

Plumbers and Pipe Fitters Local Union No. 32, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Rockford Corporation d/b/a Alaska Continental Pipeline, Inc.) and William Harper and Michael Flowers. Cases 19-CB-7206 and 19-CB-7208

October 29, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On March 23, 1993, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the exceptions.

The National Labor Relations 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.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Plumbers and Pipe Fitters Local Union No. 32, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Seattle, Washington, its officers, agents, and representatives, shall take the action set forth in the Order.

James Sand, Esq., for the General Counsel.
Hugh Hafer, Esq. (Hafer, Price, Rinehart & Robbies), of Seattle, Washington, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this consolidated case in trial at Seattle, Washington, on February 4, 1993. On August 10, 1992, William Harper filed the charge in Case 19-CB-7206 alleging that Plumbers and Pipe Fitters Local 32 (Respondent or the Union) committed certain violations of Section 8(b)(1)(A) of the National Labor Relations Act (the Act). Michael Flower filed a charge in Case 19-CB-7208 on August 12, 1992. On October 7, 1992, the Regional Director for Region 19 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondent, alleging that the Union violated Section 8(b)(1)(A) of the Act by refusing to let Harper and Flowers register at its hiring hall and by refusing to refer Harper and Flowers to a mainline pipeline construction job. Respondent filed a timely answer and amended answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Rockford Corporation d/b/a Alaska Continental Pipeline, Inc. (the Employer) is a Delaware corporation with an office and place of business in Longview, Washington, where it is engaged in pipeline construction. During the 12 months prior to the issuance of the complaint, the Employer sold and shipped goods or provided services from its facilities in Washington to customers outside the State, or sold goods or provided services to customers inside the State, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of \$50,000.

Accordingly, I find and the Union admits that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admits and I find that at all times material herein Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

In July 1992, the Employer was engaged in a pipeline construction job in the vicinity of Longview, Washington. The pipeline work was performed under the terms of the National Pipeline Agreement between the Pipeline Contractors Association and United Association of Plumbers and Pipe Fitters. Pursuant to the terms of the agreement, the Plumbers and Pipe Fitters were to be the exclusive source for one-half of the rig welders utilized on the Employer's Longview jobsite. Respondent was designated as the local union responsible for the dispatch of welders to the project and for administration of the collective-bargaining agreement. Respondent dispatched 7 of the 13 rig welders on the project. This case concerns the manner in which Respondent dispatched rig welders to the jobsite. No other job classification is at issue.

Respondent maintained hiring hall lists for the construction and maritime industries. However, Respondent did not maintain a list for pipeline welders. The last time Respondent had any pipeline work in its jurisdiction was in 1990. Respondent operated its dispatch procedures for the jobsite without published or promulgated hiring hall rules. It did not maintain any written list of applicants nor dispatch in order of application.

Jeff Manning, a member of Respondent, was chosen by the Union to be the first employee on the job and to be union steward. The business agent responsible for servicing this job, Donald Galloway, was not familiar with pipeline work. Galloway asked Manning for a list of employees known by Manning to be dependable and qualified rig welders. In addition to the list given him by Manning, Galloway had a list of rig welders who had worked the 1990 job and had received telephone calls from business managers from

other locals recommending certain of their members. From this pool of applicants Galloway dispatched employees as needed by the Employer. Welders were not dispatched in order of application nor were they ranked in any manner.

When questioned as to how employees were selected from this pool of applicants, Galloway said he relied on Manning. Manning testified that he submitted a list to Galloway and did not know how Galloway chose from the list. Several employees not on Manning's list were referred to Galloway by the business managers of their local unions. One employee was referred by his uncle, a welder chosen by Galloway. Additional jobs opened as employees failed welding tests or left for other reasons. Neither Galloway nor Manning could explain how employees were selected for these job openings. The employees on Manning's list were known to him from prior jobs or from a steward's training school he attended. Some of the employees were only known to Manning by reputation.

Harper and Flowers were members of a Plumbers local union in Bakersfield, California, and were experienced rig welders. On July 3, Harper and Flowers visited the jobsite looking for work. They were directed to Manning who had been dispatched to the job as union steward. Harper and Flowers asked about working on the job and were directed to Al Sexton, the Union's business manager. Manning said he was getting names of welders to give to Sexton and told the welders that Sexton would call them. Manning failed his welding test and did not work on the jobsite after July 3.

On July 5, the two rig welders went to the Union's offices in Seattle, Washington, to sign the out-of-work list for referral to the pipeline job. Flowers and Harper waited to see Sexton but Sexton left the offices on business without seeing the two welders. The receptionist asked Tim Elwell, business agent, to talk to the two employees. Elwell told them that he did not handle pipeline work but would try to help them. According to Elwell, the employees insisted on signing an out of work list and so he gave them the list for welders in the construction industry. This was the only list for welders that Elwell had. Harper and Flowers testified that they signed the list after being told it was for pipeline welders. I credit Elwell's testimony that he did not tell the employees that the list was for pipeline work. There was no such list. Rather, I find that Elwell simply gave the employees a welders list to sign and that the employees assumed it was for pipeline work because they recognized the name of a pipeline welder on the list.

On July 6, Harper and Flowers, returned to the jobsite where they observed workers on the jobsite. Believing that these welders had signed the out-of-work list after them, Harper and Flowers called Manning. Manning referred the employees to Sexton.

On July 10, Flowers and Harper went to the jobsite and found Phil Stroud, the new union steward. Stroud told the employees to be patient and he would get them a chance to take the welding test. Flowers and Harper returned later that day, after two welders had failed their tests. Flowers asked if he and Harper could get on the job and Stroud referred them to the Employer's superintendent.

On July 11, Flowers called Manning and said he was sorry that they had gotten off on the wrong foot. Manning said there was no problem. He told Flowers that Sexton was handling the pipeline job.

On July 22, Galloway spoke with Flowers and told him that the jobs had been filled but "maybe if some guys bust the welding test we can get you on the job." Harper and Flowers had no further contact with the Union and were not referred to the job.

No members of Respondent worked as welders on this job. The only two qualified members of Respondent were dispatched but did not pass their welding tests. Respondent attempted to dispatch rig welders from the State of Washington but got no qualified applicants. Thus, all the welders on the job, dispatched by Respondent, were from out of State and were members of other local unions. The General Counsel does not contend that Respondent specifically discriminated against Flowers and Harper but rather that the arbitrary nature of the selection process breached the Union's duty of fair representation to all qualified applicants.

Analysis and Conclusions

Section 8(b)(1)(A) of the Act provides that it shall be an unfair labor practice for a labor organization "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7 of the Act." The proviso to Section 8(b)(1)(A) states that the section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." Section 8(b)(2) makes it an unfair labor practice for a union:

to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

It is well settled that a labor organization that undertakes to operate a hiring hall pursuant to an arrangement with an employer as the exclusive source of employees¹ is obligated to refer individuals without regard to their union membership or lack thereof. The Board requires the establishment and nondiscriminatory use of objective standards in the operation of exclusive hiring halls. *Painters Local 277 v. NLRB*, 717 F.2d 805 (3d Cir. 1983), enfg. 262 NLRB 1336 (1982); *Painters Local 1178 (Roland Painting)*, 265 NLRB 1341 (1982). The absence of written standards is not itself violative of the Act, but is one factor to be considered in determining whether a hiring hall has been operated objectively. *Laborers Local 394 (Building Contractors)*, 247 NLRB 97 fn. 2 (1980); *Federated Department Stores*, 287 NLRB 951 (1987).

Galloway testified that he was not familiar with pipeline work and that he referred employees based on the recommendations of Manning and some business managers

¹ Under the relevant agreement the Employer reserved the right to request employees by name pursuant to a formula set forth in the contract. Under this agreement the Employer chose six employees, leaving the Union with the task of referring seven employees. Under Board law, the Union operated an exclusive hiring hall notwithstanding that the Employer had the right to choose half the employees. *Carpenters Local 608 (Various Employers)*, 279 NLRB 747, 754 (1986).

from other locals. He also referred one employee on the recommendation of that employee's uncle. Galloway had more recommendations than jobs to fill. However, he could not explain how the employees were selected from the pool of recommended employees. Manning admitted that he gave recommendations to Galloway but denied any knowledge as to how the employees were chosen. Manning did not rank the employees. There were additional openings after the job started because some employees failed the welding test. However, neither Galloway nor Manning could explain how employees were chosen for these job openings. Employees were not referred in chronological order.

While the record shows that Manning and Galloway attempted to refer only qualified and dependable welders, at best a subjective test was used. It would appear that such a subjective test discriminates in favor of associates of Galloway and Manning. Qualified welders such as Harper and Flowers could not be considered because they were unknown to Galloway and Manning. Assuming Manning and Galloway did not discriminate nor intend to discriminate, it is still impossible to find any objective criteria or standards for choosing among the qualified applicants. Neither Manning nor Galloway could express any objective criteria or standard. Accordingly, I find the operation of the hiring hall was violative of Section 8(b)(1)(A) of the Act.

In *Morrison-Knudsen Co.*, 291 NLRB 250 (1988), cited by Respondent, the Board found no violation where the agreement required the union to refer the most qualified individual available at the time of the opening. The Board found that the union business agent sought in good faith to determine the qualifications of applicants at the hall and that certain employees had skills and experience that qualified them for the jobs to which they were referred. The Board found that the referral operation was not left to the unbridled discretion of the business agent. Rather, the referrals were objectively considered in that a record was made of each individual's qualifications as stated by the individual in conjunction with the business agent's assessment based on questions he had asked the individual, and the referral records, which indicated whether an individual had worked on the waterway in the past. *Id.* at 250-251 fn. 6.

I find the instant case to be clearly distinguishable from *Morrison-Knudsen*. Here, there no evidence of what criteria, if any, Galloway used in referring employees. Galloway chose from a pool of rig welders which consisted of employees recommended by Manning and by business managers from other locals. Employees unknown to Manning, such as Harper and Flowers, would be excluded from this pool no matter how qualified. As to employees included in the pool, even Galloway could not provide the criteria or standards used in selecting rig welders for referral.

Respondent argues that even if it is established that the hiring hall was operated in violation of the Act, all welding positions were filled at the time Harper and Flowers applied for work. Thus, Respondent argues that neither employee is entitled to a make-whole remedy. The welding jobs were not filled as of the time that Harper and Flowers applied for work. Presumably, Respondent means that employees were selected for these jobs prior to July 3. Assuming that the welding jobs were filled at the time of Harper's and Flowers' initial visit to the jobsite, other openings occurred thereafter as employees failed their welding tests or left for other rea-

sons. In fact, Respondent referred 15 employees for the seven positions it needed to fill. Respondent's operation of the hiring hall makes it impossible to determine whether Harper and Flowers would have been referred. The Board has held that "it is unnecessary to show that jobs were available at the time of the request for referral." *Pipeline Local 38 (Hancock-Northwest, J.V.)*, 247 NLRB 1250 (1980). *Teamsters Local 519 (Rust Engineering)*, 275 NLRB 433 (1985). I, therefore, find that Harper and Flowers were refused referral in violation of Section 8(b)(2) of the Act and leave to the compliance stage any issues concerning backpay.²

CONCLUSIONS OF LAW

1. Rockford Corporation d/b/a Alaska Continental Pipeline, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, Plumbers and Pipe Fitters Local Union No. 32, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(b)(1)(A) of the Act in operating its exclusive hiring hall by failing to use objective criteria and standards in referring applicants for employment as rig welders to the Employer at the Longview, Washington jobsite.

4. Respondent violated Section 8(b)(2) by discriminating against William Harper, Michael Flowers, and other rig welders seeking referral for employment for reasons not based on objective criteria and standards, thereby causing the Employer to refuse to hire the employees.

5. Respondent's acts and conduct above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Based on the lack of objective criteria and the lack of a ranking of employees, it is impossible to determine if and when Flowers and Harper would have been referred. Accordingly, I will order a make-whole remedy and leave to the compliance stage of these proceedings the remedial issues raised by Respondent's lack of records. Respondent should be ordered to make whole Harper and Flowers for any losses they may have suffered by reason of the discrimination against them. The Employer's Longview job is completed. Therefore, reinstatement is not applicable. Backpay shall be computed on a quarterly basis, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

²Although the complaint only alleges a violation of Sec. 8(b)(1)(A), the issue of a refusal to refer Harper and Flowers was alleged in the complaint. Further, the refusal to refer the welders was fairly and fully litigated. I, therefore, find that Respondent also violated Sec. 8(b)(2).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Plumbers and Pipe Fitters Local Union No. 32, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Seattle, Washington, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discriminating against Michael Flowers, William Harper, and other job applicants seeking referral for employment through its exclusive hiring hall at the Alaska Continental Pipeline jobsite at Longview, Washington, because of arbitrary reasons not based on objective, consistent criteria and standards, thereby causing Alaska Continental Pipeline to discriminate against employees in violation of Section 8(a)(3) of the Act.

(b) Failing to use objective, consistent criteria and standards in referring applicants for employment through its exclusive referral system to the Alaska Continental Pipeline jobsite, or to any other employer with whom it maintains an exclusive job referral system for pipeline welders.

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

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

(a) Make whole Michael Flowers and William Harper for any losses they may have suffered by reason of the discriminatory refusal to refer them to the Alaska Continental Pipeline job, in the manner set forth in the remedy section of this decision.

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

(c) Post at its hiring hall, meeting rooms, and offices in Seattle, Washington, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by

³All motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴If 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."

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.

(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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

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

WE WILL NOT discriminate against Michael Flowers, William Harper, or other job applicants seeking referral for employment through our exclusive hiring hall at the Alaska Continental Pipeline jobsite at Longview, Washington, because of arbitrary reasons not based on objective, consistent criteria, and standards.

WE WILL NOT fail to use objective, consistent criteria, and standards in referring applicants for employment through our exclusive referral system to the Alaska Continental Pipeline jobsite, or to any other employer with whom we maintain an exclusive job referral system for pipeline welders.

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

WE WILL make whole Harper and Flowers for any loss they may have suffered by reason of the discriminatory refusal to allow them to use the hiring hall, with interest.

PLUMBERS AND PIPE FITTERS LOCAL UNION
NO. 32, UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING
AND PIPE FITTING INDUSTRY OF THE UNITED
STATES AND CANADA, AFL-CIO