

**Brand Mid-Atlantic, Inc. and Mark Vodopia
Local 12, International Association of Heat and
Frost Insulators and Asbestos Workers, AFL-
CIO (New Maintenance, Inc. d/b/a NPS Energy
Services) and Michael Kelly and Mark
Vodopia.** Cases 29-CA-13593-1, 29-CB-6909,
and 29-CB-6969

August 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

Exceptions filed to the judge's decision in this case¹ present the question, inter alia, of whether the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by refusing to refer union member Mike Kelly as a mechanic because of his failure to pay an initiation fee and union member Mark Vodopia because of his intraunion activities.

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.²

The Respondent Union assists its members in finding jobs in the New York City area by operating a nonexclusive referral service and by supplying information to members so that they can seek work from employers on a self-referral basis. Although the Union is signatory to some contracts that require it to be the exclusive source of referral at specific projects, members obtain 90 percent of their jobs through self-referral. As fully explained by the judge, from the beginning of 1988 the Union referred members on a nonexclusive basis to perform work at the Astoria Powerhouse Unit 6 project for New Maintenance, Inc. (NPS II).³ In addition, the Union referred employees on a

nonexclusive basis to perform work at the Astoria Powerhouse Unit 10 for Brand Mid-Atlantic, Inc. There is no relation between NPS II and Brand Mid-Atlantic.

The judge found that the Union did not violate Section 8(b)(1)(A) and (2) by refusing to refer Mike Kelly to the NPS II project at Astoria Powerhouse Unit No. 6 after January 1, 1988, because he had not paid his initiation fee. In dismissing this allegation of the complaint,⁴ the judge reasoned that because Kelly was not yet a member of the Union and because the Union did not operate an exclusive hiring hall, the Union was not obligated to refer Kelly for work. For the reasons stated below, we disagree.

Initially, we note that it is undisputed that Kelly has been a union member since 1982.⁵ In August 1987, Kelly passed the mechanic's exam. The following month he sent the Union a check to cover the balance of his initiation fee that was due before he could be sworn in as a mechanic. The check "bounced." On January 8, 1988,⁶ Kelly gave Bokun, the Union's secretary-treasurer, another check for \$200 to cover both the initiation fee and dues arrearages. In the latter part of February, Fitzgerald, the Union's business representative, received a call from Kelly requesting that he be sent to Astoria Powerhouse Unit 6 to work at the tank farm project. Fitzgerald testified that he "was going to place [Kelly] at Astoria Powerhouse sometime in the very early part of March." Fitzgerald further testified that he called Bokun in March to get Kelly's phone number. At that time Bokun informed him that [Kelly] had not paid his initiation fee and still owed the Union money. Fitzgerald replied that he needed a mechanic for the Unit 6 job, "and as long as Kelly has not paid his obligation, he is not considered a mechanic." Consequently, Fitzgerald did not refer Kelly to the NPS II project. Neither Fitzgerald

¹On August 10, 1990, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and supporting brief and a brief in reply to the General Counsel's exceptions. The General Counsel filed exceptions and supporting brief and a brief in reply to the Respondent's exceptions.

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

²The judge found, and we agree, that the Union violated Sec. 8(b)(1)(A) of the Act by threatening, through its business agent, Fitzgerald, that Vodopia would not work again in the Local. The judge also found, and we agree, that the Union did not violate Sec. 8(b)(1)(A) by refusing to refer Vodopia from March 10 to 14, 1988, and that Respondent Brand Mid-Atlantic did not violate Sec. 8(a)(3) by refusing to hire Vodopia between late April and May 25, 1988, because he had filed internal union charges and because he engaged in dissident union activities. Accordingly, we dismiss these allegations of the complaint.

³We agree with the judge, for the reasons stated by him, that NPS II was not a legal successor to NPS I and that at all times relevant there was no agreement in effect between the Union and NPS II that required the Union to be the exclusive source of referrals to the Unit 6 project. In this regard, we note that members worked at two projects for NPS II. The first involved work at Unit 6 itself; the second project, the "tank farm" or "oil field" project involved maintenance work at the tank farm approximately a quarter of a mile from Unit 6. As noted below, the projects were separate and distinct and there were no transfers between the two projects.

⁴The consolidated amended complaint alleges that the Union operated an exclusive hiring hall and that it violated Sec. 8(b)(1)(A) and (2) by refusing to refer Kelly "notwithstanding that, because Kelly was not provided the 30-day statutory grace period, he was not delinquent in the payment of the Union initiation fee and dues required by Respondent Union for referral to NPS." Although we find, as set out below, that the Union violated Sec. 8(b)(1)(A) under a different theory than that set out in the complaint, the allegations of the consolidated amended complaint put in issue the same issues which we address below, i.e., whether the Union had a fiduciary duty to inform Kelly how he could fulfill his financial obligations and to give Kelly an adequate period of time to meet those obligations before it refused to refer him for employment, and whether the Union had a duty to refer him for employment. Thus, we find that the theory on which we find the violation is encompassed within the allegations of the complaint. Finally, we emphasize that the issues were fully litigated at the hearing.

⁵In its reply to the exceptions taken by the General Counsel, the Union itself states that Kelly had been a member for 6 years and "concur[s] with General Counsel that Kelly was a member of Local 12 in 1988 (as a helper, not a mechanic)." The judge's erroneous belief that Kelly was not yet a member of the Union because he had not yet paid his initiation fee apparently arises from the fact that a union member pays one half of the initiation fee when he joins the Union and the other half when he passes the mechanic's test. Kelly paid half of the initiation fee in 1982 when he joined the Union. The initiation fee at issue here is the balance of the fee necessary before becoming a mechanic.

⁶Unless otherwise noted, all dates hereafter refer to 1988.

nor Bokun informed Kelly that he was in arrears and that the Union would not refer him as a mechanic because of his failure to pay the initiation fee.

In early April, Kelly sought out Bokun to find out why he had not received his mechanic's card. At that time Bokun informed Kelly that he had not deposited Kelly's check because Kelly had to submit two separate checks, the first to pay the initiation fee and the second to cover the dues arrearage. Finally, on May 3, 1988, Kelly submitted two signed blank checks to the Union. He began working for Brand at Astoria Powerhouse No. 10 later that month.

The issue here is whether the Union violated Section 8(b)(1)(A) of the Act by refusing to refer Kelly as a mechanic.⁷ We find that it did for the following reasons. Although the Union does not operate an exclusive referral service, it maintains exclusive control over the members' ability to seek referral in a specific status. In this regard, a member can only move up from an "improver" to a "mechanic," and thus seek employment at the higher grade, by passing an exam given by the Union and by paying the required installment of his initiation fee to the Union. In these circumstances, where members depend exclusively on the Union for access to a higher referral status and where the Union retains total control over the process by which members can achieve such status, we find that the Union has a fiduciary duty to deal fairly with its members in processing their applications to become mechanics.⁸ As part of its fiduciary duty, the Union had an affirmative duty "specifically to inform [Kelly] of his obligations and afford him a reasonable opportunity to satisfy them" before it could refuse to refer him because of his alleged failure to pay the balance of his initiation fee and his dues arrearage.⁹ Thus, the Union had an affirmative obligation to inform Kelly of the specific amounts that he owed the Union in regard to the initiation fee and the dues arrearage and of the process by which he could pay these amounts to the

Union before it could refuse to refer him as a mechanic.

Turning to the facts before us, we emphasize that the Union accepted Kelly's January 8 check without informing him that it required that separate checks be submitted to cover the initiation fee and the dues arrearages. We emphasize further that the Union never notified Kelly, in accordance with its own established procedures,¹⁰ that it considered him "delinquent" after he gave Bokun the January 8 check. Finally, as noted above, Fitzgerald testified that he would have referred Kelly as a mechanic to the Unit 6 tank farm project but for his failure to pay the initiation fee and dues. Thus, in the months following his tender of the January 8 check to Bokun and Bokun's acceptance of it, Kelly reasonably expected that he would be sworn in and referred out by the Union as a mechanic. During this same time, however, and unknown to Kelly, the Union both failed to process his application and refused to refer him as a mechanic because of his alleged failure to fulfill his financial obligations. In sum, by failing to inform Kelly how he could fulfill his financial obligations, the Union effectively prevented Kelly from fulfilling those obligations and then refused to refer him as a mechanic because he had not met them. In these circumstances, we find that the Union breached its fiduciary duty to Kelly and thus violated Section 8(b)(1)(A).¹¹

As to Vodopia, the judge found and we agree, as noted above, that the Union violated Section 8(b)(1)(A) through Fitzgerald's June 7 statement to the membership that Vodopia was a troublemaker and "would never work again in this Local." Inferring that Fitzgerald had held this view in May, the judge found that the Respondent violated Section 8(b)(1)(A) and (2) by refusing to refer Vodopia to a job at Unit 6 because he had filed internal union charges, had criticized Fitzgerald, and had become troublesome to union officials. We disagree.

Vodopia has been a member of the Union for over 30 years. A longstanding feud existed between Vodopia and Fitzgerald. In December 1987, Vodopia was referred to the NPS I project at the Unit 6 tank farm project. Vodopia expressed his concern about the quality of the work and about certain activities that took place there. On March 1, 1988, Vodopia appeared

⁷ Because the Union did not operate an exclusive hiring hall, we find that it did not violate Sec. 8(b)(2) by refusing to refer Kelly. See *Iron Workers Local 577 (Various Employers)*, 199 NLRB 37, 42-43 (1972), and *Operating Engineers Local 4 (Carlson Corp.)*, 189 NLRB 366, 366-377 (1971).

⁸ See *Service Employees Local 9 (Blumenfield Enterprises)*, 290 NLRB 1, 3 (1988), where the judge, observing that "a union member has the right to protect his right to fair treatment by the union in matters affecting his employment," cited in support *Miranda Fuel Co.*, 140 NLRB 181, 189 (1962), quoting *Electrical Workers IUE Local 801 v. NLRB; NLRB v. General Motors Corp.*, 307 F.2d 679, 683 (D.C. Cir. 1962):

The requirement of fair dealing between a union and its members is in a sense fiduciary in nature and arises out of two factors. One is the degree of dependence of the individual employee on the union organization; the other, a corollary to the first, is the comprehensive power vested in the union with respect to the individual.

⁹ See *Claremont Resort Hotel & Tennis Club*, 260 NLRB 1088, 1092 (1982), and cases there cited. These cases concern a union's fiduciary duty in the context of its failure to inform members of their dues delinquencies prior to seeking their discharge under a valid union-security agreement. In the present case, where the Union refused to refer Kelly as a mechanic because he has not met his financial obligations, we find that the Union had a similar fiduciary duty to inform Kelly of the amount he owed and how he could satisfy his obligation to the Union before it refused to refer him for employment.

¹⁰ Fitzgerald and Bokun testified without contradiction that the Union's established practice was to send a "standard letter" as a reminder to a member who was "a couple of months" behind in his dues. If the dues were not paid within a "short period," the delinquent member would be sent a suspension notice. If no answer was received within 30 days, the member stood lapsed because of nonpayment of dues. Between January and May 1988, the Union never sent Kelly such a "standard letter" despite the fact that the Union still considered him to be delinquent.

¹¹ The position in which the Union placed Kelly is analogous to the position in which a union places a traveler when it unlawfully refuses to accept his travel service fee and then refuses to allow him to work in its jurisdiction because he has not paid the fee. See, e.g., *Iron Workers Local 111 (Steel Builders)*, 274 NLRB 742, 746 (1985).

before the Union's executive board to bring internal charges against Fitzgerald and McCarthy, the shop steward on the project. On March 4, the employees at the tank farm project were laid off due to an oil spill. A "few" employees were recalled on Thursday, March 10. Fitzgerald was recalled on March 14.¹² Pursuant to Vodopia's request that members of the executive board visit the tank farm project to check on the work there, Fitzgerald visited the site on March 16. Vodopia and Fitzgerald became involved in a heated argument. Another argument between the two occurred when Fitzgerald visited the site on April 1. On April 15, Vodopia was laid off for a second time.

On April 18, Vodopia called Harry Moore, a superintendent for Brand, to request employment at the Astoria Powerhouse Unit 10 project. Moore promised him a job and told him that it would start on April 26. Despite repeated attempts to reach Moore, Vodopia could not contact Moore again until May 6 when Moore told him he could have a job at a different project. About the same time, Vodopia called Fitzgerald because he had heard that some employees had quit at Unit 6 and asked to be referred to that job. Fitzgerald told him that the jobs had been filled. On May 24, Vodopia again called the Union looking for work. Loporfido, a union representative, told Vodopia to go to the Brand jobsite and talk to Moore about a job there. On May 25, Vodopia went to the Brand jobsite, was hired and worked for 3 days before being laid off on June 1.¹³ Finally, at a general membership meeting on June 7, another quarrel took place between Vodopia and Fitzgerald. During the argument, Fitzgerald stated that Vodopia "would never work again in this Local, that he didn't even consider him a member of the Union [and] that he was nothing but a troublemaker."

Although we agree with the judge that the General Counsel has established a prima facie case that the Union had strong animus concerning Vodopia, we find that the General Counsel has not established any nexus between that animus and the failure to refer. Moreover, the Respondent has successfully met its burden of showing that its failure to refer Vodopia to the Unit 6 job was nondiscriminatory and thus did not violate Section 8(b)(1)(A).¹⁴ In this regard, we note that at the hearing Ragusin, the former foreman at the Astoria tank farm project, credibly testified that the Unit 6 project and tank farm project were separate and that there were no transfers between them. Consequently,

¹² As noted above, at fn. 2, we agree with the judge that the Union did not violate Sec. 8(b)(1)(A) by refusing to refer Vodopia from March 10 to 14.

¹³ As noted above, at fn. 2, we agree with the judge that Respondent Brand Mid-Atlantic did not violate Sec. 8(a)(3) by refusing to hire Vodopia between late April and May 25 because he had filed internal union charges and because he engaged in dissident union activities.

¹⁴ As explained above, at fn. 7, we find additionally that in the circumstances of this case the Union did not violate Sec. 8(b)(2) by refusing to refer Vodopia.

seniority did not apply from one job to the other. In addition, Fitzgerald testified without contradiction that in selecting men for work, he considered three factors in making his decision: who had been unemployed the longest, whether the individual had the skills necessary to perform the job, and whether the individual could get to the job. It is undisputed that in making referrals the Union did not consider seniority. At the hearing, the Union presented evidence that four individuals were referred to the Unit 6 job on May 5 and that there was no factor affording Vodopia priority in referral ahead of these individuals.¹⁵ In the absence of any evidence that Vodopia was entitled to referral ahead of these four individuals and in the absence of any nexus between the Union's failure to refer Vodopia on May 5 and the Union's animus toward him,¹⁶ we find that the Union did not discriminatorily refuse to refer Vodopia to the Unit 10 job. Accordingly, we shall dismiss this allegation of the complaint.

AMENDED REMEDY

Having found that the Union violated the Act by failing and refusing to refer Kelly as a mechanic from January 8 to May 1988, we shall order the Union to make Kelly whole, with interest, for any loss of earnings he may have suffered as a result of the Union's refusal to refer him for employment during that period. See *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Local 12, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening to refuse to refer any of its members for employment because they engaged in intraunion or protected activities.

(b) Failing and refusing to inform members of how they can fulfill their financial obligations to become mechanics and then refusing to refer them as mechanics because they have not met these obligations.

¹⁵ Vodopia testified that he should have been referred to the Unit 6 job ahead of Leonard, Grant, and Gosli because they had never worked for NPS at Unit 6 and therefore he had more seniority. As noted above, however, Vodopia had never worked at Unit 6 either and therefore he had no seniority on that project. Even assuming that he did have seniority, it is established, as the judge himself found, that the Union did not consider seniority in making referrals. As to the fourth individual, Matteson, Vodopia testified that he had been out of work longer than Matteson, but admitted that Matteson had worked at the oil field longer than he had. Accordingly, it is unclear whether Matteson had more experience.

¹⁶ See *Boilermakers Local 83 (Missouri River)*, 205 NLRB 951, 956-957 (1973).

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

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

(a) Make whole Michael Kelly for any losses he may have suffered by reason of the Respondent's failure to inform him how he could fulfill his financial obligations to become a mechanic and its refusal to refer him for employment as a mechanic because he had not met those obligations, with interest, in the manner set forth above in the amended remedy section of the Decision and Order.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amounts owing under the terms of this Order.

(c) Post at all places where notices to members are posted, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice on forms provided by the Regional Director for Region 29, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and be 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.

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

APPENDIX

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

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

WE WILL NOT threaten to refuse to refer members for employment because of their intraunion activities or other protected activities.

WE WILL NOT fail and refuse to inform members of how they can fulfill their financial obligations to become mechanics and then refuse to refer them as mechanics because they have not met these obligations.

¹⁷ 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."

WE WILL NOT in any like or related manner restrain or coerce members in the exercise of their rights under Section 7 of the Act.

WE WILL make whole Michael Kelly, with interest, for any losses he may have suffered by reason of our refusal to refer him for employment as a mechanic.

LOCAL 12, INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, AFL-CIO

Kevin R. Kitchen, Esq., for the General Counsel.

Bradford W. Coupe, Esq. and *Barbara M. Cummins, Esq.* (*Morgan, Lewis & Bockius*), of New York, New York, for Brand Mid-Atlantic, Inc.

Edward J. Groarke, Esq. (*Colleran, O'Hara & Mills*), of Garden City, New York, for Local 12.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York, New York, on May 22-24, July 6-7, August 14-16 and August 28, 1989. On several charges, the first of which was filed April 1, 1988, a consolidated amended complaint was issued on March 28, 1989, alleging that Respondent, Local 12, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO (Local 12 or the Union) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) and that Respondent Brand Mid-Atlantic, Inc. (Brand) violated Section 8(a)(1) and (3) of the Act. Respondents filed answers denying the commission of the alleged unfair labor practices. The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on October 26, 1989.

On the entire record of the case,¹ including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

New Maintenance, Inc. d/b/a NPS Energy Services, a Pennsylvania corporation with its principal office and place of business in Philadelphia, Pennsylvania, has been engaged in providing maintenance, repair, and renovation of industrial facilities, including a location at Astoria Powerhouse Unit No. 6 in Astoria, New York. It has been admitted, and find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, Brand, a Pennsylvania corporation with its principal office and place of business in Essington, Pennsylvania, has been engaged in providing maintenance, repair, and renovation of industrial facilities, including a location at Astoria Powerhouse Station No. 10 in Astoria, New York. It has been admitted, and I find, that Brand is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It has also been admitted, and I find, that the

¹ The General Counsel's motion to correct transcript is granted.

Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The issues in this proceeding are:

1. Whether the Union violated Section 8(b)(1)(A) and (2) of the Act by failing to refer Michael Kelly for employment for reasons other than failure to tender periodic dues and initiation fees.

2. Whether the Union violated Section 8(b)(1)(A) and (2) of the Act by failing to refer Mark Vodopia for employment for reasons other than failure to tender periodic dues and initiation fees.

3. Whether Brand violated Section 8(a)(1) and (3) of the Act by failing to employ Vodopia because of his activities as a union dissident.

B. *The Facts*

1. NPS Energy Services

On July 30, 1986, the Union entered into an agreement with NPS Energy Services, Inc., a subsidiary of NPS Technologies Group, Inc. (NPS I), with respect to work to be done at Astoria Powerhouse Unit No. 6. Article 3(a) of the agreement provided that the Union was to be the sole source of referral of employees. Pursuant to an Asset Purchase Agreement dated December 29, 1987, the assets of NPS I were sold to New Maintenance, Inc., a subsidiary of Day and Zimmerman, Inc. (NPS II). The purchaser was given the exclusive license to use the name "NPS Energy Services, Inc." The complaint alleges that the Union entered into the June 30, 1986 agreement with NPS II. However, the record demonstrates that that agreement was entered into with NPS I.

Robert P. Kaplan, a representative of NPS Technologies Group, Inc., credibly testified that NPS II has different ownership than NPS I, the two corporations operate out of different locations, have different staffs and use different equipment. As of January 1, 1988, NPS I had no further relationship with the job at Unit 6 of the Astoria Powerhouse. In addition, Michael Saccoccia, general manager of NPS II, credibly testified that the Asset Purchase Agreement did not provide for the assumption of the contract between the Union and NPS I.

2. Michael Kelly

In August 1987, Kelly passed the mechanic's test administered by the Union. A month later Kelly sent the Union a check in the amount of \$161 as the remainder owing on his initiation fee and to obtain his mechanic's card. In November 1987 Kelly was advised that the \$161 check had bounced. Kelly then spoke to John Bokun, secretary-treasurer of the Union, who told Kelly that he owed the \$161 and dues of approximately \$40. On January 8, 1988,² Kelly sent a new check to the Union in the amount of \$200. During April, Kelly asked Bokun when he would be receiving the mechanic's card. Bokun replied that since Kelly had sent one individual check, instead of two separate checks, Bokun could not separate the money between the dues and the initiation

fee and therefore he did not deposit the check. On May 3 Kelly gave Bokun two signed checks with the amounts left blank. Kelly began working for Brand in early May at the Astoria Powerhouse Unit 10 and continued to work there until April 1989.

3. Mark Vodopia

Vodopia had been a member of the Union for approximately 32 years. Although the Union does not operate a hiring hall, it does refer members for employment. In addition, members are given shop lists so that they can solicit their own jobs. The record indicates that there has been a long-standing feud between Vodopia and William Fitzgerald, the Union's business manager.

In December 1987, Vodopia began working for NPS I at the Tank Farm,³ which was adjacent to the Astoria Powerhouse Unit 6. He had been referred by the Union. Vodopia expressed his concern about the quality of the workmanship on the job and the fact that Edward Ragusin, the foreman on the job, had allowed certain activities, to take place with which Vodopia disagreed. On March 1, 1988, Vodopia, appeared before the Union's executive board for the purpose of bringing internal charges against Fitzgerald and Robert McCarthy, the job's shop steward. During the course of Vodopia's presentation, Fitzgerald yelled out "this is too much" to which Vodopia replied "I hate your guts." Vodopia was then told that he would be heard at the next executive board meeting.

On March 4, the employees at the oil field were laid off due to an oil spill. On March 7, 8, and 9, Vodopia called Fitzgerald to find out when he could return to work and Fitzgerald replied that to his knowledge he did not think that anyone had yet returned. When Vodopia called Fitzgerald on Thursday, March 10, Fitzgerald advised Vodopia that "a few guys went back." When Vodopia asked Fitzgerald why he hadn't been recalled prior to one of the other employees, Fitzgerald replied that there was no seniority on the job. Fitzgerald testified that neither the collective-bargaining agreement nor the Union's constitution provides for seniority and Ragusin, who appeared to me to be a credible witness, testified that there is no seniority for layoff or return to work. On Monday, March 14, Fitzgerald telephoned Vodopia who then returned to his job at the oil field.

On March 15, Vodopia appeared before the executive board. Vodopia attempted to address the Board on the charges he was making against Ragusin and McCarthy and requested that the entire executive board visit the jobsite. On March 16 Fitzgerald came to the jobsite. Vodopia testified that while at the jobsite Fitzgerald, told the employees they should know "what kind of rat you're working with," referring to Vodopia. Ragusin testified that at the time Vodopia and Fitzgerald were arguing loudly. McCarthy testified that Fitzgerald made an inspection and stated to the employees that he deemed that the charges that were filed were groundless and that the work was satisfactory. James Amellin, vice president of the International, who appeared to me to be a credible witness, also testified that he investigated the allegation that there had been poor workmanship at the Astoria Powerhouse and, to the contrary, he found that the workmanship was satisfactory.

²All dates refer to 1988 unless otherwise specified.

³The Tank Farm was also known as the oil field.

On April 1, Fitzgerald appeared at the jobsite to investigate a matter unrelated to Vodopia's internal charges. Vodopia questioned the way in which Fitzgerald was handling this particular problem. Vodopia testified that Fitzgerald told him to shut up, that he had nothing to say to him and that as far as Fitzgerald was concerned Vodopia was not a member of the Union. Vodopia further testified that Fitzgerald said "If you don't like what I just said, you can take a punch at me." When asked what happened between Fitzgerald and Vodopia that day, Ragusin credibly testified that there was an exchange of words, that Vodopia got angry, and "made a fist" at Fitzgerald.

On April 15, Vodopia was laid off from the oil field job. On April 18, Vodopia placed a telephone call to Harry Moore, the superintendent of a job run by Brand. Vodopia asked to be hired on a job which was to begin at Astoria Powerhouse Unit 10. Vodopia testified that Moore told him that he would hire him and that the job would begin on April 26. On April 25 Vodopia telephoned Fitzgerald and asked if men were being rehired for work at Unit 6. Vodopia testified that Fitzgerald replied "my seniority didn't count" and that NPS did not want him back. Vodopia testified that after he persisted in attempting to get Fitzgerald to refer him to the Unit 6 job, Fitzgerald told him "you declared war on me when you started writing things."

Vodopia testified that between April 26 and May 5 he made numerous attempts to contact Moore by telephone and finally reached him on May 6. Vodopia testified that Moore then promised him a different job, at the 14th Street Powerhouse. About the same time Vodopia telephoned Fitzgerald because he had heard that some employees had quit at Unit 6 and asked to be referred to work there. Fitzgerald told Vodopia that the jobs had been filled.

On May 24 Vodopia again called the Union looking for work and spoke to Loprofito, the union president. Loprofito told him to go to the Brand jobsite and talk to Moore about getting a job. On May 25 Vodopia went to the Brand jobsite, was hired by Brand and worked for 3 days. He was laid off on June 1.

On June 7, a union general membership meeting was held. Fitzgerald addressed the membership and told them Vodopia was continuing to write letters to the International. An argument ensued between Vodopia and Fitzgerald. Vodopia testified that Fitzgerald said "this guy stinks" and "I'm going to call my lawyer and sue him." James Segrich testified that Fitzgerald said Vodopia "would never work again in this Local, that he didn't even consider him a member of the Union [and] that he was nothing but a troublemaker."

At the Union's general membership meeting held on July 5 Vodopia entered the union hall with a shopping bag. Fitzgerald accused Vodopia of having a tape recorder in the shopping bag. Ragusin testified that Bokun searched the bag and found a piece of pipe in the bag. Vodopia testified that Fitzgerald said "we have a couple of rats here that are suing Local 12, so I won't go into any of the important issues." Vodopia also testified that Bokun stated "any guys that go to the National Labor Relations Board and bring charges against the Local stink." Concerning the same meeting Segrich testified that Bokun criticized Vodopia and Kelly for "running to the National Labor Relations Board and starting a lot of trouble."

Discussion and Conclusions

1. Successorship

The Board has evolved a set of criteria to determine whether legal successorship exists. The relevant questions include:

- (1) whether there has been a substantial continuity of the same business operations;
- (2) whether the new employer uses the same plant;
- (3) whether he has the same or substantially the same work force;
- (4) whether the same jobs exist under the same working conditions;
- (5) whether he employs the same supervisors;
- (6) whether he uses the same machinery, equipment and methods of production; and
- (7) whether he manufactures the same product or offers the same services. *J-P Mfg., Inc.*, 194 NLRB 965, 968 (1972); *Band-Age, Inc.*, 217 NLRB 449, 452-53 (1975), *enfd.* 534 F.2d 1 (1st Cir. 1976).

Kaplan credibly testified that NPS II operates out of a different location than did NPS I, that the two corporate entities have different office staffs, that different equipment is used, and that the ownership of the two corporations is entirely different. This testimony was not controverted. Saccoccia credibly testified that the officers and directors of the two corporations are different and that NPS II did not assume the union contract as part of the Asset Purchase Agreement. This testimony also has not been controverted. With respect to the employee complement, the testimony indicates that three managers were taken over by NPS II. Other than that testimony, the record is silent with respect to the composition of the work force. There is no indication of what percentage of the work force, if any, continued with NPS II.

One of the key factors in determining whether successorship exists is an examination of whether "the same or substantially the same work force" is employed. Indeed, General Counsel's brief concedes that the "threshold criterion in successor cases has been the continuity of the work force." This record contains insufficient evidence to be able to determine that factor. In addition, the uncontroverted testimony establishes that the same plant was not used and that the same equipment was not used. Accordingly, I find that the General Counsel has not sustained its burden of showing that NPS II is the legal successor of NPS I.

2. Failure to refer Kelly

The complaint alleges that since January 1, 1988, the Union failed to refer Kelly to NPS II, in violation of Section 8(b)(1)(A) and (2) of the Act. The complaint also alleges that NPS II entered into a contract with the Union requiring that the Union be the sole and exclusive source of referrals of employees to employment with NPS II. As discussed above, the contract entered into on June 30, 1986, was with NPS I and the Union. The uncontroverted testimony in the record is that the contract was not assumed by NPS II as part of the Asset Purchase Agreement. Since I have found that NPS II is not the legal successor of NPS I, as of January 1, 1988, there was no agreement in effect which required that the Union be the sole and exclusive source of referrals of employees to employment with NPS II.

The record is clear that the Union operates on a self-solicitation basis. In addition, the Union also makes some refer-

als. Fitzgerald testified that approximately 90 percent of the hiring done through Local 12 is done on a self-solicitation basis.

In 1987, Michael Kelly passed his mechanic's test and in September of that year he sent the Union a check for \$161 as payment of the initiation fee. He was subsequently notified that the check bounced and in January 1988, he sent the Union another check for \$200. In April the Union advised Kelly that he had to submit two separate checks and on May 3 he submitted two signed blank checks. He began employment with Brand during May.

Until May Kelly had not paid his initiation fee. The law has long been settled that absent an exclusive hiring agreement, a union is not required to refer nonmembers. *Kaiser Gypsum Co.*, 118 NLRB 1576, 1581 (1957). See also *United Construction Co.*, 169 NLRB 1, 3 (1968), enf. 415 F.2d 479 (6th Cir. 1969).⁴

Inasmuch as I have found that an exclusive hiring agreement did not exist after January 1, 1988, the Union was not required to refer Kelly to employment until he became a member. This did not take place until May, when he paid the requisite initiation fee and dues. Accordingly, the allegation is dismissed.

3. Failure to refer Vodopia

The complaint alleges that the Union failed to refer Vodopia to employment with NPS II from March 10 to March 14 and from May 5 through June 1, 1988, in violation of Section 8(b)(1)(A) and (2) of the Act.

On March 4 Vodopia was laid off from work at Unit 6 because of an oil spill. On Thursday, March 10, several employees were recalled. The record is replete with testimony, which I have credited, that the Union does not operate under a seniority system. Accordingly, there was no requirement that Vodopia be among those who were recalled on March 10. On Monday, March 14, Vodopia was called back by Fitzgerald to employment at Unit 6. Thus, he lost work for 1 day. The complaint alleges that the failure to recall Vodopia earlier was because he criticized Fitzgerald and because he filed internal union charges. I find that General Counsel has not sustained its burden and, accordingly, the allegation is dismissed.

As of May Vodopia had filed internal union charges, had spoken at several union meetings and had circulated material criticizing Fitzgerald and other union officials. I have credited Segrich's testimony that at a general membership meeting held on June 7, Fitzgerald told the membership that as far as he was concerned Vodopia was a troublemaker and "would never work again in this Local." It is not unreasonable to infer that Fitzgerald already held these views in May, in view of Vodopia's activities during the prior several months. On May 5, Vodopia contacted Fitzgerald for a job at Unit 6 advising him that six men had left that unit. Fitzgerald replied that the jobs had been filled. While I have found that the practice of seniority is not; adhered to by the Union, on the other hand, refusing to refer a member because of intraunion activities is not permitted. The Board has held that a union violates Section 8(b)(1)(A) and (2) of the Act

⁴In *Bechtel Power Corp.*, 223 NLRB 925, 933 (1976), enf. 597 F.2d 1326 (10th Cir. 1979), it was pointed out that where there is an exclusive hiring hall, unlike the instant proceeding, "a union cannot lawfully refuse to refer an applicant because of union considerations."

when it refuses to refer employees because of their intraunion or protected activities. *Laborers Local 158 (Contractors of Pennsylvania)*, 280 NLRB 1100 (1986). I find that Vodopia was not referred during this period by the Union because he had filed internal charges, had criticized Fitzgerald and had become troublesome to union officials. The law does not permit a discrimination in referrals on such basis. Accordingly, I find that by failing to refer Vodopia from May 5 to May 24, 1988,⁵ the Union violated Section 8(b)(1)(A) and (2) of the Act.

4. Threats

The complaint alleges that on March 16 and April 1 Fitzgerald threatened Vodopia and committed other acts which violated Section 8(b)(1)(A) of the Act. In the course of an argument between Fitzgerald and Vodopia on March 16, in referring to Vodopia, Fitzgerald stated to the other employees that they should know "what kind of rat you're working with." On April 1, also in the course of an argument between Fitzgerald and Vodopia, Fitzgerald told Vodopia to "shut up" and told him "I don't consider you a member of Local 12." Vodopia also testified that Fitzgerald told him "you can take a punch at me." Ragusi, whose testimony I have credited, testified that on that occasion Vodopia made a fist at Fitzgerald. I find the statements by Fitzgerald on March 16 and April 1 do not constitute violations of Section 8(b)(1)(A) and (2) of the Act.

The complaint alleges that on June 7 Fitzgerald threatened Vodopia in violation of Section 8(b)(1)(A) of the Act. Segrich credibly testified that at a general membership meeting on June 7 Fitzgerald made a "gesture to go after" Vodopia and Fitzgerald had to be restrained by the sergeant-at-arms and the president of the Union. Segrich also credibly testified that at that meeting Fitzgerald told the membership "as far as he was concerned Mark would never work again in this Local, that he didn't even consider him a member of the Union [and] that he as nothing but a troublemaker." I find that by stating that Vodopia would never again work in the Local, Fitzgerald threatened not to refer Vodopia, in violation of Section 8(b)(1)(A) of the Act. See *Plumbers Local 553 (Plumbing Contractors)*, 271 NLRB 1361 (1984).

The complaint also alleges that on July 5 Bokun criticized Vodopia and Kelly for having filed unfair labor practice charges with the National Labor Relations Board. Segrich credibly testified that at a union meeting held on July 5, Bokun referred to Vodopia and Kelly as "these two degenerates" and stated "you should never bring the Union up on charges [and] go to the NLRB." Segrich further credibly testified that Bokun used profanity in referring to Kelly and Vodopia and stated that they should have taken their "lumps" "and that is what everybody should do instead of running to the National Labor Relations Board and starting a lot of trouble."

In *Longshoremen ILA Local 1329 (Metals Processing)*, 252 NLRB 229, 233 (1980), the union president stated that the "four rats" had gone to the NLRB to testify against the Union and he wanted the membership to know that the four would "get theirs." The Board affirmed the judge's finding that the statement constituted an implied threat of reprisal.

⁵While the complaint alleges that the Union failed to refer Vodopia through June 1, the record shows that it referred Vodopia to Brand on May 24.

Similarly, in *Laborers Local 125 (O'Neil Construction)*, 260 NLRB 1082, 1085 (1982), a violation of Section 8(b)(1)(A) was found where a union official stated that a member could not work out of its hall because he had filed charges against the union. Further, in *Painters Local 558 (Forman-Ford)*, 279 NLRB 150, 157 (1986), the financial secretary of the union told a member that he was aware that he had filed charges with the Board and told him that he would not be working there "until the National Labor Relations Board thing was over." The Board affirmed the judge's finding that the statement constituted a threat, in violation of Section 8(b)(1)(A).

In the instant proceeding, contrary to the above-cited cases, no threat was expressed because of the filing of the charges. While Bokun used profanity and referred to Kelly and Vodopia as "these two degenerates," statements made at union meetings, where tempers often flare, are "not always likely to be parlor discourse." *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 11 (1st Cir. 1976), cert. denied 429 U. S. 1039 (1977). While Bokun criticized Kelly and Vodopia for having filed charges with the Board, I do not find that he threatened them with reprisals for having filed the charges. The General Counsel has cited no case in support of his contention that this statement violated the Act. Accordingly, the allegation is dismissed.

5. Brand's refusal to employ Vodopia

The complaint alleges that from late April until May 25, 1988, Brand refused to employ Vodopia because he filed internal union charges and because he engaged in dissident union activities, in violation of Section 8(a)(1) and (3) of the Act.

Vodopia testified that he called Moore on April 18 who told him that he has a job. Subsequent to that time he attempted to call Moore many times and finally on May 25 he appeared at the jobsite and was employed by Brand. Moore testified that at no time did any union representative tell him not to hire Vodopia. The record contains no evidence that Brand or Moore had knowledge that Vodopia filed internal charges with the Union or that Vodopia was a union dissident. Inasmuch as the General Counsel has not sustained its

burden of showing that Brand knew of Vodopia's internal union activities, the General Counsel has not made a prima facie showing that Brand violated Section 8(a)(1) and (3) of the Act. Accordingly, the allegation is dismissed.

CONCLUSIONS OF LAW

1. New Maintenance, Inc. d/b/a NPS Energy Services and Brand Mid-Atlantic, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 12, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to refuse to refer and by failing and refusing to refer Mark Vodopia for employment, the Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondents did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that the Union has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Union violated the Act by failing and refusing to refer Vodopia from May 5 to May 24, 1988, I shall order the Union to make Vodopia whole, with interest, for any loss of earnings he may have suffered as a result of the Union's refusal to refer him for employment during that period. See *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁶

[Recommended Order omitted from publication.]

⁶ Under *New Horizons*, interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.