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International Union of Operating Engineers, Local 150, AFL–CIO *and* Richard Chiado. Case 33–CB–4215

April 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On December 13, 2007, Administrative Law Judge John H. West issued the attached decision. The Respondent Union filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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

For the reasons stated by the judge, we agree that the Respondent Union violated Section 8(b)(1)(A) and (b)(2) of the Act, and its duty of fair representation, by departing from its established referral procedure when it dispatched member David Waters to work at a tank farm refurbishing project operated by Minnesota Limited (ML).

The Board has long held that a departure from established exclusive hiring hall rules that denies employment to an applicant

> inherently encourages union membership, breaches the duty of fair representation . . ., and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function.

Operating Engineers Local 406 (Ford, Bacon & Davis Construction Corp.), 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983); see also *Stagehands Referral Service, LLC*, 347 NLRB No. 101, slip op. at 3–4 (2006). As the judge found, under the Union's collective-bargaining agreements and longstanding practice, the Union had a well-established, nondiscriminatory procedure for referring members on work assignments. The Union departed from this procedure when Business Agent Roddie Thomason insisted on referring Waters, rather than one of the qualified members listed ahead of Waters on the Union's out-of-work list, to the ML worksite. Because Thomason acted on the basis of his own subjective opinion of who should be referred rather than according to the Union's referral criteria, and that departure was not necessary for the Union's effective performance of its representational duties, his action was unlawful.[3]

The Board has found that isolated referral errors in the operation of union hiring halls resulting from "mere negligence" are not unlawful.[4] However, Thomason's sustained insistence on referring Waters, compounded by the Local's refusal to correct his action even in the face of protest, was not mere negligence.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Union of Operating Engineers, Local 150, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Referring a member, or refusing to refer Richard Chiado or any other member, for a job in violation of the Respondent's established, nondiscriminatory referral procedure.

(b) Threatening to deny work to Richard Chiado if he asserted his referral rights under the Respondent's established hiring hall procedure.

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

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

(a) Make whole Richard Chiado, or any other qualified individual whom it should have referred to Minnesota

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] We also agree with the judge, based on the credited record, that Thomason unlawfully threatened the Charging Party, Richard Chiado, with retaliation for pursuing his right to the Pontiac work assignment according to the out-of-work list.

[4] See *Steamfitters Local 342 (Contra Costa Electric)*, 336 NLRB 549, 550–553 (2001), rev. denied 325 F.3d 301 (D.C. Cir. 2003); *Plumbers & Steamfitters Local 91 (Brock & Blevins)*, 336 NLRB 541, 542–543 (2001).

Limited, Inc. at its Pontiac, Illinois tank farm site, for any loss of earnings and other benefits suffered as a result of Respondent's referral of David Waters in violation of its established hiring hall procedure, in the manner set forth in the remedy section of the decision.

(b) 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 payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Utica, Illinois union hiring hall, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Subregion 33 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and 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 employees and members and former employees and members employed by the Respondent or on the out-of-work list at any time since February 5, 2007.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Minnesota Limited, Inc., if willing, at all places where notices to employees working at the Minnesota Limited, Inc., Pontiac, Illinois tank farm jobsite are customarily posted.

(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.

Dated, Washington, D.C. April 30, 2008

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refer any member, or refuse to refer Richard Chiado or any other member, for a job in violation of the Union's established, nondiscriminatory referral procedure.

WE WILL NOT threaten to deny you work if you assert your referral rights under the Union's established referral procedure.

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

WE WILL make whole Richard Chiado or any other qualified individual who should have been referred, pursuant to the Union's referral procedure, to Minnesota Limited, Inc. at its Pontiac, Illinois tank farm site, for any loss of earnings and other benefits suffered as a result of our referral of a member to that site in violation of the Union's established referral procedure.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL–CIO

Deborah A. Fisher, Esq., for the General Counsel.
Dale D. Pierson, Esq., of Countryside, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Peoria, Illinois, on October 1 and 2, 2007.[1] The charge was filed on March 14, and it was amended on June 18. The complaint, which was issued on May 31, alleges that International Union of Operating Engineers, Local 150, AFL–CIO (Respondent) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by, since about February 5,[2] failing and refusing to properly refer Richard Chiado to employment with Minnesota Limited, Inc. in violation of its established hiring hall rules, and by on about February 12, threatening to deny work to Richard Chiado if he tried to do anything about Respondent's refusal to refer him to employment on about February 7.[3] Respondent denies violating the Act as alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Minnesota Limited, Inc. (ML), a corporation with a jobsite located, inter alia, in Pontiac, Illinois, has been engaged in the business of pipeline excavation. The complaint alleges, the Respondent admits, and I find that during the calendar year before the complaint herein was issued, a representative period, ML, in conducting its business operations, derived revenues in excess of $50,000 from the performance of services directly to customers located outside the State of Illinois; that at all material times, ML has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent operates in Indiana, Illinois, and Iowa representing mostly heavy equipment operators and other employees in heavy highway, building, and pipeline construction. It operates hiring halls in its eight geographic districts. Each maintains an out-of-work list. When a member registers for work, the member's name is placed on the bottom of the out-of-work list. The member fills out a workcard on which the member indicates what equipment they can operate and what qualifications they have. Members are referred from the top of the out-of-work list, if they are qualified for the position. Employers seek qualified employees by submitting a work order to Local 150. The work order is recorded. The Union's dispatcher then will identify the member who is at the top of the out-of-work list and qualified to do the work. However, (a) if a member is already working for the involved employer, the employer can move that member to a new jobsite without going to the out-of-work list, and (b) if a member worked for an employer within the last 6 months that employer can request that member for a new job regardless of the member's place on the out-of-work list.[4] The employer has the final say on whether the member referred out is qualified to perform the involved work.

With respect to pipelines, the national pipeline agreement (GC Exh. 6), which is negotiated by the International Union of Operating Engineers, is administered by the locals, including Local 150. Under the national pipeline agreement employers are permitted to bring their regular employees to staff any job up to 50 percent of the number of employees required for the job. Usually there is a prejob conference involving the employer and Local 150. What is involved, including the staffing of the project, would be discussed at this conference. Dan Regan, who is assistant to the president of Local 150 and the director of Pipeline and Distribution, testified that under the national pipeline agreement a member of Local 150 cannot solicit work directly with an employer signatory to that agreement and if he did, he could be disciplined.

Counsel for the General Counsel and the Respondent stipulated that Respondent's offices, with respect to its referral procedure under the building agreement (GC Exh. 2) and the heavy and highway and underground construction agreement (GC Exh. 4)—with regard to construction work, operate as exclusive hiring halls; and Respondent stipulated that the local's offices do refer individuals from the same lists to other industries but in other industries that are not construction it cannot be an exclusive hiring hall by law but rather it has to be considered a referral hall, and the Heavy Highway and Building and the pipeline agreements are <u>all</u> construction agreements.[5]

When called by counsel for the General Counsel, Regan testified that he oversees the business agent in pipeline; that each of the eight districts of Local 150 has a referral office; that District 5's office is located in Utica, Illinois; that article II, section 7 of the building agreement refers to addendum no. 1 (GC Exh. 3) of the agreement, which addendum sets forth the procedures to be followed by the referral offices in making referrals to employers who are signatory to the building agreement; that article XII of the heavy and highway and underground construction agreement refers to addendum no. 1, which is the same addendum referred to in the building agreement and which, as noted above, sets forth the procedures to be followed by the referral offices in making referrals to employers who are

[1] All dates are in 2007, unless otherwise indicated.

[2] At the end of the trial herein counsel for the General Counsel's motion to amend the complaint to change the date in par. 5(d) of the complaint from February 7 to February 5 was granted.

[3] As noted above, the earlier reference in the complaint to February 7 was amended to February 5.

[4] This is known as call back rights. By using it, the employer avoids having to "shake down" (test) a new employee and train the new employee.

[5] On brief Respondent indicates "[a]t the hearing the parties stipulated that the National Pipeline Agreement . . . is a construction agreement and that the referral system operates as an exclusive hiring hall.[1]

[1] Local 150's stipulation was with the caveat that under the National Pipeline Agreement employers can obtain employees outside the Union's hiring hall (Tr. 22.)."

signatory to the heavy and highway and underground construction agreement;[6] that in each district the same referral office is used for both the building agreement and the heavy and highway and underground construction agreement; that article II(I) of the national pipeline agreement, which—as noted above—is General Counsel's Exhibit 6, provides that an employer has the right to employ and bring onto the job men who are regular employees of that employer, with the limitation that the employer cannot bring on more than 50 percent of the employees on the job; that article II(N) of the national pipeline agreement provides that in the event a valid nondiscriminatory exclusive referral procedure has been established by collective bargaining between a local of the Union and an association of highway and heavy contractors in the area in which the job is to be done, the employer agrees to utilize such referral procedures; that the referral procedure that article II(N) of the national pipeline agreement refers to is set forth in addendum no. 1 (GC Exh. 3); that the prejob is also "part of it" (Tr. p. 32); that article II(N)(a) reads "Nothing in this Agreement shall affect the Employer's inherent right to determine the competency and qualifications of his employees and his right to reject and discharge men accordingly"; that paragraph 9 of addendum no. 1 (GC Exh. 3) provides "The Employer may reject any registrant dispatched by a Referral Office for employment. The Employer shall determine the registrant's ability and competence to satisfactorily perform the work prior to on the job employment." (This paragraph goes on to indicate "Such determination shall not be the responsibility of the Union."); that each district referral office maintains its own separate list; that addendum no. 1 provides that all registrants are to be dispatched in the order of registrant's date of registration as available for work, and in accordance with their experience; that the dispatchers are the individuals who determine who is to be referred and who make the referrals under addendum no. 1; that the dispatchers review the work history cards and the employment history of registrants to determine their capabilities; that all of the dispatchers in the eight offices report to Pauline Leitzell, who is the dispatch supervisor and who is located in Local 150's Countryside, Illinois office; that as of February 2007, there was no separate pipeline referral list; that the dispatchers referred members to the pipeline jobs from the same list from which they made referrals under the building agreement and heavy and highway agreement; and that Roddie Thomason, who has been Respondent's pipeline business representative for 13.5 months, has his office in Countryside.

Leitzell testified that she has been the dispatch supervisor for 5 years; that it is her job to make sure that all of the District offices of Local 150 are run the same; that she was a regular dispatcher for 3 years and before that she was the office manager for the apprenticeship office of Local 150; that she has worked for Local 150 for 21 years; that she works in District 1 in Countryside, which is in the Chicago, Illinois area, and she fills work orders for her area; that Local 150 dispatchers fill work orders and send people to work; that addendum no. 1 are the rules of dispatch; that when a contractor calls in and asks for an operator of a specific piece of equipment, the dispatcher goes to the first member on the out-of-work list whose workcard indicates that the member can operate that equipment; that the fact that the member can operate the involved piece of equipment has to be on the member's workcard before the dispatcher can call that member; that a business agent has no role in dispatching members to work; that District 5 has fewer members on its out-of-work list and it is not as busy as District 1; that there is usually a prejob conference with a pipeline job; that the stewards on a pipeline job have the right to call the union hall and place an order for the contractor instead of having the contractor do it; that there is no other way she would take a request from an employer for employees; and that the employer has to call and place a work order.

Frank Studer, who has been a member of Local 150 for 20 years, testified that he is a journeyman and he went through the apprenticeship program; that he was appointed a business representative of Local 150 from 1994 until 2006; that as a business representative he was involved in approximately 100 pipeline prejob conferences; that he is familiar with the referral system under the national pipeline agreement which has two facets to it in that either the union is a nondiscriminatory referral hall or the union keeps a pipeline list that contractors are allowed to choose from; that in Local 150's case, the Union has a nondiscriminatory out-of-work list, a referral system that is negotiated in the Union's heavy and highway collective-bargaining agreement and in the national pipeline agreement, and dispatchers fall under that rule; that the referral system under the heavy and highway agreement is the same as the referral system under the national pipeline agreement, and addendum no. 1 applies to both; that employees in Local 150's jurisdiction cannot go out and find his own job in Local 150's jurisdiction; that under the national pipeline agreement under Local 150's jurisdiction a member who wants to work has to sign up on the various out-of-work lists in the different districts where work would be available and wait for the dispatcher to call him; that according to the mainline pipeline agreement, if a local has an exclusive hiring hall procedure that is negotiated within its heavy and highway agreement, which in Local 150's case is addendum no. 1, then all dispatches after the company hires its regular employees, are to come through that procedure; that when he was a business representative covering pipeline jobs, Thomason was the steward on many of those jobs; that in 2005, he had a conversation with Thomason outside the hall at Local 150's District 2; that at the time Thomason was working under him as the steward on a small pipeline job; that Thomason had come to the hall to place a work order for a side boom operator that he needed the next day; that the next operator, Mike Goodwin, was available but Thomason did not feel that Goodwin was qualified to handle the side boom that he was going to be sent out on; that he told Thomason that the dispatcher makes the call, the dispatcher said that Goodwin was the next qualified guy, "He has got side boom on his card, Rod-

[6] Addendum 1, the IUOE Local 150 hiring procedures, refers to a number of referral lists for journeymen. It goes on to state, at p. 6, that ". . . all registrants on Lists 1 through 4 shall be dispatched in the order of registrant's date of registration as available for work and in accordance with their experience as Operating Engineers in the Construction Industry, i.e., the earliest registered individual with the required experience first, as established by the written statement of the registrant, . . . and thereafter in order of date of registration."

die. He is the next guy that is going to go" (Tr. p. 180); and that

> . . . Roddie had said to me that the particular side boom that Mike was going to run was going to need someone who was able to work without counting on other side boom operators to pick up his slack. He is not going to be between other guys picking up a piece of pipe that required more than one. There were valves involved that were very heavy, and close to capacity for that machine, and he felt it was over Mike's ability.
>
> I said to Roddie that 'If Mike says he can do the work, it is not for us to decide. The contractor is going to have to make that call, Roddie.
>
> Roddie said that if Mike was any kind of a guy, he would refuse the job, because he knows he is not qualified to do it.
>
> I then said to Roddie, . . . 'Roddie, we are not building an all-star team. If the guy says he can do the job, we have to send him.'
>
> At that point, Roddie produces a copy of the Pipeline Agreement to me, and went over parts of the agreement that cover areas of the country where locals do not have exclusive hiring halls, where locals have to provide a list of operators that are qualified to do work and the contractors are allowed to pick from that list. Roddie felt that that was the system that we should be using here.
>
> I told Roddie, 'If you read a little further into the agreement, it says in the agreement, that if you have an excusive hiring hall, that prevails,' and Roddie said that he didn't believe that that should be the case.
>
> I told Roddie, at that point, 'I will go straight to Bill Dugan [who was at the time and still is President of Local 150] and get an answer for you. I will go right to the top.'
>
> The next day I called Bill's office, and I asked Bill if he had time for me to stop up and talk to him about . . . an interpretation of the agreement.
>
> Bill said I could stop up that afternoon. [Tr. pp. 180 and 181.]

Studer further testified that he met with Dugan; that he told Dugan about the question and Dugan, without hesitation, said "we have never allowed contractors to pick their own people. Addendum no. 1, the hiring hall, prevails on that." (Tr. p. 182); that in his presence Dugan, using a speaker phone so that he could also hear what was being said, telephoned two International vice presidents who were also business managers of other Locals of the Operating Engineers; that the two vice presidents, Gerald Ellis and Fred Durschek, told Dugan that they never allowed the contractor to pick, their hiring hall prevails, the contractor has to take the member in order off the list, and it is up to the contractor to decide whether or not they are qualified after the Union refers the member to the job; that Dugan then told him that he had his answer not only from him but also from the two other International vice presidents; that the next time he talked to Thomason he told him what Dugan and the two International vice presidents had said; and that he told Thomason

> Roddie, I took it to Bill, and Bill says Addendum No. 1 rules, and our dispatches are going to come in order. Whoever the dispatcher says is up, that is who you are going to get, and the contractor is going to have to make the decision as to whether or not they are qualified. [Tr. p. 185.]

And Studer further testified that it is the job of the dispatcher in the referral hall to decide who has the qualifications for the job and should be sent out.

On cross-examination Studer testified that it is not true, in his experience, that even under addendum no. 1 the prejob conference can modify the hiring hall provisions, the actual taking of men off of the list in rank order; and that he knows of no case where in the prejob conference a signatory contractor or a business agent is allowed to renegotiate the national pipeline agreement. Subsequently, Studer testified that in the approximately 100 prejob conferences he participated in not once did either the contractor or the business agent approach what was going on in terms of the prejob conference being able to modify addendum no. 1.

General Counsel's Exhibit 15 is the out-of-work lists from Respondent's Utica office during the period January 5 through February 9. On page 2 of the out-of-work list for January 26, Richard Chiado is number 95, with a call in date of "12/13/2006" and David Waters is number 108, with a call in date of "12/22/2006."

General Counsel's Exhibit 10 is an "I.U.O.E. PIPELINE PRE-JOB CONFERENCE REPORT" dated "1-12-07." The contractor named on the form is ML. The job location is Pontiac, Illinois. The equipment checked off is backhoe and truck crane for a total of "2." The "Job to Start" date is "1-10-07." Under the "Remarks" section of the form the following is handwritten: "**O.Q. Qual.** Stewart [sic] gets $50.00 a day truck payroll and fuel, operators $40.00 and no fuel, Mechs [$]10.00 an hour truck pay fuel and maintenance."[7] (Emphasis added.) Thomason signed the form for the Union. Regan testified that he did not participate in this prejob conference; that this is the prejob conference report which led to the referral of Dave Waters which is in question in this proceeding; that he saw this report before in that all the prejob reports are filed in his office; and that it is indicated "O.Q. Qual[ified]" in the "Remarks" section of the report and "sometimes" (Tr. p. 60) the parties indicate those items which are agreed upon with respect to the job in question in the remarks portion of the report. Regan testified that there is nothing on the prejob report about a dozer operator.

Thomason testified that he became a pipeline business agent for Local 150 about 14 months before he testified at the trial herein; that before that he was a part-time instructor at Local 150's training site since 2001 over the Pipeline Division; that he taught side boom, which are pipe layers, backhoes, and angle blade dozers; that he has worked in pipeline in about a total of 15-named states since 1969;[8] that he served as a pipeline union steward from 1989 to 2006, working part time as an instructor; that a union steward on a pipeline project (a) attempts

[7] As noted below, "OQ Qual[ified]" is a course the Union offers at a training site where the operator takes tests and is taught safety regulations and different forms of safety, and methods of pipelining.

[8] Thomason testified extensively about pipeline construction.

to get as many of his fellow members out on the job as possible, as opposed to individuals from other locals, (b) makes sure that the first operator sent out is the very best and will not be rejected because this can increase the percentage of operators that Local 150 gets to dispatch, and (c) calls in work orders to have the union refer out members; that nonunion contracting companies are increasing their market share in the pipeline industry; that the contractor can call in to the union hall and then make anyone referred out to the job do a proficiency test on the equipment involved before the contractor ever lets the member who was referred out on the right-of-way; that he did the prejob on the BP large storage Tank Farm project in Pontiac, it was supposed to be a 24- or 25-month project, and it involved refurbishing the facility; that the general contractor on the job was ML, which is a national pipeline contractor that he had worked for before; that since the manifolds were inside the tank farm it meant that product was going into the tank farm at mainline pressure; that there was no metering stations outside or inside the tank farm; that part of the refurbishing involves replacing pipe, namely replacing all of the branch and lateral lines which feed the tanks inside the tank farm itself, which is work customarily done under the pipeline agreement; that if there was a metering station outside of the tank farm itself, then what goes on the going away side of the metering station comes under distribution; that it would not come under building and trades anyway, not taking up and relaying the pipe; that prejobbing pipeline projects is part of his current responsibilities as business agent; that as business agent he has attended at least 100 pipeline prejobs; that his objective at the pipeline prejob conference is to get as many Local 150 members on the job as possible; that in the winter of 2005–2006 ML did some work at the involved tank farm and Dave Waters, who was working on the project,[9] would call him because he was not familiar with the agreement; that he called Brian Borwig, who works out of District 8 and who worked for ML before, asked him if he was interested in being the steward at the tank farm, and Borwig accepted; that General Counsel's Exhibit 10 is the "1/12/07" prejob under the national pipeline agreement which he signed for the involved project; that Borwig and Local 150 boom truck operator Craig Walker, who is considered a key man for ML since he is never off their payroll, also attended the involved prejob; that Gary Norris, who is ML's general superintendent, and Ron Reed, who is a Company foreman under Norris, attended the prejob; that "this is one of the very pre-jobs that I didn't go into decisions and clarifications and attach it to the pre-job" (Tr. p. 312); that it was agreed at this prejob that Local 150 would supply 100 percent Local 150 members; that it was proposed that there would be up to six operators within a week and one half if the material came in; and that there was a shortage of pipeline material in this country at the time.

On cross-examination Thomason testified that, with respect to his testimony that an objective of his is to get as many Local 150 members as he can on a job, under either the building agreement or the heavy and highway agreement a business agent wants to minimize the number of key men that an employer brings in with it; that he is not that familiar with addendum no. 1 but he thought he read it; that, in his opinion addendum no. 1 does not apply to pipelines but rather "the most experienced applies on pipeline jobs" (Tr. p. 340); that in 2005–2006 it was Dick Waters, who is Dave Waters' father, who called him about the ML Pontiac tank farm project which had been prejobbed under the building agreement;[10] and that it was totally wrong to prejob the 2005–2006 ML Pontiac tank farm project under the building agreement.

On re-cross, Thomason testified that he only put backhoe and truck crane on the prejob conference report, General Counsel's Exhibit 10, because no one knew the situation with the material and the project was shut down three times because they did not have the material.

In response to Respondent's counsel's questions, Regan testified that the objective of the Union in a prejob conference on a pipeline job is to secure a percentage higher than the 50–50 that the contract provides for; and that the pipeline employer is allowed to cherry-pick or select whatever members they choose from the out-of-work list.

General Counsel's Exhibit 9 is a work order. As here pertinent, the printed portion of the form reads as follows:

Date_____ Time_____ By_____
Contractor_____
Location of Job_____
City_____
What is Wanted_____ Equipment_____
Time:_____
Sent_____ By:_____
When Wanted_____
Call From_____
Phone No._____

As here pertinent, the following handwriting appears on the first line of the form: "1/24/07," "2:30," and "SB." "Minnesota Ltd" is written on the second line of the form. "Pontiac (Tank Farm)–B & B State Rt . . . 23" is written on the third line of the form. "Brian Borwig–Steward 150–641/990-6086" and "Pontiac" is written on the fourth line of the form. On the lines for "What is Wanted" the following is written: "Experienced High Tread 5 Dozer–OQ, clean up–Right away [sic], Back Fill, Shade Pipe Final Finish."[11] The "OQ" is crossed out and the following is written next to it: "per Roddie does not need OQ." "Mon 7:00 2/5" is written on the "When Wanted" line and "Roddie Thomason" is written on the "Call From" line. "2/1

[9] Thomason testified that he thought the guy "was the steward, that pre-jobbed it under the Building Agreement, and that wasn't the steward. . . ." (Tr. p. 306.)

[10] Tr. p. 344. That being the case, it is not clear why, in response to Respondent's attorney's questions on direct, Thomason gave the following testimony:

Q. Who is he?
A. Dave Waters
Q. Dave was at the Minnesota Limited project before?
A. Yeah.
Q. Working for—when was this, now?
A. In 2006, the winter of 2005–2006. [Tr. p. 306.]

[11] Thomason testified that shading is putting enough backfill on top of the pipe so that if there are any rocks in the ditch dirt which goes on top of the backfill, when it all is compacted the rocks or other debris will not make contact with the pipe.

Dave Waters per Roddie Thomason" and "SB" are written in the "Sent" line. Regan testified that he probably saw the document before he testified at the trial herein because it goes through his office but he could not say for certain; and that he did not believe that he saw the document by the time he met with Richard Chiado, his father Ronald Chiado, Randy Hill, and the others on February 28, which meeting is described below.

Sheila Brewer, who was a dispatcher at Local 150's District 5 referral hall in Utica for 21 years until August 23, testified that she ran the whole office at District 5, including dispatching members to jobs; that she reported to Business Agents Randy Hill, Terry Waldron, and Kevin Trolio; that when she served as dispatcher the contractors would call the hall when they needed an operating engineer; that she would go down the out-of-work list looking at the members skills and qualifications and dispatch members to the jobs; that she is familiar with the building agreement, the heavy and highway agreement, and addendum no. 1 which is the procedures the dispatchers follow as they go down the out-of-work list and dispatch members; that the building agreement and the heavy and highway agreement both refer to addendum no. 1; that when she made referrals under the national pipeline agreement she followed addendum no. 1 in making those referrals; that for the members to obtain work under any of these three agreements, the members had to call in or stop in at the referral hall and have their name placed on the out-of-work list according to their call in date and time; that the same procedure was followed for all three of these agreements, including the national pipeline agreement; that the referral list was posted in the referral hall in the reception area so that the members could review it; that Karen Milano worked with her as a dispatcher for about 1 year; that when someone calls in to register for referral the dispatcher records the name, date and time of the call on the out-of-work register; that the register is updated on the computer daily and a printed copy is posted weekly; that when she needs to make a referral she starts at the lowest number and looks to see whether they have the experience and qualifications; that in the District 5 office the dispatcher actually makes the referral; that she is the one who makes the decision whether or not the individual is qualified, after looking at the member's workcards and sometimes calling and asking the member about his skills; that, as here pertinent, she always went to the main list first, which list contained the names of members who had their card for 4 or more years; that she would go according to addendum no. 1; that when she made the decision on who to send to the job she would telephone the member and tell the member to go to the job; that General Counsel's Exhibit 15 are out-of-work lists of District 5; that, as noted above, on the out-of-work list dated January 26, Richard Chiado is number 95 and David Waters is number 108; that the name of David Waters is not on the out-of-work list dated February 9 because he was dispatched out; that all of the handwriting on General Counsel's Exhibit 9, the January 24 work order described above, is hers, and the "SB" at the top right hand corner are her initials; that she became aware on January 24 that ML had a job in District 5 at a tank farm in Pontiac when Thomason telephoned; that when Thomason first called she was not in the office and he spoke with Debbie Cargill, who was a 1-week sub (Cargill normally works as a dispatcher in District 2 in Joliet, Illinois.) because Molina was on vacation; that when she returned from lunch Debbie told her that Thomason called; that Thomason called later that day at 2:30 p.m. and she spoke with him at that time; and that

> He [Thomason] called regarding a job in Pontiac, and immediately mentioned Dave Waters' name, and I told him that Dave was, at that time, was 109 on our list, and he did not have pipeline OQ.
>
> Roddie [Thomason] just kept insisting that no one else could perform this work.
>
> . . . .
>
> I just said, I am supposed to follow my out-of-work list, and I even gave him the names, because he is familiar with all of the pipeliners.
>
> The job wasn't supposed to start for a couple of weeks, and then, I read the names. I read Stan Shevokas, Jim Shannon, Richard Chiado . . . I started naming all of my names that were ahead of Dave Waters on the out-of-work list.
>
> . . . .
>
> I just explained to him that there were several members that had pipeline OQ ahead of Dave Waters, on the out of work list, and he said that the job was two weeks away, and that he insisted that he needed Dave Waters, that he had the skills that he needed for this particular job, and that he would call me back in two weeks. [Tr. pp. 202–207.]

Brewer further testified that she got the names she gave Thomason by going down her out-of-work list, seeing who had pipeline OQ and dozer work; that when she came back from lunch on January 24 Debbie told her that Thomason had called, what Thomason said regarding what he wanted, and Debbie told Thomason that he would have to call back when Shelia Brewer was there; that Debbie did not write a work order when she spoke with Thomason; that as indicated by the time on the work order, "2:30," she, Brewer, wrote the work order when Thomason called back; that she wrote "OQ" on the work order because she thought that every pipeline job required the operator to have OQ, because she thought why do we have the training, that was the whole point; that she crossed "OQ" out when Thomason told her that he did not need it; that as indicated on the work order, she sent Dave Waters to the tank farm job in Pontiac on "2/1" and she initialed this; that when Thomason called her back on about February 1, they repeated the January 24 conversation and Thomason also told her that if anybody had any questions, because she was still concerned about going that far down the list, they should speak with him; that this is why she put the "per Roddie Thomason" on the work order; that she knew that Dave Waters was not OQ because she asked him and he told her that he was scheduled to take OQ on February 3, so she felt a little bit better; that Dave Waters did not take pipeline OQ on February 3; that in giving the names of members to Thomason she reviewed the out-of-work list, workcards, and the employment history of the various people who signed the out-of-work list and were ahead of Dave Waters; that Steve Joiner was number 44 on the January 26 out-of-

work list, Jim Cavallini was number 64, Stanley Shevokas was number 84, and Richard Chiado was number 95; that she did not type " Fin–Pipeline" under the category "DOZER" on the last page of David Waters' workcard (GC Exh. 11), but rather Debbie put that on the card the week she was there "[a]fter all these calls with . . . Thomason [on January 24]" (Tr. p. 217); that she saw Dave Waters' workcard as of January 24, and " Fin–Pipeline" under "DOZER" was typed on the last page; that she did not write "Right Away, cleanup, Shading" on the last page of Dave Waters' card and she did not know whose handwriting it is and when this was written on the card, and she does not put qualifications down in the "CLASSIFICATIONS" area of the card where this handwriting is found; that the "HAZMAT 3-1404" at the top of the last of Dave Waters' card looks like the handwriting of Molina; and that with respect to the entry "PIPELINE OPERATOR QUAL., 12/5/," the entry is not complete but at the time of the involved referral she knew that Dave Waters' pipeline OQ had expired.[12]

Thomason testified that sometime after the involved prejob conference the steward at the Pontiac tank farm job, Borwig, called him and asked him if he knew a good pipeline dozer operator in District 5 that knew how to topsoil, right-of-way, backfill, and clean up; that he gave Borwig two names, Tom Walgenbach and Dave Waters, both of whom he considered to be do-all dozer operators; that he told Borwig that he needed somebody who knows how to shade the pipe so that there would not be a lot of debris on it; that he called District 5 in Utica from District 2 in Joliet and spoke with Debbie Cargill, who at the time was filling in for Karen Molina who was on vacation; that Debbie Cargill is a dispatcher from District 2; and that

> A. I explained to her what Brian needed and she started going down the list—
>
> Q. What list?
>
> A. Whatever list District 5 has.
>
> Q. The District 5 out-of-work list?
>
> A. Yeah.
>
> Q. And did she give you names of operators?
>
> A. Yes.
>
> Q. How many operators did she identify for you?
>
> A. Three.
>
> Q. Do you remember who they were?
>
> A. Yes, because Jim Shannon was the first name that she called, and I said, 'Well, that can't be, because he is in West Monroe, Louisiana working for Sheehan Pipeline. He has been there six months, and he still is,' which they called, and he was and the second—
>
> Q. Who came next?
>
> A. Stanley Shevokas, or something like that.[13]
>
> . . . .
>
> Q. So, was Mr. Shevokas available?
>
> A. No, the way I understood it, he was on vacation.
>
> Q. Okay, and so who came next?
>
> A. Dave Waters.
>
> Q. Did he fill the experience requests of Mr. Borwig, on behalf of Minnesota Limited?
>
> A. Yes, yes, he did.
>
> Q. And what happened next?
>
> . . . .
>
> A. . . . [the dozer] was supposed to come in [to the tank farm], but it was delayed.
>
> Q. Okay, so how did that affect the dispatch of Mr. Waters to the project?
>
> A. He had to wait four or five days to come . . . out [to the job]. [Tr. pp. 318–320.]

Regarding Richard Chiado, Thomason testified that he worked with him in 1996 or 1997 in District 7 of Local 150 in Maryville, Indiana, on a Coolset pipeline project; that at the time he was running a side boom for tie-ins and Richard Chiado was oiling on a backhoe; that he did not see Richard Chiado operate any equipment on that job; that he has worked with Richard Chiado on a total of four or five jobs; that in 2000, he was a steward on the Vector job for Sheehan and he called Richard Chiado out as an oiler on behalf of the contractor; that he next worked with Richard Chiado in 2002, on the Guardian project for contractor H. C. Price when he, Thomason, was a steward and Richard Chiado was originally assigned to operate a hoe pulling the backfill and topsoil out of the fields; that allegedly he received complaint from the foreman regarding Richard Chiado's performance (The foreman who allegedly complained was not called as a witness by the Respondent.) and he moved Richard Chiado to another position on the job; that subsequently Richard Chiado quit the Guardian project; that he thought that he succeeded in getting Richard Chiado a layoff on the Guardian project so that he could draw unemployment; that when he went about securing a dozer operator for the ML tank farm project in early 2007 he did not consider Richard Chiado and the dispatcher did not offer Richard Chiado as a candidate, his name never came up; that based in his experience with Richard Chiado, he did not believe that Richard Chiado had the skills to run a finish dozer on the ML pipeline project, especially with respect to right-of-way or clean up because Richard Chiado "just hadn't been around it enough. It is something you have got to be around several years before you can do it by yourself" (Tr. p. 329); that based on his 30 years of experience, he believed that it takes an otherwise skilled operator a "good eight to ten years" (Id.) to become a good pipeline finish dozer operator and, to his knowledge, Richard Chiado did not have such experience (Thomason then conceded that, to his knowledge, Dave Waters also did not have such experience. Subsequently, it appears that Thomason changed his answer to yes, Dave Waters did have such experience.); that, in his opinion, Dave Waters was qualified for the finish dozer operator job at the ML tank farm project; that even a highly skilled non-pipeline dozer operator cannot operate a cleanup dozer on a pipeline because on a pipeline the only stakes are on each side of the right-of-way; and that there would be a risk involved in

[12] Page 2 of GC Exh. 17 shows that Dave Waters received his OQ pipeline qualification on "12-5-02." The parties stipulated that the OQ qualification is good for 3 years.

[13] J. Michael Shannon is number 101 on the January 26 out-of-work list and Shevokas is number 84 on that list. Michael Shannon is number 108 on the January 19 out-of-work list and Shevokas is number 90 on that list.

having someone who is not a cleanup trained, pipeline dozer operator "[d]epending on if you are working over or around a bunch or existing loaded gas lines. . . ." (Tr. p. 336.)

On cross-examination, Thomason testified that the Pontiac tank farm job involved removing old pipe; that when the old pipe is removed it is no longer pressurized; that you could not remove a live line; that on the H. C. Price Guardian job in 2002 when Richard Chiado came to the job he told Richard Chiado that he was going to operate an excavator; that he did not think that Richard Chiado told him that he had never operated an excavator on a pipeline job before; that he had never seen Richard Chiado operate an excavator on a pipeline job before; that the complaints were about Richard Chiado's operation of the excavator and not about any operation of a dozer on that job; that he did not remember if Richard Chiado had been sent out to operate a dozer on that job; that he could not remember if on that job Richard Chiado asked for a layoff from the H. C. Price job; that he does not know how many years Dave Waters has got on a dozer; that he looked at Dave Waters' work history card on February 13; that the card shows that Dave Waters on "5/17/2000" worked 'Dozer with Murphy Brothers'; that Dave Waters worked less than 2 months on that job; that while the cards indicate that Dave Waters worked as a dozer operator for T. J. Lambrecht—a road and heavy highway contractor, they do not show that Dave Waters worked as a dozer operator on any other pipeline job other than the aforementioned May 17, 2000 Murphy Brothers job; that Debbie Cargill is still employed by Local 150 as a dispatcher in District 2 in Joliet; that Debbie Cargill has been a dispatcher since the 1990s; that other than the one occasion when Debbie Cargill was substituting as a dispatcher in the District 5 Utica office, he had never known her to work at the District 5 office before; that he did not have conversations with Shelia Brewer the same day he spoke with Debbie Cargill at the District 5 office; and that he did have conversations with Brewer about a week later.

On re-direct, Thomason testified that Dave Waters card, General Counsel's Exhibit 11, also has an entry dated "7/10/02 Dist 2 Price, Rockdale Dozer" and Price is a pipeline contractor.[14]

And on re-cross, Thomason testified that while the entry on Dave Waters' workcard shows "11/30/01 Dist 3 U.S. Pipe–oiler," Dave Waters was not an oiler very long on this job, and after a couple of days Dave Waters went on cleanup dozer. The next entry on Dave Waters' card is "4/15/02 . . . RI." According to the testimony of Leitzell, "RI means reported in, to put his name on the list." (Tr. p. 356.)

On rebuttal, Richard Chiado testified that District 5 Business Agent Terry Waldron referred him to the aforementioned H. C. Price job telling Chiado that he was dispatched out to operate a dozer on final clean up; that when he got to the job he reported to the steward, Thomason; that Thomason put him on an excavator even though he told Thomason that up to that point in time he, Chiado, did not have any experience running an excavator; that Thomason said "That's okay, we will take care of you, and everything will be all right. We will put you in an easy spot" (Tr. p. 387); that he was never made aware of any complaint by H. C. Price about his operation of the excavator; that he left that job because it was over 100 miles from his home, he had worked on the job for about 4 months, he was raising his daughter on his own, and after 4 months of living away from his house he felt he needed to get home; and that he asked Thomason if he could be laid off, if at all possible, and that is what took place.

On cross-examination, Brewer testified that Thomason called on February 1 to confirm Dave Waters referral on February 5 to the Pontiac tank farm job; that in February 2007, Business Agents Hill and Waldron were no longer business agents, and Business Agent Trolio was no longer working out of District 5; that it always used to be that the business agent was her immediate supervisor; that she is supposed to report to Leitzell who is the head dispatcher; that if a member is referred to a job, the contractor may reject that member since the contractor has the final say on who is qualified; that as described in addendum no. 1, list no. 1 is the list of journeymen members who have been operators for more than 4 years, list no. 2 is the list of members who have been operators for more than 4 years but they are out of District members, list no. 3 is the members who have been operators for less than 4 years, list 4 is out of District under 4 years, list 5 are the operators with permits, and list 6 are the apprentices; and that Thomason argued with her that only David Waters could do the work and he kept insisting that David Waters was the most qualified.

Richard Chiado testified that he first saw General Counsel's Exhibit 9, which is the above-described work order called in by Thomason on January 24, which was taken by Brewer, when he found out he was passed on the out-of-work list in February 2007; that backfill is burying the pipe; that if shading is required, the operator puts a foot of rock free material on top of the pipe to pad against the rocks touching the pipe before filling the ditch with any kind of dirt, except black dirt; that clean up the right-of-way is putting the ground back to the way it was before the ditch was originally dug; that final finish is the same thing as clean up the right-of-way; that finish work in the heavy and highway trade is much harder to do than it is in pipeline because with the former the operator has to cut the ground to within a tenth of an inch, and there are grades all over the ground on grade stakes and the operator has to be able to match those grades and cut it accordingly; that to do final finish in the pipeline industry the operator just matches the two sides of the right-of-way together in the field and make it look natural like it used to look, which is pretty simple; that he is familiar with the Pontiac tank farm jobsite in that he has been by it many times; that there are tanks, valves, pipes sticking out of the ground, and beams around the entire tank farm; that he has operated a dozer on beams along a creek crossing and slopes similar to the involved beams; that he has operated an angle dozer on pipeline work and in the heavy and highway industry; that he has done finish work under the heavy and highway agreement, and in his opinion such finish work is much more difficult than pipeline finish work because with the heavy and highway finish work the operator is cutting to a tenth of a foot whereas on the pipeline the operator is just matching two sides of a field together, making sure that there are no low spots; that

[14] Some other entries were referenced but Thomason either testified that the entry involved oiling or the entry indicated oiling.

he has worked on pipeline jobs with Dave Waters, who also started out as an oiler and then became a dozer operator; and that he has worked with Thomason on pipeline jobs, namely, on a Coolset job where Thomason was just a normal operator on the job, on a Sheehan job where Thomason was the steward, on an H. C. Price pipeline where Thomason was a steward, and on the Murphy Brothers pipeline where Thomason was just an operator.

When called by counsel for the General Counsel, Regan testified that in February 2007, ML, which has been a signatory to the pipeline agreement for over 30 years, was working on a pipeline job within the confines of a tank farm in Pontiac, Illinois; that Thomason did the prejob conference on behalf of Local 150 on this job; that member Dave Waters was referred to this job by Local 150 to operate a bulldozer for ML; that subsequently he became aware that another Local 150 member, Richard Chiado, claimed that he was ahead of Waters on the referral list, he was qualified to do the job, and he—if not others ahead of him on the list—should have been sent out to that job; that Brewer and Milano were the dispatchers at the District 5 referral office in Utica; and that Pontiac is located within District 5.

As noted above, General Counsel's Exhibit 11 is David Water's work history card. The last two entries on the fourth page of the exhibit read as follows: "2/13/07 [in the 'DATE' column], 2:00 [in the 'TIME' column], [and] Op removed from job per P.L. Back on [in the 'REMARKS' column]" and "2/14/07, 3:26, Cancel CI per R.T. opr still @ MN," respectively.

With respect to their qualifications on a workcard, Regan testified that the individual member can put down whatever he wants on the card; that on the last page of David Waters card, General Counsel's Exhibit 11, Dozer is checked and "Fin–Pipeline" is typed above the word; that to him this means that Waters is a finished pipeline dozer operator; that on the same page under "CLASSIFICATIONS" 150 is typed and "Right of way, cleanup Shading" is handwritten; and that this handwritten entry indicates that Waters does the finished right-of-way work with a dozer.

Richard Chiado, who has been a member of Local 150 for approximately 14 years, testified that he is a member in good standing; that at all times in 2007, his dues and initiation fees have been paid up; that he has been a journeyman for about 10 years;[15] that he can operate a bulldozer, excavator, track-hoe, loader, front-end loaders, combination hoes, belt placers, concrete pavers, and a grease truck; that he has worked on 8 to 10 pipeline jobs under the pipeline agreement, which jobs involved pressurized gas lines; that "Operator Qualification" (OQ), as noted above, is a course the Union offers at a training site where the operator takes tests and is taught safety regulations and different forms of safety, and methods of pipelining; that General Counsel's Exhibit 7 is his card which shows that he has OQ and some other qualifications; that he received the card in 2006, when he took the course and it expires on "2/25/2009"; that Thomason, who was a steward on a pipeline at the time, was one of the training site instructors for the OQ class; that Thomason and the other instructors told him that he would not be allowed on pipelines unless he had the OQ class; that his home referral office in Local 150 is District 5 but he receives less than 50 percent of his referrals from this District; that he also receives referrals from Local 150's Districts 1, 2, 4, and 7; that he is registered on list 1, the journeymen's list, at the District 5 office; that he has been signing the journeyman's list for about 13 years; that the dispatcher adds the name of someone who contacts the Utica office to register for referral; that the names on the out-of-work list are numbered and members are referred out to jobs in the order that they appear on the list if they are qualified for the job; that dispatchers Brewer and Milano, who work in Local 150's District 5 office in Utica, have personally contacted him and sent him out to work; that when he is laid off from a job he telephones the union hall and tells the dispatcher that he has been laid off and his name is placed on the bottom of the out-of-work list; that if the job does not last for more than 10 days, he does not lose his seniority or his place on the out-of-work list; and that he is not aware of any differences in the referral procedure under the building agreement, the heavy and highway agreement, and the pipeline agreement.

With respect to his work history, Richard Chiado testified that General Counsel's Exhibits 8(a) and (b) are his workcard and work history, respectively; that the Utica dispatchers have access to these documents and they know what jobs a member can handle; that he has done pipeline work for Murphy Brothers, Coolset, Sheehan, Brandenburg Drainage, H. C. Price, and ARB; that, as indicated in General Counsel's Exhibit 8(a), on "12/3/96" he was dispatched to Coolset as an oiler; that this was his first pipeline job (natural gas), it lasted 3 to 4 months, and he also worked as a excavator on the job; that he was dispatched on "11/10/98" by District 2 to ARB (the workcard entry refers to "ARBY"), it involved a high pressure pipeline, the job lasted less than a month, and he was an oiler and ran a crane and a directional bore for a little while on this job; that on "7/2/99" he was dispatched to Murphy Brothers to work as a mechanic (grease truck) on a big pipeline job which lasted 4 or 5 months; that on "10/11/99" (Actually the last digit in the entry is "5" but it is obviously a mistake in that the entry was made between "10/11/99" and "12/6/99.") he was dispatched to Brandenburg Drainage for a couple of months to run a dozer final finishing the farmer's fields on a repair job where the dirt had settled around a pipeline and tiles had been broken; that on "12/13/99" he was dispatched to Murphy Brothers to work on the same pipeline he had worked on earlier in the year, he was called back as an oiler, and he ended up, after oiling for a week, running a dozer for about a month clearing the right-of-way for some creek crossings and some road bores, backfilling the ditch, and putting the right-of-way back for the creek crossing and road bore; that on "5/1/00" he was dispatched to Murphy Brothers for a couple of months to operate a dozer clearing right-of-way, backfilling the ditch, and taking piles of black dirt and putting the black dirt on the field to restore it to its original condition; that on "8/22/02" he was dispatched to H. C. Price to

[15] If his permit time was considered as journeyman time, it would be 14 years. Richard Chiado testified that he was never an apprentice. Instead he put two to three thousand hours in on a permit and then became eligible for his card.

be a dozer operator, Thomason, who was the steward on the job, had him running a hoe on final clean up for 4 or 5 months; and that, as set forth in General Counsel's Exhibit 8(b) on "7/3/2000" he was dispatched to Sheehan/Monee as an oiler on the Vector Pipeline job, he oiled a crane, and the job did not last too long (He took another job.) because he was too far away from home.

On cross-examination, Richard Chiado testified that the next entry on his workcard after "12/3/96 Dpd. Dist.7, Coolset, Oiler" is "1/16/97 . . . CI"; that he could not recall if he was oiling for Coolset for maybe 6 weeks; that with respect to the "7/2/99 . . . Dpd Murphy Grease Trk Princeton" entry on his workcard, he was on and off that Alliance pipeline job for Murphy Brothers and he, at that time, worked for Murphy Brothers until September 16, 1999; that with respect to the "11/10/98 . . . Dist. 2, Arby" entry, he next called in to the union on "11/30/98" so he worked that job for 20 days; that he was dispatched again to Murphy Brothers for the Alliance Pipeline on "12/13/99"; that the next entry on his workcard shows that he called into the Union on "1/7/00" which means that this time he worked for 3 weeks on the Alliance Pipeline; that from "5/1/00" to "7/8/00" he worked for Murphy Brothers stripping and cleaning up the right-of-way; that he operated a D-5 dozer on his "10/11/99" dispatch to Brandenburg in Hillsdale and the job involved working under the pipeline agreement fixing broken field drain tiles and doing finishing work; that the "8/22/02" H. C. Price job, where he operated a backhoe for 4 months, was the last pipeline job he worked on; that on jobs after this he operated different kinds of equipment, including dozers, but none of it was pipeline work; that he went to the training site to take the OQ class, he took a written test, he took practical tests in the field, including spotting defects in pipe and the way a ditch looked, but he did not do practical tests on equipment; that on the "OPERATOR QUALIFICATION TRAINING VERIFICATION" page of Respondent's Exhibit 1, which is the documentation for his OQ class, where he indicates that he has 10-years experience in natural gas and other gas he meant that he worked on and off over a 10-year period; that he did not have 10-years transmission mainline experience; that a member gets to put on his workcard what equipment he can operate proficiently; that "12/13/07 . . . mbr in to upgrade card–Fin Dozer" appears on the first page of General Counsel's Exhibit 8(a); that on February 13, he went to District 5's union hall and added finish dozer to his card; that on February 27, he had his workcard indicate, with respect to all makes of backhoe, that he did all rough work and no pipeline work; that while Dave Waters is a very good dozer operator, they had equal experience; that he could not say whether Waters was a better finish dozer operator than he was since he had not worked with him for a while; that the steward on a pipeline job is the one who basically calls in for operators; that on a pipeline job there could be up to 12 separate crews and the steward can move people from one crew to another; that on the H. C. Price job Thomason was the steward; and that on the H. C. Price job he was switched from one final crew to a different final crew, and then he was switched to testing at the end so that he could stay on the job until the end.

On re-direct, Richard Chaido testified that he operated a finish dozer for T. J. Lambrect for a good solid 4 years doing road construction; that he operated a D-6 LGP wide-path dozer for this company doing final finish grade on landfill cells; that a D-6 LGP wide-path dozer is a low ground pressure dozer that is used for doing finish work most of the time; that he has also finished roads, house pads, and bridge cones but none of that was under the pipeline agreement; and that he has quite a bit of experience with dozer finishing.

Brewer testified that she knew from Richard Chiado's workcard, General Counsel's Exhibit 8(a), that he had worked pipelines before; that Coolset, ARB, Murphy Brothers, Brandenburg, Sheehan, and H. G. Price are pipeline contractors; that since District 5 is a smaller District she got to know the members' skills; that she knew from Richard Chiado's work history that prior to February 2007, he operated a dozer on a pipeline job; that, in her opinion, it showed that he was qualified to do the pipeline work requested by ML; and that it was the same with Robert Joiner, James Cavallini, and Stanley Shevokas.

On cross-examination, Brewer testified that on the first page of Richard Chiado's workcard, General Counsel's Exhibit 8(a), she wrote "2-13-07 Finish no GPS" after "DOZER" and she wrote "2/13/07, 12:00, mbr in to upgrade card–added Fin Dozer"; that she knew that Richard Chiado could run a finish dozer before these entries were made on his workcard; that she would have asked Richard Chiado if he could run a finish dozer on pipeline; that she also looks at the members work history and Richard Chiado was dispatched on a dozer to Murphy Brothers, which is a pipeline company; that she would just assume that Richard Chiado has run pipeline on a dozer, the member goes out and performs the job, and if he does not make it, he is let go; that she would ask the member if he ran a finish dozer on a pipeline and she would take the member at his word; that she knew that Richard Chiado had run a finish dozer and she would have asked him if he ran a finish dozer on a pipeline; that nowhere on Richard Chiado's workcard is it indicated that he operated (a) a finish dozer on pipeline projects, (b) a dozer on the right-of-way of a pipeline project, or (c) a dozer shading pipe on a pipeline project; and that on January 24, based on the information on Dave Waters' workcard (GC Exh. 11), David Waters qualified for dispatch to the ML Pontiac work project as the work order was written in January 24.

On redirect Brewer testified that she knew that Richard Chiado had done finish dozer work on nonpipeline jobs.

Richard Chiado testified that on February 12, his father, Ronald Chiado, who was a business agent for Local 150 for about 20 years before he retired in 2002, telephoned him and told him that he had been passed over on the out-of-work list by Dave Waters for a job in Pontiac at a tank farm for ML; that his father told him that he was number 95 on the list and Waters was number 109; that he then telephoned District 5 union hall and asked Brewer why he was passed over for this job on the out-of-work list; that Brewer told him that she had nothing to do with it and he should contact the business agent about it; that he spoke with Business Agent Joe Steichen who told him that he did not know why he had been passed over, he did not blame him for being unhappy about being passed over on the out-of-work list, but it was not his department or his call and he should

call Thomason; that Brewer told him that she had talked to Thomason, the pipeline business agent, and told him that there were other people on the list before the man who was dispatched, Dave Waters, and Brewer told him that Thomason said that "he didn't care, and that is who he wanted to send out to the job" (Tr. p. 102); that he telephoned Thomason and left a message; that later that same day he went to District 5 union hall with his father and looked at the list himself; that he was 95th on the list and David Waters was 109 on the list; that the dispatchers then told him that they told Thomason, who requested Waters, that there were other people on the out-of-work list who were eligible for this job and Thomason said "he didn't care and he wanted to send this man" (Tr. p. 104); that on page 2 of the out-of-work list dated January 26, General Counsel's Exhibit 15, his name is 95th and Dave Waters name is 108th; that Thomason returned his telephone call later that day; that he told Thomason that he was very unhappy about being passed over on the list; that Thomason told him that he was not qualified for the job; that he told Thomason that he was qualified for the job, he had OQ training, and an operator is not supposed to be allowed out on a job unless the operator has it; and that he told Thomason that he planned on doing something about it and Thomason said "I was fucking with the wrong cat, . . . I wasn't going to see very much pipeline work anymore . . . [and] he was going to make a fool out of me" (Tr. p. 106).

On cross-examination, Richard Chiado testified that in February 2007, Steichen had not been a business agent for very long and he did not have any pipeline experience.

Ronald Chiado testified that on February 13, Thomason telephoned him at home; that he had not telephoned Thomason first; that Thomason said that he did not consider his son Richard qualified to run the dozer on the pipeline; that he argued with Thomason over that, telling Thomason that over the last 4 years Richard had been operating a finishing dozer for T. J. Lambrect, a road and heavy highway contractor, and that Richard was qualified to do the job; and that

> [Thomason] said he saved my boy's ass on the one job that he had, as an operator, several times, and I told him that nobody had to save his ass on the Lambrect job, running [a] dozer, and that I considered him qualified to run [a] backfill dozer on that project.
>
> He then said, if I didn't back off, I didn't know what kind of cat I was . . . fucking with, but if I didn't back off, my boy would never see another pipeline. He also called me a burned out Business Agent, and . . . [then] I hung up on him. [Tr. pp. 166 and 167.]

Thomason testified that he got an anonymous phone call and he was given a phone number to call Richard Chiado so he called the number and ended up speaking with Business Agent Randy Hill; that Hill gave him Richard Chiado's telephone number; that when he telephoned that number he got Ronald Chiado; that Ronald Chiado said "Why are calling me? You need to be talking to my boy. My boy is a lot better dozer hand than Dave Waters." (Tr. p. 331); that Ronald Chiado gave him Richard Chiado's telephone number; and that he did not tell Ronald Chiado that Richard Chiado would not work pipeline again.

Thomason testified that after getting Richard Chiado's telephone number from Ronald Chiado, he telephoned Richard Chiado; that Richard Chiado said you jumped me on the out-of-work list; that he then said

> 'Richard, your name never came up. There were only three names called to me. One guy was working for Sheehan Pipeline, one guy was on vacation, and Dave Waters,' I had had him on right-of-way dozers, etc., all the from [sic] front to back, and I said '[y]our name never came up,' and it didn't.
>
> . . . .
>
> . . . Well, I don't think he believed me. I told him to call Debbie, because Debbie is the one who placed the order. She is the one that was looking down the list when I called to place the order. [Tr. p. 332.]

Thomason further testified that he never told Richard Chiado that he would not work in the pipeline industry again; and that he never told anyone that Richard Chiado would not work in pipeline again.

Ronald Chiado testified that he worked for 40 years as a journeyman out of Local 150 and he was a business representative for this Union from 1986 to 2002; that when he last worked as a business representative his office was at District 5 in Utica; that Brewer was a dispatcher in District 5 since 1986, until she was laid off or fired recently; that Molano had worked as a dispatcher in District 5 about 5 months in February 2007; that on February 12 he went to the Local 150 District union hall with Randy Hill, who is an ex-business agent; that when he looked at the out-of-work referral list which was posted in the lobby, he noted that his son Richard Chiado was number 95 on the list and David Waters was 109; that Randy Hill had told him that Dave Waters said that he had been sent to the Pontiac tank farm as a dozer operator; that he asked Brewer why she sent Waters ahead of his son, as well as other operators on the out-of-work list that were qualified, and she said that she would have sent someone else but "Thomason told her that she must send Dave Waters. She questioned the fact that Dave Waters was not OQ qualified, which is operator qualified, and . . . [Thomason] said 'It didn't matter. OQ was not necessary' and that he was the Business Agent now and she must send Dave Waters" (Tr. p. 165); that Brewer told him that she told Thomason that she thought there were other people on the out-of-work who should be sent out first; that General Counsel's Exhibit 9 is the work order Brewer showed him concerning Waters being sent out to the Pontiac tank farm job; that he requested a copy of the work order and Brewer gave it to him; that after he looked at the work order he asked Brewer about the fact that the call had come in from Thomason whereas the contractor should be calling for a man, and Brewer said "Well, . . . [Thomason] called for it and when it was called in . . . he changed it from operator qualified to non-qualified" (Tr. p. 166); that he then went to District 5 Business Agent Dale Letterley and complained to him; and that Letterley told him that he had nothing to do with the project and he would have to talk with Thomason.

On cross-examination, Ronald Chiado testified that as a business agent he, unlike most members, was aware that there was a

work order; that it is not common to give members copies of work orders; that any dozer operator could backfill a pipeline; that he himself never worked on a pipeline when he was an operator but he was the business agent over several pipeline jobs which were performed under the pipeline agreement; that the involved job was not a pipeline but rather it was a tank farm, and they were running what would be gas mainline high pressure lines between the tanks within the perimeter fence; that "in the Pipeline Agreement, . . . it doesn't say high pressure or anything else. It says 'tank farms.' It is immaterial with Addendum No. 1" (Tr. p. 173) because addendum no. 1 would apply, in one way or another, to pretty much any dispatch from a dispatch hall; that when he served as business agent on pipeline projects he sat in on the prejob conferences, mostly as an assistant to Joe Ward, who would usually prejob it; that one of the objectives of a prejob, in a pipeline project, is to try to get a bigger percentage than the 50–50 split provided by the contract; and that the union and the contractor can modify the staffing percentage.

Brewer testified that Ronald Chiado came to the District 5 referral hall in February 2007, after Dave Waters was sent out to tank farm job in Pontiac; that she spoke with Ronald Chiado when he came to the hall; that Ronald Chiado asked her who got sent out to the tank farm job and she told him that it was Dave Waters; that she did not think that she told Ronald Chiado about her conversation with Thomason; that she did speak with Debbie about Thomason wanting Dave Waters out at the tank farm because she was very upset about the whole thing; and that when Molina came back from vacation Molina heard her, Brewer's, second conversation with Thomason about Dave Waters being sent out to the tank farm job ahead of other members on the out-of-work list.

On cross-examination, Brewer testified that she did not give a copy of the January 24 work order, General Counsel's Exhibit 9, to Ronald Chiado; that it is not customary for the dispatcher to give copies of work orders to members, even members who are former business agents; that a business agent at the office at the time can look at a work order; and that it is not customary to give a work order to a former business agent.

On February 13, Richard Chiado telephoned Local 150's head dispatcher, Leitzell, and told her that he had been passed on the out-of-work list by Dave Waters because Thomason wanted Dave Waters on the job. Leitzell told him that she would look into it and get back to him.

Leitzell testified that she first learned that there was a problem with a referral to the Pontiac tank farm project when Ronald Chiado, whom she had known for almost 20 years, telephoned her in early February 2007, in Countryside, and asked her if she was aware that there was a job in Utica and his son had been skipped for the job and somebody else was sent to the job; that she told Ronald Chiado that she did not know anything about the situation but she would check it out and call his son back because his son was the involved member; that Ronald Chiado put his son on the telephone and she told him that she would check it out and call him back; that she then called District 5 and asked Brewer about the situation; that Brewer then said 'Oh, I knew this was going to be a problem' (Tr. p. 366); that she asked Brewer why she did not tell her about the situation; that Brewer said that "Roddie had told her to send him, to send this other guy, and he pretty much —'He intimidated me into sending the other guy ahead of Richard'" (Id.); that she had Brewer fax her a copy of the involved work order; that she then called Brewer back and asked her who else was on the list who had finished dozer on their card; that Brewer told her that Stanley Shevokas was on vacation and Jim Cavallini was the next member up for this job; that she told Brewer to send Cavallini to the job; that she asked Brewer "okay, you knew the one guy wasn't there, so why couldn't you just go down the list like you normally would, and fill this order, with the first guy that has got finish dozer on his card" (Id. at 367); that Brewer told her "I don't know. Roddie scared me . . . and I didn't know what to do" (Id.); that she told Brewer "You can't skip someone on the out-of-work list, and if you do that again, you will be fired"; and that she asked Brewer where Richard Chiado was on the list and Brewer told her that Richard Chiado did not have finished dozer on his card.

Leitzell testified that after speaking with Brewer she went to the second floor of the Countryside office and spoke with Local 150's President and Business Manager Dugan; that after looking at the faxed copy of the work order, Dugan pointed out to her that it was a pipeline contractor; that before that it had not "dawned on me that it was a pipeline" (Tr. p. 370);[16] that Dugan told her to talk with Regan; that Regan called Thomason in her presence but they had a bad phone connection, and Regan told her that he would try to speak with Thomason later and get back to her; that Thomason came into the office later that day and she met with both Regan and Thomason; and that

> Roddie pretty much told me that he had pre-jobbed this, where they would get—where we would get a hundred percent of the—we would staff the project with a hundred percent of 150 guys, and that was why he was asking for Dave Waters, because he knew that he had—he had experience and he could do the job. [Tr. p. 372.]

Leitzell further testified that any contractor can name their own people in a prejob; that it is okay to send a member under these circumstances because "[i]t is part of . . . Addendum [No. 1], that any contractor can come in and pre-job" (Id.); that this is not limited to pipeline and it applies to all agreements; that prejobs would allow contractors to pick their people under the heavy and highway or building agreements; and that contractors are allowed to pick their referrals regardless of the position of individuals on the list.

Brewer testified that with respect to the "2/13/07" entry on the last page of Dave Waters workcard, General Counsel's Exhibit 11, the entry was made because she got a call from Pauline Leitzell on February 13 to remove Dave Waters from the tank farm job in Pontiac and "go down my list and do it

[16] As noted above, the work order which was faxed to Leitzell referred to "Tank Farm," and it indicated, among other things, that what was wanted was someone who could "Shade Pipe" (emphasis added) and that the call came from Thomason, who is Local 150's pipeline business agent. In these circumstances, it is difficult to believe that Leitzell was not aware, at least from the time she received the faxed work order, before she spoke with Dugan, that the situation involved a pipeline.

right" (Tr. p. 213); that she had not discussed the Dave Waters referral with Pauline prior to this date; that she telephoned Dave Waters and explained to him what she had to do; that she then went down her out-of-work list and called Steve Joiner who had a death in the family and did not want the job;[17] that she then called Jim Cavallini and he took the job; that the entry for "2/14/07" reads "Cancel ci per R.T. Opr still @ Mn." means cancel call in per Thomason and the operator was still at Minnesota Limited; and that Molina made this entry, Molina spoke with Thomason on this occasion, and Molina told Thomason that he was going to have to telephone Cavallini and explain the situation to him because Cavallini had already been dispatched.

General Counsel's Exhibit 12 is the work history card for James Cavallini, who is a member of Local 150. The following two entries appear on the second page of the exhibit: "2/13/07 [in the 'DATE' column], 3:00 [in the 'TIME' column], [and] Dpd Minnesota Ltd, Pontiac Fin Dozer" [in the 'REMARKS' column] and "2/14/07, 3:24, put on owl per R.T. give opr. RT," respectively.

General Counsel's Exhibit 13 is a work order card dated "2/13/07" which is initialed by "SB." As here pertinent, the contractor is ML, the location of the job is Pontiac, "What is wanted" is "Replace Dave Waters per Pauline L., Fin Dozer–OQ," "When" is "ASAP," "Call From" is "2:00 Per Pauline–Pull Dave Waters from job in Pontiac, and "Sent" is "Jim Cavallini."

Cavallini testified that he has been a journeyman in Local 150 for 26 years; that he can operate just about every piece of equipment involving the movement of dirt, except a crane; that in February 2007 he was OQ; that he typically uses the Union's District 5 referral hall in Utica; that he has registered there for 26 years; that members cannot go out and find their own work; that members get their work from the out-of-work list; that they are chosen based on their position on the out-of-work list, except when you are qualified and the member above you on the list is not qualified; that he was on the out-of-work list in February 2007 when Brewer telephoned him and asked him if he wanted to go to the tank farm job and run a dozer; that he told her he wanted the job; that Brewer told him that the job called for OQ qualified; that Brewer gave him the telephone number of the steward on the job, Brian Borwig, and told him to telephone the steward; that Borwig told him that he did not need him on the job and he told Borwig that the dispatcher told him that he was dispatched to this job; that Borwig told him that he would talk to Thomason and he should call back in half an hour; that when he called Borwig back he could not get him; that there was a snowstorm that day and he was not able to get Brewer when he telephoned her, and he was not able to get an answer at District 2's hall or Thomason's company number; that the following day he went to the tank farm job in Pontiac because he was not sure what to do and it was a good job; that he spoke with Borwig on the jobsite and Borwig telephoned Thomason; that Borwig then told him that "there was no work for me. He said they already had somebody for the job, and he said Dave Waters was on the job and he had the job. He said there was no work for me, and to go home." (Tr. p. 159); that on his way home he telephoned Brewer, she was not in, and he spoke with Molina who said she would find out what was going on; that Molina called him back gave him Thomason's number and told him to telephone Thomason; and that when he telephoned Thomason he said "I should listen to the steward, . . . [y]ou are not really qualified for this job . . . [you] were never on a pipeline before, so that is the reason, but if he hired more people than just one, that he would maybe have took [sic] me in with a group of guys" (Tr. p. 160).

On cross-examination, Cavallini testified that he has never worked on a natural gas pipeline but he has done sewer and water, which is done under the Union's heavy and highway and underground contract; and that he has never worked under the pipeline agreement.

Ronald Chiado testified that on February 14, he and his son went to the Union's District 5 referral hall; that they spoke with Brewer and Milano with Brewer repeating that Thomason insisted that Dave Waters be sent and that they argued over OQ and Dave Waters' place on the list in relation to other operators who were higher up on the list and were qualified on the dozer enough to send out to the tank farm; that Milano agreed with everything that was said, saying that is exactly what happened; and that he looked at the out-of-work list again that day and his son was number 95 and Waters was number 109.

Brewer testified that one day Richard and Ronald Chiado came to District 5's referral hall and she spoke with them.

On February 14, Leitzell telephoned Richard Chiado back. Richard Chiado testified that Leitzell told him that she had looked at his workcard and as far as she knew he was not qualified for that job; and that he told Leitzell that he was qualified for the job and she would be hearing more from him.

Leitzell testified that she called Richard Chiado back and told him that she had talked with Brewer who indicated that he did not get skipped because he did not have finished dozer on his card, but there were other people on the list that did have that; and that Richard Chiado told her that he ran dozers and he named contractors but that she just got off the phone with Shelia and it did not indicate finish dozer on his workcard.

When called by counsel for the General Counsel, Regan testified that he met with Brewer and Milano in Utica but it was not as a result of Waters' referral to ML; and that he met with Brewer because she said that she felt intimidated by his business agent, Thomason. Subsequently, Regan testified that he believed that Leitzell reported that Brewer told her that she was intimidated by Thomason.

Subsequently, in response to questions of Respondent's counsel, Regan testified that the first of two meetings he attended at Respondent's Utica office included dispatchers Brewer and Molina, Thomason, and Leitzell; that the two dispatchers had made an accusation that they were intimidated by Thomason; and that

> When I got down there, I got them all in a conference room, and I am a firm believer in getting everybody face to face, and ask them point-blank, I said, 'You made accusations that Roddie intimidates you. I want to know in

[17] GC Exh. 16, the workcard for Robert S. Joiner, has the following entry on the second page of the exhibit: "2/13/07, 2:13, Called for Minnesota, Ltd.–Refused."

> what way does he or doesn't he, and in what way, and I want to resolve this matter.
>
> . . . .
>
> They said that he did not intimidate them, that they just felt they weren't doing their job correctly, and that he was trying to interfere with their work. [Tr. p. 69.]

Regan further testified that the referral in question in this meeting was the referral of Waters to the pipeline job at the tank farm in Pontiac; that the fact that Ronald Chiado's son felt that he should have went out before Waters was discussed at this meeting; that he gave the dispatchers copies of the pipeline agreement since they said that they never had a copy of the pipeline agreement at the Utica office; and that he told the dispatchers at this meeting that pipeline contractors had the right to cherry-pick the out-of-work list "they can ask for individuals at a pre-job conference" (Tr. p. 72).

Brewer testified that Regan, Thomason, and Leitzell came to District 5's referral hall; that she met with these individuals; that they discussed what happened and Thomason went on and on about how Dave Waters was the only one who could do this job; that she told them that she was not doing what she was trained to do, namely follow her out-of-work list and call the member the way she was supposed to do it; that they told her about a 50-percent rule regarding the pipeline agreement; that it was her understanding that the 50-percent rule only applied if an operator had worked for that company in the last 6 months; that "it was like changing the rules in the middle of the game, that I had always known" (Tr. p. 216); and that during this meeting she was not shown anything in writing which changed the procedure that she normally followed, namely, referring to addendum no. 1.

On cross-examination, Brewer testified that during this meeting Leitzell asked her if Richard Chiado had finished dozer on his card (apparently referring to when the involved referral was made) and she told Leitzell that he did not;[18] that she understood at the time she testified at the trial herein that the contractor is allowed to staff the job under the pipeline agreement; that before this meeting she had never seen a printed copy of the pipeline agreement; and that she used to get to see copies of the prejob conference report but she did not see the one for the involved job.

Subsequently, Brewer testified, after reading the prejob conference report for the Pontiac tank farm job (GC Exh. 10) while on the witness stand, that there was nothing in that prejob conference report which indicates that the Union and the contractor agreed that the normal rules that she followed, addendum no. 1 (GC Exh. 3), would not be followed in this situation; and, as noted elsewhere herein, that she was not given anything in writing that she should not follow the normal rules set out in addendum no. 1 with respect to the involved February 2007 referral to the Pontiac tank farm job.

[18] This raises a question in that, as noted above, Leitzell testified that the first time she telephoned Brewer about this situation Brewer told her that Richard Chiado did not have finish dozer on his card. If that testimony is credible, it is not clear why sometime later at her meeting with Brewer in Utica Leitzell would be asking Brewer if Richard Chiado had finish dozer on his card.

Leitzell testified that the day after she first found out about the situation at District 5 regarding Dave Waters being sent to the tank farm job she, Regan, Thomason, Brewer, and Molina met at District 5's Utica office; that

> [I] [b]rought copies of the [pipeline] agreement, and I talked to both of them [Brewer and Molina], and I explained that sometimes there are reasons why this would have been done, and also, it—because Shelia had mentioned that Roddie had intimidated her into sending this guy there, and I made it perfectly clear that a Business Agent cannot tell you what to do. You have got to have a legitimate reason for doing it, and if a—as a Business Agent, he doesn't have any right to tell you who you are dispatching. [Tr. p. 375.]

Leitzell further testified that Regan asked Brewer and Molina if Thomason intimidated either one of them and they both said "no"; and that Brewer and Molina were glad to receive a copy of the pipeline agreement because they did not have one before that.

Brewer testified that a couple of weeks after her meeting with Regan, Thomason, and Leitzell, Thomason came to District 5's referral hall and got copies of workcards and he had Molina fax copies of workcards; and that this occurred on about February 13 or 14.

When called by counsel for the General Counsel, Regan testified that he met with Leitzell, Thomason, Richard Chiado, and his father, Ronald Chiado, in February 2007; that he did not, either before the meeting or at the meeting, look at the out-of-work list to see where Richard Chiado and Waters were on the list; that Richard Chiado claimed that he was ahead of Waters on the list but he, Regan, did not know whether he was or was not; that he never checked out the out-of-work list to determine whether Richard Chiado was ahead of Waters on the list; that Randy Hill, who is a former business agent, also attended this meeting; that before this meeting Thomason told him that Waters was referred because the contractor wanted a qualified finish dozer operator and it was a very dangerous place in this tank farm; that the contractor asked for Dave Waters and Thomason does not make the decision who to refer out to the job; that Thomason did not tell him that he, Thomason, made the decision that Waters was the individual to be sent out to the tank farm job; that at the time of this meeting he did not know whether Thomason had looked at Waters' work history card, and Thomason did not tell him that he, Thomason, had looked at any other registrant's card; that he was aware that there was a problem in the Utica office regarding the Waters' referral; that he was not really aware that the dispatchers took the position that there were other qualified individuals that were being passed over when Waters was sent out; that he did not know that Leitzell on February 13 tried to get someone other than Waters sent to the tank farm job; that he did not know that member Cavallini was sent to the job to replace Waters; that he did not recall whether Brewer attended this meeting; that there is not a separate pipeline referral list; that he did not make any changes to Waters' referral as a result of this meeting or at any other time; that neither before nor after this meeting did he take any steps to determine if Richard Chiado or anyone else ahead

of Richard Chiado on the District 5 out-of-work list had experience as a dozer operator on a pipeline job; that he oversees Thomason; that he does not—as opposed to could not—alter any decision that Thomason has made; and that he does not have authority to oversee dispatch.

Subsequently, in response to questions of Respondent's counsel, Regan testified that he held a second meeting at Respondent's Utica office; that he, Richard and Ron Chiado, Hill, who was a former business agent, Thomason, and Leitzell were present; that he thought that Brewer was in the room part of the time but he was not sure; that the purpose of the second meeting was to make peace; that he "couldn't understand what everybody was making a big to-do over this, when it was done properly and correctly, through the pre-job." (Tr. p. 91); and that while Richard Chiado, at this meeting, said that he ran a dozer, he could not recall if Richard Chiado said that he was qualified to run a finish dozer.

Richard Chiado testified that on February 28, at 9:30 a.m., there was a meeting at District 5's union hall; that his father informed him of the meeting; that he, his father, Leitzell, Regan, Thomason, Randy Hill, and Ed Reich attended this meeting; that the participants debated whether members had been wrongfully passed over when Dave Waters was dispatched to the tank farm job in Pontiac; that Regan and Pauline admitted that the dispatch was wrong but they said that it was Brewer's fault because she should have stood up to Thomason, she should not have let him pick the guy he wanted, and it is the dispatcher's job to dispatch in order; that when the subject of an exclusive pipeline list came up, Pauline said that there was no such thing as an exclusive pipeline list out of District 1; and that he and his father told the group that Brewer told Thomason that there were other people that should have been dispatched before Dave Waters.

On cross-examination, Richard Chiado testified that the February 28 meeting got a little heated and there might have been some cuss words used but he did not swear at Thomason, he did not tell Thomason that he was fat, and he did not call Thomason a "SOB"; and that he did state during the meeting that he needed that job because he had missed all of his insurance hours.

Ronald Chiado testified that on either February 28 or 29, he attended a meeting with his son Richard, Regan, Leitzell, Thomason, Reich, who is an operator, and Hill at the District 5 referral hall; that Regan asked him to attend the meeting; and that, at the meeting,

> We discussed first off, the fact that . . . [the tank farm job] was being done under Pipeline rather than Building Trades, because in previous years, that tank job was always done under the Building Trades agreement, as well as—I mean, as it [is] shown in the Pipeline Agreement, showing that tank farms are under Building Agreements. They said they changed it, so I said 'Okay you changed it.'[19]
>
> Then, we argued the fact of my boy's capabilities as a dozer operator, and again, we went through the fact that he has been running a dozer, an operator, as a finish operator for T. J. Lambrect for four years, doing grade work, ditch work, all kinds of finish work, bringing it down within a tenth, and that backfilling a pipeline wouldn't be that—I mean, it wasn't out of the ordinary. Just about any dozer operator could do it.
>
> We never got anything settled on that, but in the interim, Roddie [Thomason] brought up the fact that, 'Well, I couldn't have sent him anyway, because he wasn't on the pipeline list.'
>
> At that Pauline [Leitzell] did mention the fact, that there is no such thing as a pipeline list.
>
> . . . .
>
> . . . after a little bit further argument, one way or the other, Pauline and Dan Regan said, 'Well, we will admit that that dispatch was wrong,' that someone else should have been sent out there before Dave Waters, but it was pretty well Sheila's [Brewer] fault, her being the dispatcher and not anyone else's fault, but they would not come to a satisfactory solution. They gave no solution as to how anything could be fixed.
>
> They just said, 'Well, we were wrong, let's go on from here.'
>
> . . . .
>
> [They said Brewer] is the dispatcher and she should not have let . . . [Thomason] tell her what to do. [Tr. pp. 169 and 170.]

Ronald Chiado further testified that at the February 28 meeting he showed the copy of the involved work order, General Counsel's Exhibit 9, that he had to those in attendance; and that

> They again said that Sheila should not have sent him, and that Roddie also said that OQ wasn't necessary on this project. I said, 'Well, it is funny the other guys had to have it, and this guy doesn't,'
>
> He [Thomason] said, 'Well, it is not necessary. It is just something that has got to be done.' [Tr. p. 171.]

Leitzell testified that on February 28, she attended a meeting at District 5's office in Utica; that Ronald and Richard Chiado, Randy Hill, Regan, Thomason, and a member of Local 150 who she did not know were also present at this meeting; that Thomason and Regan

> tried to explain pre-jobs and why . . . [Richard Chiado] really didn't get skipped, because they wanted to be sent [sic] qualified people, because the contractor had agreed for us to furnish it with a hundred percent of ours, and then it just sidetracked and there was a lot of yelling. [Tr. pp. 376 and 377.]

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[19] It is noted that the national pipeline agreement, GC Exh. 6, contains the following language:

I. COVERAGE

. . . .

F. Such pipe line construction, installation, repair, replacement or reconditioning as may be combined with or associate or comprising an integral part of other work more particularly and usually defined as engineering or building construction, or work covering pumping stations, **TANK FARMS**, refineries, plant to plant connecting lines within city limits and city distribution lines are not covered by this Agreement. [Emphasis added.]

Leitzell further testified that Richard Chiado never claimed during this meeting that he could operate a finish dozer on a pipeline; that during this meeting she did say that she had talked to Shelia and she had gone down the list and she had told her the names of the people that were qualified for that job, that had finish dozer on there, and that Richard Chiado was not one of them; that Ronald or Richard Chiado asked her if she was throwing Shelia under the bus; that the meeting was hostile, there was name calling, and swearing by Richard Chiado when he used the "f" word in addressing Thomason; that Richard Chiado called Thomason a "fat hillbilly"; that neither she, Regan, nor Thomason use profanity during this meeting; that a couple of days before this meeting she reviewed the workcards of Richard Chiado and Dave Waters and she noted that Richard Chiado's card did not have finish dozer on it, it was added on the day she talked to him but it was not on the card before that; that since Richard Chiado did not have finish dozer on his card at the time of the involved dispatch, he would not have been sent to the tank farm job;[20] and that ML is a signatory to only the national pipeline agreement.

On cross-examination, Leitzell testified that according to cards 2 and 1 of Dave Waters' workcard introduced by Respondent, Respondent's Exhibit 2, Dave Waters was sent to the ML Pontiac tank farm job on "2/1/07" and he next reported in to the union hall on "5/29/07"; that she is familiar with addendum no. 1; that there are prejobs on other than pipeline jobs; that under the heavy and highway and the building agreement the contractors can pick referrals; that this is provided for in 1(B) of addendum no. 1; that under that provision the contractor would be giving the union the name of an individual and not just saying it wanted the most qualified,[21] that it was her understanding that ML had specifically picked Dave Waters, the individual; that when she makes a dispatch, she has asked the member if he is able to do that work; that if the member says that he can and he wants the job, then he will be dispatched; and that it is not always obvious from the out-of-work card whether the member can or cannot do the specific job involved.

Subsequently, Leitzell testified that when a steward calls in asking for someone to be sent out to operate a dozer she looks at the out-of-work list, she looks to see if someone has dozer experience, and if it is not fully laid out on the work history card, she would ask the member about their experience; and that the normal procedure is for the contractor to give the member a proficiency test on the equipment he claims he can operate, and the contractor can reject the person sent out by the union at any time or the contractor can accept the member who was sent out.

General Counsel's Exhibit 14(a) is a work order for "4-18-07" for ML for the involved Pontiac pipeline job. The work order calls for one oiler for a backhoe and "*OQ Cert*" is specified on the "Sent" line. (Emphasis in original.) The work order indicates that the call came from "Brian" (Borwig) and Daniel C. Jones was referred out on April 18 to the job by Molina. Brewer testified that the handwriting on the work order was Molina's; that she was familiar with this referral; and that Jones did have OQ certification.

General Counsel's Exhibit 14(b) is a work order dated "4/23/07" for the ML job in Pontiac. "[O]iler (Group II) Backhoe OQ Training" is written on the "What is Wanted" lines. Brewer testified that this is her handwriting and that she took the order and Molina filled it indicating on the work order that she, Molina, sent Dean Guerro on "4/23/07"; that Terry Tunget was originally called but he did not have OQ training so he was not referred out on this job; and that Guerro did have OQ training. "Brian Borwig" is written on the "Call From" line of this work order.

When called by counsel for the General Counsel, Regan testified that he first saw Richard Chiado's and Dave Waters' work history card about 1 month before the trial herein (or, in other words, around the beginning of September 2007); that he is familiar with the companies of Coolset, Murphy Brothers, ARB, Brandenburg Drainage, Sheehan, and H. C. Price; that all but Brandenburg Tile, which does drain tile, are pipeline contractors; that he did not learn that Richard Chiado worked for all of these companies but he thought that when he reviewed Richard Chiado's workcard a month before the trial herein he saw that Richard Chiado might have worked for a few but he was not positive about that; and that he did not know prior to

[20] The accuracy of this conclusion must be viewed in light of the testimony of Brewer that on January 24, when Thomason called in the involved work order, she knew that Richard Chiado had done finish dozer work on nonpipeline jobs; that she knew from Richard Chiado's work history that prior to February 2007, he operated a dozer on a pipeline job; that, in her opinion Richard Chiado was qualified to do the pipeline work for ML; and that she would have asked Richard Chiado if he could run a finish dozer on pipeline. Regarding asking a member if he could do the work required, it is noted—as set forth below—that Leitzell herself testified that if a member's dozer experience is not fully laid on the work history card, she would ask the member about his experience and if he is able to do the work, if the member says he can and he wants the job he will be dispatched, it is not always obvious from the card whether the member can or cannot do the specific job involved, and the normal procedure is for the contractor to give the member a proficiency test on the equipment he claims he can operate.

[21] As here pertinent, 1B of addendum no. 1 reads as follows:

> When an Employer desires to employ persons not eligible for dispatch to such Employer under the provisions of this Addendum in the performance of work covered by this Agreement in the geographical area covered by this Addendum, either by reason of such persons special skills or previous satisfactory employment within the six calendar months next preceding the date of request by the Employer requesting, such Employer shall in writing request the Referral Office servicing the job or project for pre-job conference at least two calendar weeks prior to the commencement of the work or operation of the equipment.
>
> At such pre-job conference the classification and number of such Employees and the time of the commencement of their employment or the operational stages of the job or project at which their employment shall commence shall be determined.
>
> Thereafter upon written request of such Employer, signed by an authorized representative of such Employer on a job or project and delivered to the Referral Office servicing such job or project stating the [sic] such Employer desires that a named person or persons be referred in a classification or classifications agreed to at such pre-job conference such person or persons shall be referred without regard to the provisions of Addendum No. 1, Sections 4, 5 and 6 of this Agreement and the Employer shall hire such persons or person so referred. [Emphasis added.]

February 2007, that Richard Chiado had operated a dozer on a pipeline job for Murphy Brothers.

Analysis

Paragraphs 5(d) and (e) of the complaint collectively allege that since about February 5, Respondent has failed and refused to properly refer Richard Chiado to employment with ML in violation of its established hiring hall rules, resulting in a denial of employment to Richard Chiado, and that Respondent engaged in this conduct for reasons other than the failure to tender the periodic dues and the initiation fees uniformly required for membership in Respondent.

On brief, counsel for the General Counsel contends that Thomason's testimony that Dave Waters came to the involved ML job as a result of a District 5 referral is belied by Thomason's long held belief, as indicated by the unrefuted testimony of Studer, that an operator who Thomason subjectively believes is the most qualified for the involved job should be referred out to pipeline jobs regardless if they came up on the out-of-work list next or if other qualified operators were on the list ahead of them; that here Thomason personally wanted Dave Waters on the job and Dave Waters' presence on the job had nothing to do with a specific request by ML for Dave Waters or a referral by Debbie Cargill; that other than testifying that Cargill was responsible for the Dave Waters' referral—an assertion not corroborated by Respondent's dispatcher Cargill—Thomason failed to address Brewer's detailed account of the events leading to the referral of Dave Waters to ML; that, as here pertinent, Respondent operates an exclusive hiring hall under the national pipeline agreement; that the involved referral should have been made under addendum no. 1, as described above; that to the extent that ML and Respondent may have agreed to waive the 50/50 manning ability, such agreement did not relieve them from adherence to the exclusive referral system and it did not destroy the exclusive nature of the hiring hall arrangement; that a union that acts arbitrarily, discriminatorily, or in bad faith violates the duty of fair representation, *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991); that when a union operates an exclusive hiring hall, it "'wield[s] additional power . . . by assuming the employer's role,' [and] 'its responsibility to exercise that power fairly increases rather than decreases,'" *Breininger v. Sheet Metal Workers Local 6,* 493 U.S. 67, 89 (1989); and that in *Operating Engineers Local 406*, 262 NLRB 50, 51 (1982), enfd. 701 F. 2d 504 (5th Cir. 1983), the Board indicated as follows:

> Even assuming the absence of specific discriminatory intent, a violation must be found in the circumstances of this case. The Board has held that any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function. [Footnote omitted.]

Counsel for the General Counsel further contends that the Board requires that referrals be based on objective criteria and applied in a nondiscriminatory manner, *Iron Workers Local No. 505 (Snelson-Anvil),* 275 NLRB 1113 (1985); that the basic rule of Respondent's hiring hall is first in, first out in that a referral must be offered to the first registrant on the out-of-work list who possesses the necessary qualifications, with certain exceptions such as for stewards and key men; that when Brewer made referrals under the national pipeline agreement she made the referrals under addendum no. 1; that Brewer's normal procedure was to go down the out-of-work list, look at the workcards, verbally questioning registrants concerning their skills and then dispatch the member; that Leitzell confirmed that this was the proper procedure to follow, testifying that she herself calls members, asks the member if he is able to do the work, and if he says yes, the member is sent out to the job; that Thomason deliberately bypassed the normal procedure by insisting that Dave Waters be sent to ML; that there is nothing in writing which would have indicated to Brewer that she should not follow the normal rules set out in addendum no. 1; that as indicated by Leitzell, business agents have no role in dispatching members to work; that the testimony of Studer and Thomason revealed that Thomason, contrary to all other witnesses, did not believe that addendum no. 1 should apply on pipeline jobs; that when Thomason was asked on cross-examination whether, in his opinion, addendum no. 1 applied he answered "well, in my opinion, the most experience applies on pipeline jobs" (Tr. p. 340); that Thomason knowingly and deliberately departed from the procedures that govern Respondent's hiring halls in referring Dave Waters to ML in violation of Section 8(b)(1)(A) and 8(b)(2) of the Act, *Operating Engineers Local 406*, supra; that Richard Chiado and Brewer both believed that OQ was necessary for operators doing pipeline work and the other operators referred to the ML job, namely, Cavallini, Jones, and Guerro, all had OQ certification; that Respondent has not rebutted the presumptive unlawfulness of its conduct; and that Thomason's use of subjective standards in referring Dave Waters falls short of the objective standards and criteria that a union, in operating an exclusive hiring hall, must apply, and it violated Respondent's duty of fair representation, *Teamsters Local 328 (Blount Bros.)*, 274 NLRB 1053 (1985).

Respondent on brief argues that where necessary, the employee referred by the Union to a pipeline construction job must have OQ Qualification; that Thomason, in response to a conversation with Borwig, called District 5, asked for the names of employees on the out-of-work list with pipeline experience that were capable of operating a final finish dozer, and Cargill, a dispatcher who was temporarily working there, was the one who eventually named Dave Waters as the one to be sent to the ML tank farm job; that in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), the Supreme Court held that unions breach the duty of fair representation if their treatment of bargaining unit members is "arbitrary, discriminatory, or in bad faith"; that Respondent did not deviate from its hiring hall procedures; that because ML was a pipeline job, the employees for the job were to be hired according to the prejob conference provisions of the national pipeline agreement, as well as to addendum no. 1; that section 1(B) of the addendum allowed ML to select employees

at the prejob conference without regard to sections 4, 5, and 6 of the addendum, and the pipeline agreement allowed ML to hire the most experienced and qualified individuals; that this was done through the prejob conference attended by Thomason on January 12; that Thomason followed the proper hiring hall procedures established by the national pipeline agreement and addendum no. 1 and, therefore, the Respondent did not act in an arbitrary, discriminatory, or bad faith manner when it chose to dispatch Dave Waters; that the Respondent acted at all times in good faith and in no way breached its duty of fair representation; that even if it is determined that the Respondent deviated from the hiring hall procedures, a merely negligent deviation does not constitute a breach of the duty of fair representation; that the fact that the decision was not made based on ill will, discrimination, unlawful favoritism or an unreasonable business practice must lead to the conclusion that the Union did not breach its duty of fair representation and "this was simply an inadvertent application of the Pipe Line Agreement" (R. Br., p. 30); that even assuming that Respondent breached its duty of fair representation in dispatching Dave Waters to the Pontiac Tank Farm project, Richard Chiado is entitled to no relief since he did not include on his workcard that he could operate a finish dozer and several other employees ahead of him on the list did indicate such qualification; and that under no scenario would Richard Chiado have been dispatched to the Tank Farm project to operate a finish dozer, and, therefore he is not entitled to any backpay remedy.

I do not find Thomason to be a credible witness. At the trial herein Thomason testified that Debbie Cargill went down the out-of-work list and first gave him the name of Jim Shannon and then she gave him the name of Stanley Shevokas. Before going any further, there are at least two problems with Thomason's testimony. First it is not clear why Cargill would have given Thomason Jim Shannon's name first when he was lower on the out-of-work list than Shevokas. Second, Cargill, who is still a dispatcher for Respondent, did not testify to corroborate this testimony of Thomason. Who choose Dave Waters for the involved referral is a key disputed factual issue. Yet, Respondent did not call dispatcher Cargill as a witness. When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. It may be inferred that the witness, if called, would have testified adversely to the party on that issue. While an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted where, as here, the missing witness is a dispatcher and Respondent in its answer to the complaint herein admitted (in that it did not deny this allegation in its answer to the complaint) that someone holding the same position, Brewer, is an agent of Respondent within the meaning of Section 2(13) of the Act. *International Automated Machines*, 285 NLRB 1122 (1987). Both Regan and Leitzell testified that it was their understanding that ML chose Dave Waters. But when Regan and Leitzell, along with Thomason, attended the first meeting in Utica with Brewer, Brewer's actions, and not Cargill's alleged actions, were the subject of the meeting. There was no mention by Thomason at this meeting that it was not Brewer but rather it was Cargill who was responsible for giving him Dave Waters' name. This approach, namely that it was a problem with Brewer, was carried over to the February 28 meeting attended by Regan, Leitzell, Thomason, Ronald and Richard Chiado, Hill, and Reich. Both Richard and Ronald Chiado testified that Regan and Leitzell blamed the situation on Brewer at the February 28 meeting. Their testimony is credited. Leitzell admitted that one of the Chiados asked her if she was throwing Brewer under the bus. Again, Thomason did not indicate at the February 28 meeting that it was actually Cargill who came up with Dave Waters's name.

Brewer gave very specific testimony about her telephone conversation with Thomason on January 24. The work order she drafted, General Counsel's Exhibit 9, corroborates Brewer's testimony. The fact that Regan and Leitzell held a meeting with Brewer and Molina in Utica to discuss whether Thomason intimidated them with respect to the involved Dave Waters' referral corroborates Brewer's testimony. Brewer's testimony about her telephone conversation with Thomason on January 24 is credited. Other than asserting that he dealt with Cargill on the Dave Waters referral (Respondent did not introduce any work order drafted by Cargill regarding the involved Dave Waters' referral.) and only that he spoke with Brewer sometime later, Thomason does not specifically deny Brewer's very specific testimony about what occurred during their January 24 telephone conversation. Thomason lied under oath when he testified at the trial herein that Cargill was the one who came up with the name of Dave Waters.

Thomason lied when he testified on cross-examination that he did not think that Richard Chiado told him on the H. C. Price Guardian job in 2002, that he had never operated an excavator on a pipeline job before, and that he could not remember if Richard Chiado had been sent out to operate a bulldozer on the job. On direct, Thomason tried to convey the impression that Richard Chiado was not a capable operator. To admit on cross that as steward Thomason himself created the situation on the H. C. Price Guardian job in 2002, would have been admitting that on direct he was attempting to create a false impression.

As found below, Thomason lied under oath about the threats he made to Richard and Ronald Chiado. I do not credit any of Thomason's testimony unless it is corroborated by the testimony of a credible witness or a reliable document which was received in evidence at the trial herein.

There are many problems with Respondent's position. Thomason did not even attempt to refute Studer's testimony. Studer's testimony is credited. Consequently, we have an understanding of Thomason's beliefs as of 2005. This is reinforced with Thomason's testimony at the trial herein when he testified that addendum no. 1 does not apply to pipelines but rather "the most experienced applies on pipeline jobs." (Tr. p. 340.) Who would decide which member was the most experienced? Regan and Leitzell admit that the business agent is not supposed to play any role in the dispatching process. Except for 1B of addendum no. 1, only the dispatchers are supposed to choose who to send out on a referral. Neither of the dispatchers who testified herein testified that they choose who to send out to a job on the basis of who is the most experienced. Both testified that if the member is the next one available on the out-of-

work list, he claims that he is capable and he wants the referral, the member is referred out with the understanding that the contractor can test him for his proficiency on the equipment he claims that he can operate. And, as noted above, 1B of addendum no. 1 indicates, as here pertinent,

> When an Employer desires to employ persons not eligible for dispatch to such Employer under the provisions of this Addendum in the performance of work covered by this Agreement in the geographical area covered by this Addendum, either by reason of such persons special skills or previous satisfactory employment within the six calendar months next preceding the date of request by the Employer requesting, such Employer shall in writing request the Referral Office servicing the job or project for pre-job conference at least two calendar weeks prior to the commencement of the work or operation of the equipment.
>
> At such pre-job conference the classification and number of such Employees and the time of the commencement of their employment or the operational stages of the job or project at which their employment shall commence shall be determined.
>
> Thereafter upon written request of such Employer, signed by an authorized representative of such Employer on a job or project and delivered to the Referral Office servicing such job or project stating the [sic] such Employer desires that a named person or persons be referred in a classification or classifications agreed to at such prejob conference such person or persons shall be referred without regard to the provisions of Addendum No. 1, Sections 4, 5 and 6 of this Agreement and the Employer shall hire such persons or person so referred. [Emphasis added.]

It has not been shown that this provision was complied with in the situation at hand.

Thomason testified about what occurred at the involved prejob conference. The full extent of his testimony is not corroborated by the prejob conference report received in evidence as General Counsel's Exhibit 10. Indeed, in at least one regard the prejob conference report contradicts the position Thomason later took with respect to whether OQ certification was required. Thomason tried to cover the situation with his testimony "this is one of the . . . pre-jobs that I didn't go into decisions and clarifications and attach it to the per-job" (Tr. p. 312). Thomason is not a credible witness. And Respondent did not call as a witness anyone else who attended that prejob conference. So consideration of what occurred at the prejob conference is limited to what appears on the prejob conference report. That being the case, there is no clear indication that the parties meant, as memorialized by the report, to refer to the provisions of 1B of addendum no. 1. According to the testimony the Union's representative at this prejob conference, Thomason, he does not believe that addendum no. 1 applies to pipeline jobs.

Borwig was not called to testify about whether he, on behalf of ML, authorized Thomason to contact District 5 to get a dozer operator. Everyone agreed that the proper procedure is that the steward, Borwig, is the one who is supposed to contact District 5 for a referral. Indeed, it was Borwig who contacted District 5 on two occasions in April 2007 for an oiler with OQ certification for a backhoe. There is no credible evidence of record that Thomason was authorized by ML to contact District 5 for a dozer operator on January 24.

Notwithstanding what Studer told him about what was the right approach in 2005, Thomason implemented, in the situation at hand, the approach he wanted to take. The approach Thomason took violated the Union's procedures. Moreover, Thomason was not the steward on the involved ML job. And, as noted above, there is no showing that he was authorized by the steward, Borwig, acting on behalf of ML to contact District 5.

What occurred was not a question of negligence. Here Thomason knew exactly what he was doing. He had been placed on notice years ago by a union official, Studer, that the approach he advocated did not comply with union rules. Here the Union was placed on notice at the outset that a wrong was being committed. Instead of righting the obvious wrong immediately and avoiding or at least limiting any question of liability, the Union chose to attempt to steamroll over those who challenged it over what was occurring.

Another aspect of the situation at hand may be cause for concern. Regan testified that Thomason told him that it was a very dangerous place on the involved tank farm. On direct by Respondent's counsel, Thomason testified that that there would be a risk involved in having someone who is not a cleanup trained, pipeline dozer operator "[d]epending on if you are working over or around a bunch or existing loaded gas lines . . . ." (Tr. p. 336.)[22] The involved prejob conference report called for OQ certification. Brewer testified credibly that every pipeline job required the operators to have OQ certification. Both of the work orders that ML steward Borwig called in for the involved job in April 2007 specified OQ certified. Richard Chiado testified, without contradiction, that Thomason, among others instructors, told him when he took the OQ certification training that he would not be allowed on pipelines unless he had the OQ certification class. Yet Thomason argued with Brewer when she pointed out that Dave Waters did not have OQ certification. Thomason told Brewer that Dave Waters "does not need OQ." See General Counsel's Exhibit 9. Did Thomason sacrifice safety to get Dave Waters referred to the ML tank farm job?[23] Or was Thomason, for the purpose of getting Dave Waters referred, approaching the situation in terms of tank farms not

[22] As noted above, on cross, Thomason testified that the old pipe which was to be removed was no longer pressurized and you could not remove a live line.

[23] It is noted that on direct by Respondent's counsel Thomason testified that ML did not offer its own OQ certification on the tank farm project at Pontiac. When Thomason went on to explain that ML did ask for OQ certification at first "until they found out that the amperage was going—" (Tr. p. 337). Counsel for the General Counsel renewed her objection pointing out "[w]e have no idea who is talking, when it was said . . . in terms of foundation" (Tr. p. 337). The objection was sustained. Respondent's counsel did not attempt to elicit any additional testimony from Thomason on this matter. Two things should be noted. First, Thomason is not a credible witness. And second, subsequently, as noted above, both of the work orders that ML steward Borwig called in in April 2007 specified OQ certified.

being covered by the national pipeline agreement, General Counsel's Exhibit 6, in that section 1F, as set forth above, indicates that "tank farms . . . are not covered by this Agreement"?

All agree that in the situation at hand the member cannot go to the employer and apply for and accept employment. If he does, he will be disciplined by the Union. The member, in an exclusive hiring hall situation, is at the mercy of the Union in that it has the power to affect the member's livelihood in a very dramatic way. As noted above, Richard Chiado testified, without challenge, that he needed the ML tank farm job because he missed all of his insurance hours. When a Union departs from established exclusive hiring hall procedures which results in a denial of employment to one of its members, there is no need to show a specific discriminatory intent. A violation of the Act will be found unless the Union comes forward to show that the involved referral was actually made pursuant to a valid hiring hall provision or that the Union action was necessary for the effective performance of the Union's representational function. Here, the Union has done neither. As contended by counsel for the General Counsel on brief, Thomason deliberately bypassed the normal procedure by insisting that Dave Waters be sent to the ML tank farm job. Dave Waters was not referred based on any objective criteria applied in a nondiscriminatory manner. Rather, Dave Waters was referred because Thomason wanted him referred notwithstanding the fact that there were other qualified members ahead of Dave Waters on the out-of-work list, and notwithstanding the fact that while those other qualified members were OQ certified, Dave Waters was not OQ certified at that time. As pointed out by counsel for the General Counsel on brief, Thomason's use of subjective standards in referring Dave Waters falls short of the objective standards and criteria that a union, in operating an exclusive hiring hall, must apply, and it violated Respondent's duty of fair representation, *Teamsters Local 328 (Blount Bros.)*, 274 NLRB 1053 (1985). Respondent violated the Act as alleged in paragraphs 5(d) and (e) of the complaint.[24]

Paragraphs 6(a) and (b) of the complaint collectively allege that about February 12, Respondent, by Thomason, threatened to deny work to Richard Chiado if he tried to do anything about Respondent's refusal to refer him to employment on or about February 7, and by this conduct Respondent coerced Richard Chiado in the exercise of rights guaranteed under Section 7 of the Act.

On brief, counsel for the General Counsel contends that Thomason's threat to Richard Chiado that he would not see very much pipeline work anymore if he did anything about the referral of Dave Waters violated Section 8(b)(1)(A) in that it was intended to restrain Richard Chiado in his efforts to realize the benefits of the national pipeline agreement and to coerce Richard Chiado to yield to Thomason's efforts to run the referral system as he pleased, *Local Union No. 725, Plumbers*, 225 NLRB 138, 145 (1976); and that Thomason's threat shows that Respondent had been operating the referral system in an arbitrary manner.

Respondent on brief argues that Thomason did not threaten Richard Chiado's future work on the pipeline; that Richard Chiado's claim that Thomason threatened his future work on the pipeline is just another example of Richard Chiado's tendency to exaggerate facts and events; that Richard Chiado's claim must also fail because the alleged threat was not based on rights guaranteed by Section 7 of the Act; and that the threat does not prevent Chiado from engaging in concerted activity or to join or assist a labor organization.

With respect to Respondent's first argument, namely that Richard Chiado has a tendency to exaggerate, it appears that Respondent either intentionally or unintentionally overlooks the fact that Ronald Chiado, Richard's father, also testified that Thomason told him that if he did not back off, "my boy would never see another pipeline." (Tr. p. 167.) As noted above, I do not find Thomason to be a credible witness. I do find Ronald and Richard Chiado to be credible witnesses. I credit their testimony that Thomason threatened to deny Richard Chiado work if he tried to do anything about Respondent's refusal to refer him to employment on about February 7 (February 5). With respect to Respondent's second argument regarding Section 7 of the Act, as pointed out by counsel for the General Counsel on brief, the statement that Richard Chiado would either never see another pipeline or would not see very much pipeline work anymore threatens a loss of work. It was intended to (a) restrain Richard Chiado in his efforts to realize the benefits of the national pipeline agreement, and (b) coerce him to yield to Thomason's efforts to run the referral system as he pleased. These threats violated Section 8(b)(1)(A) of the Act, *Local Union No. 725, Plumbers*, supra. Respondent violated the Act as alleged in paragraphs 6(a) and (b) of the complaint.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act on about February 5, 2007, and thereafter by improperly, in violation of its established hiring hall rules, referring Dave Waters to the ML tank farm job in Pontiac, Illinois, instead of Richard Chiado or another qualified operator who was ahead of Dave Waters on Local 150's out-of-work list.

2. Respondent violated Section 8(b)(1)(A) of the Act on about February 12, 2007, by Roddie Thomason threatening to deny work to Richard Chiado if he tried to do anything about Respondent's refusal to refer him to employment on or about February 5, 2007.

[24] With respect to Respondent's assertion that Richard Chiado would not have been referred to the ML tank farm job anyway, as noted above, the person who had the right to make that decision, Brewer, testified credibly that on January 24, when Thomason called in the involved work order, she knew that Richard Chiado had done finish dozer work on nonpipeline jobs; that she knew from Richard Chiado's work history that prior to February 2007, he operated a dozer on a pipeline job; that, in her opinion Richard Chiado was qualified to do the pipeline work for ML; and that she would have asked Richard Chiado if he could run a finish dozer on pipeline. And as noted above, regarding asking a member if he could do the work required, Leitzell herself testified that if a member's dozer experience is not fully laid out on the work history card, she would ask the member about his experience and if he is able to do the work; that if the member says he can and he wants the job he will be dispatched; that it is not always obvious from the card whether the member can or cannot do the specific job involved; and that the normal procedure is for the contractor to give the member a proficiency test on the equipment he claims he can operate.

3. 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

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.

The Respondent having unlawfully failed and refused, in violation of its established hiring hall rules, to properly refer a member to the ML tank farm job in Pontiac, Illinois, on or about February 5, 2007, it, the Respondent, must make Richard Chiado, or any other qualified person who should have been referred, whole for any loss of benefits or earnings, less any 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).[25]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, International Union of Operating Engineers, Local 150, AFL–CIO, of Utica, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Improperly, in violation of its established hiring hall rules, referring an unlawfully chosen member to a job instead of referring a qualified member who is ahead on Local 150's out-of-work list of the unlawfully chosen member who was referred.

(b) Threatening to deny work to Richard Chiado if he tried to do anything about Respondent's refusal to refer him to employment.

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

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

(a) Make whole Richard Chiado or any other qualified individual who should have been referred pursuant to the referral system rules to Minnesota Limited, Inc. at its Pontiac, Illinois tank farm site for any loss of earnings and other benefits suffered as a result of Respondent's refusal to refer Richard Chiado or any other qualified individual for employment, in the manner set forth in the Remedy section of the decision.

(b) 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 payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Utica, Illinois union hiring hall, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Subregion 33 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and 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 employees and members and former employees and members employed by the Respondent or on the out-of-work list at any time since February 5, 2007.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Minnesota Limited, Inc., if willing, at all places where notices to employees working at the Minnesota Limited, Inc. Pontiac, Illinois tank farm jobsite are customarily posted.

(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.

Dated, Washington, D.C. December 13, 2007

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[25] It will be left to the compliance stage of this proceeding to determine which member, namely Richard Chiado or some other qualified member ahead of Dave Waters on the involved out-of-work list, will be made whole by Respondent for its unlawful refusal to refer either Richard Chiado or some other qualified member ahead of Dave Waters on the involved out-of-work list out to Minnesota Limited, Inc.'s tank farm job in Pontiac, Illinois.

[26] 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.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to refer Richard Chiado or any other employee member, in violation of the established exclusive referral system rules.

WE WILL NOT threaten to deny you work if you do anything about our unlawful refusal to refer you employment.

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

WE WILL make whole Richard Chiado or any other qualified individual who should have been referred pursuant to the referral system rules to Minnesota Limited, Inc. at its Pontiac, Illinois tank farm site for any loss of earnings and other benefits suffered as a result of Respondent's refusal to refer Richard Chiado or another qualified member for employment.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL–CIO