Local 137, International Union of Operating Engineers (Various Employers) *and* Ronald Jackson *and* Frank Collins. Cases 2–CB–14511 and 2–CB–14532

June 23, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On December 5, 1994, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.

The complaint alleges that the Respondent Union violated Section 8(b)(1)(A) of the Act by discriminating in hiring hall referrals against 11 named members who ran against the incumbents in a recent election for union office and/or did not support the winning candidates. The judge found that the Union unlawfully discriminated in referrals against two individuals, Angelo Orsetti and Casmir Duchnowski, but not against the others.[2] The Union has excepted to the judge's finding that it discriminated unlawfully against Orsetti and Duchnowski. The General Counsel has excepted to the judge's failure to find unlawful discrimination against the remaining individuals. As we explain below, we agree with the judge's findings for the most part. Unlike the judge, however, we find that the Union discriminated in referrals against Frank Collins and Anthony Rubeo.

The Union operates its nonexclusive hiring hall on a modified first-in, first-out basis. That is, when there is a job to be filled, the individual who has been on the out-of-work list the longest time and who is capable of operating the equipment on the job will be the first to be offered a referral. There are exceptions to the rule, however. For example, when a contractor asks for an individual by name, the Union normally will comply with the request, even if he is not at the top of the referral list. Similarly, when a job is resumed after a layoff, the members of the crew who were working when the job was discontinued will be called back, without regard to their positions on the referral list.

Also, in an effort to mitigate the problem of intermittent employment in the construction industry, the Union operates its hiring hall with the aim of ensuring that as many members as possible obtain the 20 weeks' work they need to qualify for unemployment compensation and for contractual health benefits. Thus, when a member is referred to a job, he does not immediately return to the bottom of the list; instead, he remains high on the list for referrals until he has obtained a total of 20 weeks' employment. At that point, he is recorded as ''in book,'' and his name goes to the bottom of the list. Because of the reduction in job opportunities during the recent recession, the Union modified the system in early 1993 to give preference in referrals to members who needed 5 or fewer weeks of employment to reach the 20-week eligibility standard.[3]

As we have said, the judge found that the Union discriminated against Orsetti and Duchnowski but not against any of the other individuals. He arrived at that conclusion by comparing the length of time each of the alleged discriminatees had to wait for a referral after being recorded as ''in book'' with the waiting periods of a sample of 115 other hiring hall users with skills similar to those of the alleged discriminatees. Most of the individuals in the judge's sample waited less than 4 months between their ''in book'' dates and their next referrals; Duchnowski and Orsetti, by contrast, waited 13 and 10 months, respectively for referrals.[4] No one in the sample waited as long as Duchnowski, and only one waited as long as Orsetti. The judge found that the delays in referring those two employees were outside the range of experience of other hiring hall users with comparable skills, and that the General Counsel thus

[1] The judge inadvertently characterized a statement by the Union's president, Louis Varricchio, to Christopher Villa, one of the alleged discriminatees, that he was going to make Villa nervous, as having been made in January 1993. In fact, as the General Counsel notes, the statement was made on August 17, 1992. We correct the inconsequential error. We also correct the judge's citation to *Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500 (1993).

[2] The judge granted the General Counsel's motion to dismiss the allegation concerning Robert Smith.

[3] In exceptions, the General Counsel contends that the judge failed to account for the system as it existed before the 1993 modification, and argues that there actually was no material change in the system. We need not resolve this issue because, as we explain below, there is no evidence that the 1993 change had any impact on referrals either of the alleged discriminatees or of the individuals with whom they are compared.

[4] Actually, Orsetti was marked ''in book'' on December 20, 1991, and was referred on June 8, 1992, to a job that lasted 15 weeks. It was 10 months from the time Orsetti was laid off on September 21, 1992, until he was next offered a referral, in July 1993. The judge presumably used the latter period because, although Orsetti's ''in book'' date was December 20, 1991, the discrimination is not alleged to have started until July 20, 1992. Consequently, Orsetti could not have been discriminated against in referrals, as alleged in the complaint, until he was laid off in September of that year and was seeking further employment.

had shown that Orsetti and Duchnowski had been adversely treated by the Union in job referrals.[5]

Concerning the other eight alleged discriminatees, the judge found that their experiences in referrals were no different from those of individuals with comparable job skills. In the cases of Frank, William, and John Collins and Christopher Villa, the judge also noted that they had been offered jobs that they turned down. He therefore found that the General Counsel had not shown that any of those individuals had been discriminated against.

The General Counsel has excepted to the judge's dismissal of the allegations of discrimination against the latter eight employees. The General Counsel contends that the judge erred in failing to evaluate specific instances, summarized in General Counsel's Exhibit 11 (GC 11), in which the alleged discriminatees were passed over for referral in favor of individuals who were lower on the out-of-work list.[6]

We find merit to the General Counsel's exception. To the extent General Counsel's Exhibit 11 indicates that other individuals were given referrals at times when the alleged discriminatees were unemployed and higher on the list for referrals, we find that the Respondent had the burden of explaining why the individuals who were lower on the list were given preference. In this regard, given that the Union does not operate its hiring hall on a strict ''first-in, first-out'' basis, we would not be inclined to find unlawful discrimination merely on the basis of isolated out-of-order referrals, even if the reasons for those referrals were not explained. If a pattern of unexplained out-of-order referrals appeared, however, it would be reasonable to infer that the disfavored individuals were the victims of adverse treatment.

We have examined General Counsel's Exhibit 11 and have determined that much of the information it contains does not indicate a pattern of adverse treatment of the alleged discriminatees. In the first place, many of the referrals listed in that exhibit were made before July 20, 1992, when the discrimination is alleged to have begun. Also, in many instances, when individuals with later ''in book'' dates were referred instead of the alleged discriminatees, the alleged discriminatees had received one or more referrals before the ''out-of-order'' referral took place.[7] In numerous instances, although some other individual apparently was given an out-of-order referral in preference to one of the alleged discrim- inatees, the two men actually received about the same number of referrals over a given period of time. Finally, a union witness testified at length concerning many of the referrals listed in General Counsel's Exhibit 11 and explained that the individual referred either had been called back to a job by a contractor or possessed skills needed on the job that the alleged discriminate lacked.[8]

On the basis of our review of General Counsel's Exhibit 11, we find that the General Counsel has failed to demonstrate that the Union gave adverse treatment in referrals to William Collins, John Collins, Christopher Villa, Angelo Matero, Ronald Jackson, or George Atkinson. Atkinson and Jackson, in particular, seem to have been treated quite well. Atkinson received 12 referrals after being marked ''in book'' on September 11, 1991. Six of those referrals came after the discrimination is alleged to have begun in July 1992. During that period, only one of the seven individuals compared with Atkinson in General Counsel's Exhibit 11 (Hunt) received appreciably more referrals than Atkinson.[9] Of the 17 referrals of those individuals that are listed in General Counsel's Exhibit 11, only 2 appear to have been out of order. The others were either preceded by referrals of Atkinson or were explained; a few also occurred before July 20, 1992. Similarly, Jackson received 19 referrals between September 11, 1991, when he was placed ''in book,'' and November 1993, when he died. Seventeen of those referrals came after July 20, 1992; of the eight individuals compared with Jackson in General Counsel's Exhibit 11, only one received as many referrals during that period. Concerning Jackson, there are 31 purported out-of-order referrals listed in General Counsel's Exhibit 11. Of those, several came before July 20, 1992, and nearly all the rest were either explained or preceded by referrals of Jackson.

William and John Collins received few referrals. As the judge found, however, both men were called on several occasions but either were unavailable for work

[5] The judge also took note of the clear animus demonstrated by the Union against the supporters of the Collins' slate, and found that the General Counsel had established a prima facie case of discrimination under *Wright Line*, 251 NLRB 1083 (1980), which the Union had failed to rebut.

[6] The judge gave little, if any, weight to the information in G.C. Exh. 11 because, as Villa (who prepared it) admitted, it does not reflect the work experience of all members of the Union and probably does not include some comparable members who received fewer referrals than did the alleged discriminatees.

[7] As the General Counsel states on brief, ''The relevant pool of employees to examine . . . is not all members with comparable skills, but members with comparable skills, junior on the referral list, *who were referred out ahead of the [alleged] discriminatees*.'' (Emphasis added.)

[8] The General Counsel does not contest the proffered explanations. No attempt was made to explain any of the purported out-of-order referrals on the basis that the favored individual needed to be sent to work in order to avoid losing unemployment compensation or union benefits. Thus, we need not decide whether, as the General Counsel argues, there was no real change in the system in early 1993, because the Union did not try to justify any of the specific allegedly out-of-order referrals as prompted by the goal of insuring that members did not lose benefits.

[9] For comparison purposes, we exclude referrals made during the 8-month period in 1993 when Atkinson was working on an extended job.

or turned jobs down.[10] The vast majority of the out-of-order referrals listed in General Counsel's Exhibit 11 with respect to both men either took place before July 20, 1992, or were explained. In addition, John Collins received referrals that predated several of the referrals alleged to be out of order.

With regard to Matero and Villa, most of the alleged out-of-order referrals were not explained.[11] In Matero's case, however, nearly half of those referrals took place before July 20, 1992, and a majority of the others were preceded by referrals of Matero. Only two of the nine individuals with whom Matero is compared in General Counsel's Exhibit 11 had more referrals than he did after July 20, 1992, and they were more broadly skilled than Matero, who was basically a crane operator. Villa received eight referrals between July 6, 1993, and March 1, 1994. He also turned down two job offers and was unavailable for work for a week in June and during the early part of September 1993. Counting the jobs he declined, Villa fared at least as well in referrals as 10 of the 12 comparators in General Counsel's Exhibit 11. Thus, even though there were numerous out-of-order referrals vis-a-vis Villa, the relatively large number of referrals he received, together with the jobs he turned down and the periods for which he was unavailable persuade us that no pattern of adverse treatment of Villa has been shown.

By contrast, we find that the General Counsel has shown adverse treatment of Rubeo and Frank Collins. Rubeo was a broadly skilled operator, yet he received only two referrals between July 20 and November 1, 1992, when he retired. During that same period, Jeff Loughlin received 10 referrals and Bob Poccia received 7; nearly all of those referrals apparently were out of order. No attempt was made to explain why those individuals were treated favorably in comparison to Rubeo, or why so many of those referrals were made out of order. In Frank Collins' case, we agree with the judge that it is difficult to infer adverse treatment in referrals during 1992 because nearly all the apparent out-of-order referrals made during that year either predate July 20, 1992, or were explained, and because Collins turned down at least one job and was not at home when he was called about another.[12] The period of 1993–1994, however, is a different story. During that period, there were well over two dozen out-of-order referrals vis-a-vis Frank Collins that were unexplained, and there is no evidence that he was unavailable for work during that period.[13]

Because we find that Rubeo and Frank Collins (during 1993–1994) were treated adversely in referrals, and because we agree with the judge that the Union demonstrated animus against the Collins' slate and its supporters, we find that the General Counsel has established a prima facie case of discrimination against those two individuals which the Union has not rebutted. Accordingly, we find that the Union violated Section 8(b)(1)(A) by discriminating against Rubeo and Frank Collins in the operation of its hiring hall. We shall modify the judge's recommended Order to require the Union to make Rubeo and Collins whole for any losses they may have suffered as a result of the unlawful discrimination.[14]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 137, International Union of Operating Engineers, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Discriminatorily refusing to refer to employment Casmir Duchnowski, Angelo Orsetti, Anthony Rubeo, Frank Collins, or any other employees in a timely manner because they run for union office or support certain candidates for union office.''

2. Substitute the following for paragraph 2(a).

''(a) Make whole Casmir Duchnowski, Angelo Orsetti, Anthony Rubeo, and Frank Collins for any loss of earnings they may have suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.''

3. Substitute the attached notice for that of the administrative law judge.

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[10] In William Collins' case, we do not rely on evidence of attempted referrals on July 31 and August 1, 1992, which Collins denied having taken place.

[11] The two exceptions were jobs that involved handling hazardous materials, which Villa was not trained to do.

[12] Hiring hall records indicate that Collins was called without success on several other occasions; however, Collins denied having received those calls. Collins also turned down two referrals because he was not qualified to do the work. We do not rely on those two refusals, or on the disputed calls, because we find that, in any event, no pattern of adverse treatment of Collins has been demonstrated for 1992.

[13] With one possible exception: hiring hall records indicate that Collins was called about a job on February 4, 1993. Collins denied receiving such a message.

[14] In determining the dates of discrimination against Rubeo and Collins, the same approach should be used as the judge recommended for Orsetti and Duchnowski. In Rubeo's case, the measuring period should be computed as the judge specified for Duchnowski, but beginning with Rubeo's ''in book'' date of February 14, 1992, instead of Duchnowski's. For Collins, it should be computed as the judge recommended for Orsetti, except that January 1, 1993, should be substituted for September 21, 1992.

APPENDIX

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

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

WE WILL NOT discriminatorily refuse to refer to employment Casmir Duchnowski, Angelo Orsetti, Anthony Rubeo, Frank Collins, or any other employees in a timely manner because they run for union office or support certain candidates for union office.

WE WILL NOT impliedly threaten to withhold job referrals from employees and union members because they support certain candidates for union office.

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 Casmir Duchnowski, Angelo Orsetti, Anthony Rubeo, and Frank Collins for any loss of earnings they may have suffered as a result of the discrimination against them, with interest.

WE WILL keep and retain for 2 years, adequate records of our referral operation that will disclose fully the basis on which referrals are made and make those records available to the Regional Director for Region 2 on request.

LOCAL 137, INTERNATIONAL UNION OF OPERATING ENGINEERS

Margueritte Greenfield, Esq., for the General Counsel.
Robert D. Brady, Esq. (Corcoran & Brady), for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on March 14, 15, and 18 and April 15, 1994. The charge in Case 2–CA–14511 was filed by Ronald Jackson on January 6, 1993. The charge in Case 2–CA–14532 was filed by Frank Collins on January 24, 1993. A consolidated complaint was issued on August 31, 1993, and as amended alleged, in substance, that:

1. In September 1992, Respondent's agents told member/employees that they would have been referred to jobs had they not supported a particular slate for union office.

2. Since July 20, 1992, the Respondent has refused to refer certain employee/members to jobs because they did not support the winning candidates in an intraunion election. The people allegedly discriminated against were:

Frank Collins	William Collins
George Atkinson	Angelo Orsetti
Angelo Matero	John Collins
Robert Smith[1]	Anthony Rubeo
Casmir Duchnowski	Christopher Villa
Ronald Jackson	

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a labor organization within the meaning of Section 2(5) of the Act. As a union, it maintains a collective-bargaining relationship on behalf of its members, with a number of Employer Associations located in Westchester, Putnam, and Dutchess Counties in the State of New York.[2] It is conceded that annually the constituent members of these associations are engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act, inasmuch as they purchase goods valued in excess of $50,000 that are shipped directly to them from States other than the State of New York.

The complaint alleges and the Respondent admits that it is subject to the jurisdiction of the National Labor Relations Board.

II. ALLEGED UNFAIR LABOR PRACTICES

As noted above, the Union has entered into and maintained a series of collective-bargaining agreements with each of the aforementioned multiemployer associations whose members, from time to time, employ members of the Union. The companies that are members of these associations are primarily engaged in the building and construction or highway construction industries. In each of the contracts, there is a provision whereby the employers agree to give the Union 48 hours' notice of their intention to hire employees so that the Union can have an equal opportunity to recommend qualified applicants. Thus, pursuant to this provision, it cannot be said that the Union operates an exclusive hiring hall, albeit there was testimony from some of the witnesses that it would be impolitic for members to bypass the hiring hall and obtain jobs on their own. Notwithstanding the lack of an exclusive hiring hall, if the Union is found to have discriminated in referrals against certain of its members because of their political opposition to the incumbent officers, such conduct would constitute a violation of Section 8(b)(1)(A) of the Act. *Teamsters Local 923 (Yellow Cab)*, 172 NLRB 2137, 2138 (1968); *Development Consultants*, 300 NLRB 479 (1990).[3]

The members of this Union are employees who range from being very skilled to people having minimal skills. They op-

[1] In her brief, counsel for the General Counsel moved to dismiss the allegation referring to Robert Smith as no evidence of discrimination was adduced regarding this gentleman. The motion is granted.

[2] The associations are: (1) the Associated Contractors of Westchester Inc. (ACW), (2) the Building Contractors Association of Westchester Inc. (BCAW), and (3) the Contractors Association of Westchester, Putnam, and Dutchess Counties, New York (CAWPD).

[3] The Board held in *Development Consultants*, supra, that where there are discriminatory job referrals motivated by intraunion political considerations, the absence of an exclusive hiring hall will cause the violation to be Sec. 8(b)(1)(A) and not Sec. 8(b)(2) of the Act.

erate and maintain equipment such as cranes (which require a state license), bulldozers, cherry pickers, backhoes, graders, etc. Some members have, by dint of training and experience, the ability to operate many of these machines and are more employable than others. Other members have been content to acquire a minimum amount of skills and therefore are not qualified for many of the jobs that need to be filled. Of course, many members occupy the middle ground. The lowest skill job, essentially, is someone who is called an ''oiler.'' A person in this category basically oils the machines but may have little or no competence to operate them.

The General Counsel alleges that the present leadership of the Union discriminated against people who sought to challenge them in a election held in August 1992. The Respondent denies this allegation and asserts that the alleged discriminatees, like most of the Union's members, have had great difficulty in obtaining employment because of a drastic reduction in the amount of work being done by contractors in the area serviced by the Union.

The management of the Union is divided into what might be called professional or full-time union agents and member/officers. In the former category is the business manager and the business agents, all of whom are paid union employees and who run the day-to-day operations of the Union. In the latter category are members who are elected to various offices of the Union such as president, vice president, recording secretary, financial secretary, treasurer, executive board members, and auditors. Except for the business agents, the above-noted positions are filled by election. It is agreed that the person with the most authority would be the person occupying the position of business manager. Business agents are hired and fired by the business manager.

In addition to the above, it should be pointed out that when operating engineers are employed on a jobsite, the business manager will designate one and sometimes two members to be ''master mechanics.'' These are people who function as shop stewards and are responsible for seeing that the contract is complied with. At the same time they are generally members who have a good deal of experience and skill on various equipment and according to at least one master mechanic, Nicholas Funicello, would have foreman types of functions in relation to the other operating engineers on the site.

Before 1991, Charles Matero was the Union's business manager and was the person who effectively ran the Union. In August 1991, Charles Matero decided to retire and tried to have Salvatore Santamorena elected as the new business manager by the other officers. At that time Santamorena was employed as the Union's funds manager having received that job from Charles Matero. At two meetings of the Union's officers, however, Nicholas Signorelli was voted in as the new business manager against the wishes of Matero. Signorelli was, at that time, the Union's president but had previously been fired by Charles Matero as a business agent. In turn, Louis Varricchio became the new president. When Charles Matero sought to overturn the results of this vote, the Union's attorney (Robert Brady) told him that the vote was proper and could not be challenged. Salvatore Santamorena retained his position as funds administrator and continues to do that job to the present.

When Signorelli took over as business manager, he began to make changes, some of which affected William and Frank Collins. First, Signorelli fired William Collins as a business agent and tried to get him to resign his position as recording secretary. Second, despite some assurances to Frank Collins, Signorelli replaced him in November 1991 with Antoinette (Toni-Anne) Occhiogrossi as office manager and dispatcher. In this regard, both Frank and William Collins testified that Signorelli told them that he attributed part of his success in winning the business manager's spot to the members who wanted the Collins' brothers out of their union jobs.

As William and Frank Collins lost their paid union jobs, they registered, in the autumn of 1991, at the hiring hall for referrals to employment.

William Collins had been a member of the Union since 1968 and had operated a number of machines until he became a full-time employee of the Union in or about 1985. Although claiming that he could do crane work, he conceded that he was never paid to operate a crane. In this respect, I do not believe that William Collins was qualified to operate a crane that requires a state license and that can be very dangerous to people in the vicinity if not operated correctly. Also, his testimony revealed that he never attended the Union's apprentice school and never learned to operate some of the more difficult pieces of equipment that are run by operating engineers. After registering in the hiring hall on or about November 1, 1991, William Collins did not go out to work until 5 months later, on March 30, 1992. As discussed below, there was evidence that he was offered several jobs during the interim.

The evidence shows that after he asked William Collins to resign as recording secretary, Signorelli (perhaps in consideration of receiving the resignation) referred William Collins to a job as a master mechanic to a job that was almost finished. The evidence also shows that some time after that job ended on November 1, 1991, Signorelli told Collins that he would no longer send him out as a master mechanic. In this regard, Signorelli testified that as the master mechanic's job is akin to that of an appointed shop steward, he considered it a political plum to be given or withheld by the business manager. He stated: ''It would be just like Guilliani putting Dinkens in a good spot or President Clinton putting President Bush in a good spot. So it wasn't likely for me to do that with anyone who ran or was in a position to run.''[4]

Frank Collins began working in the trade in 1971 as an oiler that is the least skilled of all of the operating engineer jobs. (Indeed, it is so unskilled that in some of the more recent project agreements in Westchester, the Union has had to eliminate this category of work.) In 1984, Frank Collins was hired by Charles Matero to be the Union's office manager and dispatcher. He remained in that position until replaced by Signorelli in November 1991, and he registered in the hiring hall as an oiler on November 27, 1991. The Union's records show that Frank Collins did not obtain employment until January 27, 1993, about 13 months after registering. Thereafter he received four more referrals in the months of April, May, and July 1993 and February 1994.

[4] As the job of master mechanic is equivalent to that of a shop steward and as it is appointed by the business manager of the Union, it seems to me that the business manager could legitimately consider loyalty to him as a factor in referring people to these positions. See *Longshoremen ILA Local 1294 (International Terminal)*, 298 NLRB 479 (1990).

(Collins was still employed at the last job as of the time of the hearing.)

As noted above, the Union operates a nonexclusive referral system. The operation of the hiring hall was explained by witnesses from both sides, and there was not much disagreement about how it was run in the context of this particular industry.

Although highly paid, operating engineers, being in the building and construction industry do not always have steady work. Employment being seasonal, many of the Union's members obtain nonpermanent jobs and use the hiring hall to get new work. By the same token, employers utilize the hiring hall as an efficient place to obtain qualified workers as needed.

Notwithstanding the above, the evidence shows that not all of the Union's members use the hiring hall. For one thing there are a group of members who work for employers who are not directly engaged in construction work and who have full-time plant jobs. These people work in quarries, asphalt plants, etc. There is also another group who are ''company men,'' these being people, who although employed in construction, have permanent full-time jobs with a particular company. These people would have no need to use the hiring hall, except if laid off or discharged by their particular employer. Additionally, there are people who having been referred to a particular job, will be re-referred to the same job if the job was not completed by the beginning of winter and if the employer resumes the work when the weather becomes less inclement. (In those situations, the employer will likely ask for that particular man.)

The basic procedure is that when a member is laid off, he will register at the hiring hall for job referrals and his name will be placed on a list. If, at the time he registers, he had worked at least 20 weeks during the year, he will be listed as ''in book,'' which means that as of that date he would be entitled to collect unemployment insurance benefits pursuant to the laws of New York.[5] Thus, if ''Doe'' had worked for 1 year, been laid off, and then registered at the hiring hall on October 1, 1991, a notation would be made that he was in book as of that date. As we shall see this would probably affect Doe's job referrals during 1992 and 1993 when employment was particularly scarce. Assuming that Doe is sent out on jobs after registering for work, those job referrals would be noted on his workcard. (The front of the workcard is filled out by the individual member and lists the equipment that he feels he is capable of operating. In 1992, Signorelli asked the members to update their workcards by filling out new ones and listing those jobs that they were capable of performing.) Until obtaining 20 weeks of employment, Doe's name would stay in the same place on the list, but once having obtained his 20 weeks, his name would be moved to the bottom of the list.

On a day-to-day basis, the system works as follows: An employer needing a man or a group of men will call the hall and speak to Occhiogrossi (previously Frank Collins), and tell her the number and types of jobs that are needed. She will then go to the out-of-work list and obtain the names of those people who are relatively high on the list and who, by reference to their workcards, are qualified for the jobs requested. In all cases, except for crane operators, she will give the names to the business agent assigned to the area where the job is located and he will contact the member with a job offer. In the case of the crane operators (who are relatively few in number), the business manager is the person who calls the members with the job offers.

Although it might be useful to assume that the person who is out of work the longest, and therefore highest on the list, would be the person who would get first crack at job referrals, this is qualified by other factors. First of all, there must be a match between the job requested and the employee's skills. Very few members are licensed to operate cranes, whereas virtually anyone can be an oiler. There is, in this trade, a wide variety of machines and a variety of skills attendant to their use. Some of the members can operate a few machines whereas others have made it their business to learn to operate all or most of them. (The Union operates a school in which members can learn new skills.)

Then there is the situation where an employer will ask for a particular member by name. While the Union has no obligation to refer that person to the job, it seems that such a request will frequently be honored.

The hiring hall procedure was also affected by conditions in the industry during the slowdown in 1992 and 1993. In this regard, Santamorena testified that the total number of hours worked by members of the Union was as follows:

1988	1,472,000 hours
1989	1,573,000 hours
1990	1,163,000 hours
1991	1,218,000 hours
1992	1,052,000 hours
1993	988,000 hours

In 1992 and 1993 New York State unemployment benefits were extended to the extent that if a person attended a school such as the Union's apprentice school, that person could receive these benefits for up to 52 weeks. It is also noted that if a member was entitled to receive state unemployment benefits, the Union supplemented those benefits from a fund, with an additional amount of money per month, until the state benefits ran out. Thus, if a union member was laid off after having accumulated 20 weeks of employment at an average weekly earning of $80 per week, that member would be entitled to state unemployment benefits plus the Union's supplemental benefit (a total of $450 per week), for 52 weeks if he attended, during the final 13-week period, the Union's apprentice school.

At the same time, the eligibility of members for health insurance under the Union's welfare fund also depended on their having worked a certain amount of time before collecting benefits. Although the Union, in 1991 to 1993, extended health insurance to employees who were out of work, there could be occasions where a member was out of work for so long that he not longer would be covered by this insurance.

In view of the State's extensions of the unemployment benefits, it became less imperative to refer a man to work during the initial period of his unemployment. At the same

[5] To be eligible for unemployment benefits an employee has to have worked 20 weeks at an average of $80 per week within the 52-week period prior to filing. Alternatively, a person may be eligible if he or she worked 15 weeks during the 52-week period if he worked a total of 40 weeks during the preceding 104 weeks. Additionally, there may be special circumstances that apply to people who during the 104 weeks preceding filing were on Worker's Compensation.

time, because members needed their 20 weeks to be eligible for unemployment benefits and some also risked losing their health insurance, there was a decision made in the spring of 1993 to give priority to members who needed 5 or fewer weeks to reach the 20 weeks of work needed to renew their unemployment eligibility. In some cases this might have favored some people who had already obtained more referrals than others. (For example, a person who had managed to get 15 weeks of work could go out ahead of someone who had obtained only 10 weeks of work.) But it also meant that if the referral would likely result in a person renewing his eligibility for unemployment benefits, that person no longer, at least for some period of time, would be in the pool of people that the Union would be sending out on job referrals. (That is, once a person reaches 20 weeks of employment, he is listed as in book and goes to the bottom of the referral list.)

Because of the risk that some of the Union's members were about to, or already had run out of, unemployment and/or health insurance benefits, the Union also embarked on a program of asking its members to give up jobs so that other members could be referred to them. (This is reflected in the Union's minutes of August 17, 1992.)

In March 1992, Frank Collins decided to run for the office of business manager in the election that were coming up in August 1992. He was supported by his brother William and a group of other members including those who are alleged to be the discriminatees in this case. Indeed, eventually a slate was formed that was led by Frank Collins and that was designed to oppose the incumbent elected officers, trustees, etc.

Frank Collins says that there was lots of talk about the election campaign among the members who were at the apprentice school. According to Frank Collins, his campaign involved writing letters and making phone calls and visits to members' homes. He states that his group did not go to jobsites to campaign. The minutes of the union meetings indicate a lively exchange of issues between the supporters of Frank Collins and the supporters of Nicholas Signorelli.

The minutes of the union meeting held on April 20, 1992, state, in pertinent part:

> In answer to false rumors about retirement of past business manager, Charles Matero, Nick [Signorelli] read to the membership the line officers meeting when business manager, Charles Matero resigned. Nick said he didn't want to read them but because of lies the members should hear the truth. Brother Signorelli admonished brother Charles Matero for citing others to run for office and to disrupt and cause unrest among our membership during times of high unemployment. Our business manager received another standing ovation.
>
> . . . .
>
> Brother Frank Collins addressed the membership to reaffirm his candidacy for the office of business manager. Frank stated he had the administrative experience to lead this local out of economic doldrums, also he had the experience to provide this local with leadership which has been lacking for the past year or so. . . . Brother Collins stated our apprentice training program was good, but needed improvements. Frank explained he would implement a four year program which all new applicants must go through. During this period they would learn to operate several pieces of equipment. Frank stated that sons and daughters of members should have first preference to this program. He would have experienced members re-trained to learn to read blueprints and shoot grades. Frank went on to say other trades are taking our jobs, labor foreman [sic] are running the jobs and if you're lucky he speaks broken English. Why can't our men be foremen? Frank stated with 16 million in the unemployment fund why didn't our business manager reduce this fund and increase the unemployment payment. Frank would ask us to authorize a salary for the office of president . . . to assure the integrity of that office. He would set up elections for the positions of business agents making the agents accountable to the membership. He would establish qualifications for master mechanic rather than being selected by favoritism. He would establish a stamp program for our benefit funds. He would establish a scholarship fund by collecting $.05 per hour in our next contracts paid by the contractor. Brother Collins assured the membership Charles Matero would have no place in his office or his administration if elected. Frank ended by stating he had other thoughts he would share with us in the coming months.
>
> . . . .
>
> Brother Robert Dignelli rose and agreed with Frank Collins about our apprentice training school. He believed that Frank and his brother should go to the school and learn to operate so he would be in touch and know what this work is all about. It doesn't take place with your feet on the desk, it's outside in the field in the rain, heat, dust and in the freezing cold. . . . At this point the members gave Robert a standing ovation. Brother Vincent Rotello responded to Frank about the Apprentice Training Program by stating that since he became the director, the training school has become an approved apprentice training program registered by the state of New York and the Federal Government. Vinnie went on to thank Nick Signorelli for his help in implementing this new program and for his support of himself as the director since Nick became business manager. . . .

The minutes of the meeting of May 18, 1992, have the following remarks:

> Brother Cas Duchnowski went to question the line officer's meeting when Charles Matero turned in his resignation. He believed Charlie made a good choice in nominating Sal [Santamorena] for that office but the vote of the line officers went to brother Nicholas Signorelli. He went on to say Nick was fired because of threats on Charlie Matero. Cas remarked Nick and other leaders did not come forward because of threats against him. At this point John Chiumento asked for a point of order . . . and remarked to Brother Duchnowski, ''you have no proof any threats were made against Charlie Matero . . . .
>
> . . . .
>
> Brother Robert Smith . . . complained he did not get the proper representation from the business manager

> and agent Michael Brown. Bob also wanted to know how the ''out of work'' list was being handled. Nick explained how the work list is being handled now. Toni-Ann[e] takes calls for work and the agents place the members who are most needed of employment. But, also he must be qualified for that job. Only the agents place men to work. Robert raised the question about a man employed on his job, laid off and re-employed within a week. Mike explained the contractor asked for that person and that it was only a three to four day job. Lou [Varricchio] explained to Bob, we are not a hiring hall, we are a referral hall.
>
> . . . .
>
> Brother Bill Collins stated he had a copy of the line officers meeting that Brother Signorelli stated was lost, August 29, 1991 meeting. Bill read the minutes he had, but the accuracy of his minutes were firmly refuted by four of the line officers present at that meeting.

Nominations for the various union officers and other elected positions were held at the union meeting of July 20, 1992, after Nicholas Signorelli made a speech about alleged false rumors being spread by the opposition[6] and stating the reasons that he felt he was entitled to be reelected to the office of business manager. The incumbent slate, which was nominated, consisted of:

Nicholas Signorelli	Business Manager
Louis Varricchio	President
Nicholas Basso	Vice President
Daniel Falcone	Recording—Corresponding Secretary
Michael Browne	Financial Secretary
Vincent Rotello	Treasurer
Victor Bernarbo	Trustee
Rosita Mazzola	Trustee
Larry Lefler	Trustee
Joseph Miccio	Auditor
Salvatore Matero	Auditor
Matthew Fortino	Auditor
Jeffrey Loughlin	Conductor
Albert Girardi Jr.	Guard
Stanley Colburn	Exec Bd
William McGill	Exec Bd
James Griffen	Exec Bd
Joseph Polese	Exec Bd
Sal Santamorena	Exec Bd

The opposition slate that was nominated consisted of:[7]

Frank Collins	Business Manager
Chris Villa	President
Casmir Duchnowski	Vice President
Daniel Falcone	Recording Secretary (unopposed)
Robert F. Smith	Financial Secretary
Anthony Rubeo	Treasurer
Ronald Jackson	Exec Bd
Louis Lagana	Exec Bd
Angelo Matero	Exec Bd
Angelo Orsetti	Exec Bd

At this meeting, all of the people who were unopposed were elected by acclamation after checking to see that they were eligible for office. (To be elected, a member must be fully paid up in his or her dues.)

At some point following the July 20 meeting, most of the people on the Collins' slate were disqualified as their dues were not fully paid up. In August 1992, when the Collins' slate attempted to have a local court overturn the disqualifications, the court refused to intervene after reviewing the Union's constitution and bylaws.

At the union meeting on August 17, 1992, the election results were announced. In the two contested races, Nicholas Basso beat Casmir Duchnowski for the office of vice president by 554 to 83 and Vincent Rotello beat Anthony Rubeo for the office of treasurer by 552 to 82. At this meeting, Frank Collins came up and congratulated the officers who had been elected and said that he wanted to thank the membership for their views and opinions. He said that they should put their differences aside and join together.

To establish animus, counsel for the General Counsel, in her brief refers to evidence of nine alleged coercive statements directed to the Collins' slate, five of which occurred outside the 10(b) period and four of which occurred within the 10(b) period. These are described below.

Christopher Villa claims that in May 1991, Oscar Rau, who was the previous business agent, told him that William Collins was no good for Local 137 and that Villa should stay away from Collins because he was not a good business agent. Villa claims that Rau told him that he should not get involved with Collins. These alleged statements were made almost a year before Frank Collins decided to run for office and were made by someone who was no longer an agent of the Union.

According to Villa, in February 1992, he was involved in a grievance with his employer over his hours and he had a meeting with Union President Louis Varricchio regarding the matter. He states that Varricchio told him that Villa should let it (the grievance) go as the Union was trying to give the small contractors a break. Villa also testified that Varricchio stated that he should not get involved with people in the election or he would be getting into trouble.

Villa also testified that in January 1993 (5 months after the election), Varricchio told him at the union hall that he was insulted that Villa ran against him in the election and that he intended to make him nervous.

Villa testified, along with another member, Patrick Vateri, that at a union meeting held in December 1993, Signorelli said that he could bring ''us'' up on charges for going to the NLRB. (No intraunion charges were ever filed against the alleged discriminatees and this alleged statement is not contended to be an unfair labor practice.)

Union member Donald Rufell Sr. testified that he was working for Yonkers Construction Company in the summer of 1992 along with James Cassucci and Angelo Orsetti. He states that Master Mechanic Nick Funicello was always talking about the upcoming election and that he said, among other things, that he was going to get Orsetti off the job and

[6] Signorelli asserted that there were false rumors that he was the target of an FBI investigation. In this regard, he told the members that although the FBI did request the Local's books and records the grand jury was investigating the years when Charles Matero was the business manager.

[7] I note that although alleged as a discriminatee George Atkinson did not run for any office and was therefore not a part of the Collins' slate.

that Orsetti was never going to work again. James Cassucci testified in a similar vein and stated that Funicello mentioned that Orsetti was running on the Collins' slate, that the people not voting for Signorelli would never work after the election, and that Cassucci should give the cold shoulder to Orsetti. Although these statements were denied by Funicello, I am inclined to credit the testimony of Rufell and Cassucci, neither of whom had any particular interest in the election or in any of the parties involved in this case.

Anthony Rubeo testified that he announced his candidacy on the Collins' slate toward the end of April 1992. He testified that on April 22, 1992, he went to the hall and asked Signorelli when he could expect to go back to work. According to Rubeo, Signorelli showed him a little yellow pad and said something to the effect that there were two lists, one for the men who were going back to work and the other for those who were not. Rubeo did not see the paper and did not question Signorelli about what the statement meant.

Angelo Matero, who is a crane operator, testified that during the spring of 1992 he worked at the Union's apprentice school as an instructor until he started to campaign for the Collins' slate. In this respect, he testified that Vincent Rotella, the school's director, laid him off as an instructor and told him, ''I told you not to campaign up here.''

Angelo Matero and Anthony Rubeo testified to a conversation they had with Signorelli in September 1992. They state that they went to the office to congratulate Signorelli on his election but that Signorelli said that he couldn't believe that they had joined the opposition and couldn't understand how people on the Collins' slate got 80 votes. In substance, they state that Signorelli said that if they hadn't gone with ''those guys,'' Rubeo would have been at a garage job as a master mechanic, that William Collins would probably be on a welding machine at that job, and that Frank Collins would probably be back at his old job in the Union's office. Angelo Matero (the brother of Charles Matero) testified that he when he asked Signorelli where he fit in, Signorelli picked up a yellow pad and said, ''[W]hen your name comes up, you go out.'' According to Matero, Signorelli said that he probably would be going out pretty soon as his name was near the top. He states that when he asked Signorelli what he meant by pretty soon, Signorelli said, ''[W]ell if a crane comes in and you don't go out on it, then you're screwed.'' (In fact, Angelo Matero was referred to jobs on September 22 and October 2, 1992.[8] He thereafter officially retired on December 1, 1992, and began to receive pension benefits.

This is not the type of case when the evidence unambiguously demonstrates that the alleged discriminatees were denied referrals from the Union's hall. (They were not.) What is alleged is that they received fewer than their fair share of referrals because of their intraunion activities. Although one could surmise that a union's leadership might seek to retaliate against those people who opposed them, suspicion is not the same as proof, the burden of which lies with the General Counsel. *Laborers Local 423 (G.F.C.)*, 313 NLRB 807, 812 (1994). Moreover, the political challenge of the Collins' slate turned out to be ephemeral at best.

To a large extent, the evidence consisted of voluminous records from which each side made summaries to demonstrate their respective points. Part of the difficulty is that the members of this Union are not interchangeable in terms of the jobs that they do. There is a great deal of potential variation inherent in matching jobs that are called into the hall and the skills of the out-of-work members who are selected by the business agents or the business manager. Moreover, the number of weeks worked by members may vary widely depending on the relationship that a particular member has with a particular contractor who may either retain him as a ''company man'' or ask for him by name when calling in new jobs to the hall. Finally the normal course of job referrals was affected by the substantial reduction in the number of available jobs during the period from 1992 through 1993. The result of all this is that it seems to me that there is an inherent difficulty in establishing whether any particular group of individuals (such as the members of the Collins' slate) were either discriminated against or were treated no differently than the other members of the Union.

General Counsel's Exhibit 11 consists of a looseleaf notebook prepared by Christopher Villa, containing, inter alia, the workcards of the alleged discriminatees, showing their qualifications as described by themselves and the dates that they obtained work at various contractors. These cards generally indicate the date that the particular person was designated as ''in book'' meaning that as of that date, the individual had obtained his 20 weeks of work in order to be eligible for unemployment benefits. This book also contains the workcards of other members, whom the General Counsel, via Christopher Villa, claims are similar in qualifications to each of the alleged discriminatees. Additionally the book contains a group of summaries comparing each alleged discriminatee with these other members; such summaries purporting to show that these comparable members obtained work at times when the discriminatees were waiting for referrals while on the out-of-work list. It, however, was conceded by Villa that the book does *not* reflect the amount of work done by *all* of the Union's members and he agrees that he probably did not include some comparable members who obtained fewer work opportunities than the alleged discriminatees during the relevant time period.

Respondent, for its part, offered a group of its own summaries into evidence.[9] Respondent's Exhibit 5 is a list of the Union's members who worked as long boom crane operators and it sets forth the amount of weeks that each worked in that category from July to November 1992. (Although listed, the Respondent asserts with justification, that William Collins should not be placed in this category.) This summary shows:

Angelo Matero	3 days
Anthony Rubeo	3 weeks
Bob Brown	2 weeks
John Calantuno	5 weeks
Roy Holland	4 weeks
Jeff Loughlin	8 weeks

[8] The parties did not put into evidence what the hourly rates were for operating engineers during this time period. From my experience, however, operating engineers are one of the higher paid crafts in the building and construction industry. I think it is more than likely that if an operating engineer worked for 1 day during a given week, he would have earned at least $80, which would therefore have credited him with 1 week worked for unemployment insurance purposes.

[9] Neither party disputed the accuracy of the other's summaries. What they disputed was the selection process by which the other made comparisons.

Dick Rau	5 weeks
Tom Ryan	2 weeks
Boris Utko	10 weeks
Chris Villa	18 weeks

Respondent's Exhibit 6 is a summary comparing the number of weeks worked by those alleged discriminatees who were operators (excluding oilers and crane operators) during the period from July 1992 to April 1994 with all of the Union's operators (278 in number) who worked during this period on building construction or highway construction sites. (As opposed to quarries, plants, etc.) (According to the testimony of Funds Manager Santamorena, when asterisks are next to a name, this means that the person is a companyman or someone who is repeatedly called back by the same company.) Also on the summary is a list of comparable operators who retired during the period, setting forth the date of retirement and the number of weeks worked from July 1992 to retirement. This is meant to compare these other members to those alleged discriminatees who either retired or died after July 1992 when the alleged discrimination began. In part, this summary shows:

> George Atkinson worked 47 weeks. During the same period, 137 members worked the same or fewer weeks.
>
> Chris Villa worked 37 weeks. During the same period 87 members worked the same or fewer weeks.
>
> Robert Smith worked 32 weeks. During the same period 67 members worked the same or fewer weeks. (As noted above, the General Counsel withdrew the allegation relating to Mr. Smith.)
>
> Casmir Duchnowski worked 22 weeks and retired on March 1, 1994. During the period from July 1992 to April 1, 1994, 31 members worked the same or fewer weeks.
>
> Ronald Jackson worked 16 weeks until his death on November 11, 1993. The list contains 67 members who worked the same or fewer weeks as Jackson.
>
> Angelo Orsetti worked 12 weeks. He refused employment referral on July 6, 1993 because he purchased a second farm. During the period from July 1992 to April 1, 1994, 11 members had the same or fewer number of weeks worked.
>
> Anthony Rubeo worked 3 weeks until he retired on November 1, 1992. Only 3 members had the same or fewer weeks worked than Rubeo. (He, however, was not available for work during 1993 and 1994.)

Respondent's Exhibit 7 is based on the assumption that William, Frank, and John Collins worked as oilers, which is the least skilled category within the Union. William Collins from July 1992 had 0 weeks work and obtained other employment on April 29, 1993. John Collins worked 1 week and told the Union that he obtained other employment in March 1993. Frank Collins obtained 20 weeks of work. The list goes on to summarize the number of weeks worked by other oilers during the period from July 1992 to April 1, 1994, and it shows 40 people whose number of weeks worked ranged from 1 week to 58 weeks. The median number of weeks worked for this group was 24 and 13 members worked the same or fewer weeks as Frank Collins.

Frankly I am not satisfied with either set of summaries. In the case of the summaries generated by the General Counsel, they utilize very small groups of employees to compare with the alleged discriminatees and they admittedly omit references to people who received fewer referrals and worked less time than the alleged discriminatees. On the other hand, the summaries offered by the Respondent are in some respects too general.

What follows is an attempt to analyze the situations of those people who were on or who openly supported the Collins' slate.

A. *Christopher Villa*

Christopher Villa was part of the Collins' slate and was nominated for the office of president. He, however, was disqualified and Louis Varricchio, who was unopposed, won the election held in August 1992. Everyone agrees that Villa was one of the members who could operate virtually all of the machines including cranes.

At the time of the election, Villa had a steady job at a company called GALS where he had been hired in November 1990 and was a ''company man.'' In 1992 Villa was involved in a grievance with the company over his hours and Varricchio advised him to drop the matter because the Union was trying to give small companies a break. In December 1992, Villa was laid off after he refused to accept a position in the company's plant on a part-time basis. (He felt that this was contrary to the terms of the collective-bargaining agreement.) When spring came, GALS did not recall him and did not call the hall to request that Villa be rehired.[10]

Villa registered at the hall for employment and his workcard indicates that he is listed as being in book as of December 29, 1992. As he had previously worked more than 20 weeks prior to his layoff, Villa would have been eligible for unemployment benefits for 52 weeks assuming that he hung out at the apprentice school for the final 13 weeks. Thus, he would have run out of his benefits by the end of December 1993.

The Respondent's summary that shows that Villa worked 37 weeks during the period from July 1992 to April 1994 is misleading as most of those weeks came during the time that he had steady employment at GALS. The alleged discrimination could only have occurred after December 29, 1992.

Villa's workcard indicates that after his layoff from GALS he was not referred for 6 months. (He next worked at a company called Besmingham from July 6 to 20, 1993.) Thereafter, from September 14, 1993, to April 1994, he was referred to seven different jobs and worked during about 10 weeks.

The Respondent asserts that in addition to the above, there were other occasions when the Union either offered jobs to Villa or attempted to reach him without success.[11] In this re-

[10] Although Villa's testimony intimated that the Union had something to do with GALS' refusal to recall him to work (not alleged as a violation of the Act), the evidence tends to establish that GALS' refusal was more likely based on the fact that Villa was (as was his right) particularly inflexible in making compromises about his wages and hours.

[11] G.C. Exh. 6(c) contains a series of notes made by Toni-Anne Occhiogrossi that were attached to Villa's workcard at the union office and purport to show various occasions when union agents either attempted to reach Villa when he was not at home or other occasions when they offered him jobs that he turned down. She testified credibly that she made these notes based on reports given to her by

spect, Villa conceded that in March 1993, he received a call from Business Agent Mike Brown to work at a job at Indian point that he refused because he had some problem with lost unemployment records. Villa also concedes that in early June 1993, he turned down a job offer made to him from Dan Falcone. (He states that he turned this job down because he was at his son's house at the time.) Later in June 1993, Villa concedes that he told Occhiogrossi that he would not be available for work from June 21 to 26 because of his daughter's wedding. He also testified that he spoke to Occhiogrossi around September 3, 1993, to tell her that he would not be available for work as he intended to borrow money against his annuity for the purpose of his other daughter's college tuition. (As his daughter got a grant from the college, Villa advised the Union that he would be available for work, and he was in fact referred from the hall on September 14, 1993.) As it is impossible to tell from the records before me how long any of the turned down jobs would have lasted, it is difficult to say how his work record would compare to other people having similar qualifications to him. At the very least, Villa would have been referred from the hall 12 times and worked in at least 14 weeks.

B. *The Collins Family*

Since Frank Collins opposed Signorelli for the position of business manager, which is the most powerful position in the Union, and as his brother William, who had previously been a business agent, who now supported Frank in his campaign, it would seem most likely that if any unlawful discrimination occurred, it would have been directed against the Collins family.

Frank Collins ran for the business manager's position in the August 1992 election but was disqualified before the election was held. He had held the position of office manager/dispatcher under the Charles Matero regime and was ousted from that position on November 27, 1991, when Signorelli took over as the Union's business manager following Matero's resignation and Signorelli's defeat of Matero's candidate, Sal Santamorena, in the interim election held in August 1991.

For much of his life as a union member, Frank Collins worked as an employee of the Union and never obtained any of the skills that a regular member would obtain either through training or through work. He came into the Union as an oiler and did not advance from that point.

William Collins did not run for office but campaigned on behalf of his brother Frank. Previously he had been a business agent during the Charles Matero regime and also the financial secretary. During his time as a business agent (for 6-1/2 years), he did not work as an operating engineer. Although he indicated on his workcard that he was licensed to operate cranes, he concedes that he never had a paid job doing this work. (Operating a crane requires a state license because of its potential danger to other people.) His workcard also indicates that he did not operate any of the other equipment listed.

When Signorelli became the new business manager, he fired William Collins from his job as a business agent. He also induced Collins to resign his position as an officer of the Union, by offering him a position as a ''master mechanic'' on a job that was finishing up. That job lasted for 6 weeks until November 1, 1991. Therefore, at the time that William Collins reentered the work force as an operating engineer on November 1, 1991, he was only qualified to be an oiler. As his in book date was November 1, 1991, he would have been eligible for unemployment benefits until November 1, 1992.

William Collins has two sons who are members of the Union. Neither ran for office and neither campaigned for the Collins' slate. One, John Collins, is alleged to be a discriminatee, while the other William Collins Jr. is not. The theory is that the Union, under Signorelli's leadership, discriminated against John Collins because his uncle Frank ran for office and because his father William campaigned on Frank's behalf. Like his relatives, John Collins essentially worked as an oiler albeit he did indicate on his workcard that he could operate two of the machines. (One of the two being a rubber tire loader.) There is no workcard for William Collins Jr. in evidence and, according to Signorelli, he is a company man for Yonkers Contracting and therefore does not use the hall for referrals.

C. *Frank Collins*

The records show that Frank Collins, after being fired as the Union's dispatcher, had an in book date of November 27, 1991. The records also show that he did not obtain work as an operating engineer until January 27, 1993, which is about 14 months later. Thereafter, he got three jobs through referrals in 1993 (working in about 13 weeks), and received one referral to a company called Interstate in February 1994. In the latter case, Collins was still employed by Interstate as of the time of this hearing.

In the summer of 1992, Business Agent Mike Brown called Frank Collins and told him to go to work at a company called Nelsted. Collins asserts, however, that when he called someone from that company to find out when to report, he was told that they did not call in for a man.

Frank Collins agrees that on another occasion in the summer of 1992, Dan Falcone offered him a job as a loader. Collins states that he refused this job because he had never operated this type of equipment.

Frank Collins concedes that on October 7, 1992, he received a job referral to go to work for Millwood. He states that he turned this job down because his car was being repaired.

He also testified that he was offered another job at Cold Springs Harbor, but he turned it down because it was a hazardous materials job for which he was unlicensed.

Occhiogrossi in my opinion was a credible witness. Among other things, she testified that she made notes of those occasions when members refused job offers made to them by the business agents. These notes were offered into evidence as General Counsel's Exhibit 6 and appear to have been made in the ordinary course of her duties in dealing with referrals and in maintaining the Union's referral records.

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the business agents and maintained them as part of the hiring hall records. Among the notes are references to the conversations described above as well as to others. For example, there is a note indicating that it was in July 1993 and not September 1993 that Villa said he had to stay unemployed in order to get his annuity money for his daughter's school. Another example is a note indicating that Mike Brown called Villa on June 6, 1993, offering him a job at Standard Bridge which was turned down because Villa's daughter was getting married.

While Occhiogrossi's notes were made based on reports from the business agents, they, as part of their responsibilities, would have a duty to report to her the outcome of any job referrals so that she could in turn keep accurate records of which members got jobs, the dates that they obtained work, and the companies to which they were referred. These notes were made contemporaneous with the transactions described and could therefore be described as business records defined by Rule 803(6) of the Federal Rules of Evidence as an exception to rule prohibiting receipt of hearsay evidence.[12]

In the case of Frank Collins, there are two notes dated July 30, 1992. One indicates that Dan Falcone called and spoke to Collins about a job which was refused. The other indicates that Collins was called at 7:20 a.m. to go to work, that his wife said he wasn't at home, and that the job was therefore offered to another man. A note dated August 26, 1992, indicates that Collins was called and was not at home and that a message was left on his machine. There is a note dated October 7, 1992, indicating that an offer of work at Millwood was refused because Collins had no car. A note dated November 2, 1992, indicates that Collins turned down a HazMat job because he was not qualified. A note dated November 5, 1992, indicates that Collins was offered a job on a loader and excavator for Hudson Canyon Construction and that Collins refused the job saying that he could not run the machines. Another note dated November 22, 1992, reports that on the previous Friday, Occhiogrossi attempted to reach Frank Collins at home about a loader job at Pecham Patterson, but that no one was at home. Finally there is a note dated February 4, 1993, indicating that Falcone left a message on Collins' answering machine to go to work for Al Stauder.

D. *William Collins*

William Collins, as noted above, was discharged from his union job as business agent, when Signorelli took over the position of business manager in August 1991. The evidence also indicates that Signorelli induced William Collins to resign as recording secretary in consideration of which, he sent Collins to work at a jobsite as a master mechanic. When that job concluded on November 1, 1991, William Collins registered at the hall for job referrals. Although his workcard indicates that he felt he could operate a crane, he hadn't worked as an operating engineer for 6-1/2 years and he admittedly had never operated a crane in a real job setting. The Union's position is that as of this time, William Collins was not a skilled operator and that he could only be sent out on oiler jobs.

The records show that after the Halmar job, which ended on November 1, 1991, William Collins next worked at a job at Worth Construction from March 30 to April 10, 1992. This was the last job that William Collins worked in the industry and obtained a permanent Government job in March 1993.

The Union contends that William Collins was offered numerous jobs that he turned down for one reason or another. For one thing, the Union points out that for a substantial period of time from January to March 1992, Collins admitted that he was unavailable for work on account of an ear infection. The Union also points out that Collins admitted that during May 1992, he was unavailable because of a heel spur. Collins conceded that he had a tax problem and he admits that in March 1993, he told Union President Louis Varricchio that he did not want to accept work because he intended to borrow money from his annuity and would be eligible to do so in another week. Because a member cannot borrow money from his annuity unless unemployed for about a year, the Union could argue that this statement to Varricchio is consistent with other evidence showing that William Collins turned down numerous jobs during 1992 and 1993.

William Collins testified that he received a job referral from Mike Brown in late July 1992 but turned it down while stating to Brown that he felt that his son, John, should go out ahead of him because John was higher on the out-of-work list.

There are two notes written by Occhiogrossi dated July 31 and August 1, 1992, indicating that Mike Brown and Daniel Falcone called Collins to go to work for a company called Fletcher Creamer but that he refused on account of a foot injury. William Collins denied receiving either of these calls. (This would be for one job.)

A note dated August 26, 1992, indicates that William Collins was offered work at Tremson-George Trembly but that he refused that job on the ground that he had car trouble. Collins concedes that he had car trouble in August 1992, that his wife told him that the Union called him about a job, and that he told Occhiogrossi that he could not get to the job on account of his car.

By the end of December 1992, William Collins was actively looking for work outside of the industry. In December 1992, he interviewed for the Government job that was eventually offered to him and which he accepted in March 1993. Additionally, he made an arrangement with a company that sold fishing tackle to do work on a trial basis at a series of trade shows held during February and early March 1993. According to William Collins, at some point during late December 1992 or early January 1993, he told Falcone about the four trade shows and told him the dates that he would be unavailable for work as an operating engineer. (Based on the dates of the trade shows, William Collins would not have been available for almost the entire month of February 1993.)

Needless to say, William Collins was offered a number of jobs during February and March 1993. Whereas the Union contends that these jobs were legitimate offers, Collins suggests that the only reason these jobs were offered was because the Union's officials knew that he was going to be out of town and was not available to accept them. In my opinion,

[12] Rule 803 sets forth a group of exceptions to the hearsay rule even though the declarant is available as a witness. Rule 803(6), the business record exception to the hearsay rule, states as follows:

> (6) Records of regularly conducted activity. A memorandum, report, record, or date compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ''business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

however, I do not believe that there was a conspiracy as the other evidence indicates that Collins had refused earlier job offers and was unavailable for work for a significant part of 1992 and 1993 because of either his medical condition and/or his desire to borrow from his annuity to satisfy a previously incurred tax liability. In any event, William Collins left the industry in March 1993 when he accepted a Government job.

E. *John Collins*

As noted above, John Collins did not run for office and did not campaign on behalf of Frank Collins or the Collins' slate. He also did not testify in this proceeding.

The workcard of John Collins shows that when he was laid off on September 10, 1991, he had obtained his 20 weeks necessary to collect unemployment benefits and that he was listed as in book as of September 6, 1991. The card shows that the next job that he got from the hall was a referral to Thalle on March 16, 1992, which was 6 months after the in book date. The card also shows that he obtained two other jobs from the hall and worked during 2 other weeks in 1992.

General Counsel's Exhibit 6 contains a series of notes indicating referral offers or attempts to make such offers to John Collins. There is a note dated August 26, 1992, indicating that an attempt was made to contact him about a job at Tremson. There is a note indicating that Daniel Falcone called his home on September 21, 1992, about a job. A note dated November 11, 1992, indicates that Mike Brown called and that John Collins refused a job because he was working on a boat. There are two notes dated March 4, 1993, indicating that Louis Varricchio tried without success to contact Collins about a job. Several notes dated March 9, 1993, indicate that John Collins, in response to a phone call from the Union, said that he was working elsewhere and suggested that the job be given to Frank Collins. Finally, there is a note dated April 30, 1993, indicating that John Collins refused another job offered by Mike Brown, saying that he had another job and that when he wanted to go back to the union hall for job referrals, he would call.

What is striking about the work records of these three men is that many of the job offers that were made to them occurred at or around the time of the 1992 election. As many of these and later job offers were turned down, it is impossible to say how many weeks they each would have worked during the relevant period of time.[13] Indeed, the records tend to indicate that if there was any discrimination against them it would have occurred during the 6-month period after September 1991 which is before the 10(b) limitations date. In this regard, the records indicate that after Signorelli first became business manager in August 1991, Frank, William, and John Collins each had to wait about 6 months before being referred to a first job after registering for job referrals and after being listed as in book. Such a hiatus was not however, that unusual for other union members in comparable situations. Thus, the records show that many other members who worked primarily as oilers and who were listed as in book during the second half of 1991 had similar long waits before receiving referrals.[14]

F. *Operators*

Although ''oilers'' may be capable of operating some of the more simple machines such as loaders, asphalt rollers, and dynahoes, operators would constitute the largest group of union members working on building or highway construction jobs. These are the people who operate the different types of machines used such as bulldozers and backhoes. (Crane operators are considered a separate class, albeit some people such as Villas and Anthony Rubeo are qualified to operate both cranes and the other types of machines.)

The operators who were candidates on the Collins' slate were Chris Villa (discussed above), Casmir Duchnowski, Daniel Falcone (who ran on both slates), Robert F. Smith, Anthony Rubeo, Ronald Jackson, Louis Lagana (who won because one of the Signorelli's slate was disqualified), Angelo Matero, and Angelo Orsetti. Of this group, counsel for the General Counsel withdrew her original contention that Robert Smith was discriminated against and never contended that Louis Lagana was the object of unlawful discrimination. In addition, the General Counsel alleges that George Atkinson was discriminated against on the theory that he actively campaigned for the Collins' slate (in particular at the apprentice school), albeit he did not himself run for office.

Casmir Duchnowski, who was a member of the Union for 40 years, ran for the office of vice president against Nicholas

[13] For example, another oiler, Dom Montesano, had an in book date of November 22, 1991. He was not referred to another job until about 4 months later but on his second referral managed to get a long-term job at Halcyon that allowed him to make his 20 weeks. Similarly, Timothy Gallagher, who had an in book date of January 30, 1992, was first referred on July 6, 1992, to a long-term job that allowed him to get, in one shot, his 20 weeks of employment.

[14] For example, Greg Cacace's in book date was August 2, 1991, and although he was referred to a 1-week job in mid-August 1992 his next referral was 10 months later on June 16, 1992. Timothy Gallagher was listed as in book on January 30, 1992, and did not get referred until July 6, 1992. John DiRienzo was listed as in book on November 22, 1991, and was not referred until September 23, 1992. Dom Montesano was listed as in book on November 22, 1991, and was not referred until almost 4 months later on March 17, 1992. Michael Carpanzano was listed as in book on December 20, 1991, and was not referred until August 3, 1992. (Carpanzano's card indicates that he could operate an asphalt roller and a cherry picker.) Vincent Ferraro was listed as in book on November 22, 1991, and was not referred until July 13, 1992. He was listed again as in book on October 2, 1992, and waited almost 6 months until March 30, 1993, before being referred again to work. Gary Cushing, who also indicates that he is an equipment mechanic and welder, is listed as in book on August 30, 1991, and was not referred again until March 7, 1992. Basil Ciampi is listed as in book on December 5, 1991, and was not referred again until April 25, 1992. Richard Masterbuono is listed as in book on October 4, 1991, and was not referred thereafter until July 2, 1992. Michael Mascolo Jr. is listed as in book on November 29, 1991, and was not referred to a job until July 20, 1992.

On the other hand there are examples of people who had minimal hiatuses from the times that they were laid off and listed as in book and the next time that they received referrals from the Union. Such an example would be Arthur Farrey who is listed as in book on December 20, 1991, and was referred back to the same company on January 6, 1992, where he continued to work until December 1992. Other examples would include Wayne Heller, Gary Cacace, Paul Claraco, Louis Catano Jr., James O'Neill, and William Doyle. In the case of one Edward Vetrano, his card indicates that although he received a job referral soon after being listed as in book (December 21, 1991), there was a 4-month hiatus before his next referral.

Basso. He worked from September 30, 1991, to January 14, 1992, for Chrysler at which time he left the job because of an injury. His in book date is January 14, 1992, which means that he could have received unemployment benefits until at least January 13, 1993. (In some cases, unemployment benefits can be extended further when a person is on disability.)

According to Duchnowski he went off disability in March or April 1992 and therefore was available for work. His testimony, corroborated by his workcard was that he was next referred to a job on February 8, 1993, which is about 13 months after his in book date. Thereafter Duchnowski received five job referrals (three to the same company), and he achieved his 20 weeks by late November 1993. His last referral was to a company called Vozzola Concrete where he worked for 2 days. He testified that as he did not receive any further referrals in 1993, and because he was soon to run out of unemployment benefits, he decided to retire and did so on March 1, 1994, when he was 61 years old. (The hiatus in job referrals between his last job at the end of November 1993 until his retirement on March 1, 1994, could, however, be explained by the fact that this was during the winter months when many construction jobs are not available.)

George Atkinson worked at a company from June 3, 1991, until he was laid off on September 17, 1991. On his card, his in book date is listed as September 11, 1991. Thereafter, his card shows that he was continuously referred to jobs from October 2, 1991, through April 1993. (The last job listed was at Ninne, and ran from April 21 to December 23, 1993, thus fulfilling his 20-week requirement for unemployment benefits. At the time of the election campaign, his card indicates that after being laid off from Pecham on May 18, 1992, he was referred to a 2-week job on July 23, 1992, at J. C. Rossi and to three other jobs in August 1992, the last of which lasted for 2 months. He next received a 2-day job on April 19, 1993, and was finally referred to an 8-month job on April 21, 1993. In comparison to other operators, Atkinson's work experience does not show that it deviated from the normal experience of many other union members.

Anthony Rubeo, who joined the Union in 1952, was both a crane operator and an operator. His card shows that his in book date was February 14, 1992, after being laid off from Pecham. He thereafter was referred back to Pecham on April 30 and May 12, 1992. During the period of the election campaign, Rubeo was referred to Thalle on July 22, 1992, where he worked for 2 days. After the election, he received his next and last referral on October 13, 1992, to a job which lasted for 2 weeks. Rubeo retired on November 1, 1992 (about 3-1/2 months before his unemployment benefits would have run out), and he claims that he did so because he assumed, ''based on 40 years experience, that I couldn't buck the incumbent officers.'' That is, Rubeo testified that he decided to retire and go into another business because he supposed that he would be discriminated against.

Ronald Jackson's last in book date was September 11, 1991. Thereafter, his next job referrals were respectively on April 28 and May 13, 1992. (This was before Jackson announced his candidacy for union office but at or about the time that Frank Collins decided to challenge Signorelli for the Union's leadership.) After being laid off on June 2, 1992, Jackson was thereafter referred to a series of 6 jobs from September 15 through December 17, 1992, and to another series of 11 jobs from April 23 through October 11, 1993. His workcard shows that after the election in August 1992, Jackson received a continuous stream of job referrals with no hiatus except for the winter months of 1993. Jackson passed away on November 6, 1993, after a period of illness that seems to have affected his job performance and led to his being laid off on several occasions in 1993.

Angelo Orsetti, in addition to being an operator, is also a farmer. His workcard indicates that his in book date was December 20, 1991. He was referred to a company called Petrillo on June 8, 1992 (after the election campaign started), and worked at that job for about 15 weeks until laid off on September 21, 1992. The Petrillo job is the last one listed on his workcard. Orsetti testified that he bought a second farm in March 1993 and that when he was offered a job referral in July 1993 (10 months after his last layoff and 13 months after his ''in book date''), he turned it down because he was already committed to his farm operations. Although the Union claimed that Orsetti neglected to notify the hall when he was last laid off, Orsetti testified that he did notify the union hall in September 1992. In support of his testimony the General Counsel put into evidence a telephone record showing that Orsetti made a phone call to the Union on September 21, 1992.

As noted above, Steve Smith, who ran on the Collins' slate, was originally alleged as a discriminatee.[15] His workcard shows that his in book date was January 15, 1992, and that he did not get another referral until August 24, 1992. (Right around the date of the election.) Thereafter, he received job referrals on September 21 and November 16, 1992, and February 22, 1993. From his card, it would appear that he has worked continuously at the last job and had not been laid off as of April 1994.

The factual issue here is whether the group of people running or supporting the Collins' slate were treated differently in terms of job referrals than other union members and whether any disparity was, to a signigicant probability, the consequence of illegal motivation. In trying to determine if there was an nonrandom difference between the alleged discriminatees and the other members, I tried to compare them to other operators whose workcards indicated similar skills and who were laid off and received job referrals during 1991, 1992, and/or 1993.[16] In certain circumstances, I eliminated from consideration workcards that did not have adequate information such as where relevant dates of employment or termination were unknown.

From the workcards that are in evidence as General Counsel's Exhibits 2 and 3, I copied and reviewed a total of 115 workcards, which in my opinion represented a group of employees who had similar skills to the alleged discriminatees and who worked during the relevant period of time. Of this group there were 72 people who, from their in book dates, had a hiatus of less than 4 months before being referred to

[15] Louis Lagana also ran on the Collins' slate and won by default. His workcard shows that he could be considered an operator and that he worked steadily from August 5, 1991, through December 1993. He was never alleged to be a discriminatee and his work record shows a lack of adverse action against him.

[16] I should note that I do not have statistical skills. Nor did either party present any expert who could look at the records and render an opinion as to whether they revealed a pattern of discrimination or whether any pattern would possibly be the result of nondiscriminatory factors.

another job. There were, in this category, 43 instances where a man after being laid off and placed in book was referred back to the same company and, in many of these instances, this occurred after a short hiatus. There also were 35 instances where employees were referred, with less than a 4-month hiatus, to companies other than the one from which the employee was last laid off and placed in book.

The workcards showed that there were 42 individuals who had occasions when they had a hiatus of 4 or more months before obtaining work after being placed in book after a layoff. In this category, there were 12 individuals who, during the period from 1991 through 1993, had a hiatus of 4 + months,[17] 11 who had a hiatus of 5 plus months,[18] 10 who had a hiatus of 6 plus months,[19] 6 who had a hiatus of 7 plus months,[20] 1 who had a hiatus of 8 + months,[21] 1 who had a hiatus of 9 plus months,[22] and 1 who had a hiatus of 11 plus months.[23]

In addition, the workcards showed that there were eight people, who although being referred in less than 4 months after being placed in book, had breaks in employment anywhere from 4 to 7 months.[24] No one, however, had a 13-month break as in the case of Duchnowski and only one other person had a break as long as Orsetti's.

G. *Angelo Matero*

Angelo Matero is the brother of Charles Matero and he ran for a seat on the Union's executive board on the Collins' slate. According to his workcard, he is essentially a crane operator and, unlike Villa, Rubeo, and other crane operators, he does not operate other machinery. His workcard indicates that his last in book date was August 9, 1991. His card also indicates that he was referred to 10 short-term jobs from September 1991 to March 11, 1992, after which he worked at the apprentice school from March 30 to April 17, 1992. From April 17 to August 20, 1992 (a 4-month hiatus), Matero received no referrals. His card shows that, thereafter, he received three 1-day jobs at Primrose on August 20, September 22, and October 2, 1992. The testimony of Matero and Rubeo was that in October 1992, they together purchased a business which they jointly run. According to Angelo, Matero put in his retirement papers in mid-October 1992 and his retirement was effective on December 1, 1992.

III. ANALYSIS

In cases involving hiring halls, the Board has held that a *Wright Line* analysis is appropriate where there is an alleged discrimination in hiring or referral procedures. *Pacific Maritime Assn.*, 308 NLRB 39, 46 (1992); *Teamsters Local 287 (Consolidated Freightways)*, 300 NLRB 539, 548 (1990); *Polis Wallcovering Co.*, 262 NLRB 1336, 1340 (1982). Nevertheless, those cases along with *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), deal with the allocation of burdens of proof when the issue is whether the *motivation* of an established adverse action was illegal or not. Thus, under *Wright Line*, once the General Counsel has established a prima facie showing of unlawful motivation, the burden is shifted to the respondent to establish that it would have laid off, discharged, or otherwise taken the adverse action against employees for good cause despite their union or protected activities. To my mind, the *Wright Line* test, while dealing with the burden of proof insofar as the issue of motivation, does not remove from the General Counsel the initial burden of establishing that an adverse action has in fact occurred. Accordingly, in this case the General Counsel must first show that the Union has, in fact, acted to the alleged discriminatees in terms of job referrals. As noted above, the fact that the General Counsel establishes suspicion is not the same as meeting her burden of proof on this issue. *Laborers Local 423 (G.F.C.)*, 313 NLRB 807, 812 (1994).

There is no doubt but that Nicholas Signorelli when he took over in August 1991 he ''discriminated against'' Frank and William Collins. He fired both of them from their employment by the Union and induced William Collins to resign as a union officer.

Notwithstanding the above, that particular discrimination against Frank and William Collins was not unlawful for two reasons. First, it was outside the 10(b) statute of limitations period. And second, as the Collins brothers were employees of the Union, who occupied the positions of dispatcher and business agent, both of which were intimately involved with job referrals, it is my opinion that the Union's highest officer (Signorelli) was entitled to have people loyal to him in those positions and not people who owed their jobs and loyalty to the previous administration. *Longshoremen ILA Local 1294 (International Terminal)*, 298 NLRB 479 (1990). That does not mean, of course, that Signorelli would be free to retaliate against the Collins brothers by refusing to refer them, even in the absence of an exclusive hiring hall, to construction industry jobs that are called into the union hall by outside employers. *Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500 (1993), and *Teamsters Local 923 (Yellow Cab)*, 172 NLRB 2137, 2138 (1968).

I do not think that the evidence is sufficient to establish that Frank, William, or John Collins were treated any differently than other union members with comparable skills. Although they worked less than most of the other oilers, the evidence established to my satisfaction that each of the Collins was offered jobs which he turned down for a variety of reasons, including in the case of William Collins, his need to borrow money from an annuity account that required him to be unemployed for about a year.

I also do not think that the evidence is sufficient to support any contention that the Union refused to refer or offered diminished referrals to Christopher Villa, Angelo Matero, George Atkinson, Anthony Rubeo, or Ronald Jackson. In Villa's case there is ample evidence showing that the Union offered him jobs that he turned down. And in the case of the others, the evidence does not, in my opinion, establish that

[17] These were Bondatti, Cardinale, Giordano, Giradi, Hansen, Nichols, Pelose, Tierney, Venice, Vitolo, and Will.

[18] These were Brown, Burns Jr., Ciliberto, Forshaw Jr., Fraioli, Kossow, Lamanne, Ottaviano, Petti, Pisano, and Sullivan.

[19] These were Arndt, Di Pilato, Jackson, Leanord Jr., LoCurto, Lombardo Jr., MacDowall, Oliva Jr., Palmietto, and Vona.

[20] These were Atkinson, Ciampi, Fagnani, Giordano, Nueman, and Stagno.

[21] This was Griffen.

[22] This was Danin.

[23] This was Pope.

[24] These were Cuervo, Casa, and Casarella Jr. with 4-month breaks; Chutka with a 5-month break; Mastrobuno with a 6-month break; and Edge, Burns, and McPhilomy each with a 7-month break.

they were treated any differently from many other union members.

I do think, however, that the situations involving Casmir Duchnowski (who ran for vice president) and Angelo Orsetti (who ran for executive board) are different. In both cases, the delays in referring them to jobs after their in book dates was unique and outside the range of any other person having comparable skills. As such, it is my opinion that the General Counsel has established that these two individuals were treated adversely by the Union in terms of job referrals.

Having concluded that Duchnowski and Orsetti were treated in an adverse manner, the evidence showing animus by Signorelli and others associated with his administration (such as Funicello) to people who were their political rivals is enough to make out a prima facie showing that the delays in making job referrals to these two individuals was motivated by their intraunion political activity. Under *Wright Line*, supra, the burden therefore shifted to the Respondent to show that it was not motivated by unlawful discriminatory reasons. As it is my opinion that the Respondent has not adequately shown that these job referral delays were motivated by some other nondiscriminatory reason, I shall conclude that the Union violated Section 8(b)(1)(A) of the Act in this respect.

The complaint as amended also alleges that in September 1992, the Respondent's agents told member/employees that they would have been referred to jobs had they not supported a particular slate for union office. This can only refer to the conversation between Nicholas Signorelli, Angelo Matero, and Anthony Rubeo when they offered their congratulations to Signorelli in September 1992, after he had won the election. In this respect, their testimony (which was not controverted) was that Signorelli said that if they hadn't gone with ''those guys,'' Rubeo would have been at a job as a master mechanic, that Frank Collins would probably be back at his old job in the Union's office, and that William Collins would probably be on a welding machine at a garage job. In this regard, I conclude that the statement insofar as it could reasonably be construed as an assertion by Signorelli that he had gotten even with William Collins by not referring him to a welding machine job constituted an implied threat of further retaliation and therefore was violative of Section 8(b)(1)(A) of the Act.

THE REMEDY

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

With respect to my conclusion that the Respondent unlawfully delayed making referrals to Casmir Duchnowski and Angelo Orsetti, I recommend that the Union make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them from the time of the discrimination until such time as they were properly referred for employment or until they retired from the industry, less interim earnings.

In order to determine the dates that each was discriminated against, it is recommended that the Region ascertain this by comparing the workcards or other referral records to determine the median time that employees having substantially similar skills as Duchnowski and Orsetti were referred to employment after being laid off and placed in book. For example, if is shown that employees with similar skills had a median time of a 90-day hiatus between the time that they were put in book to the time of their next job referral, then it would be concluded that Duchnowski and Orsetti would likewise have obtained employment after a 90-day hiatus. In Orsetti's case, however, the time would be measured not from the time that he was put in book (December 20, 1991) but rather from his last layoff on September 21, 1992. As to Duchnowski, the time of the discrimination against him should be measured from his last in book date of January 14, 1992, and the result should be the calculated median time added to that date or July 20, 1992, whichever comes first. (Because the complaint, taking into account the 10(b) statute of limitations, sets July 20, 1992, as the date of the alleged discriminations.)

All backpay under the terms of the recommended Order shall be computed in the manner described in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It further is recommended that the Union maintain and operate its referral system in a nondiscriminatory manner and keep and retain adequate records of its referral operations for a limited period to disclose fully the bases on which referrals are made.

CONCLUSIONS OF LAW

1. By discriminatorily refusing to refer Casmir Duchnowski and Angelo Orsetti to employment in a timely manner because they ran for union office or supported certain candidates for union office, the Respondent has violated Section 8(b)(1)(A) of the Act.

2. By impliedly threatening to withhold job referrals to employee and union members because they supported certain candidates for union office, the Respondent has violated Section 8(b)(1)(A) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. Except as found above, the Respondent has not violated the Act in any other manner as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Local 137, International Union of Operating Engineers, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discriminatorily refusing to refer to employment Casmir Duchnowski, Angelo Orsetti, or any other employees in a timely manner because they run for union office or support certain candidates for union office.

(b) Impliedly threatening to withhold job referrals to employee and union members because they support certain candidates for union office.

[25] 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.

(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 Casmir Duchnowski and Angelo Orsetti for any loss of earnings they may have suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all hiring hall records, workcards, dispatch lists, and other documents necessary to analyze the amount of backpay due under the terms of this Order.

(c) Keep and retain for 2 years from the date of the attached notice adequate records of its referral operation that will disclose fully the basis on which referrals are made and made those records available to the Regional Director for Region 2 on request.

(d) Post at its union office and hiring hall copies of the attached notice marked ''Appendix.''[26] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to 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.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[26] 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.''