International Longshoremen's Association, Local 846 (Virginia International Terminals) ***and*** **James Jones.** Case 11–CB–2310

August 18, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On March 4, 1994, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the Administrative Law Judge and orders that the Respondent, International Longshoremen's Association, Local 846, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] In addition to the reasons given by the judge for concluding that the Respondent violated Sec. 8(b)(1)(A), with which we agree, we find further support in the uncontradicted testimony of Charging Party James Jones that he was told by the Respondent's president William Tucker that the membership selection process ''was hard because the people that were selected above you was family.''

In sec. III,B of his decision, the judge mistakenly stated that the dispatchers located at the union hall are employed by the Association. The dispatchers are employed by the Hampton Roads Shipping Association/ILA Guaranteed Annual Income Fund.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] We leave to the compliance stage of this proceeding the Respondent's contention that it is without authority to carry out the recommended Order which requires it to reassign, if necessary, the six port numbers.

Jasper C. Brown Jr., Esq., for the General Counsel.
Charles S. Montagna, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Portsmouth, Virginia, on November 15 and 16, 1993, pursuant to charges and amended charges filed by James Jones, and complaint issued on August 3, 1993, alleging International Longshoremen's Association, Local 846 (Respondent Union or ILA) has violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). Respondent denies it has committed the unfair labor practices alleged.

On consideration of the entire record, the testimonial demeanor of the witnesses, and the posttrial briefs of the parties, I make the following

FINDINGS OF FACT

I. BUSINESS OF THE EMPLOYER

Virginia International Terminals (Employer) is a Virginia corporation engaged in oceanic shipping at its facility in Norfolk, Virginia. In the operation of this business the Employer annually purchased and received at its Norfolk facility goods and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Virginia, and sold and shipped products from its Norfolk facility valued in excess of $50,000 directly to points located outside the Commonwealth of Virginia. The Employer is, and has been at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Allegations*

The complaint alleges that at all times material to this proceeding the Employer has been a member of the Hampton Roads Shipping Association (Association) which has been authorized by the Employer and other employer-members to bargain collectively on their behalf with Respondent Union concerning wages, hours, and other terms and conditions of employment in an appropriate unit, and that the Association and Respondent Union maintain a practice permitting Respondent Union to be the sole and exclusive source of referrals to employment for the Association's employer-members. It is further alleged that since on or about March 29, 1993,[1] Respondent Union has failed and refused to grant membership in the Respondent Union and thus permanent assignment to work gangs to employee-applicants for reasons which are unfair, arbitrary, invidious, and a breach of the fiduciary duty owed the employees whom it represents; that Respondent Union has continually failed and refused to establish objective standards for the selection of employee-applicants for inclusion in classifications for permanent assignment to work gangs, and for membership in Respondent Union, at the Port of Hampton Roads, Virginia; that Respondent Union, by these acts, caused and attempted to cause employer-members of the Association, including the Employer, to discriminate against certain employees in violation of Section 8(a)(3) of the Act by: (1) failing to grant membership in the Respondent Union and thus permanent assignments to work gangs to employee-applicants for unfair, arbitrary, and invidious reasons, and (2) failing and refusing to establish and maintain an objective standard for the selection of employee-applicants for selection in work gangs and for membership in the Respondent Union, and thereby did en-

[1] All dates are in 1993 unless otherwise stated.

gage in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) of the Act.

B. *Facts Found*

Respondent admits, and I find, that the Association is an organization composed of employer-members, and exists for the purpose of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including Respondent Union. The Employer is a member of the Association and, as such, is a party to a collective-bargaining agreement between the Association, on behalf of its members, and Respondent Union who is a signatory to that collective-bargaining agreement. Respondent Union agrees it is the exclusive collective-bargaining representative of all employees of the Employer in the following unit:

> All employees engaged in the loading or unloading of ships at the Employer's location at the Port of Hampton Roads, Virginia, excluding all other employees, guards and supervisors as defined in the Act.

The collective-bargaining agreement contains a provision establishing a contract board manned by an equal number of members from the ILA and the Association. Although the collective-bargaining agreement refers to seven members for each side, Johnnie Johnson, the Association's chairman of the board, testified he believed there were five members for each side (as to which one is correct is of no consequence to this proceeding). He explained that when a local union covered by the collective-bargaining agreement wants to increase its membership, that local union makes a request to the contract board for the issuance of ''port numbers'' for the number of new members the local union wishes to induct. As Johnson explained, a ''port number'' is an identification number assigned an employee which serves to identify that employee during the life of his or her employment in the port served by the Association, for purposes of determining qualification for welfare, pension, vacation, and other benefits based on work history, and also gives the port number holder priority in work assignment over persons who have no port numbers.

Respondent Union, who had enrolled no new members since the 1970s, decided in early 1993 to increase its membership. To that end, it publicized the fact new members would be accepted. Because the contract board had only issued 6 new port numbers to Respondent Union, less than the 12 or 15 it had requested, Respondent Union decided to accept only 6 new members, though it had received 63 applications. The assignment of port numbers is delegated to local unions by the contract board, but the number of members the local union inducts is at the local union's sole discretion. As credibly testified to by Johnnie Johnson, local unions request port numbers in an amount equal to the number of members the unions want to induct, the contract board's productivity committee then investigates the amount of work available in the port and decides whether the requesting union ''is justified to take these members in.'' In short, the port numbers are issued in a number equal to the number of new union members the local union is permitted to induct. Respondent Union clearly only sought port numbers in order to benefit its own new members. There is no showing port numbers are available to anyone but requesting unions, and the composition of the control board effectively guarantees that will be the case even though the Association takes no part in the selection of union members or those to whom the port numbers are assigned. I am persuaded, and there is no evidence to the contrary, that employees who are nonunion members, regardless of their qualifications, cannot obtain port numbers and do not enjoy the benefits union members receive.[2]

Although the collective-bargaining agreement provides at section 18 therein that the Employer is under no obligation to hire employees through Respondent Union's office, it also provides at section 25 that if the ILA, and therefore obviously its local unions who are signatory to the agreement, cannot furnish sufficient employees to fill the employer's requirements, the employer is free to employ other available employees. It would seem from this proviso in section 25 that the first source of supply for employee hires is in fact through ILA locals. That the employer-members of the Association do indeed treat the ILA locals as their first and exclusive source for employees, absent the total unavailability of union-supplied employees, is indicated by Johnnie Johnson's description of the hiring procedure as one in which persons without port numbers are only hired after ''all of the members that have port numbers'' and his advice that none of the local unions in the Hampton Roads Shipping Association has members who do not possess port numbers.

Most, if not all, of Respondent Union's members belong to work gangs composed of several employees and headed up by a hatch boss. The hatch boss is both a union member whose wages are controlled by the collective-bargaining agreement and an agent for the Employer to the extent he is responsible for assuring a work gang is complete and reports to work. When employees are needed, the Employer calls the local union and requests a specific work gang which is then dispatched from the union hall by a dispatcher located there, who is a union member but is employed by the Association. If the work gang is missing a member or additional employees are needed, it is the responsibility of the hatch boss to secure the necessary employees from the dispatcher in the union hall. The hatch boss has independent discretion in selecting the members of his work gang, but I conclude that discretion does not permit ignoring the priority status of port number holders. Employees without port numbers, and thus nonunion members, are not dispatched until all union members with port numbers have been offered jobs.

The six employees selected for membership in the spring of 1993 were Terrence Hinton, Kerry Wooden, Randall Pugh, James Penn, Andrew Jones, and Michelle Hardy. The fathers of Hinton, Wooden, Pugh, and Jones are employee-members of Respondent Union. The father of Hinton, Robert Hinton, was a member of the 3-man selection committee appointed by Respondent Union's president, William A. Tucker, to select 6 members from the 63 applicants. Penn's brother is an employee-member of Respondent Union. Hardy has no relative who is a member of Respondent Union, but was

[2] Employee-applicants selected for membership in Respondent Union effectively become union members, and by virtue of being union members are automatically assigned port numbers. Having port numbers assures union members priority in work assignment and other contractually guaranteed work-related benefits.

recommended for membership in Respondent Union by the president of another ILA local.

Tucker testified that he had no set criteria for the selection of members, but he was concerned about assuring Respondent Union, which has a predominantly African American membership, was not discriminating against white people and he so told the members of the selection committee. He also told them he wanted no riffraff or persons with a felony record but wanted members who had families and cared for them. There were no written guidelines for the committee to follow. According to Tucker, it was the committee's responsibility to examine all the applications and select the persons it thought best qualified for the work. He does, however, state that the contract requires an employee to be able to drive a forklift and other machinery and to have a driver's license to so do. Tucker took no part in the selection until the selection committee presented to Respondent's executive board a list of 6 applicants it had selected from the list of 63 applicants. Ascertaining that all six applicants were black, Tucker rejected the list and directed the selection committee to go back and review other applications and to then present a racially mixed list to Respondent's executive board. The selection committee then came up with a list of applicants including a white male and a white female. The white male withdrew his application and the white female, Hardy, was taken into membership and assigned a port number.

The Respondent Union's vice president, Roy Leonard, chaired the selection committee.[3] Leonard agrees with Tucker that the committee was required to consider hiring a white male and a white female, and that work experience and police record were also criteria to be considered. Leonard testified that ''probably quite a few'' of the applicants were related to members of Respondent Union due to the area in which they all lived, that ''probably some sons'' of members were rejected, and that the committee did not consider family relationships in its selection. He further recalls that when the applications had been reduced to 15, there was 1 white male and 4 white females on the list, and he was aware that 4 of the 15 listed were related to members. The four so related were Terrence Hinton, Kerry Wooden, Randall Pugh, and Andrew Jones, all of whom were in the final six selected and who became members. James Jones, the Charging Party in this proceeding, was included on the list of 15 applicants and, according to Leonard, is the next person, after the 6 selected, who would be received in membership. Nicholas Banks, another applicant who is named in the complaint and testified before me, was not included on the list. Leonard took this list to several hatch bosses and asked who they preferred to have in their work gangs. Leonard concedes that perhaps all 63 applicants are qualified to do the work, there were no written criteria regarding qualifications, and none of the 6 selected had driver's licenses when they became members, but were then sent to driver's school to obtain driver's licenses. None of the applicants received personal interviews before acceptance into membership.

C. *Conclusions*

Respondent Union and employer-members of the Association are maintaining a practice that establishes Respondent Union as a sole and exclusive source of employees for hire, gives preference to port number holders, i.e., union members, and therefore encourages union membership. Employer discrimination in regard to hire or tenure of employment or any term or condition of employment in order to encourage union membership violates Section 8(a)(3) of the Act. There is no charge or complaint before me that either the Association or its employer-members have violated the Act. I therefore make no finding the Association or its employer-members have so done. Nevertheless, the Act also provides a union violates Section 8(b)(2) of the Act if it causes or attempts to cause an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act.[4] By taking part in a practice that limits the grant of port numbers to its members, Respondent Union has caused employer-members of the Association to grant preferential hiring rights exclusively to Respondent Union's members, effectively guaranteeing them lifetime employment[5] and fringe benefits, and thereby discriminating against nonmembers, which obviously reasonably tends to encourage membership in Respondent Union and is forbidden by Section 8(a)(3) of the Act. By so doing, Respondent Union has violated Section 8(b)(2) of the Act. What we have here is akin to a closed shop which makes union membership a precondition of preferential employment, and ought not be countenanced. Another violation of Section 8(b)(2) flows from the complete integration of the assignment of port numbers with membership so that one may not be gained without the other. Thus the grant of membership by its close tie to the issuance of port numbers becomes directly related to employment and the terms and conditions thereof, and is a direct and obligatory requirement for the assignment of a port number, which requirement causes an employer to discriminate against employees with respect to whom membership has been denied on grounds other than failure to pay periodic dues or initiation fees uniformly required as a condition of acquiring membership.

The General Counsel alleges and argues that Respondent Union should also be found in violation of the Act for failing to grant membership to some employees[6] for unfair, arbi-

[3] Leonard refers to the selection committee as the hiring committee.

[4] Secs. 8(a)(3) and 8(b)(2) read, in relevant part as follows:

Sec. 8.[§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

. . . .

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents—

. . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

[5] Employees with port numbers are assured of a contractually guaranteed annual income at times they are unemployed.

[6] Sec. 2(3) of the Act specifically provides the word ''employee'' is not limited to employees of a particular employer, and the Board has long held ''employee'' includes members of the working class generally and specifically includes applicants. See, e.g., *Dave*

Continued

trary, and invidious reasons and for failing and refusing to maintain an objective standard to apply to applicants for membership in Respondent Union. There are no written guidelines to follow in evaluating membership applications, nor do there appear to be any firm objective criteria for that evaluation. Apart from Respondent Union's president, Tucker's injunction to avoid racial discrimination and the admission of felons or riffraff, a descriptive term with no apparent objective standard, there was no objective checklist of reasons or anything similar to be followed. The selection committee, in the person of Respondent Union's chairman, Roy Leonard, conferred with hatch bosses concerning which applicants they would prefer in their work gangs, hardly an objective standard. No applicants were interviewed, none of those selected then had the driver's license Tucker asserts is necessary for the work involved, and Leonard's concession that all of the applicants might have been qualified to do the work reveals an absence of any significant inquiry into the applicants' comparative qualifications. That there was also at least a hint of nepotism in the selection is suggested by Leonard's comment he was aware that 4 of the final 15 applicants were related to Respondent Union's members, together with the fact that the 4 he referred to were all selected for membership, as was a fifth who was also related to 1 of Respondent Union's members. Respondent Union has not shown by a preponderance of the credible evidence that it in fact has established objective standards it applies to membership applications. The evidence in fact indicates it has not done so. I am persuaded that the selection, apart from the effort to create a racially diverse group of six employee-applicants, was purely discretionary based in major part on subjective opinions of hatch bosses and family relationships between the applicants and current employee-members. Accordingly, I must agree with the General Counsel the selection was arbitrary and unfair to those who were not selected. Even so, Section 8(b)(1)(A) of the Act gives Respondent Union the right to make its own rules with respect to the acquisition of membership.[7] That right is not, however, an unfettered right because its exercise must be for a legitimate union reason and cannot be utilized to ''injure any policy Congress has imbedded in the labor laws.''[8]

Although the Respondent Union is free to propound its own rules with respect to the acquisition of membership, it runs afoul of Section 8(b)(1)(A), as it did here, by utilizing an arbitrary, capricious, and invidious method of selection of recipients of port numbers, a method which also appears to be tainted with nepotism, thereby breaching its duty of fair representation and violating Section 8(b)(1)(A) of the Act.[9]

CONCLUSIONS OF LAW

1. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent Union, by attempting to cause and causing an employer to discriminate against employees in violation of Section 8(a)(3) of the Act, has violated Section 8(b)(2) of the Act.

4. Respondent Union, by causing an employer to discriminate against employees with respect to whom membership has been denied for reasons other than failure to pay the periodic dues or initiation fees uniformly required as a condition of acquiring membership, has violated Section 8(b)(2) of the Act.

5. Respondent Union, by choosing individuals to be issued port numbers in March 1993 based on unfair, arbitrary, and invidious considerations, breached its duty of fair representation in the assignment of port numbers and thereby violated Section 8(b)(1)(A) of the Act.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent Union, International Longshoremen's Association, Local 846, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Conditioning the grant of port numbers on the acquisition of membership in Respondent Union.

(b) Choosing individuals to receive port numbers on the basis of unfair, arbitrary, and invidious considerations, thereby denying other qualified employee-applicants employment opportunities and various work-related benefits such as pension, health, vacation, and other benefits provided by the collective-bargaining agreement between Respondent and the Hampton Roads Shipping Association and its employer-members.

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

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

(a) Select applicants for port numbers on the basis of fair and objective criteria without reference to their union membership or lack of it.

(b) Grant port numbers to and make whole, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[11] any of the 63 employee-applicants denied port numbers, and therefore the employment opportunities

Castellino & Sons, 277 NLRB 453, 459 (1985); *Consolidation Coal Co.*, 266 NLRB 670, 673 (1983).

[7] The Act states under Sec. 8:

> (b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents—
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 [section 157 of this title]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

[8] *Douglas Aircraft Co.*, 307 NLRB 536, 558 (1992).

[9] *Miranda Fuel Co.*, 140 NLRB 181 (1962); *Vaca v. Sipes*, 386 U.S. 171 (1967).

[10] 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.

[11] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

and benefits flowing therefrom, by the application of unfair, arbitrary, and invidious considerations in the selection of Terrence Hinton, Kerry Wooden, Randall Pugh, James Penn, Andrew Jones, and Michelle Hardy in March 1993 for any loss of earnings and benefits they may have suffered as a result of the Respondent Union's unlawful conduct.[12]

(c) Post at its main hall or office in Newport News, Virginia, and its meeting place for members and users of its exclusive hiring hall system copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by Respondent Union's authorized representative, shall be posted by the Respondent Union immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

[12] The selection of those employees who would have been selected to receive the available port numbers had appropriate selection criteria been applied, is a matter to be resolved in subsequent compliance proceedings. *Longshoremen ILA Local 1426 (Wilmington Shipping)*, 294 NLRB 1152 (1989). All 63 applications, including those of the 6 employees who received the port numbers, must be considered in this process and, if someone other than those 6 selected in March 1993 is now selected on the application of fair and objective standards, an appropriate assignment or reassignment of port numbers must be made to those newly selected as a result of this Order.

[13] 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.''

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT condition the grant of port numbers on the acquisition of membership in International Longshoremen's Association, Local 846.

WE WILL NOT breach our duty of fair representation or discriminate against individuals by choosing individuals to whom port numbers are to be granted based on arbitrary, unfair, or invidious considerations.

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

WE WILL select employee-applicants for port numbers on the basis of fair and objective criteria without reference to their union membership or lack of it.

WE WILL review the 63 applications for membership we received in March 1993 and select the 6 employee-applicants who would have received port numbers in March 1993 had fair and objective criteria been applied, and WE WILL make whole, with interest, any of these applicants who were denied port numbers and therefore the employment opportunities and benefits flowing therefrom by our use of unfair, arbitrary, and invidious considerations in the selection of Terrence Hinton, Kerry Wooden, Randall Pugh, James Penn, Andrew Jones, and Michelle Hardy to receive port numbers in March 1993, for any loss of earnings and benefits the applicants may have suffered as a result of our unlawful conduct, and, if a person or persons other than these 6 named individuals is selected on the application of fair and objective standards, WE WILL assign or reassign port numbers to those so selected.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846