

Bricklayers, Tuckpointers, and Stone Masons of the International Union of Bricklayers and Allied Craftsmen, Local No. 1 of St. Louis, Missouri, AFL-CIO (Denton's Tuckpointing, Inc.) and Charles N. Ezell, Jr. and Mason Contractors Association of St. Louis, Party to the Contract.
Case 14-CB-7643

August 26, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On February 10, 1992, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent and the Intervenor filed exceptions and supporting briefs, and the National Right to Work Legal Defense Foundation, as amicus curiae, also filed a brief with respect to the judge's decision.

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 conclusions¹ and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bricklayers, Tuckpointers,

¹ The Intervenor's exceptions and the similar contentions of the amicus regarding the lawfulness of the union-security clause of the relevant collective-bargaining agreement clearly go beyond the scope of both the complaint allegations and the litigation in this proceeding. We therefore deny the exceptions as raising matters not properly before us.

We agree with the Intervenor that the judge erred in two matters: the union-security clause is found in art. II of the collective-bargaining agreement rather than "Article III" as the judge indicated, and in his third conclusion of law the proper section of the Act is Sec. 8(b)(1)(A) rather than "8(a)(1)(A)." These errors were inadvertent and do not affect our disposition of this case.

² We find no merit in Respondent Local No. 1's exception to the judge's finding that its \$8/monthly work permit fee violates Sec. 8(b)(1)(A). Although not specifically alleged in the complaint, the "fee" issue was closely related to the complaint's subject matter, i.e., the Respondent Local's unlawful work permit procedure, and it was fully litigated. See, e.g., *Longshoremen ILA Local 1426 (Wilmingon Shipping)*, 294 NLRB 1152, 1158 (1989). In this regard, we do not pass on the validity of the monthly "travel service dues" authorized under the constitution of the International Union of Bricklayers & Allied Craftsmen concerning traveling local members working in another local union's jurisdiction. On this record, the travel service dues charged to traveling members and the work permit fee the Respondent charged to all nonmembers of Local No. 1 appear to be entirely separate matters.

We also deny the Respondent's exception regarding the extent of its backpay obligations under the judge's remedy. See *Sheet Metal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773, 773-774 (1981), enf'd. in relevant part 716 F.2d 1249 (9th Cir. 1983).

and Stone Masons of the International Union of Bricklayers & Allied Craftsmen, Local No. 1 of St. Louis, Missouri, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order.

Frenchette C. Potter, Esq., for the General Counsel.

Eugene P. Walsh, Esq., of Clayton, Missouri, for the Respondent.

James N. Foster Jr., Esq. (McMahon, Berger, Hanna, Lanihan, Cody & McCarthy), of St. Louis, Missouri, for the Intervenor.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard in St. Louis, Missouri, on October 16, 1991, on General Counsel's complaint dated August 19, 1991,¹ which alleges, in substance, that the above-captioned Respondent, Bricklayers, Tuckpointers, etc., Local No. 1, AFL-CIO (the Union) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, by maintaining and enforcing a provision in a collective-bargaining agreement requiring certain employers, including Denton's Tuckpointing, Inc., to give unlawful preference in employment to members of Respondent; by requiring certain applicants for employment to obtain work permits issued by Respondent prior to working; by requiring certain applicants for employment to become members of Respondent prior to being permitted to work for certain employers; by refusing to issue union membership cards, or work permits, to employees and applicants for employment, thereby causing or attempting to cause an employer to unlawfully refuse to hire an employee and thereafter causing an employer to terminate an employee, all in violation of the Act. Respondent's timely filed answer denies certain allegations of the complaint, admits others, but denies the commission of unfair labor practices.²

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence and to argue orally on the record. The parties have elected to submit posthearing briefs which have been carefully considered.

On the entire record,³ including the briefs, and on my most particular observation of the demeanor of the witnesses as they testified, I make the following

¹ The underlying unfair labor practice charge, and amended charge, were filed and served upon Respondent, respectively, on July 5 and August 19, 1991.

² The Intervenor, Mason Contractors Association of St. Louis, appeared at the hearing and thereafter submitted its brief for the limited purpose of a determination whether the contract provision cited hereafter in the text, relating to the composition of an Association—member-employer's work force, is unlawful. While the Intervenor's interest is focused solely on the lawfulness of the contract clause, it appears to request, in addition, ". . . guidance as to how that clause is improper. . . ." While I shall rule on the lawfulness of the clause, and provide a basis for that ruling, to the extent Respondent perhaps seeks guidance, in addition, as to what a lawful clause would constitute, I will refrain from any such additional statement.

³ The General Counsel's brief also contains a motion to correct transcript. Neither counsel for Respondent nor counsel for Intervenor object to the motion which is hereby granted in its entirety.

FINDINGS OF FACT

I. DENTON'S TUCKPOINTING, INC. AS STATUTORY EMPLOYER

Denton's Tuckpointing, Inc., a Missouri corporation, with an office and place of business in St. Louis, Missouri, (the Employer), is in the building and construction industry as a masonry contractor, providing tuckpointing and related services for residential construction and is a member of the Intervenor, the Mason Contractors Association and St. Louis (the Association). The Association, an organization of employers in the construction industry, exists for the purpose, inter alia, of representing its employer-members in negotiating and administering collective-bargaining agreements with labor organizations, including Respondent. Denton's Tuckpointing, among other employer-members of the Association, at all material times, has authorized the Association to represent them in negotiating and administering collective-bargaining agreements. In the 12-month period ending July 31, 1991, members of the Association purchased and received at their St. Louis, Missouri facilities goods, materials, and products valued in excess of \$50,000 from other enterprises located within the State of Missouri, each of which other enterprises received the said products, goods, and materials directly from points outside the State of Missouri. The complaint alleges and Respondent admits that, at all material times, the employer-members of the Association and Denton's Tuckpointing, in particular, have been and are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. RESPONDENT AS A STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find, that at all material times Bricklayers, Tuckpointers, and Stone Masons of the International Union of Bricklayers and Allied Craftsmen, Local No. 1 of St. Louis, Missouri, AFL-CIO (the Union) has been and is a labor organization within the meaning of Section 2(5) of the Act.⁴

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Maintenance of an Alleged Unlawful Contract Provision*

The current collective-bargaining agreement (G.C. Exh. 3) between Respondent and the Association, binding Denton's Tuckpointing, Inc., was entered into on June 20, 1990, and expires May 31, 1993. It contains the following union-security clause:

Article III. *Recognition and Jurisdiction*

Section 3. It is understood and agreed . . . that as a condition of continued employment, all persons who are hereafter employed by the Employer in the unit which is the subject of this Agreement shall become members of the Union not later than the eighth (8th) day following the beginning of their employment or following the

⁴In addition, Respondent admits that its financial secretary, Joseph Schonlau, at all material times, has been and is an agent of Respondent within the meaning of Sec. 2(13) of the Act.

execution date of this Agreement, whichever is the later.

The complaint alleges, and Respondent admits, that since on or about June 1990 (the month of execution of the existing collective-bargaining agreement), the Association and Respondent have also maintained in the collective-bargaining agreement article XII, section 7, which provides:

When members of Bricklayers Local Union No. 1 of Missouri of the I.U. of B.A.C. are available they shall constitute at least 80% of the bricklaying force of the Employers at all times.

Respondent denies that the above-contract provision was ever enforced. Association Executive Vice President Carl F. Freeman testified, however, that the provision has appeared not only in the current contract but in the last two contracts between the Association and the Respondent; indeed, that the clause has been in effect for about 20 years. While there is no evidence that this contract was specifically enforced, Freeman testified without contradiction, that the Union never disclaimed the provision or told member-employers that it was no longer in effect or told employers to disregard it.

The provision, on its face, plainly requires employers to recognize and maintain a hiring and retention preference among their employees based upon membership or nonmembership in Respondent. It is essentially an 80-percent "closed shop" clause and consequently restrains and coerces employees in the exercise of their Section 7 rights. Simply by maintaining an agreement containing such a provision, Respondent violates Section 8(b)(1)(A) of the Act. *Carpenters Local 2396 (Tri-State Ohbayashi)*, 287 NLRB 760, 764 (1987). Absent a showing that Respondent had actually caused or attempted to cause employers to discriminate in hiring and enforcing the clause, there can be no violation of Section 8(b)(2), *ibid.* But, the mere maintenance of such a provision violates Section 8(b)(1)(A) of the Act, *ibid.*

To the extent Respondent defends by noting that there was no proof of enforcement and that the contract provision was not involved in the subsequent transactions between the Charging Party and Respondent, these defenses, on the above authority, are without merit. The essential vice in the contract provision, again, is that its mere maintenance, requiring a member-employer, like Denton's Tuckpointing, Inc., to give preference in hiring and retention of employment to members of Respondent, unlawfully restrains and coerces the Section 7 rights of all employees, whether union members or otherwise, within the meaning of Section 8(b)(1)(A) of the Act.⁵

⁵For example, a first-day work force composed of nonunion employees who are not obliged, under the lawful 8-day union-security clause, to become members of the Union, would face termination if union members of more than 20 percent sought and obtained employment. Their alternative might be to seek immediate union membership, a status not required under the union-security clause.

Whether, and to what extent, such a dilemma and ambiguity of obligation might affect the lawfulness of the otherwise lawful construction industry union-security clause is an issue not before me.

B. Respondent's Unlawful Transactions with the Charging Party

1. Background

The Charging Party, Charles N. Ezell Jr., prior to the instant dispute, had been a nonunion bricklayer for more than 14 years. His trade specialty is "tuckpointing." A tuckpointer grinds out the mortar between bricks and, where necessary, replaces defective mortar and bricks in sidewalks, foundations, etc. He also caulks windows and swimming pools.

William Denton, chief operating officer of the Employer, heard of Ezell's ability, called him on March 15 and asked him to start on the following Monday, March 18, 1991, working in the St. Louis area. When Denton told Ezell that he would have to have a union card to go to work, Ezell told him that he was not a member of the Union. Denton then told him that if he came to St. Louis, Denton would give him a letter to the Union stating that he would hire Ezell; that Ezell should take the letter to the union hall, join the Union and pay its membership fee. Then, Denton would put him to work. Ezell said that he would do as Denton had suggested. Ezell, as agreed, went to St. Louis and appeared at Denton's office early in the morning of March 18, 1991. Denton gave him a letter (G.C. Exh. 4) to give to the Union.

Ezell went directly to the union head and gave the letter to Joseph Schonlau, Respondent's financial secretary. Schonlau handles Respondent's finances and sends union bricklayers and tuckpointers out to jobs when the Union gets a call for them. Schonlau testified that Respondent maintains a referral system at its union hall for its members only. At the time of the hearing, the Union maintained a list of over 200 out-of-work union members. Although the Union has a list of nonmembers, it is not used for referral. Nonmembers do not call into the union office for referral;⁶ only union members are referred out by the union hall.

Schonlau further testified that although employers, bound by the Association agreement, are permitted to employ employees who are not members of the union, such nonunion employees are required to obtain from the Union "work permits" before they go to work for employers. The work permit is viable for 30 days and costs \$8 per month. At the end of 30 days, the nonunion employees are permitted to renew the work permit. Union members are not required to have work permits. Association employers may hire union members without regard to the union hall list. Although union members' monthly dues are \$8 per month, the same cost as the work permit, the union members are referred to jobs and receive a mortuary benefit for their dues. Since the beginning of 1991, Schonlau has refused to issue work permits to nonmembers. Nonunion employees, caught working for Association employers without work permits, according to prior practice, had been permitted to continue to work but paid for work permits in all delinquent months.

The complaint alleges (par. 5(b)) that since on or about January 5, 1991, Respondent has required nonunion appli-

⁶Schonlau says he keeps the list of nonmembers merely to identify them in case a union business agent runs across the nonmember on a job, who identifies the individual, and checks it against Schonlau's list. Schonlau emphasized that, regardless of the need for bricklayers, he never refers out nonunion bricklayers.

cants for employment with employer-members of the Association to obtain union work permits in order to work for Association employer-members. By paragraph 5(c) the complaint alleges that, since on or about January 5, 1991, Respondent has required applicants for employment and nonunion employees of employer-members of the Association to become members of Respondent before these individuals are permitted to begin or continue working for the member-employers. The complaint alleges that these arrangements violate Section 8(b)(1)(A) and (2) of the Act.

Schonlau admitted that since the beginning of 1991, he has refused nonmembers both membership in the Union and work permits. Since the evidence shows that he has refused them work permits because of the large number of union members who are out of work in the St. Louis area, and since Schonlau admitted that applicants and nonunion members must obtain union work permits before they are permitted to work for employers who are bound by the Association contract, it is clear that, since January 5, 1991, under present conditions, a nonunion applicant or employee will not be permitted to work at all for Association employers. Since Respondent, as Schonlau admitted, refers for employment only union members from its out-of-work list, and since Respondent will grant neither work permits nor union membership to nonunion employees, Respondent's procedures, commencing certainly as early as the beginning as 1991, create "closed shop" conditions among the employers bound by the Association contract. In order to work for employers bound by the Association contract, beginning January 1991, the applicant bricklayers or nonunion bricklayers are discriminated against because of their lack of work permits from or membership in the Union. Such arrangements, as alleged, restrain and coerce nonunion employees and cause or attempt to cause unlawful discrimination in violation, respectively, of Section 8(b)(1)(A) and (2). I also agree with General Counsel that the mandatory \$8-per-month work permit fee for nonunion employees violates Section 8(b)(1)(A). The fee is not a service or referral fee since nonmembers are not referred. The fee, on this record, serves no purpose except to enrich the Union, to restrain nonmembers and to keep track of employers employing nonmembers. Indeed, the requirement of nonmembers obtaining union clearance, in the form of a work permit, as a condition of gaining or retaining employment, is merely part of closed-shop mechanics and violated Section 8(b)(1)(A) and (2) of the Act.

2. The Charging Party visits the union hall

As above noted, Ezell, on Monday, March 18, 1991, went to the union hall in St. Louis. There is no contradiction that he gave Denton's letter in an unsealed envelope to Schonlau on that day. The letter (G.C. Exh. 4) reads:

I will give Charles Ezell a job if you will issue him a card. He has been a bricklayer for 15 years.

The letter was unsigned. Ezell testified that he removed the letter from the envelope, gave it to Schonlau, and that Schonlau read the letter and returned it to Ezell.

Schonlau denied having read the letter. Rather, he testified that Ezell *told* him that the letter was from Denton requesting that Ezell be permitted to become a union member. In view of Schonlau's testimony, it is clear that he knew why Ezell

had come to him. In any event, I find that Schonlau told Ezell that he "could not help him because there were too many [union tuckpointers] out of work." At that point, Ezell told Schonlau that he had a family to support; that he had been a tuckpointer for 14 years; that he had to work non-union; and that he now had a chance to "go union" and that Schonlau would not help him. Schonlau told Ezell to have Denton call him and Schonlau would explain the Union's refusal to permit Ezell to become a union member. Schonlau also told Ezell that, perhaps in a couple of weeks, he would be able to let Ezell join the Union.

Ezell left the union hall, telephoned Denton and told him that he was not able to join the Union. Denton told him that he would "Try to pull a few strings to help [me] get in the union." Ezell did not work that day, Monday, March 18.

The complaint alleges (par. 6(a) and (b)) that on or about March 18, 1981, Respondent refused to issue a union card to Ezell thereby attempting to cause and causing Denton to refuse to hire Ezell and that such conduct violates Section 8(b)(1)(A) and (2) of the Act.

Regardless whether Schonlau read the letter, there is no dispute that he knew that the letter came from Denton; that the object of the letter was to have the Union grant Ezell union membership; and that the reason for such membership was to permit Denton to employ Ezell as a tuckpointer. Schonlau had already testified, in substance, that Association employers could employ only union members or nonmembers with union work permits; and he would now grant neither to nonunion employees. Schonlau said that he told Ezell that he would not grant him union membership and that he should have Denton call him for an explanation, all because there were too many union tuckpointers out of work.

While the Board has consistently held that it is unnecessary to prove the existence of available jobs at the time when unlawful discrimination on the basis of union membership occurs, *Utility & Industrial Construction Co.*, 214 NLRB 1053 (1974), it is clear that discrimination occurs even without the existence of an actual job opportunity where the discrimination occurs against applicants registering for employment. *NLRB v. The Lummus Co.*, 210 F.2d 377, 381 (5th Cir. 1954). In short, Schonlau denied Ezell union membership or a work permit, requisites to his being employed under the instant actual "closed shop" conditions, not because Ezell refused to tender or pay for the work permit or for periodic dues and initiation fee uniformly required as a condition of acquiring membership in the Union. Rather, he denied him the permit or membership because there were too many St. Louis union tuckpointers out of work at this time. This constitutes an unlawfully discriminatory basis for the refusal: making union membership or clearance a condition of gaining employment in order to insure jobs for union members. The Union, by its agent, Schonlau, as alleged, violated Section 8(b)(1)(A) and (2) of the Act by its refusal, on or about March 18, 1991, to permit Ezell to become a union member or to issue a work permit in the face of an actual job for which he would have been hired but for Respondent's unlawful conduct. As already noted, I would find the same violation even in the absence of the discriminatory motive. The refusal to issue a work permit here is merely part of the mechanics of insuring "closed shop" conditions.

Respondent defends on several grounds. To the extent that it argues that Ezell was not actually employed at the time of

the discrimination, such a defense, on the above authority, is without merit. Applicants for employment, without regard to the existence of a job, may not be unlawfully discriminated against. The applicants are considered protected employees. *Alexander's Restaurant & Lounge*, 228 NLRB 165, 179 (1977); *enfd.* 586 F.2d 1300 (9th Cir. 1978). The final determination of job availability imposing backpay liability is properly left to the compliance stage of Board litigation. *Apex Ventilating Co.*, 186 NLRB 534 fn. 1 (1970).

To the extent that Respondent denies that it caused Denton not to hire Ezell and that Denton's insistence on Ezell's union membership was a condition set by Denton, alone, the record does not support such contention. Rather, the undisputed evidence is that whether or not Schonlau read the letter, it is clear that he knew that Denton wanted to employ Ezell and that a condition of that reemployment was his union membership (the only other alternative was a union "work permit" which Schonlau said he would not issue). Hence Schonlau knew that Denton sent Ezell to the Union in order to fulfill the condition on which Denton would hire him. Schonlau specifically testified that he would give Ezell neither a work permit nor a union membership card because there were too many local members out of work.

To the extent Schonlau testified that it was not merely a question of union tuckpointers out of work but too many local bricklayers out of work, he appeared to imply that he refused to give Ezell a work permit or union membership card because Ezell was not from St. Louis and there were too many St. Louis tuckpointers and bricklayers out of work. Essentially, however, Schonlau ultimately testified that he did not give Ezell the union card or the work permit because there were too many members of the Union out of work. I find that the basis of Schonlau's discrimination against Ezell was not the general conditions of St. Louis unemployment but the unemployment of *union* tuckpointers and bricklayers in St. Louis. Schonlau testified that he had 200 union members on the out-of-work list.

Schonlau testified that Ezell could have worked for Denton as a nonmember of the Union, but this testimony is essentially a "Catch-22." Thus, Schonlau testified that Ezell could work for Denton either as a union member or nonmember, but if he worked as a nonmember, he would need a work permit. Schonlau testified, however, as above noted, that he would not grant union membership or issue a work permit to Ezell because there were too many union members out of work. Thus, on Schonlau's own testimony, Ezell's right to be hired and employed by Denton whether with a work permit (nonunion) or as a union member (Schonlau refused) is clearly illusory.

I find that, as alleged, Respondent's March 18, 1991 refusal to grant a work permit or union membership to Ezell, with or without the presence of unlawful motivation, violated Section 8(b)(1)(A) and (2).

3. Respondent's unlawful actions against Ezell on May 21, 1991

As above noted, on March 18, 1991, Schonlau rejected Ezell's request for a work permit or union membership and Ezell so informed Denton who said he would try to pull a few strings to help Ezell become a union member.

On March 20, 1991, Ezell sought to become a member of Respondent's sister local, Bricklayers Local No. 23, in Cape Girardeau, Missouri. Thereafter, on March 25, 1991, while still attempting to become a member of Local 23, Ezell telephoned Schonlau and asked if Respondent would issue him a work permit (for Denton) if he became a member of Local 23. Schonlau said that he would not issue him a work permit because there were too many tuckpointers out of work. He said nothing of Ezell complying with Respondent's rules on allowing members of sister locals to work in St. Louis. He said that he might give him a work permit in a couple of weeks.

By April 4, 1991, Ezell was able to join Local 23 and pay \$200 for a membership card. On that date, he telephoned Denton and told him of his union membership. Denton told him that he would put him to work because of the union card and would "worry about a [Local No. 1] permit later." Denton told him that as long as he had a union card, Denton would give him the job and that Respondent would thereafter "have to sell you a [work] permit." Denton directed Ezell to commence work Monday morning, April 8, 1991. Ezell started work for Denton on April 8 and worked until May 21, 1991. Because Denton sent pension and welfare contributions on Ezell's behalf to the Union, the Union discovered that Ezell was working for Denton and was not a union member. Ezell told Denton of this condition.

On May 21, 1991, while Ezell was loading a truck, Denton told Ezell that they would have to visit the union hall. They went to the hall and spoke with Schonlau. Denton told Schonlau that he would like to continue to keep Ezell working and asked Schonlau to sell Ezell a work permit. Schonlau refused, saying that there were still too many tuckpointers⁷ out of work and that he would not sell Ezell a work permit. Ezell again told Schonlau how desperately he needed a job. Denton told Schonlau that Ezell was a good worker and that he did not want to hire any bricklayer out of the union hall; he wanted Ezell to work for him. Schonlau again told them that he would not issue Ezell a work permit because there were too many tuckpointers out of work; but that he might do so in a couple of weeks. Ezell further testified that Denton, in Schonlau's presence, told Ezell that he could not employ him any further and that Schonlau said nothing. Schonlau denies being present. It is unnecessary to decide this conflict.

After May 21, 1991, Ezell no longer worked for Denton. The complaint (par. 6(c)) alleges that on or about May 21, 1991, Respondent refused to issue a work permit to Ezell by which Respondent attempted to cause and caused Denton to lay off the Charging Party.

Schonlau, essentially contradicting Ezell's testimony, as above noted, denied that he was present or heard Denton tell Ezell that he could not put him to work or could not employ him any further. Schonlau, however, admitted that immediately prior to his conversation with Denton and Ezell on the morning of May 21, 1991, he had a conversation with Respondent's pension and welfare director, James Hassler, at the union hall. Hassler told Schonlau that he had spoken with Denton concerning Ezell's appearance on Denton's employee-contribution sheet for the pension and welfare plan

and that he was not familiar with who Ezell was. Hassler told Schonlau that Denton told him that Ezell was a pointer working for Denton. Schonlau denied that Hassler said that he had told Denton of the necessity of a work permit for Ezell. Thus Respondent defends by asserting that Denton's termination of Ezell's employment on May 21 was purely Denton's act without any coercion, demand or request by the Union to discharge Ezell, "nor was there any conduct on the part of the Union from which Denton would reasonable infer" that the Union was coercing Denton to discriminate against Ezell by firing him (R. Br. 12). Respondent denied that Hassler was a union agent and he did not testify at the hearing.

Although Schonlau admitted that, as a matter of normal "procedure," Hassler, upon discovering Ezell's nonunion status from Denton, would tell her of the necessity of a work permit, there was no proof that Hassler said this to her. In any event, I agree with Respondent that Denton interpreted Hassler's phone call as proof that the Union had discovered the presence of a nonmember (Ezell) on the Denton job. This phone call to Denton, I have already concluded, prompted Denton to bring Ezell to see Schonlau about these matters on the morning of May 21.

The evidence is not disputed and Respondent concedes (R. Br. 14) that on the morning of May 21, Denton and Ezell came to see Schonlau for the purpose of obtaining a work permit which Schonlau then refused to issue to Ezell. As Respondent further concedes (R. Br. 14) Schonlau knew (pursuant to his conversation with Hassler) that Ezell was employed by Denton and that Ezell was not a member of the Union (R. Br. 14). The facts remain, however, that, as Respondent admits, it refused on May 21 to issue Ezell a work permit; that a work permit is necessary in order to have a non member work for an employer bound by the Association contract; and that that work permit must be issued before the employee goes to work. Schonlau also knew that Ezell was working for Denton and needed membership or a work permit to continue to do so.

Schonlau also testified concerning Respondent's conduct when one of its business agents discovers a nonunion employee already working on the job without a work permit. The normal procedure, as I understood his testimony, was that the union business agent who discovers a nonmember working on an Association job requires the nonmember to pay for a work permit for each month that he worked. Even that procedure, however, was not allowed to Denton and Ezell. It is clear, and I find, that the reason he did not issue the work permit to Ezell on May 21 was because, as Schonlau earlier testified, there were too many of Respondent's union tuckpointers in St. Louis out of work. Schonlau testified that Ezell never told him that he was a member of Local 23 (contrary to Ezell's testimony concerning his alleged March 25, 1991 telephone call to Schonlau). Assuming, arguendo, however that Schonlau's testimony denying knowledge of Ezell's Local 23 membership is credited, then, to the extent Respondent defends on the ground that Ezell did not follow the International Union constitution with regard to the constitution's travel rules, such a defense is plainly irrelevant. The uncontradicted testimony, indeed Schonlau's own testimony, is that he did not refuse to issue a work permit to Ezell because of Ezell's noncompliance with travel rules concerning membership in the sister local.

⁷ Again Schonlau testified that too many "tuckpointers" out of work meant "union tuckpointers."

Rather, Schonlau's own testimony was that he denied issuing the work permit to Ezell because there were too many "members" (i.e., Respondent's members) out of work.

Respondent quite correctly notes that if Schonlau's denial of Ezell's testimony is credited (Ezell testified that Schonlau told Denton that he could not put Ezell to work), Schonlau never *directed* Denton to terminate Ezell's employment. On the other hand, he did not have to. All he had to do, as he did, was to refuse to issue the work permit. Schonlau's testimony is that a work permit is necessary in order for a nonmember to even proceed to work; or if a nonmember is discovered working for an Association member, he is permitted to continue to work provided he pays for a current work permit and back work permits at the rate of \$8 per month.⁸ Ezell was not permitted this historical alternative. Schonlau flatly refused to issue him a permit and flatly stated that the reason was because of too many (St. Louis area) union members out of work. When Schonlau, in Denton's presence, refused to issue Ezell the permit, Ezell and Denton having specifically presented themselves to Schonlau at the union hall because the Union discovered Ezell's nonunion status, the natural and foreseeable consequences of Schonlau's refusal was for Denton to refuse to continue and to terminate Ezell's employment. Schonlau, even if I discredit Ezell, cannot defend behind the assertion that he did not, in haec verba, direct that Denton terminate Ezell's employment. The Schonlau refusal to issue Ezell the work permit in Denton's presence had that immediate effect and consequence, regardless whether or not Schonlau was present when Denton actually told Ezell that he could no longer employ him. A labor organization may be found to have engaged in unlawful discrimination, within the meaning of Section 8(b)(2) of the Act, in terms of *causation* of a violation of Section 8(a)(3) of the Act, without an express demand for the discriminatory result. A labor organization's discriminatory conduct may be inferred from all the circumstances of the case. See *Teamsters Local 980 (Auburn Constructors)*, 268 NLRB 894, 900 (1984); *Food & Commercial Workers Local 454 (Central Soya of Athens)*, 245 NLRB 1295, 1299 (1979).

Under the circumstances of this case, Schonlau's refusal to issue the work permit on May 21, 1991, I find, was conduct which was intended to cause, caused, or attempted to cause, Denton to terminate Ezell's employment in violation of Section 8(b)(2) of the Act. This is so because, under actual practice in existence, the work permit is a precondition of any employment by an employer-member bound by the Association contract who employs nonunion members. In short, Ezell could not work for Denton without union membership or a work permit; as a matter of actual practice, Schonlau and Denton knew this to be true; Denton and Ezell visited Schonlau to get the permit; Schonlau refused to issue the work permit (for unlawful reasons) in Denton's presence and ipso facto caused, without a formal demand, Denton to terminate Ezell. That, it seems to me is sufficient Schonlau conduct, under the circumstances, to "cause or attempt to cause" Denton to refuse to continue Ezell's employment in violation of Section 8(a)(3), thus violating Section 8(b)(2) of

the Act. In this respect there is a sufficient "nexus" between Schonlau's May 21 conduct and Denton's failure to continue Ezell's employment, cf. *Brand Mid-Atlantic, Inc.*, 304 NLRB 853 (1991), to meet the test of 8(b)(2) causation. Compare: *Laborers Local 332 (D'Angelo Bros.)*, 295 NLRB 1036 (1989), with *Holiday Inn Riverfront*, 250 NLRB 99, 102 (1980) (Cobbs incident). Even if Schonlau did not act for the specific purpose of causing the resulting Denton conduct, he nevertheless acted knowing that this particular result would follow. That is sufficient causation. Schonlau, as a matter of actual practice under the contract binding Denton, *knew* that Denton, whose visit to Schonlau was for that very purpose, would not continue to employ Ezell without a union work permit or union membership. Since Schonlau's refusal to grant either was prompted by a desire to unlawfully eliminate nonunion (or non-St. Louis union) competition for St. Louis jobs, his actions against Ezell are discriminatory and unlawful, as they would be even without the unlawful motive.

CONCLUSIONS OF LAW

1. Denton's Tuckpointing, Inc., a member of Mason Contractors Association of St. Louis, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent, Bricklayers, Tuckpointers, and Stone Masons of the International Union of Bricklayers and Allied Craftsmen, Local No. 1 of St. Louis, Missouri, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining any agreement with the Association, or with any other employer, that requires the employer to give preference in hiring or employment to employees based on membership or nonmembership in any labor organization, Respondent violated Section 8(a)(1)(A) of the Act.

4. By charging a fee to nonmembers for issuance or maintenance of a work permit, Respondent violated Section 8(b)(1)(A) of the Act.

5. By failing and refusing to issue nonmembers of Respondent work permits or membership cards in Respondent, which work permits and membership cards are conditions of employment or continued employment with employers who are members of the Association, because of reasons other than the employees' failure to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in Respondent, Respondent unlawfully discriminated against employees in violation of Section 8(a)(3) of the Act, thereby violating Section 8(b)(1)(A) and (2) of the Act.

6. By causing Denton's Tuckpointing, Inc. to terminate the employment of Charles N. Ezell Jr. because of his nonmembership in Respondent or because Respondent failed and refused to issue him a work permit, Respondent, by this discriminatory practice, unlawfully encouraged membership in Respondent in violation of Section 8(a)(3) of the Act, thereby violating Section 8(b)(2) and (1)(A) of the Act.

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

⁸I have already concluded the requirement of an \$8-per-month work permit fee is unlawful, and that the present work permit requirement, on this record, is unlawful because it is merely part of a closed-shop apparatus.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that the Respondent cease and desist therefrom and take certain affirmative action in order to effectuate the purposes of the Act.

As above noted, I refused to further elaborate, for the benefits of the Association or others, what I believe would create a lawful clause relating to membership in the union as a condition of employment. I have, in any event, recommended to the Board that it find that the 80-percent manning clause (art. XII, sec. 7) be found unlawful. I have also separately found unlawful Respondent's failure and refusal to issue work permits or union membership cards because too many union members are out of work, where the work permits and other membership cards are a condition of gaining or retaining employment with members of the Association.

Since I have found that Respondent caused Denton's Tuckpointing to terminate the Charging Parties' employment, it is recommended, that Respondent immediately notify, in writing, Denton Tuckpointers, and all other members of the Association, that it has no objection to the Charging Party's employment by any of such members as a Tuckpointer or for any other position for which he is qualified and to request of Denton's Tuckpointing, in particular, his reinstatement. I shall further recommend that Respondent make the Charging Party whole for any loss of wages and benefits suffered by reason of the discrimination against him from March 18, 1991, the date of Respondent's initial unlawful discrimination against him, to the date of his reinstatement by Denton's Tuckpointing, Inc. to his former or substantially equivalent job, or to the date he secures substantially equivalent employment with some other employer, less his net earnings during this period. The loss of earnings shall be computed in the matter prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with Board policy set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Bricklayers, Tuckpointers, and Stone Masons of the International Union of Bricklayers and Allied Craftsmen, Local No. 1 of St. Louis, Missouri, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Denton's Tuckpointing, Inc., an employer, to discriminate against Charles N. Ezell Jr., or any other employee, because of their nonmembership in Respondent or because they engaged in activities protected under Section 7 of the Act except to the extent permitted by Section 8(a)(3) of the Act.

(b) Maintaining any collective-bargaining agreement with the Mason Contractors Association of St. Louis, or with any other employer, that requires the employer to give preference in the hiring or retention of employment to employees based upon membership or nonmembership in any labor organization except to the extent permitted by Section 8(a)(3) of the Act.

(c) Charging a fee for work permits, failing or refusing to issue to nonmembers of Respondent work permits or requiring as a condition of gaining employment, membership in Respondent in order to give preference in employment to existing members of Respondent.

(d) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

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

(a) Notify Denton's Tuckpointing, Inc., and all members of Mason Contractors Association of St. Louis, in writing, that it has no objection to the employment of Charles N. Ezell and to request his reinstatement by Denton's Tuckpointing, Inc.

(b) Make whole Charles N. Ezell Jr. for loss of earnings he may have suffered by reason of the discrimination against him commencing March 18, 1991, as set forth in the remedy section of this decision.

(c) Notify all employer-members of the Association, bound by a collective-bargaining agreement with Respondent, that paragraph article XII, section 7, of the collective-bargaining agreement between the Association and Respondent, effective for the period June 20, 1990, through May 31, 1993, or any amendments thereto or successors thereof containing such clause, is unlawful.

(d) Post at its offices and meeting halls in St. Louis, Missouri, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Forward to the Regional Director for Region 14 signed copies of said notice for posting by Denton's Tuckpointing, Inc., or other members of the Association bound by the collective-bargaining agreement above reference, if they are willing, for 60 consecutive days, in places where notices to members are customarily posted.

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

⁹If 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.

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

APPENDIX

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

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

WE WILL NOT cause or attempt to cause Denton's Tuckpointing, Inc., an employer, to discriminate against Charles N. Ezell, Jr., or any other employee, because of his or their nonmembership in Bricklayers, Tuckpointers, and Stone Masons of the International Union of Bricklayers and Allied Craftsmen, Local No. 1 of St. Louis, Missouri, AFL-CIO (the Union), or because he or they engaged in activities protected under Section 7 of the National Labor Relations Act.

WE WILL NOT maintain or otherwise give effect to any collective-bargaining agreement with Mason Contractors Association of St. Louis (the Association), or with any other employer or employer association, that requires the Employer or the Association to give preference in the hiring or retention of employment to employees based upon membership or nonmembership in any labor organization except to the extent permitted by Section 8(a)(3) of the Act.

WE WILL NOT fail or refuse to issue to nonmembers of the Union work permits or require, as a condition of gaining employment with employers who are members of the Associa-

tion, membership in the Union in order to give preference in employment to existing members of Respondent.

WE WILL NOT charge nonmembers a fee for issuing a work permit.

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

WE WILL notify Denton's Tuckpointing, Inc., and all members of the Association, in writing, that the Union has no objection to the employment of Charles N. Ezell and to request his reinstatement by Denton's Tuckpointing, Inc.

WE WILL make whole Charles N. Ezell Jr. for any loss of earnings he may have suffered by reason of the Union's discrimination against him commencing March 18, 1991, plus interest.

WE WILL notify all employer-members of the Association, bound by a collective-bargaining agreement with the Union, that paragraph article XII, section 7, of the collective-bargaining agreement between the Association and the Union, effective for the period June 20, 1990, through May 31, 1993, or any amendments thereto or successors thereof, containing such a clause, that such clauses are unlawful and will be given no further force or effect.

BRICKLAYERS, TUCKPOINTERS, AND STONE
 MASONS OF THE INTERNATIONAL UNION OF
 BRICKLAYERS AND ALLIED CRAFTSMEN,
 LOCAL NO. 1 OF ST. LOUIS, MISSOURI, AFL-
 CIO