

**Local Union No. 58, International Brotherhood of Electrical Workers, AFL–CIO (Southeastern Michigan Chapter, National Electrical Contractors Association, Inc.) and John Hopkins.** Case 7–CB–8174

January 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On August 7, 1991, Administrative Law Judge David L. Evans issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order dismissing the complaint.

The General Counsel excepts to the judge's failure to address the complaint allegation that the Respondent's conduct in denying Charging Party Hopkins necessary application forms prevented him from invoking his appeal rights provided in the Supplemental Unemployment Benefit (SUB) Plan and that the denial thus violated Section 8(b)(1)(A). We agree with the General Counsel that he is entitled to a resolution of this issue. On the merits, however, we find that the allegation should be dismissed.

The SUB Plan summary states that the Plan is administered by a joint board of trustees and that each employee has the right to appeal any denial of his claim, in whole or in part, by writing to the board of trustees. The Plan summary also, however, states:

One word of caution—no one has the authority to speak for the trustees in explaining the eligibility rules or benefits of the Fund, except the full Board of Trustees or the Fund's Administrator to whom such authority has been delegated.

Hopkins was thus on notice that he was not obligated to accept the Respondent's explanation for not permitting him to apply for unemployment benefits. He further knew that he had direct recourse to the Trustees to the extent he viewed the Respondent's actions as denying him a claim under the Plan. We conclude therefore that the Respondent's failure to honor Hopkins' request for benefit application forms did not deprive him of any appeal rights under the SUB Plan.

ORDER

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

*Mary Beth Onachi, Esq.*, for the General Counsel.  
*Chris Legghio, Esq. (Miller, Cohen, Martens & Ice, P.C.)*, of Southfield, Michigan, for the Respondent.

DECISION

DAVID L. EVANS, Administrative Law Judge. This matter was tried in Detroit, Michigan, on February 1, 1991. The charge was filed by John Hopkins,<sup>1</sup> against Local Union No. 58, International Brotherhood of Electrical Workers, AFL–CIO (the Union or the Respondent) on January 24, 1990, and a complaint and notice of hearing (the complaint) was issued by General Counsel on March 15, 1990.<sup>2</sup> The complaint, alleges that by certain acts and conduct the Union has violated, and is violating, Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by coercing and restraining employees who are employed by members of Southeastern Michigan Chapter, National Electrical Contractors Association, Inc. (NECA) in the exercise of rights guaranteed to those employees by Section 7 of the Act.

The alleged violative acts by the Union involve its relationship with the Supplemental Unemployment Benefit Plan of the Electrical Industry, Detroit, Michigan (the SUB Plan or the Plan), a trust created by the Union and NECA. The complaint names the SUB Plan as a party in interest to this proceeding; however, the SUB Plan was not served with the charge or the complaint. Counsel for the General Counsel makes no reference to the SUB Plan as a party in interest to this proceeding in her brief; the caption of the brief, contrary to the usual practice of the office of the General Counsel, differs from the caption of the complaint in that, while the caption of the complaint names the SUB Plan as a party in interest, the caption of General Counsel's brief does not. (Moreover, counsel for the General Counsel does not show service of her brief to the SUB Plan.) Under the circumstances, it must be concluded that the SUB Plan has been amended out as a party in interest to this proceeding, a factor to be considered if my ultimate recommendation is not adopted.

Respondent filed an answer to the complaint and, as amended at trial, the answer admits jurisdiction but denies the commission of any unfair labor practices.

I have considered the briefs filed by the parties and, on consideration of the arguments made on brief, the record made at trial, and my observations of the demeanor of the witnesses, I issue the following

FINDINGS OF FACT

I. JURISDICTION

NECA has been and is now an organization composed of employers engaged in the electrical construction industry, and which exists for the purpose, inter alia, of representing

<sup>1</sup> Charging Party's name appears as amended at the hearing.

<sup>2</sup> Unless otherwise indicated, all dates are between October 1, 1989, and March 15, 1990.

its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including Respondent. During 1989, NECA, in the course and conduct of its members' business operations, had gross revenues in excess of \$1 million and purchased and caused to be transported and delivered to various construction jobsites within Michigan goods and materials valued in excess of \$50,000 directly from suppliers located at points outside Michigan. Therefore, NECA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and Respondent is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *Facts and Allegations*

#### 1. Allegations of the complaint

As alleged and admitted, Respondent and NECA established the SUB Plan by joint action in 1972. As stated in the Plan's summary plan description, a simplified description of the SUB Plan that is required by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. (ERISA),<sup>3</sup> the purpose of the SUB Plan is:

to provide some measure of income security during periods of lay-off, illness, injury or jury duty to employees in the electrical contracting industry who work under the jurisdiction of Local Union #58, International Brotherhood of Electrical Workers.

This case involves the distributions of benefits for periods of unemployment occasioned only by periods of layoff, not injury, illness, or jury duty.

The complaint alleges:

10. Since on or about October 17, 1989, by virtue of the provisions of the Supplemental Unemployment Benefit Plan, the Charging Party, and other members<sup>4</sup> have become, and are currently, eligible to receive benefits prescribed in the [SUB] Plan.

11. Since on or about October 17, 1989, and continuing to date, Respondent, through its agent, Thomas Butler, has prevented the Charging Party and other members from receiving benefits by either establishing arbitrary and artificial eligibility dates not provided for in the provisions of the Supplemental Unemployment Benefit Plan, and/or refusing to provide the Charging Party and/or other members with application forms that are required to be filed with the Supplemental Unemployment Benefit Plan.<sup>5</sup>

12. By denying the Charging Party and other members the necessary application forms, Respondent, through its agent Thomas Butler, has also prevented the Charging Party and other members [from invoking]

their appeal rights as provided in the SUB Plan for claims that have been denied in whole or in part.

13. Respondent engaged in the conduct described above in paragraphs [11 and 12] for discriminatory, invidious, irrelevant and arbitrary reasons.

#### 2. Operation of the SUB Plan and contentions

The application forms referred to in the complaint are used by employees to apply for SUB Plan benefits when they are unemployed because of layoff. The Union maintains the forms and distributes them on behalf of the SUB Plan. The Union then transfers the applications to the trustees for further processing. The SUB Plan does not distribute benefits to all qualifying employee electricians during all parts of the year; it distributes benefits only during periods of general unemployment.

What constitutes a period of general unemployment, with one exception, has historically been determined by the Union. William Dellapa, administrator of the SUB Plan since 1976 (and assistant administrator before then), testified that he receives telephone calls from agents of Respondent when there is a period of time in which the fund should be paying benefits because there is an insufficient amount of work available in the area. Dellapa testified that the trustees are not bound to accept the Union's determination of when there are no jobs available in the area, and they may make their own inquiry, but he could point only to one occasion when the fund did not accept the Union's determination that there were no jobs available in the area. (That was an occasion where there was a strike; naturally, the employer-appointed trustees of the SUB Plan took the position that jobs were available, and they would not affix their necessary signatures on checks for unemployment benefits.)

Even during periods of general unemployment, the fund does not distribute unemployment benefits to any applicant who applies for them. An employee-applicant must meet certain qualifications, including: the employee-applicant must have accumulated a certain number of credits that are earned by working for NECA employers; he must have been out of work for at least 1 full week; his current unemployment situation must have resulted from his being laid off while working in the Union's geographic jurisdiction; he must not have refused more than one job opportunity during the period of unemployment for which he seeks benefits; and he must not have left the area after he applies.<sup>6</sup>

General Counsel contends that Charging Party Hopkins was a qualified laid-off electrician who was twice unlawfully denied forms on which he could have applied for benefits from the SUB Plan; and General Counsel further contends that, on a third occasion when Hopkins asked for such a form, he was given one, and he was allowed to complete it and return it to the Union, but the Union unlawfully refused to process it. General Counsel alleges that these actions, and Respondent's practice of establishing when any benefits will be paid by the SUB Plan, deprived the Charging Party, and other employees, of SUB Plan benefits to which they were entitled.

<sup>6</sup>All of these requirements are contained in the trust fund instruments that were received in evidence. General Counsel does not contest the existence, or the validity, of any of these requirements.

<sup>3</sup>Transcript references to "Arisa" are corrected to read: "ERISA."

<sup>4</sup>The Charging Party is not a member of Respondent. The complaint equates members and employees. This is an obvious oversight; General Counsel would not contend that any order he sought herein would protect only employees who are members of Respondent.

<sup>5</sup>Complaint pars. 10 and 11 are quoted as amended at the hearing.

Respondent admits that Hopkins sought SUB benefits three times. It further admits that, on the first two occasions, its agent refused to give Hopkins the necessary application forms, and it further admits refusing to process his completed application on the third occasion. Respondent defends its actions on the ground that, regardless of how it was determined during what period of time that SUB Plan was to be distributed to qualified employees, Hopkins was never a qualified employee when he applied, or sought to apply. Therefore, Respondent argues, it would have been futile to accept, or process, Hopkins' applications.

### 3. Effect of Respondent's referral procedures

As noted, an employee must not have refused more than one job offer during a period of employment to become or remain qualified to receive SUB Plan benefits. Declining an offer of employment from Respondent's exclusive hiring hall constitutes a refusal of employment under the Plan, as the parties have interpreted the Plan's rules of individual eligibility.<sup>7</sup> An issue in this case is whether Hopkins refused two jobs that were offered to him at the hiring hall; therefore, a certain knowledge of the operation of Respondent's hiring hall is necessary.

In the operation of its hiring hall, the Union (by the dispatcher or someone acting in his stead) maintains registration books. Book 1 is the registration book in which applicants for employment register if they have sufficient local experience. Book 2 is Respondent's registration book that is reserved for "travelers," or those employee-applicants who do not have such experience.<sup>8</sup>

Hopkins is a member of the IBEW, but not a member of Respondent; Hopkins is a member of Local 446, Monroe, Louisiana, and has for several years worked as a traveler in various areas of the United States, including Respondent's geographic jurisdiction. (There is no contention that Respondent has taken any action against Hopkins because of his membership in another local union, or his race, or anything else about him.)

Each day that jobs are available, the Union conducts rollcalls, by classifications or "books," of all applicants. At 8 a.m., the dispatcher calls the roll of the job applicants who are registered in book 1. Registered local applicants who are present take the jobs that are offered at that time. At 1 p.m., if the book 1 rollcall has not filled all of the requests for employees that the Union has received, the dispatcher calls the roll of job applicants who are registered in book 2. Registered travelers who are present take the jobs that are offered at that time.

An employee must be present at rollcall to receive a referral.

Each evening, the dispatcher creates a telephonic recorded message that: (1) lists the jobs that the dispatcher then knows will be available the next day, and (2) the volume-page-line placement of the 20th name on the out-of-work lists in book 1 and book 2. (Names are not mentioned; each employee who is seeking work through the referral procedures keeps track of his last registration's volume, page, and line.) By

<sup>7</sup>General Counsel does not contest the existence or validity of this historical interpretation; Hopkins testified that he was aware of this interpretation.

<sup>8</sup>There are other referral books, but they are not relevant here.

calling in for the recorded message, a registered employee-applicant can form an idea about whether it would be worth his while to appear for rollcall the next day.

Of course, some of the earlier registered employees may not appear, or some of them may decline jobs. Then the dispatcher will go to the names of those who are successively registered and offer to those applicants the jobs that are available. If this occurs, a registered employee who does not appear because he did not think the rollcall would get to him (or for any other reason) runs the risk of being passed over. If that happens, the nonappearing, passed over, employee is charged with a refusal under the rules of the SUB Plan (just as if he had been present and refused an offered job).

As noted, if an applicant for SUB Plan benefits has refused two job offers, he is rendered ineligible to receive SUB Plan benefits.

### 4. Hopkins' applications

Hopkins worked for 2 years in the area of Respondent's geographic jurisdiction, 1988 and 1989, taking job referrals from the Respondent's hiring hall. On October 17, he was laid off by an area employer and went that day to sign the referral book. On the same day, Hopkins also asked Respondent's dispatcher, Nino Como, for the form with which out-of-work applicants apply for SUB Plan benefits, or "SUB pay."<sup>9</sup> Como refused to give Hopkins a form, stating that SUB pay was not being paid at that time.<sup>10</sup>

On direct examination Hopkins testified that he attended the 1 p.m. rollcall that Respondent conducts for travelers for "a couple of weeks" after October 17. He further testified that on October 18, or the day after he registered for referrals with Respondent, he registered for referrals with IBEW Local 252 in Ann Arbor. Ann Arbor is not in Respondent's geographic jurisdiction.

After being blatantly led by General Counsel to state that he attended the Respondent's 1 p.m. rollcall every day between October 18 and November 6, Hopkins admitted, in an examination by me, that he attended the 1 p.m. rollcall only "usually" every day.<sup>11</sup> Hopkins then testified that he did not attend the rollcalls if the prior evening's recorded telephone message indicated that there were "no jobs available." "On cross-examination, Hopkins again acknowledged that it was possible that he may have missed referrals because "there were days" that he did not go to the union hall between October 17 and November 6.

Respondent produced business records which plainly demonstrate that, on October 23 and 24, Hopkins was passed over, and jobs that he could have taken, had he appeared and responded to the rollcall, went to applicants who were registered below him on the out-of-work lists.

I find incredible Hopkins' testimony that, between October 17 and November 6, he failed to go to the hall only if the previous evening's telephone message had indicated that there was no work the next day. Hopkins appeared to be

<sup>9</sup>Throughout the transcript, "supp pay" is corrected to read: "SUB pay."

<sup>10</sup>Although one Thomas Butler is the only agent of Respondent named in the complaint, Nino Como is the only person proved to have acted as Respondent's agent in this case.

<sup>11</sup>Tr. 80, LL. 18-19, is corrected to read: "Judge Evans: What does that mean? 'Usually' every day or . . . ."

coming up with an afterthought, after General Counsel's leading had obviously failed. Moreover, on October 24, the Union exhausted books 1 and 2, and it is unlikely to the point of disbelief that the recorded message for October 23 had indicated that there was no work available on October 24. (Even if Hopkins was telling the truth on the matter, the Respondent could have received more requests for employees after the telephone message was created on October 23, but before the 1 p.m. rollcall on October 24. The result would have been the same.)

Hopkins took a job in Ann Arbor on November 6. That job lasted until December 1 when Hopkins was laid off. Hopkins testified that he immediately registered at both Respondent's hall and at Local 252's hall. Hopkins further testified that he attended both Respondent's and Local 252's rollcalls<sup>12</sup> each day thereafter until he got a job, again through Local 252, again in Ann Arbor, on December 20. Hopkins' second Ann Arbor job lasted until December 31 when Hopkins was again laid off. On January 2, Hopkins again signed the travelers' referral books in both Ann Arbor and Detroit.<sup>13</sup>

On January 2, when he registered for referral in Respondent's book for travelers, Hopkins again asked dispatcher Como for a form with which he could apply for benefits under the SUB Plan. Como told Hopkins that he could not have a form because benefits under the SUB Plan were not being paid at the time.

On January 24, after having received no referrals from Respondent, Hopkins again asked Como for a form to apply for benefits under the SUB Plan. SUB Plan benefits were then being paid, and Como gave Hopkins a form. After reviewing it, Hopkins, literally, threw it in a wastebasket, telling Hopkins that he was doing so because Hopkins did not have "a Detroit layoff."

Hopkins continued attending the travelers' rollcalls until January 31 when, having received no referrals, he left the area. (There is no contention that any of Hopkins' failures to receive referrals were caused by unfair labor practices on the part of Respondent.)

### B. Conclusions

The complaint alleges that Respondent violated Section 8(b)(1)(A) by preventing Hopkins and other employees from receiving benefits by determining, arbitrarily, the SUB Plan eligibility dates. The complaint also alleges that Respondent violated Section 8(b)(1)(A) by preventing Hopkins and other employees from receiving SUB Plan benefits by refusing to provide Hopkins "and/or other [employees]" with SUB Plan application forms. In both cases, the complaint is alleging, as the predicate for the findings of violations by the Respondent, the prevention of Hopkins or other employees from receiving SUB Plan benefits.

Couched in the negative: The complaint does not allege that Respondent has violated Section 8(b)(1)(A) because it determines, as it does, the periods during which the SUB Plan pays benefits. Also, the complaint does not allege that Respondent has violated Section 8(b)(1)(A) by engaging in the practice of not providing, at all times, forms for applying

for SUB Plan benefits. That is, the complaint does not allege as per se violations either Respondent's practice of effectively determining when the SUB Plan will distribute benefits or Respondent's practice of not distributing SUB Plan application forms whenever they are requested by employees.

The complaint challenges these practices only where they have "prevented the Charging Party and other employees from receiving benefits."

Respondent has shown that, even if SUB Plan benefits had been paid at all times to all qualifying employees, and even if Hopkins had been given forms each time that he requested them, and even if such forms had been duly processed, Hopkins would not have received any SUB Plan benefits. That is, Respondent has "prevented" Hopkins from receiving nothing.

Assuming that Hopkins had been allowed to file an application on October 17, and further assuming that the SUB Plan had been paying benefits at that time, he would not have received SUB Plan benefits pursuant to that application. The Plan does not allow payment for the initial week of unemployment; therefore, Hopkins would not have been eligible for SUB Plan benefits before October 25. However, on October 24 Hopkins disqualified himself from receiving any benefits for his unemployment caused by his October 17 layoff by not appearing at Respondent's rollcall and allowing himself to be passed over for a second job referral. Therefore, even if he had been given a SUB Plan application form, and it had been duly delivered to SUB Plan office, he would not have been entitled to the benefits for which he applied.

After October 24, Hopkins was never again in the position of having been unemployed by reason of an area layoff; he was unemployed because of two Ann Arbor layoffs, but Ann Arbor is not "under the jurisdiction of Local Union #58, International Brotherhood of Electrical Workers," as stated in the summary plan description quoted supra.

If Hopkins had been given an application form on January 2, and he had filled it out, he would have necessarily listed an Ann Arbor employer as the employer who had laid him off, which is what he necessarily<sup>14</sup> did on January 24. To have required the Union to accept and process the application that Hopkins would have filed on January 2 would be to have required the Union to have done an absolutely futile act, even if benefits were then being paid to qualified<sup>15</sup> applicants.

To have required the Union to have processed the January 24 application, again, would have been to require an absolutely futile act; benefits were then being paid, but not to unqualified applicants such as Hopkins.

Therefore, General Counsel has failed to prove the predicate for the alleged violations; neither Hopkins nor any other employees have been shown to have been prevented from receiving SUB Plan benefits because of Respondent's practices.

<sup>14</sup>The form had been destroyed, but Como's remark shows that Hopkins had (truthfully) listed an Ann Arbor job as his last employment.

<sup>15</sup>By first alleging, in par. 10 of the complaint, that Hopkins and others are entitled to SUB Plan benefits, General Counsel necessarily acknowledges that the Charging Party was required to meet the fund's requirements that are not challenged by the complaint.

<sup>12</sup>Local 252 conducts its rollcall(s) at 8 a.m. each day.

<sup>13</sup>Both times that Hopkins took an Ann Arbor job, he notified Respondent's hall so that he was not registered with Respondent while he was working in Ann Arbor.

Accordingly, I find and conclude that Respondent has not committed any violation of Section 8(b)(1)(A) of the Act, as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>16</sup>

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<sup>16</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

The complaint is dismissed.

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ommended 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.