

Local Union 370, United Brotherhood of Carpenters & Joiners of America, AFL–CIO (Eastern Contractors Association, Inc.) and John Newell Jr.
Case 3–CB–6913

September 20, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On October 25, 1996, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Background

The facts, as more fully set forth by the judge, may be briefly summarized as follows. Carpenters Union Local 370, the Respondent Union, was formed in 1985 by the merger of Carpenters Local Unions 1150 and 117. Charging Party John Newell Jr. has been a member of Respondent Union since its formation. Prior to that, the Charging Party was a longtime member of Local 1150. He has been active in union affairs. He once served as recording secretary for Local 1150. In 1990 and 1993, he unsuccessfully ran for office in the Respondent Union. He filed internal union charges regarding both these defeats. After his defeat for office in 1993, he filed charges with the Department of Labor. He has also filed charges with the NLRB alleging discrimination regarding job referrals.

The Respondent Union has operated a nonexclusive hiring hall.¹ Since February 1995, Newell regularly signed the Respondent's out-of-work list. According to Newell, he heard from other members that various individuals, whose names were lower on that list than his, were working when he was not. Accordingly, in January 1996, he wrote to Respondent Union requesting information about those persons who had been referred, or worked, at certain construction projects in the Albany, New York area. The Respondent did not respond to the Charging Party's request.

Analysis

The issue in this case is whether the Respondent was obligated to provide Charging Party Newell with the information he requested regarding the Respondent's op-

eration of a nonexclusive hiring hall. The judge concluded that the Respondent violated Section 8(b)(1)(A) of the Act by failing to provide the Charging Party with the requested information. For reasons that follow, we find that, under Board precedent, the Respondent was not legally obligated to provide the requested information.

As the judge correctly noted, in the context of a union's operation of an exclusive hiring hall, it is well settled that a union is obligated to provide those seeking work through the hall with relevant information regarding referrals so that employees may be assured of fair treatment. See, e.g., *Operating Engineers Local 3 (Kiewit Pacific Co.)*, 324 NLRB 14 (1997); *Boilermakers Local 197 (Northeastern State Boilermaker Employers)*, 318 NLRB 205 (1995); and *Operating Engineers Local 513 (Various Employers)*, 308 NLRB 1300 (1992).

Further, in the context of a union's operation of a nonexclusive hiring hall, the Board has held that a union may not retaliate against a member seeking to obtain referrals because he or she engaged in activities protected by Section 7 of the Act. See, e.g., *Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500 fn. 2 (1993); *Carpenters Local 537 (E. I. du Pont)*, 303 NLRB 419 (1991).

As the judge recognized, in *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 441 (1990), the Board set forth the established principle that no duty of fair representation attaches to a union's operation of a nonexclusive hiring hall. As the Board, at 442, stated:

Where a union has a nonexclusive referral arrangement with an employer, the union has no exclusive status relating to potential employees. Individuals can obtain employment either through the union's hiring hall or through direct application to the employer. Without the exclusive bargaining representative status, the statutory justification for the imposition of a duty of fair representation does not exist.

As the Board further set forth in *Carpenters Local 537 (E. I. du Pont)*, supra at 420, "No duty of fair representation attaches, however, to a union operation of a nonexclusive hiring hall because the union lacks the power to put jobs out of reach of workers."

While finding that no duty of fair representation attached to the Respondent's operation of a nonexclusive hiring hall, the judge concluded that the absence of that duty was not dispositive of the issue in this case. He acknowledged that the issue here was not discrimination in referrals, but he nonetheless found that the Charging Party was entitled to information to ascertain whether the Union was properly referring members.

¹ The complaint alleged, the Respondent admitted, and it is thus undisputed that the hiring hall operated by the Respondent is a nonexclusive hiring hall.

In reaching his conclusion that the Respondent violated Section 8(b)(1)(A), the judge relied on the reasoning of a judge in *Hi-Way Paving Co.*, 297 NLRB 835 (1990). In *Hi-Way Paving*, a judge found that a union, in the context of a nonexclusive hiring hall, violated Section 8(b)(1)(A) by refusing to supply a member with information about referrals. The *Hi-Way Paving* judge found a violation even though he did not find that the union was retaliating for the member's Section 7 activity. However, the respondent union in *Hi-Way Paving* did not file exceptions to the judge's findings. Thus, the Board adopted the judge's 8(b)(1)(A) findings on a pro forma basis and had no occasion to address, or pass on, the merits of the judge's findings.² Thus, we apply the precedent of *Superior Asphalt*, rather than the nonprecedential holding in *Hi-Way Paving*.³ Absent either a finding that the Union owed the Charging Party a duty of fair representation in these circumstances, or a finding that the Union was retaliating against the Charging Party because he engaged in Section 7 activity, there is no basis to conclude that the Union violated the Act by failing to provide Newell with the requested information.

The judge's reasoning, that Charging Party Newell could use the requested information as "a predicate" for establishing that the Union has engaged in unlawful discriminatory conduct, is an insufficient basis for holding that the Respondent was obligated to provide the requested information. As the judge himself noted, the Board, in *Carpenters Local 537*, supra at 420, explicitly agreed with, and adopted, the following language from *Teamsters Local 17 (Universal Studios)*, 251 NLRB 1248(1980): "[I]t is therefore *only* when a union operating a nonexclusive referral system ignores one of its members *because* he or she engaged in activities protected by Section 7 of the Act that there is the 'prohibited' interference with Section 7 rights within the meaning of Section 8(b)(1)(A) of the Act." [Emphasis added.] Thus, to establish an 8(b)(1)(A) violation under this precedent, the General Counsel needed to establish—as a predicate to proving a violation of the Act—that the Union acted as it did toward Newell because Newell had

engaged in activities protected by Section 7. However, the complaint here did not allege, and the judge did not find, that the Respondent Union denied Charging Party Newell information because Newell had previously engaged in Section 7 activity.⁴ Further, the record would not support any such finding. Contrary to the judge, the case law, for this sort of violation of Section 8(b)(1)(A), requires that the General Counsel establish that the Respondent Union acted for a discriminatory motive, i.e., in retaliation for a member's protected activity.⁵ Thus, even assuming arguendo that the complaint alleged such a violation, the General Counsel failed to meet his burden. Accordingly, there is no basis to find, under the established precedent represented by *Carpenters Local 537*, that the Respondent's failure to provide Newell with requested information violated Section 8(b)(1)(A).

The complaint alleged, and the judge ultimately found, that the Respondent's denial of information to Newell was "arbitrary and capricious." This terminology is regularly associated with a union's failure to meet its duty of fair representation. However, as noted, the judge found here, and the General Counsel does not dispute that, under *Superior Asphalt*, supra, no duty of fair representation attached to the Respondent's operation of its nonexclusive hiring hall. Accordingly, the duty of fair representation does not provide a basis for concluding that the Respondent's action (or, better stated, its inaction) toward Newell violated Section 8(b)(1)(A) of the Act.

We find that the General Counsel failed to establish that the Respondent ignored Charging Party Newell because Newell engaged in activities protected by Section 7 of the Act. We further find that the Respondent did not owe a duty of fair representation to Charging Party Newell regarding its operation of a nonexclusive hiring hall. Accordingly, we cannot conclude that the Respondent's failure to provide Charging Party Newell with the requested information violated Section 8(b)(1)(A) of the Act and we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Robert A. Ellison, Esq., for the General Counsel.
Dominick Tocci, Esq., for the Respondent.

² It is well settled that the Board's adoption of a portion of a judge's decision to which no exceptions are filed is not precedent for any other case. *ESI, Inc.*, 296 NLRB 1319 fn. 3 (1989); *Anniston Yarn Mills*, 103 NLRB 1495 (1953).

³ We need not address the *Hi-Way Paving* judge's reasoning. We note, however, that the *Hi-Way Paving* judge concluded his analysis by citing *Operating Engineers Local 825 (Building Contractors)*, 284 NLRB 188 (1987), a case involving an exclusive hiring hall.

In joining his colleagues in applying Board precedent to the facts of this case, Member Hurtgen notes that no party to this proceeding has challenged, or argued against, the existing precedent that the Board today applies.

⁴ Thus, significantly, the judge did *not* find that the Respondent failed to provide the information to the Charging Party because the Charging Party had in the past engaged in protected activity including, inter alia, filing charges with the NLRB against the Respondent.

⁵ See, e.g., *Longshoremen ILA Local 20 (Ryan-Walsh Stevedoring Co.)*, 323 NLRB 1115, 1116–1117 (1997) (union violated Sec. 8(b)(1)(A) by denying a member's request (i.e., O'Rourke's request) that he be added to a referral list in retaliation for the member's protected activity).

Peter Henner, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Albany, New York, on September 16, 1996. The charge was filed on January 16, 1996, and was amended on February 20, 1996.¹ The complaint, which issued on April 29, alleges that Charging Party John Newell Jr., an individual, was arbitrarily and capriciously denied information that he requested from Local Union 370, United Brotherhood of Carpenters & Joiners of America, AFL-CIO (the Respondent), in violation of Section 8(b)(1)(A) of the Act. Respondent's timely answer admitted all jurisdictional allegations. It denied that Newell requested information and that Respondent had refused to provide information.

On the entire record, including my observation of the demeanor of the witness, and after considering the oral arguments made by all parties at the hearing I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a labor organization that maintains a contract with Eastern Contractors Association, Inc., an organization of employers engaged in the building and construction industry which annually purchases and receives goods and services valued in excess of \$50,000 at various jobsites in the State of New York directly from points located outside the State of New York. The Respondent admits and I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The facts in this case are not in substantial dispute. Charging Party John Newell Jr., is and has been a member of the Respondent Union since its formation in 1985. The Respondent Union was formed that year when Local Unions 1150 and 117 merged. Newell was a member of Local 1150 for some 13 years, thus he now has a total of 24 years membership. Newell had been the recording secretary of Local 1150 before the merger and ran unsuccessfully for this office in 1990 and again in 1993 in the merged Local 370. He filed internal charges regarding both defeats and, following his unsuccessful internal challenge to the 1993 election, he filed charges with the Labor Department. Additionally he has filed numerous unfair labor practice charges with the Regional Office of the Board alleging discrimination regarding referrals.

The complaint alleges and the Respondent admits that it operates a nonexclusive hiring hall.

The instant case arises from the Respondent's failure to provide information to Newell pursuant to a request for information by letter dated January 16. Every 3 weeks since February

1995, Newell signed the Respondent's out-of-work list. He heard, through conversations with other members, that various individuals whose names were below his on the out-of-work list were working at various locations. This prompted him to send the letter of January 16 in which he requested the names of all persons who had been referred to and/or worked at 10 named construction projects in the Albany area. He never received any response.

B. Contentions of Respondent

Counsel for Respondent contends that there is no obligation on the part of the Respondent to provide Newell the information he requested. In this regard he initially argued that there was no legal authority that required the requested information be given and, therefore, the complaint fails to allege a violation of the Act.² He later argued that there was no obligation to provide the information since this case involves a nonexclusive hiring hall and there has been no finding that Newell had actually been discriminated against. In this regard he pointed out that Newell has filed several charges with the Regional Office of the Board; however, no allegation of a discriminatory or retaliatory failure or refusal to refer him has been found to have merit.

Counsel also sought to raise a question regarding the sufficiency of the information request. Thus, upon cross-examination of Newell, he called paragraph 5 of the out-of-work list procedure to Newell's attention and questioned whether persons could still appear on the list if they had been working for 10 weeks. Newell agreed that they could. Counsel then questioned Newell regarding why he had not asked for information regarding the duration of employment. Newell responded that he had made a subsequent request that sought, *inter alia*, the duration of employment of members who had been referred. This letter is dated April 4. Even if I were to find that Newell's initial request was incomplete, which I do not, the information requested in the January 16 letter would establish whether any person below Newell had been referred regardless of the duration of the employment. Indeed, anyone working for over ten weeks should not appear on the list either below or above Newell's name. I find the request clear and sufficient. Newell sought information relating to all referrals made in the last six months as well as any information regarding persons known by Respondent to be working at any of the named projects.

C. Analysis and Concluding Findings

The issue presented in this case concerns the obligation of a union to a member in the context of a nonexclusive hiring hall. It is well settled, in the context of an exclusive hiring hall, that a union is obligated to provide an employee seeking work through the hall with requested data relating to referrals it has

² Counsel moved for dismissal of the complaint on this ground at the beginning and end of the hearing. This would appear to represent a change in the Respondent's position since Respondent did not file a Motion for Summary Judgment pursuant to Sec. 102.24 of the Rules and Regulations of the Board, but filed an answer to the complaint in which it denied the paragraphs that alleged Newell's request and its failure to respond to the request.

¹ All dates are 1996 unless otherwise indicated.

made so that the employee may be assured that he is being fairly treated. See *Operating Engineers Local 513 (Various Employers)*, 308 NLRB 1300, 1303 (1992).

The Board, in *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 441 (1990), reiterated the established proposition that no duty of fair representation attaches to a union's operation of a nonexclusive hiring hall. It is clear, however, that the absence of a duty of fair representation does not preclude finding violations of the Act for unlawful mistreatment of members. The Board has held in numerous cases that where there is discrimination against *members* in retaliation for their protected activities, Section 8(b)(1)(A) of the Act is violated. See *Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500 fn. 2 (1993). The most recent restatement of this principle appears in *Carpenters Local 1102 (Detroit Edison Co.)*, 322 NLRB 198 (1996), where the Board, in the context of a nonexclusive hiring hall, states that a union may violate Section 8(b)(1)(A) by failing to act evenhandedly, that is, without discrimination against members based on the exercise of Section 7 rights. *Id.* at fn. 3.

Thus, the absence of a duty of fair representation is not dispositive of the issue in this case. If a union were to discriminate or retaliate against a *member*, even in the context of a nonexclusive hiring hall, the Act would be violated.³

The issue in the instant case is not discrimination in regard to referral. Rather it is a refusal to respond to a request for information that would, at least initially, establish whether members whose names appeared on the out of work list after Newell's name had been referred to jobs whereas he had not. If they had not been, he would be assured that there had been no discrimination or retaliation against him; if they had been, he could try to determine whether the referrals were, nonetheless, proper or whether he should seek redress for the improper referrals. I find it immaterial that prior charges of discrimination were not found meritorious. The last charge filed prior to the current one was in 1994. As noted above, Newell testified that he had signed the out-of-work list every 3 weeks since February 1995 without receiving a referral. He received information that members whose names were below his were working. He sought to assure himself that the Union was properly referring members by seeking information from the Union.⁴

³ This principle is specifically discussed in *Carpenters Local 537 (E. I. du Pont)*, 303 NLRB 419 (1991), where the Board found no 8(b)(2) violation since the union therein was operating a nonexclusive hiring hall. In the decision the Board stated it agreed with, and quoted with approval, language from *Teamsters Local 17 (Universal Studios)*, 251 NLRB 1248 (1980). That language noted the absence of any obligation to *nonmembers* stating "it is therefore only when a union operating a nonexclusive referral system ignores one of its members because he or she engaged in activities protected by Section 7 of the Act that there is the prohibited 'interference' with Section 7 rights within the meaning of Section 8(b)(1)(A) of the Act." *Id.* at 420. The discussion by the administrative law judge in *Universal Studios* makes clear that, with regard to *members*, the union, although not having a duty of fair representation, does have an obligation to act in an evenhanded manner without discrimination based on the exercise of Sec. 7 rights. *Supra* at 1257.

⁴ When dealing in the realm of potential violations of Sec. 8(b)(2), the legal ramifications of a failure to refer differ when the union is the

The Board, in *Hi-Way Paving Co.*, 297 NLRB 835 (1990), found a violation of Section 8(b)(1)(A) in the context of a non-exclusive hiring hall where a union denied a "dissident" member access to referral lists without evidence of discrimination on the basis of the member's dissident activities.⁵ It adopted the following language of the administrative law judge:

Thus, the evidence substantiates a wrongful denial of access to critical job referral data. Even if the hiring arrangement were nonexclusive, the list remained as the means for ascertaining nondiscriminatory job priorities. Thus, as indicated, ranking on the list determines who is referred whenever the Union receives a blanket, unqualified request for labor. The fact that employees are free to shop their own jobs, and that the list may also be bypassed through an employer's request by name, does not limit an employee's right to verify the list against any information he might have bearing upon the proper administration of the Union's hiring authority. In this regard, lists from the recent past, as well as that for the current month, might provide a useful, if not conclusive tool, for determining whether the member had been treated fairly. The denial of access was a reminder of the Union's power, and no less an influence upon the membership than would be true in the case of an actual discriminatory referral. *Id.* at 838.⁶

There was no requirement that the denial of a good-faith request for relevant information be shown to be discriminatorily motivated. This is true because Section 8(b)(1)(A) of the Act does not require proof of a discriminatory motive. Rather, the prohibited conduct is action which either restrains or coerces employees in the exercise of Section 7 rights. Insofar as a discriminatory refusal to refer interferes with the exercise of Section 7 rights, the denial of information that would be a predicate for establishing such discrimination is, as was found in *Hi-Way Paving*, coercive. The Respondent presented no evidence that responding to Newell's request would be unduly burdensome. It never responded to his request in any manner whatsoever. I find such behavior to be both arbitrary and capricious, as alleged in the complaint. This union member was not even given the courtesy of a response. At hearing the Respondent con-

exclusive source of all referrals. The issue herein is, in the context of an alleged 8(b)(1)(A) violation, whether a union's obligation to its members regarding a good-faith request for information is dependent upon the type of contract it has signed, i.e., whether it is operating an exclusive or nonexclusive hiring hall. As discussed above, even in the absence of a duty of fair representation, Sec. 8(b)(1)(A) prohibits a union from engaging in actions that restrain or coerce employees in the exercise of their Sec. 7 rights.

⁵ In addition to the failure to provide information, Newell had, in the instant case, alleged a retaliatory filing of internal charges against him by the Respondent and failure to refer him. The dismissal of that aspect of the charge has no bearing upon the Union's obligation regarding the information request.

⁶ Counsel for Respondent noted that the request in *Hi-Way Paving* involved access to the out-of-work list, which was provided in the instant case. A close reading of *Hi-Way Paving* reveals that the access sought therein was to referral data and the conclusions of law specifically note the union's refusal to permit review of "hiring hall referral lists." *Id.* at 838 and 845. In the instant case the out-of-work list provides no information regarding referrals actually made.

tended it had no obligation to respond to Newell. The precedent discussed and cited above holds otherwise. I find that the Respondent's failure to provide the requested information has restrained and coerced its member in violation of Section 8(b)(1)(A).

CONCLUSIONS OF LAW

1. Eastern Contractors Association, Inc., is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. By failing and refusing to provide John Newell Jr. with requested information relating to referrals that it had made the

Respondent has restrained and coerced Newell and other member employees in the exercise of rights guaranteed in Section 7 of the Act and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically the Respondent shall provide Newell with the information regarding referrals that he sought in his request of January 16.

[Recommended Order omitted from publication.]