

**Local 45, International Association of Bridge,
Structural & Ornamental Iron Workers, AFL-
CIO and Sam Britton.** Case 22-CB-7666

March 28, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On October 31, 1995, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local 45, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

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.

¹ 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(b)(1)(A) by threatening employees with the prospect of litigation, with loss of membership, and loss of job referrals to discourage them from filing unfair labor practices with the Board, we find it unnecessary to rely on the judge's finding that the Respondent's business agent, James Kearney, told Charging Party Sam Britton that there was no work for him.

² The judge inadvertently used the broad cease-and-desist language "in any other manner" in his recommended notice. We shall conform the notice to the narrow "in any like or related manner" language in the judge's recommended Order.

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 threaten you with litigation, with loss of your union book, or with loss of job referrals to discourage you from filing an unfair labor practice charge against us.

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.

LOCAL 45, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO

Amanda Alvarez Ford, Esq., for the General Counsel.
Raymond Heineman, Esq. (Kroll & Gaechter), of Verona, New Jersey, for the Respondent.

DECISION

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Local 45, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO (the Respondent) has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by having threatened employees with loss of their union books and with lawsuits because they filed unfair labor practice charges against the Respondent with the Board. The Respondent's answer denies these allegations and avers, as an affirmative defense, that the Respondent would have been privileged to take the actions alleged in the complaint inasmuch as the unfair labor charges referred to therein were premised on assertions that were knowingly false, malicious, and defamatory and which subjected the Respondent to legal expense.

I heard this case in Newark, New Jersey, on September 20, 1995. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel and for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION—LABOR ORGANIZATION

The Respondent has its office in Jersey City, New Jersey, and is a labor organization as defined in the Act. It represents, for purposes of collective bargaining, employees employed at jobsites in its geographical area by employer-members of the Building Contractor Association of New Jersey (BCA) with which it has a collective-bargaining agreement. BCA's employer-members are in the construction industry. In their operations annually, they meet the Board's nonretail standard for asserting jurisdiction.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

On October 13, 1994, an informal settlement agreement in this case was approved. The Respondent, however, refused to comply with the requirement in that agreement that it post a notice to its members. As a consequence, the agreement was revoked and the complaint then issued. The events that led up to the specific allegations of the complaint are set out next.

On December 23, 1993, one of the Respondent's members, Gerard Jefferson, filed an unfair labor practice charge against the Respondent in Case 22-CB-7625 which asserted that the Respondent coerced him and other members by violating hiring hall procedures regarding referrals. That case is still open; no complaint has issued in it nor has the charge been withdrawn or dismissed.

On January 5, 1994, Sam Britton, the Charging Party in the instant case, filed an unfair labor charge in Case 22-CB-7632, which antedated the charge in the instant case and which asserted that the Respondent has failed to refer him for employment from its hiring hall in a nonarbitrary or non-discriminatory manner in the 6-month period preceding January 5, 1994. Britton in fact had been working steadily during that 6-month interval but from a referral hall operated not by the Respondent but by an Iron Workers local located in Elizabeth, New Jersey. Britton requested withdrawal of the charge in Case 22-CA-7632; his request was approved on February 25, 1994, the day after he filed the unfair labor charge in the instant case.

Also on January 5, 1994, Britton, Hilal Yasin, and five or six other members of the Respondent filed charges with the Equal Employment Opportunity Commission (EEOC) which asserted that the Respondent has a pattern and practice of giving them and other minorities short work assignments while giving Caucasians longer job assignments by making referrals out of order. EEOC dismissed those charges in November 1994.

B. The Union Meeting

On January 25, 1994, the Respondent held a meeting attended by approximately 100 of its members. Soon after it began, the matters pertaining to the unfair labor practice charges which had been filed by Jefferson and Britton on January 5, 1994, as noted above, were referred to, along with the EEOC charges also referred to above. Many of the members present vigorously expressed annoyance with the assertions in those charges that minorities were being discriminated against in job referrals.

Britton and Yasin testified for the General Counsel as to statements made at the meeting by James Kearney, the Respondent's business agent. Kearney and Frank Cullen, the Respondent's recording secretary, testified for the Respondent.

Britton's account was not a model of clarity. The Respondent would have me discredit it based on its asserted inconsistencies, embellishments, imprecisions, and contradictions. The Respondent notes too that Yasin's account was not, in some respects, in accord with Britton's. Britton, more so than Yasin, had some problems verbalizing. Their difficulties, however, appeared to be attributable to the somewhat

chaotic atmosphere prevalent at the meeting and attributable also to subjective considerations, neither of which impacted adversely on the veracity of their respective accounts. It was clear to me that the message they got from Kearney's remarks was that Kearney would file countercharges under the Respondent's constitution against those who had filed unfair labor practice and EEOC charges, that those individuals would lose their union books and that they would never work out of the Respondent's referral hall again.

Kearney testified that, after he had stated in essence that Britton had worked regularly while most members had not, someone present yelled that Britton ought to be brought up on charges and that Kearney responded that the Union's constitution provides that a member can file a charge of slander with the executive board. Cullen testified that Kearney, when members raised questions about internal union charges, indicated to them that the Respondent's constitution allowed for such charges. Cullen's account also was not too precise. It appears that there was a great deal of yelling by members throughout the course of the meeting.

Cullen took longhand minutes of the meeting. Those minutes are kept in a bound book containing the minutes of the Respondent's regular meetings. Those minutes were not produced at the hearing before me.

I credit the testimony of Britton and Yasin.

C. Regarding the Respondent's Contention

The Respondent contends that the unfair labor practice charge Britton had filed against it in Case 22-CB-7632, as stated above, contained a patently false assertion that he had been discriminated as to job referrals by the Respondent in the 6 months preceding the date he filed that charge, January 5, 1994. As noted above, Britton throughout virtually all of 1993 had worked steadily on jobs to which he was referred by an Iron Workers local located in Elizabeth, New Jersey.

Britton, however, testified without contradiction that part of Kearney's job is to call sister locals to see if any of the Respondent's members had work to which they could be referred and that, in January 1994, Kearney told him that there was no work for him. Yet, according to Britton, he applied the very next day to the Elizabeth local for a job and was referred out to work immediately. It is apparent that Britton, Yasin, and other members of the Respondent who are minorities had little faith that Kearney would treat them in a racially nondiscriminatory manner and that it was in this context that Britton and Jefferson went to the Board's Regional Office for assistance, where they, on January 5, 1994, filed the charges referred to above.

D. Analysis

The credited evidence establishes that the Respondent, by its business agent, Kearney, threatened to retaliate against members in warning them that they would face litigation based on charges brought against them by the Respondent, in warning them that they would lose their membership in the Respondent, and in telling them that they would no longer work out of the Respondent's referral hall—all because of unfair labor practice charges filed with the Board. As noted earlier, the Respondent contends that the charges filed with the Board were premised on assertions which were totally false and defamatory and that the Respondent has the

right to avail itself of its internal union rules to stop such abuse.

There are two aspects to the complaint against the Respondent. It is alleged that employees were threatened by the Respondent with the filing of retaliatory lawsuits because they filed unfair labor practice charges with the Board. In support of that allegation, the General Counsel's witnesses testified that Kearney said "countercharges" would be filed against those who filed unfair labor practice charges with the Board. It is unclear what "countercharges" were contemplated. It may well be that Kearney himself had not contemplated a specific course of action. Thus, his comment could be construed as an intent to file some type of countercharge with the Board, or to file an internal union charge, or to file a lawsuit. The ambiguous and vague nature of Kearney's stated intent to file "countercharges" does not establish that the Respondent threatened employees with a civil lawsuit as retaliation against their filing unfair labor practice charges with the Board. Nonetheless, it did inform them, in substance, that they could well incur litigation expenses and perhaps other liabilities because they filed charges with the Board. As Kearney failed to clarify his statement, the ambiguity therein must be resolved against the Respondent.

The second aspect of the complaint is the allegation that the Respondent, in violation of Section 8(b)(1)(A) of the Act, unlawfully threatened employees with the loss of their union books because they filed charges with the Board. That section provides that a labor organization cannot restrain or coerce employees in the exercise of their Section 7 rights. It also provides that Section 8(b)(1)(A) shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership there. The question posed in this case is whether the Respondent can tell its members that they can lose their membership by filing, in its view, baseless charges with the Board. Two competing considerations are involved. One, that an employee should be free to use the Board's processes. The other, the statutory proviso in the Act itself allowing a labor organization to determine whom it will accept or reject as a member. In *NLRB v. Shipbuilders Local 22, AFL-CIO*, 391 U.S. 416 (1968), the Court held that the right to Board access is the paramount consideration. See also *Painters Local 1115 (C&O Painting)*, 312 NLRB 1036, 1042 (1993). More precisely, the Respondent is not entitled to protect its asserted institutional interests if, in doing so, it restrains an employee's access to the Board. See *Iron Workers (Walker Construction)*, 277 NLRB 1071, 1072 (1985). See also *Painters Local 1115*, supra at 1041-1042. I therefore find that Kearney's statement, that those who filed charges against the Respondent could face retaliation, infringed on employee rights under Section 7 of the Act.

Based on the foregoing and the record as a whole, I find that the Respondent has restrained and coerced employees in the exercise of their rights under Section 7 of the Act by having threatened them with, in effect, the prospect of their being involved in litigation, with the loss of membership,

and with loss of job referrals because they filed, with the Board, unfair labor charges against the Respondent.

CONCLUSIONS OF LAW

1. BCA is an employer engaged in commerce within the meaning of the Act.

2. The Respondent is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act by having threatened employees with the prospect of litigation, with loss of membership, and loss of job referrals to discourage them from filing unfair labor practices with the Board.

4. The unfair labor practices described in the above paragraph affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Local 45, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees with litigation, with loss of union membership, and with loss of job referrals to discourage them from filing unfair labor practices against it with the Board.

(b) In any like or related manner restraining or coercing them 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) Post at its hiring hall in Jersey City, New Jersey, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 22, 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.

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

¹If 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.

²If 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."