as Granger, while 12 men had later dates than 11 May. In addition to the individuals who were contacted and referred to the Washingtonville job, there were also a number of men who were contacted and who refused referral. Llewellyn testified concerning 13 of these individuals stating that only one of them had a higher place on the out-of-work list than Granger. Thus, if Granger's name had not been removed from the out-of-work list, his 11 May date would have entitled him to a referral during the 15 through 25 October period.

On 15 and 22 October Granger made phone calls to the Union. On one or both of these occasions he apparently complained about not being referred to the Washingtonville job, explaining once again that he had not quit the Herre Brothers job, but had been laid off and was therefore entitled to referral.

On Tuesday, 30 October, at the regular weekly meeting of the business agents, it came to the attention of Hartinger for the first time that Granger was upset about not being referred to the Washingtonville job. Likewise, Hartinger was informed during this meeting that Granger was claiming that he had been laid off from Herre Brothers and had not quit as had been supposed. On hearing this, Hartinger directed Rhinehart to go to Herre Brothers immediately after the meeting, talk with Schminsky, and find out whether Granger had quit or had been laid off.

On the afternoon of the agents' meeting, Rhinehart went to the jobsite, where Schminsky confirmed Granger's story that Herre Brothers had, in fact, laid off Granger and that he had not quit. Rhinehart promptly contacted the hiring hall and relayed the message. Llewellyn received the information sent by Rhinehart and immediately reinstated Granger to his proper place on the seniority list with an 11 May out-of-work date. Unfortunately, by the time Granger was reinstated to his proper place on the out-of-work list," all of the jobs at the Washingtonville job had been filled.

2. Decision

I find that the Union placed Kenneth Granger's name at the bottom of the out-of-work list as a result of an

honest mistake in the belief that he had quit his job at Herre Brothers, although he had, in fact, been laid off. When the Union mistakenly placed Granger's name at the bottom of the out-of-work list he was thereby denied employment at the Washingtonville jobsite where he should have been hired but for this unfortunate mistake.

Now, the Union had long operated its hiring hall without any specific system or procedure governing referrals and without keeping any written records by which its referrals could be judged. Then Hartinger was elected business manager and certain other individuals were elected business agents. These newly elected officers sought to institute a referral procedure susceptible of being monitored by the membership to see that referrals were fairly made. Though the National Labor Relations Board has long maintained that it could conceive of a hiring hall being fairly maintained without recordkeeping,¹² the very act of recordkeeping guarantees to the membership a means whereby fairness can be measured. Therefore, recordkeeping should not be discouraged. It follows then, that if a union hiring hall voluntarily chooses to implement a system of recordkeeping to ensure to its membership a means of monitoring its referral rights, that union should not be prejudiced by finding it in violation of the Act for every possible mistake it might make in administering that system. To do so would certainly discourage recordkeeping to the detriment of the membership. I am convinced that the mistake which the Union made in placing Granger's name at the bottom of the list was not in violation of the Act¹³ and to find it so would undermine the Union's good-faith attempt to operate its hiring hall in a fair and nondiscriminatory manner.

B. Frederick Belair

1. Facts

The collective-bargaining agreement which the Union has with the Mechanical Contractors Association provides: "*A steward shall be a working journeyman appointed by the Business Agent of the Local Union who shall, in addition to his work as a journeyman, be permitted to perform during working hours such of his union duties, as pertain only to that job and cannot be performed at other times.*" Prior to the election of Hartinger as business manager and the introduction of the new referral system described above, the previous union leadership exercised its contractual right to appoint stewards. When Hartinger and the other current union officers were elected, they continued to appoint stewards without regard to their places on the referral list. The Union maintains that it has the lawful right to make such appointments regardless of the appointees' places on the referral list, although the General Counsel takes the position that it violates the law by doing so. The immediate issue concerns the failure of the Union to appoint Fred Belair as steward to the Allis-Chalmers job, and the appointment of another member, Jerry Royer, to the job as

¹⁰ R Exh. 5 indicates an 11-minute telephone call was made from the union hall to Granger's telephone number.

¹¹ Granger testified that he made various efforts between 8 and 30 October to have himself reinstated on the out-of-work list in his proper position. I find that he did so only to the extent described above.

¹² *Laborers Local 394 (Building Contractors)*, 247 NLRB 97 (1980).

¹³ *Operating Engineers Local 450 (Houston Chapter, AGC)*, 267 NLRB 775, 799 (1983).

steward though Belair was higher on the referral list than Boyer.

Belair has been a member of the Union for well over 12 years and politically active both in and outside the Union. Belair was trustee for the Union's apprenticeship program from 1979 to 1982, trustee for the health and welfare and pension program from 1981 to 1983, and served as delegate to the Lebanon Labor Council during the late 1970s and early 1980s. In 1983 Belair ran for business agent but lost. Rather, Charles Llewellyn, Charles Gross, and Robert Sabo won the business agent slots.

Belair went to the hiring hall in February or March 1984 in order to determine his position on the out-of-work list. He talked to Business Agent Sabo about the list and his place on the list relative to the names of other members. He had been getting different versions from other people about how the list was supposed to operate. During the discussion Sabo asked Belair rhetorically: "Well, where do you think we'd be, Fred, if we had lost the election?" Belair replied, "You mean I can't get a job in my local because I ran for business agent and lost?" Sabo did not reply.¹⁴

Sometime around October a prejob conference was held between the field representative for Allis Chalmers and Hartinger concerning a long-term project to be undertaken at Safe Harbor in December. Allis-Chalmers was going to install new turbines in the hydroelectric dam located there. Inasmuch as the company had been advised that the job was to be a union project, the prejob conference was scheduled for the purpose of deciding labor requirements. During the conference the Allis Chalmers representative specifically asked for cooperation from the Union on the job. Because the Union did not have a labor agreement with Allis Chalmers, Hartinger, in hopes of building a good relationship, took the request seriously.

As a result of the conference, Allis Chalmers requested three men in October to perform some short-term installation work. These men completed the job and were then laid off. Subsequently, however, when the company requested two more men in November and two more in December, the Union was specifically asked not to send two of the three men supplied in October.

In early November, at the request of Allis Chalmers, the Union sent a foreman and a welder to the Safe Harbor jobsite. Traditionally, and for obvious reasons, the first person on the job was the foreman. The second man on the job, traditionally, and for almost the same obvious reasons, was made steward. In the instant case, one John Delp was the welder sent out to the job by the Union and, as the second man on the job, was appointed steward. Thus, as foreseeable, and for good cause shown, the first two employees on the job were the foreman—to represent the rights of the employer—and the steward—to represent the rights of the workers. However, the fly

in the ointment was that Delp did not want to serve as steward, so he was made temporary steward, so that someone more willing to shoulder the responsibilities could, at some later time, be appointed as steward for the length of the engagement. The person chosen, namely, Gerald Boyer, was appointed steward in November or December to take over from Delp. Delp was higher on the seniority list than Belair, so that there is no argument about Delp's referral. On the other hand, Belair, on 3 December, went to the union hall and asked Business Agent Gross to see the out-of-work list in order to compare his place on the list to Boyer's. Belair had been advised by Boyer that he (Boyer) had been referred as steward to the Safe Harbor job and Belair was certain that he was higher on the list than Boyer. Gross showed Belair the list which indicated, as Belair suspected, that his name was, in fact, higher than Boyer's. Belair then asked Gross why Boyer had been sent out ahead of him for a full-time job. Gross replied that the Union had a right to appoint stewards. Belair argued that he had been told by an NLRB agent that being a steward was not considered a special skill. He added that Gross could appoint stewards but had no right to "jump the list." Gross continued to maintain that he did have such a right. Belair left. Subsequently, on 17 December Belair was referred to the Safe Harbor job, albeit, not as a steward. On 19 December Belair filed the charge in the instant case based on the Union's appointment of Boyer as steward on 3 December rather than Belair.

2. Decision

The General Counsel argues that the failure of the Union to refer Belair as steward was unlawful because it had no objective basis for selecting Boyer out of turn instead of Belair. The General Counsel contends that the Union's collective-bargaining agreement with the Association merely confers on the business manager the authority to appoint a working journeyman as steward on a job and does not provide that he is entitled to select an individual to be steward without reference to placement on the out-of-work list. The General Counsel argues that such power would have to be explicitly stated in the contract.

Respondent, on the other hand, argues that by choosing not to refer Belair as steward on the Allis-Chalmers job at Safe Harbor it exercised its legal and contractual prerogative by sending a person that better met its qualifications to serve the Union as its steward. In support of this contention, Business Manager Hartinger testified that his usual practice in appointing a steward is for him to start at the top of the out-of-work list and work his way down until he finds a qualified person.

Hartinger explained that to be qualified to act as steward, the appointee must be familiar with the contract and with the work which belongs within the Union's jurisdiction in case a dispute should arise with another craft about who should do the work. Further, to be qualified, a steward must be capable of controlling his men, to make certain there are no serious arguments on the job, either with other employees or with members of management. The steward must see that the men receive proper

¹⁴ The General Counsel argues that Sabo's statement is indicative of animus based on Belair's internal union political activity and is evidence of why Belair was later refused appointment as steward. I find, however, that the statement was equally susceptible to other interpretations including the explanation that Sabo meant only that if he had not been elected business agent he, too, like Belair, would be unemployed.

pay, breaks, overtime, and other contractual rights while at the same time being flexible enough so as not to appear hard-nosed. He must also make certain that working conditions are safe. The steward acts as a conduit, handling complaints of management about workers, and of workers about management, and/or conditions on the job. In short the steward acts as the Union's, i.e., the business manager's, agent on the job for the purposes mentioned. Finally, the steward may also play a major role in the grievance procedure.

In the instant case, Hartinger testified, he was anxious to make a good impression on Allis-Chalmers inasmuch as the corporation had never done business with the Union before and he had hopes of obtaining future work for his members and perhaps a contract. With this in mind, and recalling that Allis-Chalmers had been dissatisfied with two of the three earlier referrals, Hartinger tried to make certain that the steward chosen for the project would be right for the job. Thus, when Hartinger noted that Belair was high on the out-of-work list he considered whether to appoint him steward. Having known Belair for years he decided that Belair would not be right for the job. He testified that, in his opinion, Belair was hot-headed, self-motivating, self-serving, and very quick to react. He testified further, "rather than step back for a second, think the situation through and then think for the good of . . . the members, I find Fred is . . . very quick to jump to a conclusion and . . . not think of the whole membership, whether it be 20 men on a job or 1,200 men of the local. He's just not the kind of person . . . that I want to represent the people that elected me."

The arguments are joined. The General Counsel's contention that the failure of the Union to refer Belair as steward was unlawful because of a lack of objectivity is misplaced. If the Union had refused to appoint Belair to a job as a plumber or a titter because the business manager disapproved of his temperament, I might well agree with General Counsel's position. However, this is not a matter of a referral to a rank-and-file position as a plumber by the Union of an individual whom the business manager dislikes. Rather, it is a question of the management of the Union determining whom it should appoint as its agent to carry out its policies. Granted, it may very well be violative of the Act for a union to deny a livelihood to an individual because he ran for office against the incumbent and lost. But does it follow that the winner in an internal union struggle is bound by the Act to appoint his recent opponent as his agent, to carry out his objectives, the same objectives that the would-be agent may have fought against so recently. To require Hartinger to appoint Belair as his agent to carry out his objectives would be the equivalent of requiring a Republican president to appoint a Democrat as his most trusted agent solely on the basis of his seniority in the Congress. If a corporation is free to appoint its supervisors to carry out its program without outside interference, it is equally true that a union must be free to ap-

point its stewards to carry out its program without outside interference. In short, the requirement of objective criteria should not apply to the appointment of stewards.

The second of the General Counsel's contentions, namely, that the Union's collective-bargaining agreement with the Association merely confers on the business manager the authority to appoint a working journeyman as steward on a job and does not provide that he is entitled to select an individual to be steward without reference to placement on the out-of-work list, does not make sense. Clearly, if the object of the section is to state that the business manager, business agent, or person in charge has only the power to follow an out-of-work list in accordance with the date thereon—there would have been no authority conferred whatsoever. A purely ministerial duty would have resulted whereby any clerk could have followed the requirement as described. Who needs a special provision for that. Obviously, the object of the provision is to permit the Union's management to select its agents to carry out, at the worksite, the policies agreed on back at the Union's headquarters.

I find, with regard to the choice of Boyer over Belair for steward at the Allis-Chalmers' Safe Harbor facility, that the Union's business manager determined that Boyer should be his choice of lieutenant or steward because he felt that Boyer was better capable of carrying out his policies than Belair. In so doing, Hartinger was not bound by the out-of-work list which had nothing to do with the appointment of stewards and how the Union should manage its affairs, but rather with how fairly available jobs, not stewardships, should be distributed.¹⁵

C. Failure to Notify Job Applicants of the Existence of a Steward Preference Exception to the Union's Referral System

The record indicates that for years the Union referred its stewards to jobs without reference to an out-of-work list. This was because no out-of-work list existed until Hartinger became the business manager. When Hartinger became business manager and thereafter instituted an out-of-work list system, he nevertheless continued to assign stewards *without being bound* by the out-of-work list, though it was *utilized* to some degree. The procedure was known to the general membership and to Charging Party Belair who disagreed with the Union's procedure.¹⁶ Despite the disagreement between the union leadership and Belair about how stewards should be appointed, Belair was always given free access to the out-of-work list and told repeatedly how appointments were being made. I find, therefore, that information on the subject was always made freely available to Belair and to the membership, and the allegation to the contrary is without merit.

¹⁵ *Pile Drivers Local 2375 (Offshore Welding)*, 767 NLRB 320 (1983); *Carpenters Local 1243 (Arctic Slope)*, 240 NLRB 1118 (1979)

¹⁶ Several discussions took place between Belair and the Union's leadership concerning this subject

Having found that the allegations of violation of Section 8(b)(1)(A) and (2) are without merit, I issue the following recommended' ⁷

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The consolidated complaint is dismissed in its entirety.