

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
LOCAL 1426 (Stevedoring Services of America)

and

CASES 11-CB-3119

D. R. WASHINGTON, An Individual

and

11-CB-3120

ELIESHER MCCORMICK, An Individual

and

11-CB-3248

JACK METTS, An Individual

Ronald C. Morgan, Esq. for the General Counsel.
Robert Kilroy, Esq., of Hempstead, NC, for the
Respondent.

DECISION

Statement of the Case¹

JOHN H. WEST, Administrative Law Judge: Upon a charge filed in Case No. 11-CB-3095 on October 13, 2000 by Robert O. Willis against the International Longshoremen's Association, Local 1426 (Union), which charge was amended five times, upon a charge filed in Case No. 11-CB-3119 on February 28, 2001 by D. R. Washington against the Union, and upon a charge filed in Case No. 11-CB-3120 by Eliesher McCormick on March 2, 2001 against the Union, as here pertinent, a consolidated complaint was issued on September 28, 2001 alleging that the Union (1) violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended (Act), by failing and refusing to assign to permanent gang positions to D. R. Washington and Eliesher McCormick, and by causing or attempting to cause employers to discriminate against employees D. R. Washington and Eliesher McCormick and other employees in violation of Section 8(a)(3) of the Act.² The Union denies violating the Act as alleged.

¹ On April 30, 2002, the first day of the trial in this consolidated proceeding, Case No. 11-CA-19117, Stevedoring Services of America, was severed and remanded to the Regional Director of Region 11 of the National Labor Relations Board (Board or NLRB) in view of the fact that the parties in that proceeding had entered into a settlement agreement. By Order dated May 15, 2002, the Regional Director withdrew the complaint allegations in 11-CA-19117.

² Counsel for General Counsel's Motion to Withdraw Donald Pridgen from this allegation was granted at the trial herein.

On September 17, 2002 Counsel for the General Counsel's Motion to Consolidate Case No. 11-CB-3248 with this consolidated proceeding was granted. In that case a charge was filed by Jack Metts, an individual, against the Union on May 23, 2002 and a complaint issued on August 28, 2002, alleging that the Union violated Section 8(b)(1)(A) and 8(b)(2) of the Act by since January 1, 2002 and continuing to date refusing to assign Metts to a permanent gang position, thereby causing or attempting to cause employers to discriminate against Metts, in violation of Section 8(a)(3) of the Act. The Union denies violating the Act as alleged.

On January 17, 2003, as here pertinent, Counsel for General Counsel's Motion to Consolidate Case No. 11-CB-3276 with this consolidated proceeding was granted. In that Case, a charge was filed by Ernest Galloway, an individual, against the Union on September 25, 2002, and a complaint issued on October 29, 2002, alleging that the Union violated Section 8(b)(1)(A) and 8(b)(2) of the Act since March 25, 2002 and continuing to date by failing and refusing to assign Galloway to his former permanent gang position, thereby causing or attempting to cause employers to discriminate against Galloway, in violation of Section 8(a)(3) of the Act. The Union denies violating the Act as alleged.

A trial was held on April 30, 2002, May 1, 2002, September 17-20, 24, 26, 27, and 30, 2002, October 1, 2002 and on March 18, 2003 in Wilmington, North Carolina. At the March 18, 2003 session the parties entered into settlement agreements with respect to 11-CB-3095 and 11-CB-3276, Joint Exhibits 1 and 2, respectively. In view of the settlements, Counsel for General Counsel's Motion to Sever those two proceedings was granted. Briefs were filed by General Counsel and the Union on April 23, 2003. As pointed out by General Counsel on brief, after the various settlements, and after General Counsel's Motions to Sever were granted, the issues that remain are as follows:

1. Whether the Respondent Union, in December 2000 and December 2001, unlawfully refused to select employees D. R. Washington, Eliesher McCormick, and, in December 2001, Jack Metts as permanent gang members in violation of Section 8(b)(1)(A) of the Act.

2. Whether the Respondent Union by not properly selecting Washington, McCormick and Metts as permanent gang members caused Southeast Crescent Shipping Company and other employers in the stevedoring industry to discriminate against these three employees in violation of Section 8(a)(3) and thereby violated Section 8(b)(2) [of the Act].

General Counsel also included whether "headers" are agents of the Union as an issue to be resolved. While, in its answer to the complaint the Union denied this, on brief the Union "acknowledges extant case law making Headers 'dual agents' in the filling of vacancies in a gang, daily and permanent." (The Union's brief, page 3) In view of this and in view of the fact that the NLRB has already concluded that the "headers" involved herein are dual agents of the employer and the Union, this issue will not be treated further. *North Carolina Shipping Assn.*, 326 NLRB 280 (1998) and *Longshoremen ILA Local 1426 (Wilmington Shipping)*, 294 NLRB 1989. Upon consideration of the entire record in this case including my observation of the demeanor of the witnesses and of the briefs, I make the following:

Findings of Facts

I. Jurisdiction

It is admitted that Stevedoring Services of America (SSA) and Southeast Crescent

Shipping Company, Inc. (Southeast) are now, and have been at all material times herein, corporations with facilities located in Wilmington where they are engaged in the business of providing stevedoring services. Collectively, the complaints allege, the Union admits, and I find that SSA and Southeast are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.³

II. The Alleged Unfair Labor Practices

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The Facts

As here pertinent, the Union provides longshoremen for loading and unloading work at the Ports of Wilmington and Sunny Point. The longshoremen work on “gangs.” As of January 1, 2001, General Counsel’s Exhibit 84, there were 15 cargo (loading and unloading) gangs and 3 carpenter gangs. There are supposed to be 10 permanent members on each of the cargo gangs and 8 permanent members on each of the carpenter gangs. General Counsel’s Exhibit 14.⁴ There is also a tie-up gang of four longshoremen who either secure the vessel to the dock or release it. Each of the gangs has a “header.” According to paragraph 5B of the Seniority Plan, “[m]anagement shall select headers after considering recommendations of the Union to fill 15 cargo gangs and 3 carpenter gangs.” If there are not a sufficient number of permanent members on the gangs that are going out from the Union hiring hall on a given day, the headers choose additional members off the floor during a “shape up” at the hiring hall. Paragraph 5 of the Plan indicates in what order the header should pick available and qualified people to temporarily fill available gang positions. That same paragraph also speaks to filling permanent vacancies in the gangs. More specifically, paragraph 5, as here pertinent, specifies as follows:

- 5. In order to have a workable Seniority Plan and practical hiring procedures for all longshore work, the Employers and the Union agree on the following:
 - 30 A. All headers will fill out their gang from their present permanent gang structure.
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 - 35 c. On or after December 1 through December 31, each header shall fill all permanent vacancies in his gang according to seniority qualifications and classification.
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 - 40 C. If a vacancy occurs in a gang and a permanent replacement is needed, the header must first consider his regular gangmen and promote them to

³ As pointed out by the Union in its answers to the complaints, the employers belong to the North Carolina Shipping Association (NCSA), for which the Union supplies labor pursuant to a collective bargaining agreement and the Wilmington, North Carolina Seniority Plan (Plan).

The following is the involved unit:

All employees engaged in the loading or unloading of ships at the facilities of the Employer in the Port of Wilmington, North Carolina, including the port at Sunny Point, of the U.S. Army [Southport, North Carolina], excluding all other employees, guards and supervisors as defined in the Act.

⁴ See page 6, paragraph number 14 of the Seniority Plan, as revised in April 1999.

key positions if they are qualified. If this is possible, replacements must be picked from the seniority list in order of Class AA, A, B, C, D, E, F, G, H, I, and J, in that order, provided people in those groups are available and qualified.

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General Counsel's Exhibit 104 is a copy of a memorandum dated November 29, 2001 regarding which headers have gang openings. The memorandum was posted in the Union hall. It indicates that Header Ronald Devane had one opening, Header Clinton Howlett had one opening, Header Earl Mack had two openings, Header Richard Simpson had one opening, and Header Dannie Taylor had one opening. General Counsel also introduced a letter, General Counsel's Exhibit 100, from Union President Wilbert Rowell to member Melvin Dinkins dated December 3, 2001 advising him that since he had not worked for his gang for some time, he was no longer assigned to the gang. It is noted on the letter that Header S. L. Gore was to receive a carbon copy of the letter.⁵

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McCormick testified that she has been a member of the Union for 12 years; that in 2000 she was not a member of a permanent gang; that in December 2000 she had a "J" seniority classification; that in December 2000 she had a class "A" commercial driver's license which authorized her to drive a "hustler," which is a truck operated at the State Port and at Sunny Point⁶; that she operates a tractor, forklift, and she has a license to operate the "Big Lift," which can be used to pick up containers but which is usually used to move big items on the dock; that she handled all of this equipment prior to December 2000; that she appeared for shape up at the Union hall in 2000 on a regular basis; that she had tried to become a permanent member of a gang prior to 2000⁷; that she was not successful in getting into a gang as a permanent member in December 2001; that she did become a permanent member of Header Gore's loading gang in May 2002 after the trial herein commenced: that she goes to work when Gore's gang works; and that the qualifications and skills she now has are the same she had in December 2000. On cross-examination McCormick testified that she should have been placed on a gang permanently in December 2000 because Jerome Fraser, who according to her was a casual, was given a permanent position in a gang at that time and she believed that she was

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⁵ General Counsel's Exhibit 101, the "EMPLOYERS ILA PENSION AND WELFARE FUND, Employee Hours History" for Dinkins indicates that Dinkins last worked in 1997 with a total of 111.50 hours. General Counsel also introduced General Counsel's Exhibit 102, which is a letter from Rowell dated April 8, 1997 to Carl Parker (stipulated) indicating that since Parker did not show up for work in the last six months, was employed outside the industry, and numerous members are seeking a gang assignment, the Union "will instruct your header to replace your gang assignment effective immediately." General Counsel's Exhibit 103 is Parker's "Employee Hours History."

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⁶ Longshoreman D. R. Washington testified that McCormick's U.S. Government Motor Vehicle Operator's Identification Card, Respondent's Exhibit 6, authorizes the operation of a hustler at Sunny Point Port.

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⁷ Beginning in May 1997 McCormick collectively wrote the Seniority Board and the Executive Board of the Union requesting to be placed on a gang permanently, General Counsel's Exhibit 60. The request was reiterated in August 1998 (General Counsel's Exhibit 61), November 1999 (General Counsel's Exhibit 62), and December 2000 (General Counsel's Exhibit 63). In December 2000 she also reiterated her written request to headers, General Counsel's Exhibits 64-69. In a letter dated January 8, 2001, General Counsel's Exhibit 70, McCormick reiterated her request to Rowell, the Seniority Board, and the Grievance Committee. And in December 2001 McCormick reiterated her request to five headers, General Counsel's Exhibits 71-75.

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just as qualified as Fraser; that she did not know any of Fraser's qualifications and Fraser was placed in a gang in 1999; that in December 2000 there were also vacancies in other gangs; that there was a posting in December 2000 showing which headers had vacancies; that she worked 94.5 hours as a longshoreman in the contract year ending 2000 (October 1999 to September 2000), and under the Seniority Plan she would have been reduced to a casual; that in the contract year of October 2000 to September 2001 she had a total of 333 hours, Respondent's Exhibit 5⁸; that she drove a bus on the dock at Sunny Point; that she has worked on cargo gangs at Sunny Point and at the State Port; and that in December 2001 five headers had vacancies on their gangs.

Metts has been a member of the Union since 1990. According to his testimony, since January 2000 he has had a seniority classification of "1." Before that he was a "casual." He has worked at the Wilmington Port and at Sunny Point as a Longshoreman. At Sunny Point he works as a general laborer "in the hole," hooking up cargo, sweeping the floor and doing carpentry work. At the Wilmington Port he drives forklifts and stacks lumber. His commercial driver's license allows him to drive trucks. Metts sponsored General Counsel's Exhibit 76 which is a "GANG TRANSFER FORM" dated "8-1-00." On the line designated "Position Held" Metts wrote "Bus Driver." On the line designated "Gang Request To Be Transferred" Metts wrote "Sammy Lee Gore/Clinton Howlett." And on the line designated "Reason For Request" Metts wrote "To work in Cargo, Drive Truck & operate equipment." Metts testified that he completed this form because he wanted a permanent gang assignment; and that he sent the completed form to the President of the Union, Rowell. The form was offered as background evidence to show that Metts sought the position of permanent gang member before 2001. According to the testimony of Metts, in September 2001 he asked Rowell for a permanent gang assignment, and Rowell told him that he had to wait his turn. Metts also asked Header Thomas Bryant if he had any openings in his gang in September 2001, and Bryant told him he had an opening but he was going to fill the opening with an individual who was working with him. Metts was not selected for a permanent gang assignment in December 2001. He testified that not all gang assignments were filled by January 1, 2002 because Carpenter Header Bryant had casual George Cooper go into his gang, Header Scipio Hawkins had a truck driver, Howard Marshburn, who left the industry, and Header Devane had a truck driver, Walter Moore III, who was listed on Devane's gang but he had not been working with Devane's gang. On cross-examination Metts testified that from 1990 to December 2001 he worked as a combination person in that he drove a bus at Sunny Point and he worked on the dock; that during the contract year October 1990 through September 1991 he had a total of 68 hours working as a longshoreman; that for the contract year 1992 he worked a total of 233 hours; that in the year 1993 he had a total of 27 hours; that in the Plan year 1994 he worked a total of 32 hours; that in 1997 he had a total of 233 hours driving a bus and working as a longshoreman⁹; that for the contract year ending September 30, 1998 he had a total of 17 hours; that for the year 1999 he had 435 hours combined working as a bus driver and a longshoreman; that in the year 2000 he had 39 hours; that for the year which ended September 2001 he had 683 hours; that Respondent's Exhibit 7, which are his ILA Pension Plan hours, shows the hours he worked from 1990 to September 30, 2001, as specified above; that the request he made for a gang assignment in August 2000 was on a gang transfer form and he was not a member of anyone's gang at the time; that in December 2001 he did not post his name on the bulletin board to be considered for a vacancy;

⁸ The Exhibit, the Retirement Card Year Report for McCormick, indicates that she has total hours of 1, 084.5 for the years 1991 through 2001.

⁹ On or about January 1, 1997 the Welfare Plan for bus drivers was merged into the ILA Employer's Plan, and after that time all the bus driving hours were carried as longshoreman's hours.

that when he spoke to Rowell in 2000 he was a casual; that he believed that Header Bryant discriminated against him in December 2001 because he was an “H” at the time and Bryant choose casual Cooper; that in January 2000 he turned in his card with an “H” and he was given a card with an “I”; that in 2001 he had a “Casual” card; that he had seniority over “casual”
 5 Cooper and he was more qualified; that he did not take his complaint to the Seniority Board; that he did not speak with Header Devane; and that he told Header Clayton Vaught that he wanted to be in his gang and Vaught told him that he did not have an opening.

Galloway, who has been a member of the Union since 1991, testified that he was a
 10 member of a gang, Howlett’s, and he had a seniority classification of an “H”; that General Counsel’s Exhibit 78 is a letter dated December 3, 2001 from Rowell which indicated that he was no longer assigned to a gang because he had not actively worked in his gang for quite some time; that he had been in Howlett’s gang for almost 10 years; that he knows union member Vernon Patton (Galloway mistakenly used the surname Patrick.), a “casual” who
 15 became a permanent member of Howlett’s gang in January 2002; that Patton does not have any special skills as a longshoreman; that Eric Lloyd (described below as Eric Robinson and James Robinson), who is a “casual” and the grandson of J. H. Richardson, was placed in Howlett’s gang in January 2002; that Lloyd does not have any special skills as a longshorman; that Johnny (described below as Donald) Doyle, who used to work at the State Port changing
 20 tires, was placed in Howlett’s gang before Patton and Lloyd; and that Doyle did not have any special skills as a longshoreman. On cross-examination Galloway testified that Doyle had a “G” classification, he was doing ILA work at the State Port, and he was on the Maintenance and Repair Roster; that he was in Header J. H. Richardson’s gang, and in 2000 J. H. Richardson was taken out as the header and Howlett took over the gang; that he was classified as a “G” up
 25 to 2000; that for the contract year which ended September 1999 he only had 113 hours and he was reduced one classification to an “H”; that he was incarcerated in 1999 or 2000; that he did not know what months he was incarcerated; that he thought that he was incarcerated for “traffic”; that he was locked up for 150 days; that he had a “G” at the end of the contract year which ended September 2001, and he had 506 hours before he was incarcerated; that after
 30 being incarcerated, he came back in February 2002; that he was put back in his gang because he had the hours; that Rowell would not let him go to work and he missed four months of work; that he did not know if he was taken out of the gang because he was not available for work; that he was “locked up” on or about December 3, 2001; that he “got out” in February 2002; and that for four months after he was released he came to the Union hall but he was not allowed to work
 35 with his gang.¹⁰

D. R. Washington testified that his seniority classification was an “I”; that his seniority classification was reduced in 2000 from an “I” to a “J”; that subsequently he had his “I” restored; that he first became a permanent member of a gang, Earl Mack’s, in May 2002; that he asked
 40 Rowell about becoming a permanent member of a gang in November 1999 and Rowell told him about the Seniority Plan; that he also spoke with the Chairman of the Executive Board in 1999, Jason Millhouse, about the procedures to get into a gang; that no one was permanently placed in a gang in December 1999; that a header might not want to fill a vacancy in his gang because when that header does not have a sufficient number of gang members at a shape-up, he can
 45 choose another header, who has a sufficient classification and who otherwise would not work that day, to temporarily work on his gang; that in January and February 2000 he spoke with a number of headers individually and they told him that it was past December so they could not fill

¹⁰ As noted above, Galloway’s case was settled and the Motion of General Counsel to Sever
 50 that proceeding was granted. However, Galloway testified in this proceeding before he filed a charge with the Board and a complaint issued in his case.

the gangs until the next December¹¹; that in February and March or April 2000 he asked Rowell about the fact that vacancies on the gangs were not being filled and Rowell told him that he was waiting for some work to come to Sunny Point and he would try to get the gangs filled by having the Seniority Plan amended; that in August 2000 the work picked up at Sunny Point and at a Union meeting when he asked about filling the permanent vacancies on gangs Rowell said that he was trying to let the men in the gangs make their hours¹² and they were not going to fill the gangs at that time; that at one point in 2000 Rowell told him that he was pushing the gang assignment too hard and if he continued, the headers might not pick him at shape-ups; that Rowell also told him that he could file a grievance with the Seniority Board; that by letter dated October 4, 2000, General Counsel's Exhibit 79, to the Executive Board of the Union he filed a grievance regarding his not being able to get a permanent assignment to a gang; that he received a reply, General Counsel's Exhibit 80, indicating that he should present his grievance to the Seniority Board; that he had filed his grievance with the Seniority Board, General Counsel's Exhibit 81, at the same time he filed it with the Executive Board, and about two weeks later Rowell asked him if they could resolve the matter before the hearing with the Seniority Board; that after the grievance was heard by the Seniority Board he was informed by letter dated November 27, 2000, General Counsel's Exhibit 82, that the grievance lacked sufficient evidence to indicate that the Local had failed to assure performance of the Collective Bargaining Agreement¹³; that in December 2000 there was no reason that he could not have worked in either a loading or a carpenter gang; that he has a military license to operate a hustler truck and he has a lift license to operate up to 15,000 pounds; that he has worked as a longshoreman at Sunny Point and at the State Port on a regular basis; that in December 2000 he had the same skills, licenses and abilities as a longshoreman as he did in 2002 when he was placed in Mack's gang; that in the first week of December 2000 he talked with some headers about getting into their gangs and they asked him about his qualifications, skills, if he had any licenses, and they told him that they would have to wait to see what would actually happen in the next couple of weeks¹⁴; that he asked Header Simpson about Clinton Rose, who was listed as a member of Simpson's gang but was no longer with ILA; that he also asked Simpson about Steven Paige, who was listed as a member of Simpson's gang but instead was working for the State; that Simpson said that he had to see if Rowell was going to take Paige off the gang; that Header Lockhart, who had vacancies in his gang, also needed a winch man and he was going to use Derek Ballard to fill that slot; that he asked Lockhart about James Beatty, who was listed as a member of Lockhart's gang but who was employed by the State Port, and Lockhart told him that he was not going to take Beatty out of the gang and he would take him out when he got ready; that in 2001 he spoke to Rowell who told him that he could not do anything because it was past December 31, 2000 and if he did not believe that he received a fair shake with the Seniority Board, he could file a charge with the NLRB; that he then filed a charge with the NLRB; that also in 2001 he spoke with a couple of headers and told them that he believed that they were in violation of the Collective Bargaining Agreement and the Seniority Plan about filling vacancies in gangs; that by letter dated January 16, 2002, General Counsel's Exhibit 83, he advised the Seniority Board of his intent to get into a gang; that he had a meeting with the Seniority Board in late January 2002 with Rowell representing the Union and Billy Helms representing SSA; that Helms stated that he was concerned about D. R. Washington's health and he asked him to get

¹¹ Clyde Dinkins, William Lockhart, S. L. Gore, Greg Spaulding, Scipio Hawkins, Richard Simpson, and J. H. Richardson.

¹² Longshoremen are required to make 700 hours during the year from October 1 to September 30 to get their pension and benefits.

¹³ The Seniority Board was comprised of Rowell, Wayne Richardson, William Helms and Jamie Whitman. Wayne Richardson left the Board that day and John Bellamy took his place.

¹⁴ Clyde Dinkins, Richard Simpson, William Lockhart, J. H. Richardson, and S. L. Gore.

another letter from his doctor to return to work¹⁵; that when Rowell asked if D. R. Washington could be dispatched to work, Helms said the only way D. R. Washington could come back to work was if he had a letter from his physician indicating that he could come back to work; that the discussion at the meeting centered on the fact that D. R. Washington had his leg amputated
 5 in November 2001; and that after this meeting he was placed on a gang in a permanent position.

On cross-examination D. R. Washington testified that, as shown on Respondent's Exhibit 8 which is a "RETIREMENT CARD YEAR REPORT," he had 248.5 hours in contract
 10 year 2000 (a fiscal year beginning on October 1, 1999); that he was a "J" in December 2000; that he had 1,059 hours in contract year 2001 of which about 230 to 260 hours were spent working on a Cargo or Carpenter gang, with the remainder spent working as a clerk at ILA Checkers Local 1776; that the Clerk's Local has collective bargaining agreements with the
 15 NCSA so he was working for the same employers but he was clerking rather than working on a Cargo or Carpenter gang; that he was placed in Mack's gang pursuant to the parties negotiations to settle this matter; that he has not worked as a longshoreman since he had his operation in November 2001; that after November 2001 he was not capable of work; that beginning in February or March 1999 he came to the hiring hall every day, and at the time he was a casual and not a member of the Union; that when he spoke with Millhouse in September
 20 1999 about getting into a gang he had about 200 hours of experience on the waterfront; that Millhouse told him that he had to have some qualifications to get into a gang and at the time his only experience was operating a hook or working in a hole; that in 2000 he spoke with seven headers including Spaulding and Audwin Pellom; that there is nothing in the seniority rules which disqualifies a man from a permanent gang position if he works another job; that in the Fall
 25 of 2000 Pellom told him that he was not going to fill a vacancy on his Carpenter gang; that at the time he had worked on a Carpenter gang about five or six times; that Ballard was just beginning to learn how to run a winch when Lockhart bought him into his gang; and that the undated letter from his doctor regarding his ability to perform certain tasks was written after the President of the NCSA, Helms' February 13, 2002 letter to the doctor inquiring about whether Washington
 30 should return to work, and his ability to perform his daily work duties, Respondent's Exhibit 9.

On redirect D. R. Washington testified that there were no permanent gang vacancies filled in December 1999 but some were filled in December 2000; that after he filed his grievance Helms informed the headers that they had to fill the gangs and they filled them in December
 35 2000; that when Reggie Hawkins transferred out of Pellom's gang in December 2001, he was replaced by Ivy Hollis in January 2002; and that Hollis was a casual.

With respect to General Counsel's Exhibit 84,¹⁶ which is a list of the members of the Cargo and Carpenter gangs, D. R. Washington testified that it shows that Lockhart's gang in
 40 December 2000 and December 2001 improperly lists Beatty because he was employed by the State for, he believed, at least 2 or 3 years; that Lockhart should not have been carried on the gang after he retired in August 2001¹⁷; that Mack became a header when William Lockhart

45 ¹⁵ D. R. Washington testified that in January 2002 he submitted a letter from his doctor to the Union's business agent and to SSA.

¹⁶ Counsel for General Counsel stated that the document indicates that it was created in 1999 but the printout, which was provided by Respondent's counsel on or about May 7, 2001, purports to indicate the Carpenter and the Cargo gangs as of January 1, 2001.

50 ¹⁷ Counsel for General Counsel pointed out that the number 5 is missing on the list of gang members.

retired; that after December 2001 Larry Venture¹⁸ and Donald Pridgen were added to Mack's gang; that Donald Pridgen, who was a casual, came to Mack's gang in January 2002¹⁹; that Donald Pridgen had a license to operate a hustler and he also operated a lift on State docks; that he could handle these pieces of equipment; that he was a "J" when Pridgen went to Mack's gang; that with respect to Header Taylor's gang, he believed that Taylor had a vacancy on his gang in December 2000 and December 2001 in that while Garry Wilson was listed as a permanent member of the gang, Gary Wilson was working on Leo Wilson's tie-up gang since 1999, which is a regularly designated gang, and he was not allowed to work in Taylor's gang at the same time; that Leo Wilson is Garry Wilson's father; that a member is not allowed to be on two gangs as a permanent member at the same time; that Header Howlett had vacancies in December 2001 in that Galloway was removed from the gang by Rowell, and J. H. Richardson had asked to be removed from the gang in July or August 2001 since he had a "AA," classification which is the highest seniority, and he could pick any job that was available; that in January 2002 Will High transferred from Howlett's gang to a cargo gang; that Walter Moore III should not have been carried in Devane's gang in December 2000 because Moore left the industry, Willie Frazier should not have been carried in this gang since 1998 because under the Seniority Plan casuals cannot be in gangs²⁰, and John Brown got in an accident and died in November 2001 and so he should not have been carried in Devane's gang in December 2001; that there was a vacancy in Clyde Dinkins gang in December 2000 and December 2001 in that Reggie Hagans should not have been included in the list of gang members because he had left the industry and he had a full time job with the State since 1999; that Hagans was replaced in December 2001²¹; that in December 2000 and December 2001 Lee Davis should not have been included in the list of gang members in Jimmie King's gang because he had not been working in that gang²²; that in December 2000 and December 2001 Melvin Dinkins and Willie E. Brown should not have been included in Gore's gang because Melvin Dinkins left the industry ever since 1999, and Willie Brown had not been working with the gang; that Greg Nixon should not have been included in Spaulding's gang in December 2000 and December 2001 because he had not worked with the gang since 1999; that Paige and Rose should not have been included in Simpson's gang in December 2000 and December 2001 because Paige left the industry prior to 2000 and was working for the State full time, and Rose had left; that Mohammed (Howard) Marshburn should not have been included in Scipio Hawkins' gang in December 2000 and December 2001 because he left the industry²³; that Marvin Bryant should not have been in Thomas Bryant's gang in December 2001 because Marvin Bryant transferred out of that Carpenter gang to Clyde Dinkins Cargo gang in December 2001; that Thomas Jacobs should not have been included in Thomas Jacobs' gang in December 2001 because he died before December 1, 2001; that Moses Dyson is the header of that gang now; that Reggie Hawkins

¹⁸ Venture, a "J", transferred from a Carpenter gang, Moses Dyson's, to Mack's Cargo gang in January 2002. D. R. Washington testified that he had two sets of licenses and he was not aware that Venture had any licenses until later when Venture received a hustler license.

¹⁹ D. R. Washington testified that while it is indicated at the bottom of page 18 of General Counsel's Exhibit 84 that Donald Pridgen has a "J," Pridgen's classification changed to a "casual" in November 2001.

²⁰ Frazier was not removed and eventually he became an "H".

²¹ With respect to the list of gang members in Header Top Keaton's gang, Counsel for General Counsel pointed out that the number 4 was missing and so there were only 9 members in that gang.

²² Counsel for General Counsel points out that the list is not correctly numbered. It contains the name of the header and eight other members.

²³ Counsel for General Counsel points out that the number 6 is missing from the list of Hawkins' gang members.

should not have been included in Pellom’s Carpenter gang in December 2001 because he transferred out of the gang in December 2001 and went to Simpson’s Cargo gang; and that this vacancy on Pellom’s gang was not filled by December 31, 2001.

5 On cross-examination D. R. Washington testified that Header Spaulding told him that Nixon had not been working with him for several years; that in April 2000 seven gangs had permanent vacancies and under the Seniority Plan they were supposed to fill those vacancies in December 2000; that not all of the gang vacancies were filled in December 2000; that if the permanent vacancies were filled according to the Seniority Plan in December 2001, he would
10 have been placed in a spot ahead of some of the people that went in the gangs; that since he had his leg amputated in November 2001 he was still disabled in December 2001 notwithstanding the fact that he had a prosthesis; that Rose was incarcerated for over six months; that in December 2001 vacancies on the gangs were posted²⁴; that Hagans was taken off his gang in December 2001 and Marvin Bryant went in that gang at that time; that it is his
15 understanding that if a man does not work one hour in a contract year, he is considered by the Seniority Board to have left the industry; that if a man has worked one hour in a contract year, he has not left the industry; and that Howard Marshburn left the industry and he should not have been included in Hawkins’ gang.

20 Counsel for General Counsel introduced the “EMPLOYERS ILA PENSION AND WELFARE FUND, Employee Hours History” for nine members, General Counsel’s Exhibits 85-93. As here pertinent, General Counsel’s Exhibit 85 shows that Beatty had 73.5 hours in 1999, 45.5 hours in 2000, and 29 hours in 2001; General Counsel’s Exhibit 86 shows that Davis had 530.5 hours in 1999, 288.5 hours in 2000, and 197 hours in 2001; General Counsel’s Exhibit 87
25 shows that Melvin Dinkins did not have any hours after 1997²⁵; General Counsel’s Exhibit 88 shows that Hagans had 223.5 hours in 1999, 199.5 hours in 2000, and 49.5 hours in 2001; General Counsel’s Exhibit 89 shows that Howard K. Marshburn had 17 hours in 1999, no hours in 2000, and 33 hours in 2001; General Counsel’s Exhibit 90 shows that Walter J. Moore, Jr. (described above as Walter Moore III) had 499 hours in 1999, 180.5 hours in 2000, and 64.5
30 hours in 2001; General Counsel’s Exhibit 91 shows that Gregory Nixon had no hours after 1998; General Counsel’s Exhibit 92 shows that Paige had no hours in 1999, 94 hours in 2000, and 154 hours in 2001; and General Counsel’s Exhibit 93 shows that Rose had 472 hours in 1999, 77 hours in 2000, and no hours are specified for 2001. The Respondent stipulated that the fiscal year begins on October 1 and ends on September 30, i.e. 1999 begins on October 1,
35 1998 and ends on September 30, 1999.

Gregory Washington, who is D. R. Washington’s brother and who is Chairman of the Executive Board of the Respondent, testified pursuant to a government subpoena that headers
40 are required by the Seniority Plan to fill any vacancies existing in their gang between December 1 and December 31 of that calendar year; and that there were vacancies existing in gangs as of

²⁴ General Counsel’s Exhibit 104 is the notice of “Headers Who Have Gang Openings” which was posted on or about November 29, 2001. It lists one opening in each of the gangs of Devane, Howlett, Simpson, and Taylor, and two vacancies in Mack’s gang.

45 ²⁵ As noted above, General Counsel’s Exhibit 100 is a letter dated December 3, 2001 from Rowell to Melvin Dinkins advising him that he was no longer assigned to a gang because he had not actively worked in his gang for some time. General Counsel’s Exhibit 101 also gives Dinkins’ hours.

50 Also as noted above, General Counsel’s Exhibit 102 is a letter from Rowell to member Carl Parker removing him from a gang because he did not show up for work and was employed outside of the industry. General Counsel’s Exhibit 103 shows Parker’s hours.

January 1, 2001 and as of January 1, 2002 which had not been filled in the preceding December. On cross-examination Gregory Washington testified that he began working at the Local in 1989, he received an “H” in 1990²⁶, and his classification was changed in 1992 to a “G”; that in December 1993 he filed a grievance with the Seniority Board arguing that he was more
 5 qualified and he had a higher classification than some of the people who were chosen for permanent gang assignments²⁷; that the Seniority Board ruled in his favor and he was given a permanent position on Lockhart’s gang; that in choosing a person to fill a permanent position on a gang the Seniority Plan refers to qualifications and seniority; that the Seniority Plan also indicates that the vacancy must be filled and, therefore, the header has the responsibility to pick
 10 the best qualified man or woman he can, and the header cannot, using qualifications as an excuse, avoid filling his gang; and that there was a list of vacancies posted by the Local.

Rowell testified that he spoke with D. R. Washington about getting into a gang, telling him to be patient and that when some work came to Sunny Point perhaps people would be put
 15 into gangs prior to December; that in December 2001 D. R. Washington was disabled in that he had his leg amputated; that sometime after December 2001 Metts asked him about a gang assignment and he told Metts that a header would have to select him; that with respect to the filling of permanent vacancies in gangs in December 2001, he had to go out of town with Local 1426’s business agent on January 4, 2002 and so the vacancies were not filled until he came
 20 back from his out of town trip; that the Seniority Board has never required a header to fill a vacancy where the header could not find a qualified person; and that transfers between gangs are treated like permanent positions, and they are done in the month of December of each year. On cross-examination Rowell testified that a header could remove a member of his gang if the member did not appear for work on a regular basis; that Local 1426 cannot let a person stay in
 25 a gang if he is not working or appearing for work since the Union has people who are not in a gang showing up at the Hall every day seeking employment; that Local 1426 does not remove anyone from a gang but rather Local 1426 contacts the header to determine the member’s status; that a member who has no hours working with his gang for one year, and is not on disability, is considered to have left the industry and he will be replaced if he does not provide
 30 some acceptable explanation; that if a member has 1 or more hours working on the docks then it is entirely up to the header to determine whether he wants to keep that man in his gang; and that headers are the only ones who remove members from gangs. On cross-examination Rowell testified that before he and Local 1426’s business agent went on the trip at the beginning of
 35 January 2002 he announced at a shape up that the rules with respect to filling vacancies in December were going to be relaxed until he got back because he wanted to be on hand to make sure that it went right; that while he can not change the Seniority Plan on his own, he can change it with the consent of the owners; that it is possible that approximately six gang positions were filled after he came back from his out of town meeting in January 2002; and that he
 40 guessed that four gang positions, rather than six, were not filled in December 2000. On redirect Rowell testified that when headers remove someone from the gang the member is informed by the Union; that when he delayed the filling of gangs to January 2002 he was “sure” (transcript page 1136) that he made a phone call to one of the Seniority Board members, Helms, indicating that he was going to be out of town and what he intended to do; and that the employers had no objection to the delay in filling vacancies until later in January 2002. On recross Rowell testified
 45 that he told either Helms or Jamie Wrightman of his intent to delay the filling of vacancies in

²⁶ While the Seniority Plan did not have an “H” classification in 1990, the then President of the Local, Sloan, gave certain members an identification card with an “H” on it to distinguish which people had worked at least 700 hours the year before.

²⁷ At the time he was a “G” and the Seniority Plan did not have a classification lower than a “G.”

gangs until after he returned from his out of town trip in January 2002.

5 Hines, who has been the business agent for Local 1426 since 1990, testified, with respect to General Counsel's Exhibit 84, that none of the cargo and carpenter gangs, all the members of which were listed in the exhibit, had vacancies as of January 1, 2002, except for the gangs headed by Keaton, who had one vacancy, and King, who had one vacancy; that the vacancy in King's gang was created by a disability retirement and there was a retirement in Keaton's gang; that he was assigned to Taylor's gang and if he is not elected business agent again he will return to that gang; that some men in maintenance are assigned to Taylor's gang and if their maintenance jobs end, they will go back to Taylor's gang; and that he did not know why the two above-described vacancies were not filled in December 2001 but he guessed that there were not qualified people to fill the two vacancies. Hines further testified that in January 2002 there was a vacancy in William Lockhart's gang since Lockhart retired and one of his gang members, Mack, became the header; that Pridgen and Ventura were placed in this gang in 10 January 2002; that in January 2002 Eric Robinson, Vernon Patton, and Donald Doyle were placed in Howlett's gang when J. H. Richardson left the gang, Galloway was removed from the gang, and High transferred out of the gang and went to Devane's gang; that the vacancy in Simpson's gang was filled by Hawkins, who transferred from Thomas Jacob's (According to General Counsel's Exhibit 84, it was Pellom's gang.) carpenter gang; that the vacancy in 20 Taylor's gang was filled by James Underwood; that in the carpenter gangs Hollis was added to Pellom's gang, Alvin Chavez was added to Dyson's gang and Cooper was added to Thomas Bryant's gang; that as of January 2002, excluding people on disability or in maintenance, there were no other vacancies in the gangs that he could remember; that members of the Local who do maintenance work repairing chassis, containers and over-the-road trucks are seniority 25 classified and they can work off the floor but generally since they have 40 hour a week jobs, they allow other members to work off the floor ahead of them; and that Howard Marshburn, who is assigned to the gang of Scipio Hawkins, is on a leave of absence, which he is entitled to as long as he does not work in an industry that is competitive with long shoring. On cross-examination Hines testified that Rowell would have been the person who gave Marshburn the 30 leave of absence; that he became aware that Marshburn had a leave of absence when header Scipio Hawkins asked him about Marshburn and he spoke to Rowell who told him that Marshburn had a leave of absence; that he did not know if leave of absences, which are covered in the Seniority Plan, are a matter controlled by the Seniority Board; that Melvin Dinkins, who is listed as a member of Gore's gang, has no hours with the Union since 1997, 35 General Counsel's Exhibit 87; and that Melvin Dinkins has been out on disability since 1997, but there are no disability hours listed for Dinkins because in order to have disability hours you have to qualify by earning 700 hours which Dinkins never did.

40 William Freeman, who has been a member of Local 1426 for 39 years and a member of a longshoreman gang for the same period of time, testified that he has seen people who are hook or hold men made a permanent member of a crew but this does not happen often.

Header Howlett testified that he fills permanent vacancies based on what qualifications he needs and then he looks at seniority; that in December 2001 he made some replacements In 45 his gang; that at that time he was looking for forklift and bulldozer drivers and hold men, and he picked up Donald Doyle, Patton, and James Robinson; that McCormick sent him a registered letter about getting into his gang in December 2001 or January 2002 but he did not recall any discussions with D. R. Washington or Metts about getting into his gang; that he was aware in December 2001 that D. R. Washington had had his foot removed; that Donald Doyle had the 50 most seniority of those on the list of members seeking a permanent gang position; that Patton can drive a bulldozer and a forklift and he is "a good strong person for ... [a] hold job" (transcript page 1234); that James Robinson can drive a forklift and "he's real good in the hold"

(transcript page 1234); and that member Galloway was removed from his gang when Galloway missed 6 months work while he was in jail. On cross-examination Howlett testified that while Donald Doyle came into his gang in December 2001, Patton and James Robinson did not come into his gang until January 2002; that at the time both Patton and James Robinson were
 5 classified as casuals; that he did not remove Galloway from his gang; that while he asked Rowell about Galloway's status because Galloway had not made hours for the past three years, Rowell only said at the time that he would check it out, and he subsequently found out that Galloway was removed from his gang when he received a copy of a letter from Rowell to Galloway informing him that he had been removed from the gang; that eventually Galloway was
 10 reinstated to the gang by Rowell; that to maintain his seniority classification a member has to have worked 400 hours in the prior fiscal year; that he could not disagree that in 2001 Galloway had 506 hours of work time; and that under the Seniority Plan the header is required to go by classification first when filling a gang position.

Header Taylor testified that on days he is not taking his gang out he occasionally works with other gangs by exercising his seniority off the floor; that in December 2001 he had a vacancy in his gang and he selected Underwood to fill the vacancy; that he choose Underwood, who was a "G," because Underwood had worked in his gang a number of times and Underwood was a good hold worker who did not mind getting dirty; and that he did not have any
 20 conversations with D. R. Washington or Metts about vacancies in his gang and he did not accept a registered letter from McCormick. On cross-examination Taylor testified that the one vacancy in his gang in December 2001 was created when Gary Wilson left for the tie-up gang; that since 1997 Gary Wilson had worked regularly with his father on the tie-up gang but he came back to work with Taylor's gang one or two times since 1997; that he did not remove Gary
 25 Wilson from his gang in December 2001; that when the vacancies were posted he asked in January 2002 who needed to be replaced, and he was told it was Gary Wilson; and that he did not ask about it earlier because he did not believe that he had any vacancies in his gang.

Header Simpson testified that he has filled permanent vacancies in his gang; that
 30 normally his approach is to fill the vacancy with someone who can do the job that needs to be done; that when he is not working with his gang he works with other gangs; that McCormick has worked in his gang as a driver and a hook person; that D. R. Washington has worked in his gang two or three times; that he has seen Metts driving a bus; that he may have had a vacancy in his gang in December 2000; that he did have a vacancy in his gang in December 2001 and
 35 he selected Reggie Hawkins to fill the position; that Hawkins transferred from Pellom's carpenter gang; that he selected Hawkins because Hawkins approached him and he needed a good man like Hawkins who could work in the hold, hook and unhook steel, operate a forklift, and drive a truck; that he had seen Hawkins work and he was impressed with the way he worked; that there was no reason he did not select McCormick; that he was aware in December
 40 2001 that D. R. Washington had lost his foot; and that he never saw or worked with Metts before December 2001. On cross-examination Simpson testified that he did not fill any vacancy in December 2000; that before December 2001 two of the members in his gang were not coming to work, namely Rose and Paige; that according to General Counsel's Exhibit 116, which is a Pension and Welfare Fund printout, Rose worked 77 hours in 2000²⁸; that he never received
 45 anything indicating that Rose had been removed from his gang; that according to the Fund printout, Rose did not work even an hour in his gang in 2001; that Rose and Paige are still carried in his gang; that that according to General Counsel's Exhibit 117, which is a Pension and Welfare Fund printout, Paige worked 94 hours in 2000 and he did not work at all in 2001²⁹;

50 ²⁸ The printout does not have any hours for any year after 2000.

²⁹ As noted above, General Counsel's Exhibit 92 shows Paige worked 154 hours in 2001.

and that he did not know that permanent vacancies are required to be filled during December.

Header Mack, who is also a winch man, testified that McCormick has worked in his gang; that he did not know what skills and abilities D. R. Washington has and he has never
5 worked with him in other people's gangs; that he just knew that Metts drove a bus; that in
January 2002 he filled his two vacancies with Ventura, who was a "J" at the time, and Donny
Pridgen, who was a casual at the time, because Ventura was a good hold man and he could
drive a lift and a truck, and Pridgen was skilled in that he could operate a lift, a truck, and a
10 bulldozer; that his predecessor, Lockhart, selected Ballard, who was a good winch man, to fill a
vacancy in the gang in December 2000; and that in December 2000 he was not aware of any
other winch man wanting to fill the vacancy in Lockhart's gang. On cross-examination Mack
testified that two vacancies occurred in his gang when Jason Millhouse retired in 2000 and
Michael Dinkins went up into the office and became an officer of the Union; that Lockhart retired
15 in August or September 2001, and Beatty, who did not come to work for some time, was carried
in the gang because "[a]in't nobody told me to take him off" (transcript page 1299); that he did
not have the option to remove a member who stops coming to work in his gang; that prior to
December 2001 he worked with D. R. Washington in other gangs but he was not aware of D. R.
Washington's qualifications to operate vehicles; and that he did not know that McCormick could
20 operate anything but a bus and a truck. On redirect Mack testified that in December 2001 he
was aware that D. R. Washington had had his foot amputated and he had not received a
release to work.

Header Keaton testified that he has filled a permanent vacancy in his gang and the
25 criteria are seniority and qualifications; that he has worked with McCormick both in his gang and
in another gang; that D. R. Washington worked in his gang once or twice and he is acquainted
with his skills and abilities; that he has had Metts work in his gang as a longshoreman and it
was his observation that Metts could work; that Metts worked as a stickman, placing wood
under a shipment, and as a lift driver; that in December 2000 he filled a permanent vacancy in
30 his gang with Franklin Graham, who was a "G" at the time, because he had more seniority than
all the other members who were on the list seeking to fill a permanent vacancy on a gang; and
that Graham had more seniority than McCormick, D. R. Washington, and Metts, Graham
worked in the industry repairing containers for 10 years, and he could work in the hold or drive a
forklift or a truck. On redirect Keaton testified that he was not aware that Metts sought a job in a
gang in December 2000.

Header Devane testified that he was somewhat aware of the procedure for filling a
35 permanent vacancy in his gang; that it was his understanding that the permanent vacancy had
to be filled in December, and he tries to pick the best qualified man unless he needs a special
man; that McCormick had worked in his gang as a truck driver and on the dock on a lumber
boat; that D. R. Washington worked in his gang about twice on a paper boat and as a stickman
40 on a steel boat; that he did not believe that he worked Metts in his gang and he never worked
with Metts in somebody else's gang; that in December 2001 he filled a permanent vacancy in
his gang with High, who was a winch man, because his winch man, John Brown, was killed in
November 2001 while working and he needed a winch man; that High transferred from Howlett's
45 gang; and that he considered High to have more skills, capacity and ability than McCormick, D.
R. Washington or Metts. On cross-examination Devane testified that on December 1, 2001
Moore was taken out of his gang because Moore told him that he did not want to be a
longshoreman anymore; that, according to General Counsel's Exhibit 90 as noted above, a
Pension and Welfare Fund printout, Moore had 180.50 hours in 2000 and 64.50 hours in 2001;
50 and that High transferred into his gang in January 2002. Subsequently Devane testified it was
necessary to have the President of the Union involved in determining if High could be
transferred because there was so much controversy about who was going into gangs, and this

held the transfer up.

Header Vaught testified that formerly he was the Vice President and business agent of the involved Local; that on days that his gang is not going out he comes to the Union hall and works in someone else's gang; that it is his understanding that permanent gang vacancies are filled going by seniority first and then by qualifications; and that seniority can be bypassed if the man does not have the qualifications the header needs. On cross-examination Vaught testified that for a header to bypass a man with more seniority the header has to have the permission of "the President, Vice President, Seniority Board, whatever" (transcript page 1349); and that he has skipped seniority and taken a less senior man when the more senior man is a laborer and cannot operate a winch, a truck, a lift, or a big bird.

Contentions

General Counsel on brief contends that since the gangs rotate and each one does not generally work every day, a permanent gang vacancy is a commodity to the header of the gang, which that header is then able to utilize as trade with other headers for work for himself on days when his gang is not scheduled to work; that headers seek to create and preserve vacancies in the membership of the gangs they oversee; that while a header can fill a gang vacancy at any time, under the Seniority Plan a header must fill all vacancies in his gang by the end of each calendar year; that in order to show a violation of the Act concerning D. R. Washington and McCormick, it need only be proven that unfilled gang vacancies existed for which they could have been selected in December 2000, or alternatively December 2001; that for Metts only unfilled gang vacancies in December 2001 are relevant; that General Counsel is not required to prove that any of the three Charging Parties would have actually been selected by a header for a particular permanent gang position; that to establish a violation of the Act, it need only be shown that (1) vacant permanent gang positions existed in December 2000 and 2001, (2) Washington, McCormick, and Metts were sufficiently qualified to be selected to fill these vacant permanent gang positions, and (3) the Union through its agent headers arbitrarily deviated from the rules of the Seniority Plan and did not fill vacant gang positions by the end of December 2000 and 2001; that there were permanent gang vacancies which were not filled in December 2000 or December 2001; that the Union's refusal to abide by the requirements of the Seniority Plan by arbitrarily not filling gang vacancies is tantamount to refusing to refer employees for work; that a union's departure from clear and unambiguous referral procedures by a refusal to refer qualified employees resulting in a denial of employment establishes a prima facie violation of Section 8(b)(1)(A) and 8(b)(2), *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 220 NLRB 147 (1975), and compare *Boilermakers Local 374 (Combustion Engineering, Inc.)*, 284 NLRB 1382 (1987), and *Iron Workers Local 118 (Carpenter Erectors)*, 309 NLRB 808, 811 (1992); that the Union violated the Section 7 rights of the three Charging Parties and others by unlawfully refusing to fill all gang positions in December 2000 and December 2001 thereby failing to provide them with an opportunity for referral for employment through its exclusive hiring hall, which action cause employers in NCSA to discriminatorily not hire the Charging Parties in violation of Section 8(a)(3) and thus resulted in a Section 8(b)(2) violation by the Union; and that the Union has provided no valid reason for its outright refusal to adhere to the Seniority Plan and fill all vacant gang positions in December 2000 and December 2001.

The Union on brief argues that permanent vacancies in gangs are posted on the Local bulletin board, along with a posting of individuals, by seniority, desiring a permanent position in gangs; that permanent vacancies occurring throughout the year are filled on a permanent basis at the discretion of the header; that persons who do not post their names are not considered for permanent vacancies in December; that McCormick was classified for seniority as a "Casual" in December 2000 and December 2001; that in December 2001, with the exception of Pridgen and

Robinson, all of the others chosen were classified with a higher seniority than McCormick, and Robinson and Pridgen, both of who were casuals, were chosen because of their skills and their ability to work in a hold, while McCormick preferred to drive; that Metts failed to follow the established system of posting his name with seniority classification for vacancies posted in gangs in December 2001; that D. R. Washington was a “J” in December 2000 and he had no complaint of Header Lockhart’s selection of Ballard, who was a “J,” as a winch man, and Header Keaton’s selection of Graham, who was a “G,” in December 2000; that while D. R. Washington claims that there should have been a vacancy in Taylor’s gang in December 2000 because Gary Wilson was also a member of the tie up gang, the Seniority Plan only covers loading gangs and carpenter gangs; that while D. R. Washington claims that the positions held by Walter Moore III in Devane’s gang, Reggie Hagans in Clyde Dinkins’ gang, Lee Davis in King’s gang, Melvin Dinkins in Gore’s gang, Gregory Nixon in Spaulding’s gang, Steven Paige and Clinton Rose in Simpson’s gang, and Howard Marshburn in Hawkins’ gang should have been vacant in December 2000, all but Dinkins, Nixon and Marshburn had hours in contract year 2000³⁰; that D. R. Washington failed to post his name in December 2000; that as a practical matter D. R. Washington was disabled and disqualified from any vacancy in December 2001 because of his amputation and non-release by his physician to work as a longshoreman; that Rowell established that it is up to the discretion of the header to leave a person in a gang, and to take qualified, skilled people to work over senior classified persons who did not have the capacity or ability to perform the work; and that determining vacancies is in the discretion of the header, and there is no evidence of an abuse of discretion in this matter.

Analysis

While the Union asserts on brief that determining vacancies is in the discretion of the header, the evidence of record indicates that Rowell is the one who determines whether there is a vacancy to be filled. On the one hand, (a) Rowell did not deny stating at a Union meeting in August 2000 that he was trying to let the men in the gangs make their hours and they were not going to fill the gangs at that time, (b) Header Simpson did not deny saying that he was going to wait and see if Rowell was going to take Paige out of the gang, (c) Header Howlett testified that he did not remove Galloway from his gang and he found out that Galloway was removed,³¹ (d) Header Taylor did not remove Gary Wilson from his gang, he saw a vacancy posted for his gang, and when he asked about it he was told it was Gary Wilson, (e) Header Simpson testified that he never received anything indicating the Rose had been removed from his gang, and that he did not even know that permanent vacancies are required to be filled in December, (f) Header Mack testified “[a]in’t nobody told me to take ... [Beatty] off [the gang]”³² and he, as a header, did not have the option to remove a member who stops coming to work in his gang, and (g) Hines testified that Header Hawkins asked him about Marshburn, who had 17 hours in 1999, no hours in 2000, and 33 hours in 2001, and subsequently Rowell told him that Marshburn was on a leave of absence, apparently granted by Rowell. On the other hand, Rowell testified that the headers could remove a member, the Union does not remove anyone, headers are the only ones who remove members from gangs, and when the header removes, the Union informs the

³⁰ The evidence of record, General Counsel’s exhibit 84, shows that in December 2001, 12 members are listed in Gore’s gang, 11 members are listed in Spaulding’s gang and 10 members are listed in Hawkins’ gang because there is no number 6 on the list. A similar exhibit was not introduced showing the number of gang members in December 2000. It is noted that Hines testified that Marshburn, who is in Hawkins gang, was on a leave of absence.

³¹ Howlett did testify that he asked Rowell about Galloway.

³² It is noted that according to the testimony of D. R. Washington, the former Header of this gang, Lockhart, said that he would take Beatty out of the gang when he got ready.

member that he has been removed. While Rowell may not want to admit it, it is obvious that notwithstanding his testimony,³³ he controls when someone is removed from a gang and thereby he controls, to a great extent, how many permanent gang member positions are vacant.

5 Taking the latest first, did the Union unlawfully fail and refuse to assign permanent gang positions to D. R. Washington, McCormick, and Metts in December 2001 and thereby fail to represent them for reasons that are unfair, arbitrary, invidious and a breach of the fiduciary duty owed the employees it represents? With respect to certain allegations regarding vacancies, if an individual has earned some hours during a contract year, then he or she has not left the industry since there is no break in service. Under these circumstances there is no requirement that the individual be removed from the gang. Rowell testified that if a man has 1 or more hours working on the docks then it is entirely up to the header to determine whether he wants to keep that man in his gang. If the man has hours during the contract year, it is a matter of discretion. Who actually exercises that discretion is set forth above. The following individuals would be in this category since they worked some hours during the involved contract year, 2001: Paige, Beatty, Moore, Hagans, Davis, and Marshburn.³⁴ It has not been shown that there was an abuse of discretion regarding these individuals.

20 With respect to those individuals who did not earn any hours in a given contract year, as indicated in the Memorandum of Understanding between the NCSA and the Union, "Clarifying item 4B(a): 'leaves the industry' is defined as a break in service where one has not earned any hours in any given contract year." Respondent's Exhibit 2. Item 4B(a) of the Seniority Plan, General Counsel's Exhibit 14, reads as follows:

25 B. The seniority of any man shall cease with respect to priority of employment in the event he:

a. Voluntarily quits, resigns, retires and/or leaves the industry.

30 It is questionable whether this clarified language could be interpreted to mean that someone who leaves the industry because of a break in service when he has not earned any hours in a given contract year gives up his right to a permanent position on a gang. Nonetheless, Rowell testified that a member who has no hours working with his gang for one year, and is not on disability, is considered to have left the industry and will be replaced if he does not provide some acceptable explanation. The following individuals would be in this category since they did not work any hours during the involved contract year, 2001: Clinton Rose, Melvin Dinkins, and Gregory Nixon. None of these individuals were removed in December 2001. However, since there were more than 10 members in the gangs of each of these individuals, even if they had been removed, it would not have created a vacancy in their respective gangs since the cargo gangs under the Seniority Plan are supposed to have 10 members.³⁵

³³ And the testimony of D. R. Washington regarding what Lockhart told him about Beatty.

45 ³⁴ It is noted that Header Devane testified, as set forth above, that Moore was taken out of the gang on December 1, 2001 because Moore told him that he did not want to be a longshoreman anymore. With the replacement of John Brown by winch man High and since it was not established that Willie Frazier, who was an "H" in December 2001, should be taken out of the gang, Devane's gang had the required 10 members.

50 ³⁵ No documentary evidence was introduced showing William Brown's hours. If D. R. Washington is correct in his testimony that William Brown did not work with Gore's gang, his removal would not create a vacancy because Gore's gang had 12 members in December 2001 and with the removal of William Brown and Melvin Dinkins there would still be 10 members.

With respect to the positions which were filled in December 2001 (actually in January 2002 but for the purposes at hand, I will continue to refer to it in terms of December 2001), D. R. Washington was not physically capable of doing longshoreman work at the time, and all of those
 5 involved knew it, and Metts (a) did not place his name on the posted list of those who wanted to be considered for permanent gang positions, and (b) did not establish, with the exception of Header Thomas Bryant, that he had asked any of the headers to be considered for any vacancies they had at the time. Regarding the choice made by Thomas Bryant, namely “Casual” Cooper, it appears that Thomas Bryant explained his reasons to “Casual” Metts in advance of
 10 the selection of Cooper in that he told Metts that he was going to fill the opening with an individual who was working with him. Originally Metts testified that he felt that Header Thomas Bryant discriminated against him because he was an “H” at the time. Subsequently Metts conceded that he had a “Casual” classification when Cooper was chosen. There was no discrimination in the choice. It has not been shown that there was an abuse of discretion or a
 15 reliance on reasons that are unfair, arbitrary, or invidious in this permanent gang selection. Obviously since Thomas Bryant worked with Cooper, he was basing his selection on his personal knowledge of the work ability of Cooper and, therefore, made an objective decision based on factors he could lawfully rely on. In these circumstances, the choice was not made for reasons that are unfair, arbitrary, or invidious. As noted above, McCormick was a “Casual” in
 20 December 2001. It has been established that, in addition to Cooper, certain of the individuals selected for permanent gang positions in December 2001 were also “Casuals.” As noted above, the cargo headers involved explained their reasons for making the choices they did. Patton and James Robinson were described as good hold workers and the former, like Pridgen, can operate a bulldozer. While McCormick testified about the equipment she operates, she did not
 25 include bulldozers. It has not been shown that there was an abuse of discretion or a reliance on reasons that are unfair, arbitrary, or invidious in those permanent gang selections. While carpenter Header Pellom did not explain his reasons for selecting “Casual” Ivy Hollis to replace the transferred Reggie Hawkins, and carpenter Header Dyson did not testify to explain his reason for selecting Alvin Chavez, it was not established with respect to these choices that
 30 there was an abuse of discretion or a reliance on reasons that are unfair, arbitrary, or invidious.³⁶

As noted, Hines testified there were two gangs which had vacancies which were not filled in December 2001. Both had numbers missing on their list of gang members, General
 35 Counsel’s Exhibit 84, so that although both of these gangs only had nine members, the last member listed had the number “10” in front of his name. Neither was included in the posted list of gangs with vacancies, General Counsel’s Exhibit 104. Hines speculated as to the reason why Headers Keaton and King did not fill these vacancies. Keaton and King did not testify at the trial herein, and so they did not explain why these cargo gang vacancies were not filled. The
 40 Seniority Plan, as noted above, specifies that “On or after December 1 through December 31, each Header shall fill all permanent vacancies in his gang according to seniority qualifications and classification.” (Emphasis added.) “Shall” is not may. This was not done with the above-described two vacancies and Keaton and King did not testify to explain why the dictates of the Plan were not complied with. The non-selection of two individuals to fill these vacancies in the
 45 circumstances extant here was arbitrary and invidious and it adversely impacted on the employment prospects of those not selected. Even if these vacancies had been filled, D. R.

³⁶ It is not clear what classification Chavez is. If he had a classification above “Casual,” then he obviously would have been entitled to the position over McCormick. It is noted that with the
 50 death of carpenter Header Thomas Jacobs in December 2001 and with the transfer of Ventura out of this gang, there would have been a vacancy in what became Dyson’s gang.

Washington and Metts would not have been considered since the former was not physically capable of doing the involved work at the time and the latter (a) did not have his name included with those posted as seeking a permanent gang position, and (b) did not establish that he asked Keaton or King to be considered. McCormick did, however, post her name. Some of the headers have had McCormick work in their cargo gangs. None testified that she either could not or would not do her job. The Union violated the Act as alleged in failing and refusing to assign a permanent gang position to McCormick in December 2001.

Did the Union unlawfully fail and refuse to assign permanent gang positions to D. R. Washington and McCormick in December 2000 and thereby fail to represent them for reasons that are unfair, arbitrary, invidious and a breach of the fiduciary duty owed the employees it represents? It is not alleged that either D. R. Washington or McCormick should have been chosen over Ballard, who is a winch man, or Graham, a "G," when they were chosen for permanent gang assignments in December 2000. According to McCormick, a list of vacancies was posted in December 2000. If such a list exists, it was not introduced at the trial herein.

With respect to certain of General Counsel's allegations regarding vacancies in December 2000, if an individual, as noted above, has earned some hours during a contract year, then he or she has not left the industry since there is no break in service. Under these circumstances there is no requirement that the individual be removed from the gang. Rowell testified that if a man has 1 or more hours working on the docks then it is entirely up to the header to determine whether he wants to keep that man in his gang. If the man has hours during the contract year, it is a matter of discretion. The following individuals would be in this category since they worked some hours during the contract year involved here, 2000: Paige, Beatty, Moore, Hagans, and Rose. It has not been show that there was an abuse of discretion with respect to these individuals.

As noted above, Rowell testified that a member who has no hours working with his gang for one year, and is not on disability, is considered to have left the industry and will be replaced if he does not provide some acceptable explanation. The following individuals would be in this category since they did not work any hours during the involved contract year, 2000: Melvin Dinkins, and Gregory Nixon. Neither of these individuals were removed in December 2000. However, since, according to General Counsel's Exhibit 84 there were more than 10 members in the gangs of both of these individuals, even if they had been removed, it would not have created a vacancy in their respective gangs since the cargo gangs under the Seniority Plan are supposed to have 10 members. I am hesitant to include Willie Brown in this group because there is no documentary evidence regarding his hours. General Counsel did not introduce his Pension and Welfare history as General Counsel did for other members to show that they did not have any hours during a contract year. But even if he was included in this group, according to General Counsel's Exhibit 84 there would still be 10 members Gore's gang even with his removal. Regarding Marshburn, he did not have hours in contract year 2000. However, Hines testified that Marshburn was on a leave of absence. Under the Seniority Plan, paragraph 4A(f) of General Counsel's Exhibit 14, the Seniority Board can grant a leave of absence for up to a year. It is noted that Marshburn had 33 hours in 2001. It is not clear exactly when Marshburn was on the leave of absence Hines testified about. If he was not on the leave of absence in 2000 and if he should have been removed at that time, then according to General Counsel's Exhibit 84, Hawkins gang would only have had 9 members. General Counsel's Exhibit 84, however, shows who was in the gangs in December 2001. It has not been established that the gang members listed in General Counsel's 84 were the same in December 2000. Indeed Header Mack testified that his gang lost two gang members in 2000, namely Jason Millhouse and Michael Dinkins. It is noted that neither one is included in the list of gang members in Mack's (formerly Lockhart's) gang in General Counsel's Exhibit 84. A list of the gang members

for December 2000 was not introduced at the trial herein. In December 2000 some of the gangs may have had more than 10 members. So even if it is determined that a gang member should have been removed from one of the gangs, it has not been established exactly how many gang members each gang had in December 2000. It would be a mistake to declare that a vacancy
5 existed in a particular gang if even with the removal, it is possible that there were 10 or more members in the gang. As noted above, McCormick testified that there was a posted list of vacancies in December 2000. Such a list was not introduced at the trial herein.

Regarding Gary Wilson, on brief the Union indicates that D. R. Washington is correct in
10 asserting that a longshoreman cannot be a member of two gangs at the same time. While the Union cites the fact that the Seniority Plan covers loading gangs and carpenter gangs but not tie up gangs, the Union does not explain why, if there was not a problem, Rowell removed Wilson in December 2001. The situation with respect to Gary Wilson was the same in December 2000. In December 2001 Gary Wilson was replaced by James Underwood who was a "G" and worked
15 in the gang before. If Gary Wilson had been removed and was not replaced, according to General Counsel's Exhibit 84, Header Taylor's gang would only have had only 9 members. But again, General Counsel's Exhibit 84 speaks to the make up of the gangs in December 2001. It has not been established that in December 2000 the gangs were also only made up of the members listed in General Counsel's Exhibit 84.

20 As noted above, in December 2001 Keaton and King both had one vacancy in their gangs. This fact was shown by General Counsel's Exhibit 84, in addition to the testimony of Hines. If the make up of these two gangs was the same in December 2000 as it was in December 2001, then they both would have had one vacancy in December 2000.

25 Without a list of vacancies posted in December 2000, one does not have documentary evidence of exactly how many declared vacancies there were. As noted above, two of the vacancies were filled by Ballard and Graham. As indicated above, there is testimony of record that there were vacancies which were not filled in December 2000. Among those testifying
30 about the vacancies, Rowell testified that he guessed that four rather than six vacancies were not filled in December 2000. One would expect that Rowell was testifying about declared and not asserted vacancies. This would mean that there were six declared and posted vacancies in December 2000, two of which were filled by Ballard and Graham. General Counsel's Exhibit 104 shows that six vacancies were declared and posted by Rowell in December 2001. So having six
35 declared and posted vacancies in December 2000 would seem reasonable in comparison. In view of the above, I find that there were four declared and posted vacancies in December 2000 which were not filled. The Union did not explain at the trial herein why these declared and posted vacancies were not filled in December 2000. Moreover, the Union did not have the involved headers testify to explain at the trial herein why D. R. Washington and McCormick
40 would not have been considered for these vacancies. All six of the declared and posted vacancies in December 2001 were for cargo gangs. Additionally, Keaton's and King's vacancies were cargo gang vacancies. Both D. R. Washington and McCormick had worked on cargo gangs. Both McCormick and D. R. Washington were assigned permanent cargo gang positions when this proceeding went to trial. On brief the Union argues that in December 2000 D. R.
45 Washington did not post his name on the bulletin board of those seeking a permanent gang position. No record cite is given. Additionally, Rowell testified that there is no duty for a member to post his name on the board to try to get into a gang. And unlike Metts, D. R. Washington did speak with many of the headers in his attempt to be placed in a permanent gang position. I find that the Union unlawfully failed and refused to assign permanent gang positions to D. R.
50 Washington and McCormick in December 2000 and thereby failed to represent them for reasons that are unfair, arbitrary, invidious and a breach of the fiduciary duty owed the employees it represents. The Union violated the Act as alleged in failing and refusing to assign

permanent gang positions to D. R. Washington and McCormick in December 2000.

As pointed out by Counsel for General Counsel, by unlawfully refusing to fill all gang vacancies in December 2001, the Union violated the Section 7 rights of McCormick, and by
 5 unlawfully refusing to fill all gang vacancies in December 2000, the Union violated the Section 7 rights of McCormick and D. R. Washington. The Union's unlawful conduct caused employers to discriminatorily not hire McCormick and D. R. Washington in violation of Section 8(a)(3) of the Act and this resulted in a Section 8(b)(2) violation.

10 Conclusions of Law

1. SSA and Southeast are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

15 2. The Respondent, International Longshoremen's Association, Local 1426, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to assign permanent gang positions to Eliesher McCormick in December 2001, and to McCormick and D. R. Washington in December 2000, notwithstanding
 20 the fact that there were vacancies and notwithstanding the fact that the Seniority Plan requires that each Header shall fill all permanent vacancies in his gang according to seniority qualifications and classifications on or after December 1 through December 31, the Respondent Union violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

25 4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Remedy

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

35 The Respondent having discriminatorily failed and refused to assign a permanent gang position to Eliesher McCormick in December 2001, and to McCormick and D. R. Washington in December 2000, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis for McCormick from December 31, 2000 until she was assigned to a permanent gang position in May 2002, and for D. R. Washington from December 31, 2000
 40 until he was not able to work as a longshoreman in November 2001, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

45 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁷

50 ³⁷ 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.

ORDER

The Respondent, International Longshoremens’s Association, Local 1426, of
Wilmington, North Carolina, its officers, agents, successors, and assigns, shall

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1. Cease and desist from

(a) Failing and refusing to fill vacant permanent gang positions thereby failing to
represent unit employees for reasons that are unfair, arbitrary, invidious and a breach of the
fiduciary duty owed the employees whom it represents.

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

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

(a) Make Eliesher McCormick and D. R. Washington whole for any loss of earnings and
other benefits suffered as a result of the discrimination against them, in the manner set forth in
the remedy section of the decision.

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(b) Within 14 days from the date of this Order, remove from its files any reference to the
unlawful refusal to assign permanent gang positions to Eliesher McCormick and D. R.
Washington, and within 3 days thereafter notify Eliesher McCormick and D. R. Washington in
writing that it has done so and that failure and refusal to assign permanent gang positions will
not be used against them in any way.

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(c) Preserve and, within 14 days of a request, or such additional time as the Regional
Director may allow for good cause shown, provide at a reasonable place designated by the
Board or its agents, all records in the possession of the Union, including an electronic copy of
such records if stored in electronic form, necessary to analyze the amount of back pay due
under the terms of this Order.

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(d) Within 14 days after service by the Region, post at its union office and hiring hall in
Wilmington, North Carolina copies of the attached notice marked “Appendix.”³⁸ 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 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. In the event that, during the pendency of these proceedings, the Respondent has gone
out of business or closed the facility involved in these proceedings, the Respondent shall
duplicate and mail, at its own expense, a copy of the notice to all current members and former
members of the Respondent at any time since December 31, 2000.

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³⁸ If this Order is enforced by a Judgment of the 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.”

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(e) 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 has taken to comply.

5 Dated, Washington, D.C.

John H. West
Administrative Law Judge

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APPENDIX

NOTICE TO MEMBERS

5 Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board had found that we violated Federal labor law and has
ordered us to post and obey this notice.

WE WILL NOT fail and refuse to fill vacant permanent gang positions thereby failing to
represent you for reasons that are unfair, arbitrary, invidious and a breach of the fiduciary duty
owed to you.

15 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.

20 WE WILL make Eliesher McCormick and D. R. Washington whole for any loss of earnings and
other benefits suffered as a result of the discrimination against them, with interest.

25 WE WILL remove from our files any reference to the unlawful refusal to assign permanent gang
positions to Eliesher McCormick and D. R. Washington, and WE WILL within 3 days thereafter
notify Eliesher McCormick and D. R. Washington in writing that this has done and that the
failure and refusal to assign permanent gang positions will not be used against them in any way.

International Longshoremen’s Association, Local
1426

(Labor Organization)

30

Dated _____ By _____
(Representative) (Title)

35 The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor
Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it
investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under
the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s
Regional Office set forth below. You may also obtain information from the Board’s website: www.nlr.gov.

40 4035 University Parkway, Republic Square, Suite 200, Winston-Salem, NC 27106-3323
(336) 631-5201, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

45 THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST
NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS
NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S
COMPLIANCE OFFICER, (336) 631-5244.

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