

**Local 46, Metallic Lathers Union and Reinforcing Iron Workers of New York and Vicinity of the International Association of Structural and Ornamental Iron Workers and Fred James.** Case 2-CB-15169

March 22, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

On September 25, 1995, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel 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,<sup>1</sup> findings,<sup>2</sup> 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, Local 46, Metallic Lathers Union and Reinforcing Iron Workers of New York and Vicinity of the International Association of Structural and Ornamental Iron Workers, New York, New York, its officers, agents, and representatives, shall take the action set forth in the Order.

<sup>1</sup> The Respondent contends that portions of Fred James' testimony about his conversation with Johnny Rodriguez are hearsay and should not have been admitted. The judge relied on this testimony to find that Business Agent Ledwith has deviated from the hiring hall rules. We note that the Respondent did not specifically object, on hearsay grounds, to this testimony at the hearing. Thus, the Respondent's hearsay claim is waived. *NLRB v. Cal-Maine Farms*, 998 F.2d 1336, 1343 (5th Cir. 1993). Further, even if the claim were not waived, we have long held that hearsay evidence is admissible if probative and corroborated. *Dauman Pallet*, 314 NLRB 185, 186 (1994), and cases cited there. Here that test is met. James' testimony that he verified what Rodriguez said by checking the hiring hall list was uncontradicted and corroborates the hearsay testimony.

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

*Kevin M. Smith, Esq.*, for the General Counsel.  
*Richard H. Markowitz, Esq. (Markowitz & Richman, Esqs.)*,  
for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was tried before me on May 3, 1995, in New York, New York. The complaint alleges that Local 46, Metallic Lathers Union and Reinforcing Iron Workers of New York and Vicinity of the International Association of Structural and Ornamental Iron Workers (Respondent, the Union, or Local 46) in its operation of an exclusive referral agreement with a multiemployer league failed and refused to refer Fred James (the Charging Party) to an employer-member of the league because James filed an unfair labor practice charge with the National Labor Relations Board (the Board), and for reasons other than the failure to tender dues and initiation fees uniformly required for membership in Respondent, in violation of Section 8(b)(1)(A) and (2) of the Act. Respondent filed a timely answer denying commission of the violations alleged.

The parties were provided full opportunity to participate, to introduce relevant evidence,<sup>1</sup> to examine and cross-examine witnesses, to argue orally, and to file briefs. Posttrial briefs have been filed by counsel for the General Counsel and Respondent and they have been carefully considered. On the entire record in the case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, the Cement League (the League) has been an organization composed of various employers engaged in the erection of concrete and cement structures, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including Respondent. Annually, employer-members of the League in the course and conduct of their business operations, collectively purchase and receive, at facilities and construction sites located in New York State, goods and materials valued in excess of \$50,000 directly from points located outside the State of New York. By virtue of the foregoing, and as admitted by Respondent, I find that some employer-members of the League have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I find, that Local 46 is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> Respondent counsel argues in his brief that the General Counsel's proffer of evidence seeking to show a failure by the Respondent to follow its rules regarding referral, thereby seeking to undercut one of Respondent's defenses to the complaint, that James was not entitled to referral because it would have violated the hiring hall rules, raised new matter and was outside the scope of the allegations of the complaint. To the contrary, the General Counsel's offer of evidence was in the nature of rebuttal and was therefore a proper and relevant response to Respondent's defense and did not raise a new issue in the proceeding. My rulings, denying Respondent's motion made at trial to strike this evidence is reaffirmed as is my ruling permitting the development of this rebuttal evidence during the presentation of the General Counsel's case-in-chief in the interest of expediting the hearing and avoiding the unnecessary recall of witnesses.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Respondent's Exclusive Referral Agreement and the Rules Governing Its Operation

Local 46 is a party to a collective-bargaining agreement with the Cement League running from July 1, 1993, to June 30, 1996. In addition to an exclusive recognition clause and an 8(f) 7-day union-security provision contained in article II, the agreement also contains, inter alia, an article VIII entitled, "Manning of Jobs," including, inter alia, a subparagraph (5) providing that "the Hiring Hall shall be the exclusive source of workmen and no hiring shall be done at the jobsite," and a subparagraph (1) providing that "The Union shall establish and maintain an open employment list for the employment of competent workmen in accordance with the Rules and Procedures for Operations of Hiring Hall dated August 17, 1991 and presently in effect and all referrals shall be made pursuant to said Rules and Procedures." Those rules and procedures were confirmed by U.S. District Court Judge Marvin Frankel in a memorandum order dated July 16, 1971, and made effective August 17, 1971, in a proceeding brought by the United States of America against Local 46 and the Joint Apprenticeship Committee of the Employing Metallic Furring and Lathing Association of New York, in the U.S. District Court for the Southern District of New York, in 68 Civ. 2116, in which proceeding Judge Frankel had issued an opinion on May 12, 1971, finding merit to claims of racial discrimination in hiring referrals made by the Union and in the administration of the apprenticeship training committee. The rules, with minor modification, had been proposed by a court appointed administrator, George Moskowitz. For purposes of this decision, reference to various sections of these rules bearing on the merits of the allegations made in the instant complaint shall be made hereinafter when appropriate. Suffice it to say now that the rules, overseen by the administrator, appear to provide an objective and neutral set of rules and guidelines governing the referral of out of work lathers and ironworkers to contracting employers from the Union's hiring hall, while at the same time providing preferences for employment of nonwhite workmen when requested by those employers.

### B. The Evidence Relating to the Union's Alleged Failure and Refusal to Refer Fred James to Northberry Corp. on or about May 9, 1994

Fred James testified that he was a member of the Union for 25 years and that his dues were currently paid up. He is familiar with the Union's hiring hall, having shaped it on a regular basis.

Over the years James had registered complaints regarding the operations of the hiring hall. In 1974 he filed an internal union complaint with its executive board. Robert Ledwith, since 1981, an elected business agent, responsible, inter alia, for referring lathers and ironworkers from the Union's hiring hall to jobs in Manhattan, was a member of the Union's executive board at the time of James' internal complaint. In 1990 James filed an unfair labor practice charge with the Board over operations of the Union's hiring hall. James is also 1 of approximately 30 minority members, of a total minority membership of 300 in Local 46 who are plaintiffs in a Federal lawsuit filed against the Union charging discrimi-

nation in job referrals, which the suit has been pending at all material times. On April 25, 1994, James filed the initial unfair labor practice charge against Local 46, in this proceeding, alleging that since about mid-November 1993, the Union has racially discriminated against him by failing to refer him to jobs, in violation of Section 8(b)(1)(A) and (2) of the Act. The charge listed the union representative to contact as Robert Ledwith, business agent. The charge was mailed to Local 46, Lathers Union on May 1, 1994. In an unskillfully worded affidavit of service, a Board employee swore that on May 1, 1994, she served the charge<sup>2</sup> by forwarding it by postpaid mail on the addressee above, together with a transmittal letter. The addressee above is listed as:

Local 46, Lathers Union  
Attn: Robert Ledwith, Bus. Agent  
1322 Third Avenue  
New York, N.Y. 10021

A certified receipt stapled to the charge shows delivery of the charge was made on May 4. It is signed by a P. DeFeo, later identified as one of the Local 46 secretaries who work for Business Manager Fred LeMoine.

On Wednesday, May 4, James shaped the Union's hiring hall. He signed the register. He also spoke to Ledwith. The two were alone. He asked Ledwith for work because he had been out of work for so long. Ledwith told him that the Northberry job was about to start and when that gets started he would send James on that job. He said that job was going to start sometime next week and it was at 61st and 11th Avenue. James continued to shape the hall on May 5 and 6. On Monday, May 9, James shaped the hall and signed the register. While waiting in the hall, James learned that three men had been sent out early that morning by Ledwith to the Northberry job. When the men signed the workslip he asked them where they were going and one of them confirmed the Northberry job as their referral. On learning this, James approached Ledwith and reminded him of his promise to send James to the Northberry job. Ledwith replied he was going to send James out on the job until he got the letter from the Labor Board. James asked, "Does that mean that I'm not going out to work now because you got the letter from the Labor Board?" In an angry and sarcastic tone of voice, Ledwith replied, "Oh, I'm going to send you out all right." Then Ledwith went back into his office and closed the door. Before he did so, James told Ledwith he had filed a charge because he wanted to get Ledwith's attention because he'd been out of work for a long time. And that was the only way he could get his attention.

During his cross-examination, James agreed that the written hiring hall rules provide that the Union's business agents must send men to a job in the order in which they appear on the priority list. James also agreed that in order to be eligible for referral the individual applicant must be present in the hiring hall when his name is called. James denied that in questioning Ledwith on May 9, it was his intention that the business agent skip over names on the priority list to send him out to work. He wasn't thinking about the list, but only about a job and Ledwith's promise. He took Bobby

<sup>2</sup>Described improperly as "the above-referenced letter," but which is also heavily marked with Xs on the line above as "CERTIFIED CHARGE."

Ledwith by his word and his promise. At the time, on May 9, James was not aware of where he stood on the priority list but he knew he was on it.

In James' pretrial affidavit he had stated that Ledwith told him in their May 9 conversation that he had received the Labor Board charge on Friday, May 6. At the trial James at first denied that Ledwith told him when he got the charge, but after being refreshed about his prior statement agreed that he had given that date to the Board agent taking his statement.

James also acknowledged that after May 9, he continued to register at the hall and was sent out to a number of jobs of short duration, none for a period longer than 1 week. Furthermore, in January 1995, Ledwith sent him to a job, and also lent him money so he could go home, change his clothes, and take a cab to the job on time. On this occasion, James had appeared in the union hall after the job had been called, his name had been called, and he wasn't present. When James appeared he didn't have his tools, was not dressed for work, and told Ledwith he didn't have cabfare to ride home. Ledwith gave him \$20, told him to take a cab home, have it wait, change his clothes, get his tools, and take the cab to the jobsite in Manhattan. James did not recall Ledwith saying he would call the job and tell them he was unavoidably delayed. James continued on that job at least to the date of his testimony on May 3, 1995.

James learned from an employee that the Northberry job ran from May 9, 1994, until November of that year.

Another General Counsel witness, Zaid Abdullah, testified that he had been a member of Local 46 for approximately 25 years. When out of work he shaped the hiring hall on a regular basis. Abdullah recalled a conversation he had with Ledwith in mid-May 1994. It took place in front of a hotel at 43d Street and Eighth Avenue in Manhattan where the Union was picketing a nonunion contractor. At this moment the two were alone. They were talking about the running of the hiring hall. Abdullah was explaining that minorities felt that they were not being treated fairly on jobs referred out of the hall. During this discussion, Ledwith mentioned that Fred James had him at the National Labor Relations Board and how can he give him a job.

Early in his cross-examination Abdullah expressed criticism of the expenditure of trust fund moneys for trips taken by union delegates. When pressed he noted that based on the last Local 46 membership meeting, a lot of members beside himself felt the same way.

Abdullah had testified on direct examination that Ledwith had at one time referred to himself as a friend. Now Abdullah noted that although Ledwith referred to them as friends, he wasn't treated as a friend because his, Ledwith's, friends, were working constantly. Although presently employed for about a week, he had last worked 2 days in January and 2 days in April 1995. Abdullah readily acknowledged that better than 25 minority union members believe themselves to have been discriminated against on referrals. But Abdullah denied ever telling Ledwith in front of another business agent that he was going to shove his foot up his "ass," explaining that it made no sense to say this to someone like Ledwith who believed he treated Abdullah and other minority members fairly.

Robert Ledwith testified for the Union. He was a business agent since June 1991, having been elected six straight times

to that position. Among other duties he handles complaints, job referrals, jurisdictional disputes, and nonunion problems. On May 4, 1994, he had a conversation with James in the vestibule between the main room at the union hall and the office. James asked him to go to the Northberry job at 61st Street and West End Avenue. Ledwith replied that if he was on the priority list and the job called in for men and his name was read out, he'd be more than happy to send him to the job.

On May 9, 1994, Ledwith received a request from Northberry for three workers and sent out individuals who held the positions of 1, 2, and 9 on the priority list for that day. The work was just starting for construction of a high rise building at 61st Street and West End Avenue and Northberry was the ironwork contractor. The three men sent to the jobsite were Daryl Moore, George Caban, and Dennis Campbell. Each was a member of a minority. Moore was ninth on the priority list. Strangely, he had not signed the sign-in sheet for that day, yet Ledwith called his name along with those of the two others. The three were the first workers who wanted to go to the job. Yet Ledwith failed to positively testify that priority list members numbered 3 through 8 were called and whether each rejected a potentially long-term job referral offer. He told the three the job was just starting, "you know, I can give you a job, but you've got to keep it."

Although the original priority list for the week of May 9, 1994, would normally contain the notations opposite the listed workers names of those who were "sent" or were absent, represented by an "A," on the particular day of that workweek, Ledwith was obliged to report that the original two-page list was lost with the comment "[T]hings disappear in that place, believe it or not." (Tr. 115.) The duplicate copy Ledwith produced and the one he read from in the morning did show a correction in a worker's priority, raising his priority from 14 to 15 days after the worker, Devon Goode, brought the error to the attention of the secretaries who prepare the weekly lists.

On the same day, the foreman of another contractor, Pinnacle Concrete, had requested two workers by name, James Hatcher and Howard Golding, and consequently they were referred out to that job. On May 9, James' name was more than 50th on the priority list.

At around 9 a.m. James approached Ledwith in the vestibule between the hall and the agents' office. James said he wanted to be sent to 61st Street and West End Avenue. Ledwith repeated again, "that you have to sign and get on the priority list and when they need men, I will call the list. If your name comes up, I will send you." James said, "No, I want to go to the job." Ledwith told him the industry doesn't work that way. There must first be a request for men and then the priority list is followed. He could not just magically wave a wand and put people to work arbitrarily. As Ledwith described it, he again reviewed the hiring hall procedures for James and how they worked. Ledwith denied telling James he wasn't going to get the job because he got a letter from the Labor Board. Ledwith also denied getting a letter and charge from the Labor Board. Until Respondent counsel showed him the charge in the period leading up to the instant trial, Ledwith had not seen it nor was he aware that James had filed it. Charges alleging or referring to racial discrimination are handled by the Union's business

manager/financial secretary. Ledwith also denied that James made any reference to filing the unfair labor practice charge in order to get his attention during their interchange on May 9. Ledwith did acknowledge that James said he had been out of work a long time.

As for the conversation to which Abdullah testified, Ledwith recalled having a private conversation with him at the Times Square Hotel picket line which could have taken place near the end of May. The picketing by union members took place every Friday and was an occasion for Ledwith to hear members' complaints and comments and receive reports from members. The Friday in question could have been May 20 or 27. The conversation was away from the group and up against the building. They talked at length about the state of trade unions, their role in helping solve problems in American society, and Ledwith's admiration of certain things in the African-American culture. They exchanged views about where the country could go and the Union can go for its betterment. Ledwith denied any recollection to his knowledge of Fred James' name being mentioned. Ledwith denied telling Abdullah, "How can I give James a job, he's at the National Labor Relations Board." Indeed, on May 23, 1995, Ledwith sent James to work on a job for Pinnacle Concrete at 92d Street and York Avenue in Manhattan, a job which lasted 2 days for him. Ledwith also testified that 4 or 5 months ago, in the inner union agents' office. Abdullah told him he's going to shove his work boot up Ledwith's "ass." Ledwith told Abdullah please leave the office, and he did so. The context in which this alleged threat was made was not explained.

Ledwith described the incident when he provided James with pocket money and held a job for him in January 1995 in the following terms. At that time period he had spoken with James about his employment possibilities, reminding him he had to come in every day and sign and be ready to go to work. James' name was on the priority list at the time. Ledwith mentioned that 165th Street was going to call for men. On a Wednesday or Thursday the call came from the contractor at the 165th Street jobsite. Ledwith reached James' name but he wasn't in the hall. He came in 10 or 15 minutes later, not prepared to go to work, dressed in street clothes, and with no tools. Ledwith made a quick decision, told James he would loan him \$20 to get a cab, go home, keep the meter running, change and get his stuff, and get over to the job. Meanwhile he would call the job and tell them James was delayed. These events then followed. As noted earlier, James continued on that job for at least 4 months.

During his cross-examination, Ledwith acknowledged talking on occasion to the business manager's secretary, Pat DeFeo, who signed the receipt for certified mail delivery of the original unfair labor practice charge on May 4, 1994. Furthermore, Ledwith also speaks frequently with the Business Manager Freddie LeMoine. Yet, according to Ledwith it was the Union's practice not to make him aware of a charge that named him on its face as the union representative to contact. When pressed further about his lack of knowledge of this pending charge until February 1995, Ledwith replied: "Yeah, no, I'll tell you what, Yes, that's my answer, yes." (Tr. 168.) When asked further whether the union office didn't ask him about the charge, and the identity and motives of the individual charging party and the circumstances which

led to its filing, Ledwith, rather than answering directly, now referred to serious jurisdictional disputes with other unions and pressures with other unfair labor practices and picket lines which were his main concerns. Then Ledwith followed his avoidance of a direct response with the explanation that "[We] had a court appointed administrator who handled all that stuff, I never got involved in this kind of a thing. The court-appointed administrator, Moskowitz, handled this stuff with the attorney." (Tr. 169.) Both Respondent counsel and Ledwith immediately agreed that the administrator was not a party to this proceeding. Furthermore, he had resigned in October 1993, well before the events alleged in the charge, has not since been replaced, and passed away some 6 months before the instant hearing.

Terrence Moore, a union business agent since November 7, 1993, also testified for the Union. He was present and heard Zaid Abdullah tell Ledwith about 6 or 8 months ago that he was going to take his foot and stick it up Bobby's "ass." They were in the Union's office. Abdullah, Ledwith, and the Business Manager LeMoine had gone into LeMoine's office and this was said as Abdullah was leaving and stopped just outside the door to the office the business agents shared.

Fred James retook the witness stand in rebuttal testimony following Ledwith's denial of his version of their May 4 and 9 conversations. James testified that when he spoke to Ledwith on May 9, Ledwith was holding the letter from the Labor Board in his hand. He knew what it was because he could see the return address and the little certified sticker on the envelope which was also on the envelope enclosing the letter he had received from the Labor Board following his filing of the April 25 charge. On cross-examination, James acknowledged that his pretrial affidavit does not refer to Ledwith holding the letter from the Labor Board when they talked on May 9 although he believed he mentioned this fact to the Board agent taking his statement. Nonetheless, James insisted he saw Ledwith holding the letter and made reference to it when telling him he would have given him a job until he received "this" letter from the Labor Board. James also mistakenly believed he had earlier testified about Ledwith holding the letter.

### *C. The Rules and Practices Governing Operation of the Union's Hiring Hall*

Aside from Ledwith's denials of any particular promise to refer him, knowledge of James' charge or denying him a particular referral because he had filed a charge, the Union relies on the hiring hall rules and procedures as providing a full defense to the allegations in this case. Those rules provide, in pertinent and relevant part, as follows:

#### II. REGISTER FOR REFERRALS

The Union shall maintain a daily register based on existing forms installed by Administrator. All workmen, regardless of place of residence, who seek referral to employment in New York City must personally appear at the Union Hiring Hall and register no later than 8:30 A.M. on the "Hiring-Hall sheet." . . .

#### III. REQUESTS BY EMPLOYEES FOR REFERRAL

A. Requests for referral of workmen shall be recorded on existing forms installed by the Administrator for that purpose. The Union business agents or other union personnel charged with responsibility for recording employer requests for referral shall cause the following information to be obtained and recorded on a numbered "Contractor's Sheet," using the contractor's sheet bearing the lowest unassigned work number.

1. Date and time of receipt of request, using time and date clock installed by Administrator.

2. Date workmen are required to start on the job.

3. Contractor's name, location of job site, number of men.

4. Type of men, and number of men in each category, nature of specific outside work experience where any specific experience is requested.

5. Expected duration of job.

B. The Union may not grant an employer's request for referral of a specific individual, other than a foreman or deputy foreman. Nothing contained herein shall limit the Union's obligation to grant employer's requests, pursuant to requirements of Federal, State and Local law, that non-white workmen be referred.

#### IV. REFERRALS TO EMPLOYMENT

A. The objective of these rules and procedures is to ensure that all eligible workmen, regardless of race or union membership, share equally in the available employment, and all referrals shall be made consistent with this objective.

B. The business agents shall be responsible for the referral of workmen from the Hiring Hall sheet. In carrying out their duties, the business agents shall:

1. Offer jobs in the order in which requests for workmen are received.

2. Announce to all registrants present at the Hiring Hall each available job, state its location, expected duration if known, type of work and the number of men in each category, and the nature of specific outside work experience required where such specific experience is requested.

3. For jobs in New York City, business agents shall make referrals in the following manner from those who are present in the Hiring Hall and who have signed the Hiring-Hall sheet:

(a) Workmen who are on the priority list as provided in Paragraph IV. C and who have noted such priority on the daily Hiring Hall sign-in sheet as required by Paragraph IV, C (5) shall be first offered job referrals. Failure to accept referral shall deprive the workman of any further priority that day.

(b) Workmen on the priority list in any one week who refuse work referrals on 2 or more days in any one week shall be deemed to have waived their rights to any priority for the following week.

(c) The business agent shall record, on the daily Hiring Hall sheet, in the "Remarks" column, any refusal to accept referral on a priority basis, noting also the "Work Number" for which the job was refused.

#### C. *Priorities for Job Referral*

1. The Union and its business agents shall be required to maintain a cumulative list for the previous

two weeks of all workmen who registered at the Hiring Hall in accordance with Rule II (Register for Referrals) of these Rules and Procedures, recording the dates on which each workman did not obtain employment.

2. Workmen whose names appear on such list more than five times in said two (2) week period shall be entitled to priority for referral. The priority sequence shall be established by the number of days when the workman was not referred for employment, except as qualified by Rule IV, B (3).

3. If more than one (1) workman is entitled to the same priority, the workman who registers earlier on that day of referral shall be entitled to the first referral.

4. The Union shall post the priority list in a public place in the Hiring Hall. Any workman who challenges of the priority list as prepared by the Union may notify the Administrator forthwith.

5. Workmen who are entitled to a priority as set forth on the priority list, shall be responsible for recording such "priority entitlement" on the daily Hiring Hall "sign-in" sheet.

. . . .

#### VIII. THE ADMINISTRATOR

The Administrator shall be responsible for making a computer study of the Union's records on a periodic basis and reporting all violations of these rules and procedures uncovered by the study to the Union and the Government.

Based upon his analysis of the data produced by the computer study, and any other information he receives, the Administrator, after consultation with the Union and the Government, has the power to amend, modify, revise or change these rules and procedures, or any of the forms referred to herein. The Administrator shall communicate any such amendment, modification, revision or change to any such amendment, modification, revision or change to the Union and the Government in writing, and either the Union or the Government may apply to the Court within fifteen days of the receipt thereof and seek a determination as to the validity of the Administrator's action.

#### IX. PUBLICATION OF RULES AND PROCEDURES

A copy of these rules and procedures shall be mailed to every person who is registered at the Union Hiring Hall and, at all times, at least one copy shall be kept in a public place at the Hiring Hall and shall be open to inspection on working days between 7:00 A.M. and 4:00 P.M.

Dated: August 17, 1971

As noted earlier, James' place on the priority list on May 9 left him well below the position of three registrants who were offered and accepted referral to the Northberry job on that date. The Union refers to the events of May 9 and the operation of the Union's referral rules on that occasion as negating any claim James may assert to union liability for failing to refer him, even if a promise to do so had been made. And, further, the Union claims the operation of the rules and Ledwith's obligation to comply with them show that Ledwith could not have made the promise James asserts because the

union rules Ledwith administers would not have permitted him to fulfill the promise in any event.

Ledwith testified that he was obliged, at the risk of contempt, to administer the rules fairly and in accordance with their adoption in an order of the Federal district court and as administered and revised by George Moskowitz over the years. Ledwith described the exceptions to the rule requiring referrals to be made in the order in which the names of men who have registered on a particular day appear on the priority list. The person seeking referral must be present in the hiring hall when his name is called. (See rule IV,B,3 providing priority only to those workmen who are both present in the hall and have signed the sheet.) If the job calls for certain specified skills only the men who have those skills will be eligible for referral to a particular job. (See rule IV,B,2 which refers to specific outside work experience where such experience is requested.) Where a contractor requests a nonwhite workman, those registrants who are nonwhite go to the top of the priority list if they also meet the other conditions enumerated. (See rule III,B referring to the Union's obligation to grant employer's requests pursuant to requirements of Federal, state, and local laws, to refer nonwhite workmen.) Although Ledwith testified that it was his practice to refer nonwhite workmen requested by name, whether or not their names appeared on the priority list, the wording of the rule does not necessarily support Ledwith's interpretation. Thus, the language ("Nothing contained herein shall limit the Union's obligation to grant employer's requests . . . that non-white workmen be referred") does not provide a convincing affirmation of Ledwith's practice. If the rules had intended that the earlier limited prohibition against honoring employer requests for referral of a specific individual be lifted in the case of nonwhite workmen it would have said so without leaving the matter ambiguous. Furthermore, as noted by counsel for the General Counsel at page 25 of his brief, the rules surely could not have contemplated that in a union with a large minority component, nonwhite workers who had not shaped sufficiently to receive priority in referral would be referred ahead of their brethren who demonstrated by signing the out-of-work register that they were seeking and were eligible to seek referral.

Although the rules clearly specify in IV,C,2 that only workmen whose names appear in the cumulative registration list maintained at the hall more than five times in the previous 2-week period shall be entitled to priority in referral, Ledwith testified that Administrator Moskowitz had approved a significant modification of this rule. Because of men who were out of work for longer periods of time, the Union sought and obtained from the administrator a lengthening of the out-of-work period to 15 days for which a cumulative list of out-of-work registrants is prepared (thus changing 2 weeks to 3 for such list), and listing those registrants in order of priority, starting with those who signed the out-of-work or referral register at least four times in a week. The Union failed to offer any evidence that this amendment was ever placed in writing or that members were apprised of it by posting or otherwise. (See rule VIII granting power to the administrator to modify the hiring hall rules, but only if made in writing to the Union and the Government so that a determination may be sought by either party as to the validity of the modification.)

Ledwith described also the daily procedure of setting out the work referral sheet that workmen can sign starting at 7 a.m., and until 8:30 a.m., from the top down. The sheet also includes a column to list social security numbers, among other information. When Ledwith calls a name from the separate priority list which is prepared daily for the 15 prior workdays he notes in a separate column opposite the man's name if he was sent out or if he was absent when his name was called. Two absence of refusals to accept referral to a particular job in any 1 week acts as a disqualification for inclusion on the priority list for the following week.

When workmen are referred out to a job they are asked to sign a work referral sheet and the last man referred to the job takes that sheet to the contractor. It includes the names, signatures, social security numbers, and description of the work to which the men are referred. When nonwhite workmen are requested or referred the designation "M" is placed next to their names.

During Ledwith's cross-examination, he also noted that the modification in hiring hall priority rules also included a provision lessening the number of days required to sign the out-of-work register to fewer than four in a week in which a holiday falls. Thus, in a workweek limited to 4 days, one need register only 3 days and in a week with two holidays, one need register only 2 days.

Ledwith also confirmed that various modifications in hiring hall rules were not placed in writing but rather were verbally approved by the administrator over the years at the Union's urging. Ledwith also verbally informed members of these changes. The priority list, prepared by the week and posted on Mondays, also shows the order of names of registrants starting at the top with those registered 15 days down to those registered for 4 days.

When pressed about his degree of discretion in selecting registrants for referral to jobs, Ledwith denied he had any. As established in his testimony, from time to time, such as in connection with the May 9 request from Northberry, which was starting construction of a high rise, Ledwith will learn from the foreman how long a particular job is scheduled to last. By virtue of Ledwith's own experience and expertise he can also infer that such a job as a high rise will last 3 to 4 months. Other jobs Ledwith will also learn will last only a couple of days. Yet, Ledwith agreed that nothing in the rules sets out how he should go about making referrals when he receives multiple contractor requests for workmen on the same day before seeking workers for these jobs. Ledwith did explain that in the situation described, with, e.g., three jobs of varying duration and the foremen now having made requests, he will go out to the membership and inform them of the job locations, nature of job, whether high rise, roll out wire, or slab job, the approximate duration, and then call out names in order from the priority list.

Ledwith has also skipped over names where they did not meet specific contractor work experience requirements.

In one particular striking deviation from the written hiring hall rules, Ledwith testified that within the group of workers on the priority list who have the same number of out-of-work days, e.g., those with the highest or 15 days' priority, the names are listed in alphabetical order. In selecting workers for referral Ledwith will follow this alphabetical sequence in calling out names for referral. This admitted practice directly contradicts the hiring hall rule which requires that "If more

than one (1) workman is entitled to the same priority, the workman who registers earlier on the day of referral shall be entitled to the first referral.” (Rule IV,C,3.) I have earlier noted that in referring Daryl Moore to the Northberry job on May 9, while Moore was ninth on the priority list, Ledwith failed to note or account for the fact that although present in the hall, Moore did not sign the out-of-work register for that day, as required by rules IV,3 and IV,C,5. These sections, read together, specify that entitlement to priority requires not only priority on the priority list but also that the workman report his priority on the daily hiring hall “sign in” sheet.

A review of the series of contractor’s sheets received in evidence, show that while they note those registrants who were referred as nonwhite workmen, because of the “M” designation next to their names, there are no records which show the contractor’s requests for nonwhite workmen and whether they were requested by name, other than the word “request” which Ledwith wrote next to the names of James Hatcher and Howard Golding on May 9, 1994, when he referred them to Pinnacle Concrete. Without such records, in particular, confirming records from the contractor, the business agent’s discretion to select among nonwhite workmen is readily apparent. On the same date, May 9, 1994, that Ledwith referred minority members James Hatcher and Howard Golding to Pinnacle Concrete at 92d Street and York Avenue, there were a number of other nonwhite workmen on the priority list who had also signed the sign-in sheet, including Fred James. And Hatcher’s name does not appear on the priority list for the week of May 9. Thus, the record only has Ledwith’s word in support that Pinnacle requested Hatcher and Golding by name to warrant their referral over other nonwhites, on the priority list, even if the rules permitted such priority, which I have rejected.

The General Counsel’s witnesses testified to a number of other instances of alleged circumvention of the recognized hiring hall rules. Fred James testified to an incident involving a workman named Johnny Rodriguez which occurred in the fall of 1994, 4 or 5 months after the May incident involving Northberry. Rodriguez had 13 days on the priority list. There had been some kind of confrontation between Rodriguez and Ledwith. On the date in question, with both Rodriguez and James present in the hiring hall, Ledwith first called the two names at the top of the priority list for referral, but instead of continuing down the list to reach Rodriguez’ name, Ledwith started to call names starting at the bottom of the list and working his way up. When Rodriguez brought this deviation of the rules to James’ attention, James was able to confirm what had happened from looking at the weekly priority list posted in the front of the hall. Rodriguez said, “you see what Bobby did,” James looked at the list and said, “yeah.” As a result, Rodriguez’ name was skipped and not called in breach of the hiring hall rules.

Zaid Abdullah testified that the Union did not refer him to the job he held at the time of his appearance as a witness in this proceeding on May 3, 1995. He was called directly by the contractor, although his name was listed on the shape lists. (It is unclear whether this refers to the weekly priority lists or to the daily sign-in sheet.) The union delegate gave him a workslip to go to the job.

Abdullah also testified that in 1992 he had been employed at a union job on 92d Street and either First or Second Ave-

nue in Manhattan. The job was coming to an end; Abdullah was laid off but certain workmen were retained on the job to finish up. About a week later, and after shaping the hall every day since his layoff, he saw three of these workmen who had stayed on the job come to the hall. On that very day, the first day these workmen returned to the hall, they and a fourth worker who had not been shaping at all, were all referred out on a new job. A half hour later Abdullah approached Ledwith and asked him for a job. Ledwith asked if his name was on the shape list. Abdullah replied he had just seen Ledwith send out four people who weren’t on the shape list, three of whom had been on the same job with him and had got laid off after him. Ledwith now said he sent these men out on specialty jobs. When Abdullah asked what kind, Ledwith said layout and bending machine. Abdullah responded that a bunch of us can do layout and work a bending machine. Ledwith then spent considerable time trying to convince Abdullah that nobody else could do the job to which they had been assigned. Abdullah said he had done both layout and bendings work. At the 92nd Street job he and the other three had been doing layout and tying slab.

During his cross-examination, Abdullah agreed he had told Ledwith that he was not able to operate a PG 4 bending machine, but he did so because he believed operation of the machine was dangerous. In fact, he ended up operating the machine anyway. Abdullah also acknowledged that he had not signed up for a course given by the joint apprenticeship committee on journeyman upgrading, but only because he had not been made aware timely of the existence of the course, only later learning of the course by word of mouth. If a notice was sent to members, he didn’t receive one; members have complained of not receiving union mail and he, himself, had complained of not receiving any.

During his direct examination, Ledwith did not respond directly to Abdullah’s detailed testimony of having been bypassed for referral by three workers laid off after him who had only appeared at the hall on the very day they were immediately dispatched out again. He claimed lack of recall as to that incident, in spite of having spent considerable time with Abdullah that morning explaining his referral of the three ahead of Abdullah. Neither did Ledwith deal with James’ testimony about Rodriguez’ name having been bypassed in the fall of 1994 after some dispute with Ledwith and in spite of Rodriguez having 13 out-of-work days near the top of the priority list. Nor did Ledwith respond to Abdullah’s claim to having been contacted directly for a job by a union contractor in violation of hiring hall rules.

Ledwith did testify generally about sending men out of order when their special skills were requested, such as in the operation of a PG 4 bending machine, use of an alligator cutter, use of certain welding and laser torches requiring a license to operate, and tag writing, which involves skills in laying out and then executing the job at the jobsite. As for the PG 4 bending machine, he recalled that some 4 or 5 months before the hearing, he had openly asked members in the hall if they could operate the machine, and had approached Abdullah about his experience or skills in this area. Abdullah, in front of 50 people had responded no, when asked if he could operate the machine.

In order to raise members’ skills as the machinery in use in the trade becomes more sophisticated, and in the view of Abdullah and perhaps other members, presents a greater risk

of injury arising from their operation, a journeyman upgrading program was instituted, probably in 1994 or earlier, handled by the apprentice coordinator and involving qualified members as instructors. The Union sent out a letter to the membership describing the course designed to upgrade their skills. Notice was also given by word of mouth, spread by agents and business managers. Workers would sign up on a list maintained at the hiring hall behind the counter. The response among those who signed up was disappointing, with only a third showing up at the first meeting. I have previously noted Abdullah's testimony about his lack of written notice, and his belatedly hearing about the training, too late to participate or be selected for the initial training.

#### D. *Credibility Resolutions*

In weighing the relative credibility of James and Ledwith on their conversations central to the resolution of the issues in this case, I am most influenced by the following factors. It is evident that Local 46 received a copy of James' unfair labor practice charge and covering letter on May 4, but after James and Ledwith conversed earlier that morning. Although there is some dispute as to whether and when Ledwith became personally aware of the charge, I am convinced that either sometime during the 9 to 5 business day on May 4 and certainly no later than May 6, Ledwith was made personally aware of the charge. Ledwith was evasive, contradictory, and ultimately not credible in denying any knowledge of the charge and its contents until shortly before trial. His indecisiveness is made explicit in his answer I quoted earlier (Tr. 168). In later grasping at the administrator and attorney's handling of the charge, when no administrator was in place at the time the charge was filed and mailed to the Union, Ledwith was clearly seeking to avoid any direct involvement or knowledge at the expense of the truth. At this point, Ledwith had to have realized that his earlier reliance on the sole responsibility of the business manager in dealing with a charge personally naming him as the union representative to contact and as to an allegation involving his administration of the hiring hall job referral function, was not a very satisfactory or honest reply. Clearly, logic and reason support the finding that Ledwith was early provided with the charge so that a defense by the Union could be made. In finding that James' version of his conversations on both May 4 and 9 are far more credible than Ledwith's, I am also convinced that, contrary to Ledwith's version, James would not have had the advance information that the Northberry Corp. would be starting a high rise project in the near future. Certainly, Respondent failed to adduce any evidence that James or other workers would have been aware of the scheduling of future Manhattan construction projects and by companies for whom they had not been recently employed. Further, it strains credulity for Ledwith to have testified that on both May 4 and 9 he repeated a recital of the wellknown hiring hall procedures to a 25-year member who would have been expected to have and did show at trial a basic understanding of the rules relevant to the incidents, instead of dealing with an evident request by a litigious and long out-of-work member to a job on May 4 and a particular complaint about a bypass on May 9. I am further convinced that when Ledwith referred to James' filing of the charge on May 9, he was holding the relevant documents in his hand. This finding is consistent with the earlier findings I have made and is sup-

ported by James' specific, reasonable, and credible testimony.

The Union's and Ledwith's defense that he and another business agent referred James to a number of jobs later in May and subsequent months and, in fact, that Ledwith lent him money and held a job for him so that James could take a referral in January 1995, to a job which continued at least to the trial date, are not persuasive that Ledwith did not rely on James' filing of a charge in denying him a promised referral. This is so, because Ledwith's expression of anger and animus toward James would have been strongest on immediately learning of the charge, and that as time elapsed and some good sense took hold, Ledwith would have shown a more balanced attitude toward a militant minority member like James. In fact, it was in character for Ledwith to have come to see over time that an effort to be and to appear fair to minority members in exercising the referral function made good sense and helped to lessen racial conflict and tensions, in spite of the pendency of the Federal lawsuit that James, Abdullah, and other nonwhite members had joined. Furthermore, James, Abdullah, and other more, militant, nonwhite members constituted a large constituency within the Local and their view and interests required a responsive administration if for no other reason, than that it made political sense to its longtime elected officials like Ledwith. Besides, any referrals and extra attention afforded James on referral after the fact, might lessen not only any evidence of discrimination arising in this case but in the Federal litigation as well.

Ledwith's holding of a job for James for 10 minutes in the hall and for a longer period of time until he could report to the jobsite, in spite of his failure to respond to the job referral timely when the job and his name was called and not being ready to work when he finally showed, are evidence of the wide degree of discretion Ledwith exercised, contrary to his denial, in administering the hiring hall rules and procedures. James was neither present in the hall nor signed up on the sign-in sheet, nor ready for referral as a workman once he arrived, when the job offer was made. Thus under the rules James should have been marked absent. Ledwith bent the rules to an inordinate degree to refer James to a job on this occasion well after the issuance of the complaint.

I also find that Ledwith in a moment of intimacy and confidentiality, on an occasion of warmth and union solidarity at the weekly picket line on West 43d Street let his hair down with Abdullah and spoke frankly about member James' propensity to file charges with the Labor Board and his immediate negative response to a charge recently filed. I find this conversation took place on May 20, not May 27, before Ledwith referred out James to a 2-day job on May 23.<sup>3</sup> This conversation with Abdullah essentially corroborates the conversation Ledwith held with James on May 9 during which he denied James a referral because of his having filed the charge.

<sup>3</sup> Respondent's attempt to show that this or another job to which James was referred after May 9 lasted 3 to 4 months is basically irrelevant on the issue of liability. It is the May 9 nonreferral which is at issue. Furthermore both James and Abdullah credibly testified that they were told by their respective foremen that their tenure at different jobsites was 2 days, and not any longer. The evidence does not preclude a practice by some contractors of hiring iron workers in phases even on beginning high rise projects.

Although I have credited Abdullah on his private conversation with Ledwith in mid-1994, I am persuaded that Abdullah in all probability made the physically threatening remark attributed to him by Ledwith and Terrence Moore in late 1994 or early 1995. Undoubtedly, the threat grew out of a meeting held among Abdullah, Ledwith, and LeMoine and some remarks made or positions taken there. Abdullah's manifestation of disrespect for Ledwith on this occasion is not inconsistent with his attitude toward Ledwith's unsatisfactory dealings with nonwhite members, as evidenced by his claim of manipulation of the referral process and his participation in the outstanding Federal lawsuit. Although I cannot credit Abdullah's denial on this matter I find Abdullah credible on his mid-May conversation with Ledwith and his recounting of his direct hire and Ledwith's bypass of him on referral.

Aside from the credited instance of Ledwith's reliance on James' charge in refusing him referral, I deal now, in particular, with Ledwith's alleged promise to refer James to the Northberry job made on May 4 and with the instances of the alleged circumvention of the referral rules in actual practice and Ledwith's denial of any deviation from the rules.

I have credited James as to his conversation with Ledwith on May 4 as well as on May 9. I have given various reasons for having done so. The Union nevertheless argues that Ledwith could not have made the credited promise, and even if he did so, his fulfilling that promise would have violated the hiring hall rules and, therefore, cannot result in a make-whole remedy for James.

As the earlier discussion of the hiring hall operation in practice makes clear, Ledwith did not lack authority to administer the rules regarding at least Manhattan referrals in a manner different from the written rules and in furtherance of his own and the Union's particular agenda. Thus, priority among workmen with the same listed priority days did not follow the rules requirement of according priority based on the order of signing the daily hiring hall sheet but rather was based on the alphabetical order of the workmen's last name. This was an arbitrary device that clearly impacted the job duration of workmen. Where the rules were silent, as to the order in which job orders received the same day were referred out, Ledwith had discretion to select an order which could favor certain workmen over others. It is doubtful Ledwith announced three jobs as he described and asked workmen in a high priority status to accept a referral to a 2-day job which he had announced simultaneously with the startup of a long-term high rise job. In any event, Ledwith had to establish a priority here because the rules did not cover the situation. The absence of notations as to requests for workmen, and nonwhite workmen in particular, permitted Ledwith to select minority workmen in an order or priority which precluded verification.

Another example of an informal variance, from the referral rules, were direct referrals, bypassing the hall, but with the later ratification of the union agent. Discretion is also apparent in the experience and special skills area, where subjective determinations of skill levels permitted Ledwith to refer out three workmen who could not have been on the priority list because they had been working until the very day of their referral, and ahead of workmen who may have and probably did possess the special bending machine skills, aside from Abdullah's skill level in this area which was probably satis-

factory in spite of his having denied his qualifications to Ledwith on one occasion because of safety concerns.

The most damaging instance of circumvention of the rules was the instance when member Rodriguez was bypassed without explanation and for what appear to be invidious reasons. Particularly in the absence of contrary testimony, and on the basis of the credibility of the narrative by Fred James, I find that Ledwith misused the referral rules to punish Rodriguez, and did so with impunity. On the bases of this instance and the practices previously discussed, it would not have been inconsistent for Ledwith to have responded to James' entreaty for work to inform him that a long-term job would be shortly available. James was a nonwhite workman who had filed past charges against the Union and was a plaintiff in a pending Federal lawsuit alleging race discrimination on referral and Ledwith was in a position to provide work for him to seek to undercut James' allegations. It was only when Ledwith became aware that James had filed his last charge, filed some days before the May 4 conversation but not received by Local 46 or Ledwith until after the May 4 offer, that Ledwith's position hardened and in a fit of anger he reneged on his promise to James.

#### Analysis and Conclusions

Based on my credibility resolutions and the exclusive referral agreement in effect between Local 46 and the various employer-members of the Cement League, I now conclude that Business Agent Robert Ledwith discriminatorily refused to refer Charging Party Fred James to a job with the Northberry Corp. on May 9, 1994, and thereby violated Section 8(b)(1)(A) and (2) of the Act. By specifically denying James the referral because he had recently filed an unfair labor practice charge alleging race discrimination on referrals out of the Union's hiring hall, Ledwith was demonstrating that he was motivated by James' exercise of his rights under Section 7 of the Act, in particular his right to make and pursue a charge under the Board's processes, in refusing James a referral he had earlier promised him. Such conduct violates not only Section 8(b)(1)(A), see *Painters Local 1115 (C & O Painting)*, 312 NLRB 1036, 1042 (1993), and Section 8(b)(2) as well. As noted and found by the Board in *Electrical Workers IBEW Local 675 (S & M Electric)*, 223 NLRB 1499 (1976), in rejecting the conclusion of the administrative law judge, that the record lacked any evidence that the union there, directly or indirectly induced any employer to refuse employment to the charging party:

This conclusion must be rejected. The Board has consistently found a violation of Section 8(b)(1)(A) and (2) of the Act where a union has discriminatorily refused to refer an employee for employment pursuant to the terms of an exclusive referral system in effect between the union and an employer. Such union conduct, by its very nature indirectly induces the Employer to refuse employment to that employee in violation of Section 8(a)(3). Hence, we find that by discriminatorily refusing to refer [employee] Owchariw for employment, the Respondent Union violated Section 8(b)(2). [Cited cases omitted.]

Just as in *Electrical Workers IBEW Local 675*, the charging party had filed a charge with the Board against the re-

spondent union alleging that it unlawfully failed to refer him to jobs. In reliance on that charge, as well as a subsequent complaining letter, the administrative law judge inferred, and the Board affirmed, that the charge and letter substantially caused the union business agent not to refer him to jobs to which he was entitled under the union referral system. Here, in a case containing stronger and more direct evidence of animus, the union agent made his decision in explicit reliance on the employee's filing of a charge. While under a strict reading of the rules of the hiring hall, James would not have been eligible for the particular referral at issue, my other credibility resolutions as well as the evidence of instances of circumvention of the rules and the discretion which Ledwith exercised to achieve his and the Union's ends even where contrary to the rules, I also conclude that the weight of the evidence establishes that James was discriminatorily denied a referral on May 9 which, but for Ledwith's illegally motivated conduct, he would have received.

I have previously found that Ledwith on May 4 made the promise to refer James to the Northberry job. That promise alone shows that Ledwith had the discretion to offer referrals when it suited the Union strategically to do so. At the time it was in the Union's interest to blunt the general claim asserted in the pending Federal suit in which James appeared as a plaintiff that complaining nonwhite workmen would not receive favorable job referrals so long as they met minimum shape requirements. Ledwith was responding as well on May 4 to a member's plea for help and at the time was favorably disposed to grant it.

The record also shows that Ledwith exercised considerable discretion on matters both contrary to, and not covered by the rules, in determining, e.g., which out-of-work members shall receive preference when a group of them had the same number of days listed on the out-of-work register, and in determining the order of referral to jobs of greatly varying duration for which contracting employers made same day worker requests. Of greatest weight in demonstrating Ledwith's breach of the rules, was his arbitrary and invidious bypass of worker John Rodriguez in spite of his 13 days of priority. The lack of detailed request records, the honoring of requests for particular nonwhite workmen, and the subjective decisions on workers' experience and qualifications also add to the ambiguous atmosphere in which Ledwith functioned in administering the Union's job referral responsibilities under its exclusive referral agreement.

All of these factors lead me to conclude that Ledwith, in the exercise of the authority he possessed under his administration of the hiring hall rules and practices, reneged on a promise to refer James to the anticipated Northberry job when it became available, because James filed his most recent charge with the Labor Board. Such conduct violates Section 8(b)(1)(A) and (2) of the Act. *Electrical Workers IBEW Local 675*, supra; *Laborers' Local 1334 (Western Sign)*, 281 NLRB 185 (1986); *Electrical Workers IBEW Local 211 (NECA) v. NLRB*, 821 F.2d 206 (3d Cir. 1987). See also *Plumbers Local 38 (Bechtel Corp.)*, 306 NLRB 511 (1992).

Because the Respondent Union's agent reneged on a promise of referral I have concluded he had the discretion and authority make, I also conclude that absent James' filing of the instant charge, the agent would have referred him to the Northberry job. Thus, the Union has failed to meet its

burden under *Wright Line* [251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).] that absent James' protected concerted activity it would not have referred him. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). See *Teamsters Local 287 (Consolidated Freightways)*, 300 NLRB 539, 548 (1990); *Polis Wallcovering Co.*, 262 NLRB 1336, 1340 (1982).

#### CONCLUSIONS OF LAW

1. Respondent Local 46, Metallic Lathers Union and Reinforcing Iron Workers of New York and Vicinity of the International Association of Structural and Ornamental Iron Workers is a labor organization within the meaning of Section 2(5) of the Act.

2. Employer-members of the Cement League are employers within the meaning of Section 2(2) and are engaged in commerce as defined in Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act to assert jurisdiction over Respondent in this proceeding.

3. At all times material, Respondent and the Cement League have maintained and been parties to a collective-bargaining agreement providing, inter alia, that Respondent shall be the exclusive source of workmen employed under the terms of the said agreement.

4. Northberry Corp. is a member of the Cement League and a party to the collective bargaining described in paragraph 3, above.

5. By, since May 9, 1994, failing and refusing to refer Fred James to employment with Northberry Corp. because he filed an unfair labor practice charge with the Board and engaged in other protected concerted activities, the Respondent has been restraining and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

6. By the same conduct described in paragraph 5, above, the Respondent has been attempting to cause and is causing Northberry Corp. to discriminate against employees for filing charges with the Board in violation of Section 8(b)(2) of the Act.

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

#### THE REMEDY

Having found that the Respondent has engaged in and is continuing to engage in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I shall recommend that the Board order it to cease and desist and to take certain affirmative actions which are necessary to effectuate the policies of the Act.

With regard to Charging Party Fred James, I have found that the Respondent unlawfully failed and refused to dispatch him to an available job with the Northberry Corp. on May 9, 1994, based on an unfair labor practice charge he had filed with the Board and other protected concerted activities. To remedy this unlawful conduct, I shall recommend that James be made whole<sup>4</sup> for any loss of earnings and benefits he suf-

<sup>4</sup>Such a remedy, the usual one in cases of this nature, will not conflict with the court-approved hiring hall rules, which the record establishes were interpreted with a degree of self-interest and were deviated from on other occasions and, particularly this occasion, to

ferred. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>5</sup> Finally, the Respondent shall be ordered to post a notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

ORDER

The Respondent, Local 46, Metallic Lathers Union and Reinforcing Iron Workers of New York and Vicinity of the International Association of Structural and Ornamental Iron Workers, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Operating its hiring hall in an arbitrary and discriminatory manner.

(b) Refusing to refer applicants because they filed unfair labor practice charges with the Board or engaged in other protected concerted activities.

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

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

(a) Make Fred James whole for any loss of earnings and benefits which he may have suffered since May 9, 1994, because of the Respondent's discrimination against him because he filed unfair labor practice charges with the Board and engaged in other protected concerted activities. Backpay, with interest, shall be computed 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 hiring hall records, dispatcher lists, job orders, contractor sheets, sign-in sheets, referral calls, and other documents necessary to analyze and compute the amount of backpay due James under the terms of this Order.

(c) Post at its business offices and hiring hall located in the Borough of Manhattan, city and State of New York, cop-

\_\_\_\_\_ further Respondent's institutional interests, without any evidence of administrator oversight or review.

<sup>5</sup>Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

<sup>6</sup>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.

ies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, 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.

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

\_\_\_\_\_ <sup>7</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND 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 operate our exclusive hiring hall in an arbitrary or discriminatory manner.

WE WILL NOT refuse to refer applicants because they filed unfair labor practice charges with the National Labor Relations Board or engaged in other protected concerted activities.

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

WE WILL make Fred James whole, with interest, for any loss of earnings and other benefits which he may have suffered as a result of our discrimination against him because he filed unfair labor practice charges with the Board and engaged in other protected concerted activities.

LOCAL 46, METALLIC LATHERS UNION AND  
REINFORCING IRON WORKERS OF NEW YORK  
AND VICINITY OF THE INTERNATIONAL ASSO-  
CIATION OF STRUCTURAL AND ORNAMENTAL  
IRON WORKERS