

**North Carolina Shipping Association and its Member, Southeast Crescent Shipping Company and Alter Ego Southeast Crescent Terminal Co., Inc. and Emmett L. Denkins**

**International Longshoremen's Association, Local 1426 and Emmett L. Denkins.** Cases 11-CA-16155 and 11-CB-2483

August 24, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX  
AND LIEBMAN

On September 12, 1996, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent Employer and the Respondent Association jointly filed exceptions and a supporting brief, the Respondent Union filed exceptions and a supporting brief, and the General Counsel filed a cross-exception and a supporting and answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.<sup>1</sup>

We agree with the judge's findings that Respondent Southeast Crescent Shipping Company and its alter ego Southeast Crescent Terminal Co., Inc. (Respondent Employer), through the actions of its agent, James Grady, violated Section 8(a)(3) and (1) of the Act by discriminatorily denying Charging Party Emmett Denkins a permanent assignment on a warehouse crew, and that the Respondent Union, also through the actions of Agent Grady, violated Section 8(b)(1)(A) and (2) by causing the Employer to discriminate against Denkins.

We do not agree, however, with the judge's finding that Respondent North Carolina Shipping Association is liable for the unfair labor practices engaged in by its member, the Respondent Employer. The record establishes, and the judge found, that the Association exists solely for the purpose of representing five stevedoring companies and one line-handling company in the negotiation and administration of collective-bargaining agreements. Consistent with the record, the judge found:

<sup>1</sup> In addition to the change discussed below, we have modified the judge's recommended Order to conform it to *Indian Hills Care Center*, 321 NLRB 144 (1996), to require the reciprocal posting of notices, to state that the Respondent Union's backpay liability is joint and several with the Respondent Employer, and to provide that the Respondent Union's backpay liability is terminated 5 days after it notifies the Respondent Employer that it has no objection to the hiring of Emmett Denkins for the three-person permanent warehouse crew. *C. B. Display Service*, 260 NLRB 1103 fn. 6 (1982).

The Association has no income or assets of its own. The member companies pay assessments to the Association which are used to cover the Association's administrative expenses. The Association does not itself employ union labor. Neither is the Association responsible for making contributions to the Union's pension and welfare funds. The Association is purely and simply a multi-employer collective bargaining association.

The unfair labor practices here involve the actions of work crew "header" James Grady, who the judge properly found to be a dual agent of the Respondent Employer and the Respondent Union.<sup>2</sup> Specifically, the unfair labor practices concern Grady's discriminatory refusal to select Denkins for a permanent work crew because Denkins signed a petition which Grady perceived to be disloyal to the union leadership with which Grady was aligned.

Contrary to the judge, we find that the Association is not liable for Grady's conduct because it did not have any involvement in the hiring decision at issue here or in the acts that constituted the unfair labor practices. The Association has no authority to, and does not, make employment decisions on behalf of its employer-members, and does not exercise any control over the terms and conditions of employment which its employer-members apply to their own employees. In these circumstances, we find that the Association was not an employer of Grady, Denkins, or any other employee of the Respondent Employer or of any other member of the Respondent Union. Thus, we find that Grady was not acting as the agent of the Association when he engaged in the conduct involved in this case. Accordingly, we reverse the

<sup>2</sup> In its exceptions, the Respondent Employer contends, among other things, that Grady cannot be found to be its agent because no "identity of interests" exists between leaders of gangs, called "headers," such as Grady, and the Respondent Employer, and the headers act solely in the interests of the Respondent Union. In support, the Respondent Employer cites *NLRB v. Master Stevedores Assn. of Texas*, 418 F.2d 140 (5th Cir. 1969). For the reasons set forth by the judge, we find no merit in the Employer's contention. We note further that the Board has not adopted the court's decision in *Master Stevedores* and that, in any event, the situation in that case is distinguishable from that presented in the instant case. In *Master Stevedores*, the court found that certain dock foremen who selected employees to work for employers were not acting as agents of the employers for hiring purposes, and therefore were not supervisors under Sec. 2(11) of the Act. Here, in contrast, the Employer has stipulated that the headers are Sec. 2(11) supervisors. More significantly, unlike the situation in *Master Stevedores*, here the Employer was directly involved in the hiring process performed by the headers. Thus, the record shows that the Employer specifically chose Grady to be the header on the three-person warehouse gang, and it directed Grady to choose workers for the gang who would best perform the tasks required by the Employer. Accordingly, we find that Grady clearly was acting within the scope of his authority as agent and supervisor for the Employer in making the hiring decisions for the three-person gang. Thus, even under the Fifth Circuit's test set forth in *Master Stevedores*, Grady's actions at issue here were taken "in the interest of the employer."

judge on this matter, and we shall delete the Association from the Order.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. Respondent Southeast Crescent Shipping Company and its alter ego Southeast Crescent Terminal Co., Inc., Wilmington, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire individuals because of their union activities or sentiments.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Emmett Denkins employment in the position on the three-member warehouse gang which he would have held but for the discrimination against him, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Jointly and severally with the Respondent Union, International Longshoremen's Association, Local 1426, make Emmett Denkins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent Union's liability for backpay shall terminate 5 days after it notifies the Respondent Employer that it has no objection to the employment of Denkins.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Emmett Denkins for a position on the three-member warehouse gang, and within 3 days thereafter notify Denkins in writing that this has been done and that the failure to hire will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records and reports, all 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.

(e) Within 14 days after service by the Region, post at its Wilmington, North Carolina facilities copies of the attached notice marked "Appendix A."<sup>3</sup> Copies of the

notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 22, 1994.

(f) Post at the same places and under the same conditions set forth in paragraph 2(e) above, and as soon as they are forwarded by the Regional Director, copies of the Respondent Union's notice marked as "Appendix B."

(g) Furnish to the Regional Director for Region 11 signed copies of Appendix A in sufficient number to be posted by the Respondent Union in places where notices to its members are customarily posted.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Employer has taken to comply.

B. Respondent International Longshoremen's Association, Local 1426, Wilmington, North Carolina, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing, or attempting to cause, the Respondent Employer, Southeast Crescent Shipping Company and its alter ego Southeast Crescent Terminal Co., Inc., or any other employer, to fail and refuse to hire Emmett Denkins, or any other individual, because of their union activities or sentiments.

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

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

(a) Jointly and severally with the Respondent Employer, make Emmett Denkins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra. The Respondent Union's liability for backpay shall terminate 5 days after it notifies the Respondent Employer that it has no objection to the employment of Denkins.

<sup>3</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."

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Respondent Employer, in writing, with a copy to Denkins, that it has no objection to the employment of Denkins in the position on the three-member warehouse gang that he would have held if not for the discrimination against him.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to select Denkins for the permanent three-member warehouse gang, and within 3 days thereafter notify Denkins in writing that this has been done and that the refusal to select will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its Union office copies of the attached notice marked "Appendix B."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions as set forth in paragraph (d) above, and as soon as they are forwarded by the Regional Director, copies of the Respondent Employer's attached notice marked as "Appendix A."

(f) Furnish signed copies of the notice marked "Appendix B" to the Regional Director for posting by the Respondent Employer at all places on its premises where notices to employees are customarily posted. Copies of that notice, after being signed by the Respondent Union's authorized representative, shall be returned to the Regional Director for disposition by him.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

#### APPENDIX A

NOTICE TO EMPLOYEES  
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 fail and refuse to hire individuals because of their union activities or sentiments.

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

WE WILL, within 14 days from the date of the Board's Order, offer Emmett Denkins employment in the position on the three-member warehouse gang which he would have held but for the discrimination against him or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, jointly with International Longshoremen's Association, Local 1426, or severally, make whole Emmett Denkins for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to hire Emmett Denkins for a position on the three-member warehouse gang, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the failure to hire will not be used against him in any way.

SOUTHEAST CRESCENT SHIPPING COMPANY  
AND ALTER EGO SOUTHEAST CRESCENT TERMINAL CO., INC.

#### APPENDIX B

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 cause, or attempt to cause, Southeast Crescent Shipping Company and its alter ego Southeast Crescent Terminal Co., Inc., or any other employer, to fail and refuse to hire Emmett Denkins, or any other individual, because of their union activities or sentiments.

<sup>4</sup> See fn. 3, supra.

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

WE WILL, jointly with the Employer, and severally, make Emmett Denkins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL notify the Employer, in writing, with a copy to Emmett Denkins, that we have no objection to the employment of Denkins in the position on the three-member warehouse gang that he would have held if not for the discrimination against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to select Emmett Denkins for the permanent three-member warehouse gang, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to select will not be used against him in any way.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1426

*Jane P. North, Esq.*, for the General Counsel.  
*W. T. Cranfill Jr., Esq. (Blakeney & Alexander)*, of Charlotte, North Carolina, for Respondent Employer.  
*Robert W. Kilroy, Esq.*, of Hampstead, North Carolina, for Respondent Union.

#### DECISION

##### STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Wilmington, North Carolina, on April 29 and 30, 1996. The case originated from a charge filed on July 22, 1994, in Case 11-CB-2483 by Emmett L. Denkins against International Longshoremen's Association, Local 1426 (Respondent Union). On August 9, 1994, Denkins filed a charge in Case 11-CA-16155 against North Carolina Shipping Association (Respondent Association or the Association) and its member Southeast Crescent Shipping Company, Inc. (Respondent Employer or Southeast Crescent Shipping).

On August 25, 1994, an order consolidating cases, complaint and notice of hearing issued. The complaint alleges violations of Section 8(b)(1)(A) and (2) and Section 8(a)(1) and (3) of the Act.

In their respective answers to the consolidated complaint, Respondents admitted certain allegations, including the filing and serving of the charges; the status of Southeast Crescent Shipping as an employer within the meaning of the Act; the status of the Association as a multiemployer bargaining association; and the status of International Longshoremen's Association, Local 1426, as a labor organization within the meaning of the Act. Respondents denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act. Additionally, the Association denied that it is an employer within the meaning of the Act.

At the trial here, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Based on facts revealed for the first time at the trial by Respondent Employer's counsel,

I granted counsel for the General Counsel's motion to amend the complaint to add Southeast Crescent Terminal, Inc. (Southeast Crescent Terminal), as a Respondent and alter ego of Southeast Crescent Shipping.

All parties filed timely briefs which have been duly considered. In their posttrial briefs, counsel for the General Counsel and Respondent Employers both state that following the close of the hearing, the parties agreed to stipulate Southeast Crescent Shipping and Southeast Crescent Terminal are, and have been at all times material, alter egos and a single employer within the meaning of the Act.

On the entire record in this case, and from my observation of the witnesses, I make the following

#### FINDINGS OF FACT

##### A. Background

North Carolina Shipping Association is a nonprofit North Carolina corporation which exists solely for the purpose of representing five stevedoring companies and one line-handling company in Wilmington, North Carolina, in the negotiation and administration of collective-bargaining agreements with Respondent Union. The Association has no income or assets of its own. The member companies pay assessments to the Association which are used to cover the Association's administrative expenses. The Association does not itself employ union labor. Neither is the Association responsible for making contributions to the Union's pension and welfare funds. The Association is purely and simply a multiemployer collective-bargaining association.

Respondent Southeast Crescent Shipping Company, Inc. is a Delaware corporation engaged in the business of providing stevedoring services at the port in Wilmington, North Carolina, and is one member of the Association.

Respondent Union serves as the exclusive hiring agent for the member employers of the Association to provide longshoremen for loading and unloading work in the port of Wilmington. This practice has been in existence since at least 1977, although not embodied in a written contract for many years. Recently, the practice has been embodied in an agreement known as the "Wilmington North Carolina Longshore Seniority plan" revised October 1, 1992.

At the Wilmington port, regular work crews are referred to as working "gangs." There are from 15 to 18 loading gangs, with 12 people assigned to each such gang, and 3 carpenter gangs. On the loading gangs, there are forklift operators, crane operators, laborers, a flagman, and a hatch tender. Gangs work in rotation in 2-day cycles as work is available.

Each gang is supervised by a "header" who is chosen by the Employer, but on recommendation of the Union. Each gang header receives a dollar more per hour than longshoremen on the gang. Under the agreement between Respondent Union and the Association, the header has authority to hire individuals to work on the gang, and has authority to "check a man out," that is, send him home from work, and take him off the gang, if he is not working. Headers generally do not perform loading work themselves, but devote themselves entirely to supervising the work of the gang. The parties stipulated that headers are supervisors within the meaning of the Act.

Gangs consist of certain permanent members who are assigned to the gang based on seniority. All permanent members "shape-up," i.e., appear for assigned work, at a designated time. If a vacancy occurs in the gang due to absence or the need for

additional men, the header will select within plan seniority guidelines those longshoremen available on the floor at the union hall, provided they have the qualifications to perform the work.

#### *B. Emmett Denkins' Background*

Emmett Denkins became a member of Respondent Union in 1991. From the outset, Denkins was a vigorous supporter of Union President Willie Sloan. He and fellow member James Grady were two of Sloan's most outspoken advocates, campaigning for Sloan in the 1991 local union campaign. Grady and Denkins often had breakfast together before work, and had various meetings with Sloan, who Grady routinely referred to as "the man." As more fully described below, Sloan was suspended from his duties as local union president in November 1993, and a trustee was appointed to act in his place. Even after this occurred, both Denkins and Sloan continued to openly support Sloan.

During the first years of Denkins' union membership, he was not assigned to a permanent gang. Denkins acquired work through a process called "catching work," i.e., going to the union hall early in the morning to attend "shape-ups" in order to be available if a particular gang needed additional people that day. Through this procedure, Denkins caught work primarily on the Thomas Nixon gang, where he worked with James Grady. For at least half of his working time on the Nixon gang, Denkins drove a forklift and a hustler. It is undisputed that Denkins was qualified to drive all types of vehicles needed on the docks, including forklifts, container handlers, and hustlers, which are similar to tractor-trailer rigs.

#### *C. Union Trusteeship*

In November 1993, the International Longshoremen's Association placed the local union under trusteeship, in part for failing to fill permanent gangs. Local union officers and executive board members were suspended. The trustee assumed complete control of the local union, retaining only those persons and suspended officers necessary to operate the local, such as Vice President and Business Agent Clayton Vaught.

#### *D. Formation of the Warehouse Gang*

In December 1993, Grady approached Denkins and told him that he had been designated header on what was to be a permanent warehouse gang of seven men to be working for Southeast Shipping at the GADA warehouse in Wilmington. This smaller gang was to be used for a "stuffing and stripping operation," i.e., loading and unloading of freight in and out of containers. Grady explained that as header, he would be selecting four permanent members of the gang and two carpenters. It is undisputed Grady told Denkins that he would be Grady's first pick, because Denkins had the ability to operate all the equipment. Grady gave Denkins his choice of positions on the gang. Denkins chose to be "door man" opening and closing containers, while others drove trucks and forklifts and the carpenters shored up and packed as needed. Other members of this gang included Manning Bryant, a driver, and Preston Walker, a carpenter.

In mid-March 1994, Grady told Denkins that Captain John Wightman, president of Southeast Shipping, had told Grady that he needed a three-man permanent crew for work at the warehouse operation. Grady told Denkins the jobs were to be permanent positions, working guaranteed 40 hours a week. Grady, who was to be header on this crew, asked Denkins

whether he wanted to take one of the other two permanent positions on that crew, or whether he would rather remain as header of the seven-man warehouse gang of which Grady was then the header. Denkins said that he wanted one of the permanent, 40-hour a week positions, as he needed the money. Grady explained that Wightman would submit the names to the Union for approval, and stated that he would submit Denkins' name to Wightman as one of the other two people. Three or four days later, Grady told Denkins that he intended to submit Preston Walker's name as the carpenter for that three person crew.

Thereafter, Denkins spoke with then Acting Union President Clayton Vaught. It is undisputed Vaught told Denkins, "you all have the job" but that he didn't know exactly when they would start to work. Preston Walker also confirmed that Clayton Vaught told him, at some point prior to his starting to work on the three-man crew, that Grady had said the three chosen individuals were Walker, Grady, and Denkins. It is undisputed that Denkins was fully qualified to perform all of the work required on the three-man crew.

#### *E. The "Petition" and its Consequences*

In early April 1994, Denkins was approached by fellow union member Wilbert Rowell who was circulating a petition containing a statement of support for the work done on behalf of Respondent Union by Trustee John Mackay. At the trial here, Rowell conceded that at the time he circulated this petition, he was considering running for president of the local union against incumbent Willie Sloan and that part of his reason in circulating the petition was to gauge the amount of support he might have. Rowell asked Denkins to sign the petition, and Denkins agreed.

Rowell sent this petition to the International Union on or about April 13, 1994. The petition quickly became the subject of much discussion within the Union. Rowell testified that he heard talk in the union hall after Denkins signed the petition about Denkins' having "jumped the fence." Given that the overwhelming majority of those who signed the petition were not Sloan supporters, and that Rowell's purpose in circulating the petition was, in part, to ascertain the amount of support his own presidential bid would garner, the petition was quickly characterized by many as an anti-Sloan petition.

Denkins testified, without contradiction, that Grady approached him at work shortly after he signed the petition. Grady accused Denkins of having "sold the man out." Denkins asked Grady what he meant. Grady replied that Denkins had signed the petition to get rid of Sloan and keep Respondent Union under trusteeship. Denkins said that nothing he had read or signed stated anything to that effect. Grady continued to tell Denkins that he had "sold the man out" and that he had "changed camps." Grady told Denkins, "Well, I have something for you then."

Preston Walker corroborated Denkins. Walker testified that he was present when Grady, in an angry tone of voice, accused Denkins of having changed over. Later that day, Grady explained the meaning of his term "changed over" to Walker by explaining that Denkins had signed the petition that Rowell had circulated.

Although Denkins had previously served as Grady's secretary in filling out gang cards prior to his signing the petition, Grady took over this practice himself after Denkins signed the petition. Whereas the two previously had eaten breakfast together on a regular basis, after Denkins signed Rowell's peti-

tion Grady stopped this practice. Grady continued commenting on Denkins' character throughout the weeks that followed. Grady routinely told others that Denkins was no good, a traitor, and that he had changed on "the man."

Realizing that it would lose business if it did not reduce the cost of using union labor, Southeast Crescent Shipping decided to apply to the Carriers Containers Council for a "subsidized freight station." Through the Carriers Container Council, one such container freight station per port may be established to perform stuffing/stripping work using union labor. The union workers' wages are subsidized by the council trust fund, on the condition that the freight station employs the workers on a permanent basis in 40-hour-per-week positions. This application was submitted to the Carrier Container Council by Southeast Crescent Shipping on or about April 22, 1994. Southeast Crescent Shipping advised Respondent Union that the proposed container freight station would require the employment of three union members who would work a 40-hour workweek, and that this permanent work force would be comprised of James Grady and "whoever else in his team he feels would best meet our requirements."

Thereafter, during the month of May, Denkins saw Willie Sloan at a local Little League baseball game. Denkins testified without contradiction about their ensuing conversation. Sloan walked up to Denkins and said he had heard Denkins had "got the cold feet." Denkins asked Sloan what he meant, and Sloan stated he had heard that Denkins had signed "the petition" to keep the trusteeship and to get rid of Sloan. Denkins replied he did not know anything about a petition with language to that effect, but that he had signed a petition that Rowell had circulated. Sloan concluded by telling Denkins that he'd be back.

Sloan was at least partially correct. The Trusteeship was terminated in May 1994. Officers, including Sloan, were reinstated and new members of the executive board were elected.

Grady's hostility toward Denkins continued. Early in July 1994, Grady talked to longshoreman Shelby King, who also had been a strong supporter of Sloan. Grady told King that he was not going to pick Denkins for the permanent three-man warehouse gang because Denkins had "jumped the fence." When King asked Grady what he meant by Denkins "jumping the fence," Grady said that Denkins had gone the "other way" and was a Rowell supporter, having signed a petition to keep Sloan from coming back as president of Respondent Union.

The application of Southeast Crescent Shipping was ultimately approved by the Container Counsel and the International Union, and plans were made for the creation of a new corporation, Southeast Crescent Terminal, to operate the container freight station. Wightman informed Sloan by letter dated July 15, 1994, that the terminal would begin operation on July 18 and that "James Grady should choose two men from our present crew who he feels are able to perform all necessary tasks."

On July 18, Denkins learned that he had not been chosen by Grady to work at the freight station. Rather, Grady selected driver Manning Bryant and carpenter Preston Walker to work with him at the freight station, and Grady's former seven-man loading gang was dissolved. Denkins learned this when he passed by the warehouse yard and noticed Grady, Preston Walker, and Manning Bryant working in the yard. Denkins went directly to the union hall, where he spoke to Business Agent Lewis Hines. Hines told Denkins that he knew very little about the situation and that when Union President Willie Sloan,

who had returned to the position of president, had gone out of town on the previous Friday, he had given Hines only two names, those of Grady and Preston Walker. Denkins replied that he had seen Manning Bryant working at the yard. Hines then explained that when Grady came to the hall that morning, he had told Hines to call Manning Bryant at home, and to tell him to come to work. Bryant's name did not appear on the "anti-Sloan" petition.

At noon on that same day, Denkins spoke to Grady at the union hall when he came to lunch. Denkins told Grady that he knew he was one of the three people chosen, and that he had just been waiting to go to work. Denkins directly confronted Grady by asking him how the change had come about. Grady replied, just as directly, that he and "the man" made the change. The only person Grady ever referred to as "the man" was Willie Sloan.

#### *F. Later Events*

On July 18, Denkins immediately filed a grievance with the "seniority board" of Respondent Union regarding Grady's decision not to select him to work at the freight station. A hearing took place in late July or early August, at which Denkins was represented by Wilbert Rowell. It is undisputed that at this hearing then Vice President Clayton Vaught testified that he had talked with John Wightman, and Wightman had at one time submitted three names of people to the Union who had been selected by Grady to work. These included Grady, Walker, and Denkins. There is no dispute about the fact that Wightman himself never instructed Grady as to who should be selected to work at the freight station. Rather, Grady made the choice, who passed it on to Wightman, who in turn passed it on to the Union. Vaught stated that he did not know how Denkins was not chosen, but that Denkins' name had been submitted to the Union.

The argument or theory behind Denkins' grievance was that as soon as he was told he would be picked for the freight station gang, he became a member of the gang for seniority purposes and, therefore, he had "gang seniority" over Manning Bryant. Denkins' grievance was rejected. Both he and Manning Bryant were classified in the same "G" seniority group and, therefore, Denkins had no greater claim to the position than Bryant.

In late August, at the urging of fellow union member Shelby King, Denkins attended a lunch meeting with Sloan and King to discuss the situation. By this time, Sloan had returned to the position of union president. The events of this meeting are undisputed. Denkins asked Sloan why he had allowed Grady to make the change and take him off the freight station gang. Sloan responded that Grady had come to him and told him that Denkins had changed sides. When Denkins asked Sloan what he meant, Sloan replied that Denkins had changed camps and had "gone the other way." Grady asked Sloan who he would suggest to replace Denkins since Denkins had changed camps. Sloan continued that he had told Grady he did not want to get into that, and that he would leave it directly up to Grady. Denkins, Sloan, and King then discussed Denkins' receiving a permanent assignment on a loading gang. Thereafter, Denkins did receive a loading gang assignment, on which he then worked an average of 2 to 3 days a week.

#### *Analysis and Conclusions*

I find that Respondent Employer, through the actions of its agent, James Grady, violated Section 8(a)(3) and (1) of the Act by discriminatorily denying Denkins the permanent warehouse

gang assignment. As hiring agent and Section 2(11) supervisor, Grady clearly was acting within the scope of his authority in choosing the individuals who would work on the three-member gang. As a supervisor, Grady could not lawfully use statutorily protected activities as the basis for his decision not to include Denkins on the three-member gang. The retaliation that Grady crafted, aimed directly at Denkins' protected and union activities, which Grady perceived as evidence that Denkins had "changed camps" and "turned on the man," served inherently and by design to discourage and chill certain internal and protected union activity, and thereby violated Section 8(a)(3) and (1) of the Act.

I agree with counsel for the General Counsel that the foregoing facts, largely undisputed, also present a textbook case of 8(b)(1)(A) and (2) violations. As an initial matter, I find that Grady's status as a header positioned him as a dual agent acting on behalf of the Union as well as the Employer. The parties stipulated that headers are supervisors within the meaning of the Act, and their actions are, therefore, clearly attributable to the employers for whom they work. Based on the facts here, I find headers are also agents of Respondent Union. In an earlier case involving Respondent Union, the Association, and its member the Wilmington Shipping Company, the administrative law judge, affirmed by the Board, relied on the same factors present here to find dual agency status. *Longshoremen ILA Local 1426 (Wilmington Shipping)*, 294 NLRB 1152, 1154 at 1157 (1989). As the administrative law judge stated in that case:

[H]eaders who were members of the Union were also supervisors within the meaning of Section 2(11) of the Act. But because the header was a union member and essentially achieved his position by virtue of the Union's recommendation, the header obviously had mixed loyalties which gave the Union potential influence in the header employee selection beyond the guidelines imposed by the seniority plan in the collective-bargaining agreement.

Here, as there, headers have authority to hire employees and to fire employees. While technically "chosen" by the employers, since they have the right to decline the Union's "recommendation," the fact that the Union refers or recommends these people to be supervisors has the practical effect of the Union exercising substantial control over the choice of headers. As a result, headers have a dual loyalty and act consistent with that as dual agents of Respondent Union as well as Respondent Employer.

It is well settled that a union, in the operation of an exclusive hiring hall, violates Section 8(b)(1)(A) and (2) of the Act when it refuses to refer an individual because of that individual's opposition to or criticism of the local union administration. See *Longshoremen ILA Local 1408*, 258 NLRB 132, 138 (1981); and *Carpenters Local 720 (National Maintenance)*, 283 NLRB 617, 623 (1987). Clearly, Denkins' signing of Rowell's "straw-poll" petition is specific union activity statutorily protected by the Act. Grady's promise to Denkins that "he had something for him" as a result of Denkins protected activity constituted a not-too-veiled threat which reasonably tended to interfere with, restrain, and coerce Denkins in the exercise of his statutorily protected right. That the statement was indeed a threat was borne out by the conduct that Grady took later in passing over Denkins for the assignment which Grady had earlier assured

Denkins was his. I find that passing over Denkins for this reason violated Section 8(b)(1)(A) and (2) of the Act.

Respondents offered little defense, and no evidence whatever from which it might be concluded that Denkins would have been passed over for this assignment regardless of his internal union activity. None of the Respondents put on any evidence to contest Denkins' testimony concerning Grady's actions, and Grady's statements evidencing his motivation for those actions. Instead, in its posttrial brief, Respondent Employer and the Association argue that in spite of the stipulation that headers are supervisors within the meaning of the Act, "with regard to gang assignment and hiring, the headers cannot be considered [its] agent" because hiring takes place at the union hall. Regardless of where the selection process takes place, however, in the act of selecting people for gang assignments, the header is fulfilling a traditional supervisory function for which the employer must be held accountable.

Respondent Employer and the Association argue that liability can be imposed for Grady's conduct only "if Respondents had knowledge or notice of that conduct." This principle has been applied in the context of conventional hiring halls, in which the hiring agent operates at arms' length from the employer. See, e.g., *Wolf Trap Foundation*, 287 NLRB 1040 (1988); cf. *Toledo World Terminals*, 289 NLRB 670, 673 (1988). I agree with counsel for the General Counsel that the requirement of actual or constructive knowledge simply is inapplicable to the present case in which the header is a Section 2(11) supervisor, and in which standard agency principles attribute the knowledge and conduct of the supervisor directly to the Employer. Moreover, the record establishes here that Respondent Employer did know or reasonably should have known of the discrimination effected through header Grady. Respondent President Wightman was on notice that Denkins had originally been slotted for a position on the three-person gang. Grady had told this to Wightman, and Wightman had passed it on to the Union. Given that the full-time positions reasonably would appear to be choice assignments, and given that Wightman should have known it was at least possible it was Grady who had effected the change, the change itself should have put Wightman on notice that he should inquire further concerning the matter. The mere fact that Wightman did not bother to inquire, and perhaps did not care since he was leaving composition of the crew entirely to Grady, does not shield Respondent Employer from liability.

The posttrial brief of Respondent Union is interesting in that it demonstrates how each of the Respondents tries to avoid liability for Grady's actions by pointing blame at the other. As Respondent Union notes, "these selections [for the three person gang] were outside the Seniority Plan and hiring hall procedures for filling vacancies in a gang . . . . None of these positions were announced or filled at the hiring hall." Elsewhere Respondent Union argues, "Grady was not acting under the seniority rules when he selected Bryant and Walker but rather at the direction of the Employer." Based on the facts presented here, I am convinced that it simply does not matter where Grady happened to be when he made the decision to not hire Denkins, as he had earlier planned on doing. What matters is that in making that decision, Grady was acting within authority conferred on him by mutual arrangement and agreement of Respondent Union, Respondent Employer, and the Association. What matters too is that in fulfilling his dual role as defined by the parties themselves, Grady passed over and discriminated

against Denkins for reasons proscribed by the Act. In conclusion, I find that Respondents unlawfully denied Emmett Denkins a position on a permanent longshoremen crew in retaliation for Denkins' having signed a petition that was perceived as criticism of Union President Willie Sloan. Respondent Union thereby violated Section 8(b)(1)(A) and (2) of the Act, and Respondent Employer violated Section 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent Employer and Respondent Association are, and have been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. James Grady has acted throughout all times relevant to this case as a header, and as such as a dual agent acting on behalf of both Respondent Union and Respondent Employer.

4. Respondent Employer, through the actions of its agent, James Grady, violated Section 8(a)(3) and (1) of the Act by discriminatorily denying Emmett Denkins a permanent ware-

house gang assignment because of Denkins' union activities or sentiments.

5. Respondent Union, through the actions of its agent, James Grady, caused Respondent Employer to discriminate against Emmett Denkins in violation of Section 8(a)(1) and (3) of the Act, and thereby itself violated Section 8(b)(1)(A) and (2) of the Act.

6. The unfair labor practices which Respondents have been found to have engaged in have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondents have engaged in certain unfair labor practices in violation of the Act, I shall recommend that they be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In cases such as this, the Board has traditionally held that liability for the backpay obligation is joint and several.

[Recommended Order omitted from publication.]