

Wismer and Becker, Contracting Engineers and Jess Aaron Jameson

International Brotherhood of Electrical Workers Local Union 497 and Jess Aaron Jameson, John Neal, and Decevigne Kilpatrick. Cases 9-CA-7271, 19-CB-2290, 19-CB-2266, and 19-CB-2267

August 27, 1980

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND TRUESDALE

On March 16, 1977, the National Labor Relations Board issued its Decision and Order in this proceeding.¹ In that Decision, the Board found Respondent Union violated Section 8(b)(2) and (1)(A) of the Act by refusing, under an exclusive hiring hall agreement, to refer three named applicants for employment to Respondent Employer because of a dispute over working conditions at a construction site. During this dispute, Respondent Union's policy was to refuse to refer any individuals to Respondent Employer for employment. The Board found that Respondent Union's subsequent demand to Respondent Employer to replace with union referrals 24 employees Respondent Employer had hired directly during the period when Respondent Union refused to refer also violated Section 8(b)(2) and (1)(A) of the Act. The Board also found that Respondent Employer's acquiescence in this discharge demand violated Section 8(a)(3) and (1) of the Act.

Thereafter, the Board filed an application for enforcement of its Order and Respondent Employer filed a petition for review with the United States Court of Appeals for the Ninth Circuit. On September 12, 1979, the court, *sua sponte*, remanded the case to the Board for "a determination of whether or not the Union's wholesale refusal to dispatch employees" during the dispute was an abuse of the hiring hall process which also violated the rights of employees under the Act.²

On November 8, 1979, the Board accepted the court's remand and thereafter notified the parties that they could file statements of position on the issue raised by the remand. Subsequently, Respondent Union, Respondent Employer, and the General Counsel filed statements of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the entire case in light of the court's decision and the statements of position on remand and has decided to affirm its original Decision in this case.

The record establishes that Respondent Employer is an electrical contractor and a member of the National Electrical Contractor's Association. On January 11, 1974, before hiring employees for a job at the Grand Coulee Dam, it executed a "Visiting Employer Compliance Agreement" with Respondent Union by which it agreed to be bound by the collective-bargaining agreement between Respondent Union and the National Electrical Contractor's Association. In addition to establishing certain working conditions, the agreement provided for exclusive referrals of employees by Respondent Union and contained a no-strike clause applicable to contractual disputes. In March 1974, a dispute arose over the adequacy under the agreement of Respondent Employer's change shack on the Grand Coulee jobsite. Respondent Union advised several employees to refuse orders to report to the change shack. When five employees were discharged for refusing to report to the change shack, Respondent Union filed a grievance under the contract and refused to continue to refer individuals for employment, including three individuals who specifically requested referrals. This refusal to refer was intended to protest the discharge of the five employees and lasted from approximately March 6 to June 23, 1974. During this time, Respondent Employer independently hired employees for the Grand Coulee jobsite under a contractual provision granting it power to do so when there were no applicants available under the union referral system. However, the contract also stated that certain employees hired by Respondent Employer in such circumstances would be considered temporary employees and were to be replaced as soon as possible by qualified applicants referred by Respondent Union. After an arbitration award issued on May 24, 1974, which ordered Respondent Employer to reinstate the five discharged employees, Respondent Union relied on this contract provision and demanded that the employees hired directly by Respondent Employer be replaced by union referrals. When Respondent Employer refused to replace the direct hires, Respondent Union grieved the matter. On July 1, 1974, Respondent Employer was ordered by the Joint Conference Committee, composed of management and labor representatives, to discharge the direct hires on the ground they were temporary employees under the contract. Respondent Employer complied with this order.

In the subsequent proceeding before the Board, the Administrative Law Judge found that the dis-

¹ 228 NLRB 779.

² 603 F.2d 1383.

charge of the direct hires violated Section 8(b)(2) and (1)(A) and Section 8(a)(3) and (1) of the Act. However, he found that Respondent Union's refusal to refer the three individuals who had specifically requested referral, as well as its general refusal to refer individuals, did not violate the Act.³ On review, the Board affirmed the finding that the discharge of the direct hires violated the Act, but, contrary to the Administrative Law Judge, the Board also found that the refusal to refer the three who had requested referral violated the Act. However, the Board did not consider the issue of Respondent Union's general refusal to refer individuals to Respondent Employer because both the General Counsel and the Charging Parties failed to file specific exceptions to the Administrative Law Judge's conclusion that these actions did not violate the Act.⁴ None of the parties filed a motion for reconsideration of the Board's refusal to consider this issue.

The failure to file adequate exceptions to the Administrative Law Judge's finding that the Union's general refusal to refer individuals to Respondent Employer did not violate the Act precluded the General Counsel from raising this issue both before the Board and before the court on petition for enforcement. Thus, Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, states that "No matter not included in exceptions or cross exceptions may thereafter be urged before the Board, or in any further proceeding."⁵ However, the General Counsel, pursuant to the court's remand, now urges that the Board find Respondent Union's general refusal to refer individuals to Respondent Employer violated the Act on the ground that Respondent Union had a duty under the Act to refer applicants without regard to consideration of its dispute with Respondent Employer. In light of the unusual procedural posture of this case, it is necessary to detail at some length the litigation of this issue in order to determine whether the General Counsel has adequately presented this issue to the Board for determination.

The bulk of the charges filed in this case did not specifically allege that the general refusal to refer violated the Act. Rather, this refusal was alleged primarily as part of an argument that the direct hires were entitled to retain their jobs under the contract and that their discharge was thus unlaw-

ful. The initial charge, filed July 3, 1974, alleged Respondent Union's attempt to have the direct hires discharged was unlawful because the direct hires "were properly hired by the Employer when [the Union] failed or refused to provide employees within a contractually limited period after a request had been made for electricians to the Union by the Employer." The second charge, dated July 5, 1974, alleged that Respondent Union violated the Act by actually bringing about the threatened discharges, again relying in part on Respondent Union's failure to refer to show the direct hires were entitled to retain their employment. The third charge, filed July 22, 1974, made no mention of the refusal to refer. Another charge filed on that date alleged, "On or about March 14, 1974, the Union refused to permit Jess Aaron Jameson and others to sign its out-of-work book because of their lack of membership . . . and because . . . they refused to participate in a work stoppage conducted by the Union . . . in violation of a pending collective bargaining agreement." (Emphasis supplied.) A final charge, filed August 15, 1974, stated, "In or about July 1974, the Employer discharged Jess Aaron Jameson and approximately 25 other employees because they refused to engage in an unlawful work stoppage conducted by [the Union when it] refused to dispatch workers from its hiring hall in violation of a pending collective bargaining agreement ." (Emphasis supplied.) Thus, the general refusal to refer appeared in the bulk of the charges as an element of the illegality of the discharges of the direct hires. While the second July 22 charge alleged that this refusal violated the Act, it did so not independently but in apparent reliance on the Union's alleged breach of the no-strike clause of the parties' collective-bargaining agreement.

The complaint based on these charges differs somewhat from them in its treatment of the general refusal to refer. While certain complaint allegations seem to follow the theory presented in three of the five charges that the refusal to refer was a breach of contract which entitled the direct hires to retain their employment,⁶ the complaint also specifically alleges in paragraph 7 that from about March 7 until June 18, 1974, the Respondent Union refused, though requested, to dispatch employees for employment to Respondent Employer. And, at paragraph 9(d) of the complaint, it is alleged that on certain unknown dates during the period beginning in March and ending in June 1974 Respondent Union refused to register certain unknown individ-

³ See 228 NLRB at 800.

⁴ See Sec. 102.46(h) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, and fn. 7, *infra*.

⁵ See, generally, *Aitoo Painting Corporation*, 238 NLRB 366 (1978). See also Sec. 10(e) of the Act; *Cascade Employer Association Inc., et al. v. N.L.R.B.*, 404 F.2d 490 (9th Cir. 1968); *N.L.R.B. v. International Longshoremen's and Warehousemen's Union, Local 12*, 378 F.2d 125, 130-131 (9th Cir. 1967), fn. 67, *infra*, and cases cited therein.

⁶ Par. 8 of the complaint alleges that, on March 22, 1974, Respondent Employer began hiring employees directly pursuant to the parties' contract and seemingly as a result of Respondent Union's refusal to refer employees, alleged in par. 7.

uals on its dispatch list for employment because of its dispute with Respondent Employer. These allegations make no mention of the refusal to refer violating the parties' contract. However, at the hearing, the General Counsel did not argue that the general refusal to refer itself violated the Act, but characterized it as an unprotected strike in violation of the parties' contractual obligations. While counsel for Respondent Union admitted there was a refusal to refer individuals, he argued that the mere fact that this refusal might have violated contractual obligations did not make it an unfair labor practice. Objections were made to the relevance of evidence on the general refusal to refer. At no time did the General Counsel argue that the significance of evidence on the refusal to refer went beyond proof of a breach of contract. No evidence was introduced to establish the identity of the unknown individuals the complaint alleged were prevented from registering for employment or even that such refusals to register occurred. Nor did the General Counsel present any other evidence which could have given Respondent Union notice of a theory under which the refusal to refer was alleged independently as a violation.

Nor can the General Counsel's briefs to the Administrative Law Judge and the Board be said to argue that the admitted refusal to refer, without more, violated the Act. Thus, the brief to the Administrative Law Judge reiterated the argument that the direct hires were entitled to retain their employment because Respondent Union had "elected to pursue the risky and contractually unprotected tactic of refusing to refer employees to the job during the dispute." Although the brief also states that the refusal "to register and refer qualified job applicants to the Company because of the pending dispute . . . [violated] Section 8(b)(2) of the Act," the only individuals who were shown at the hearing to have been either qualified or applicants for employment with Respondent Employer were the three who specifically requested referral. When the Administrative Law Judge nevertheless considered the issue and found that the general refusal to refer did not violate the Act, the General Counsel failed to file with the Board a specific exception to his finding and made no mention of the general refusal to refer in the brief filed in support of the other exceptions, other than to argue that it was an unprotected strike. Indeed, in his brief to the Board the General Counsel apparently disavowed any allegation that Respondent Union's general refusal to refer violated the Act when the General Counsel referred to paragraphs 9(a), (b), and (c) of the complaint, which involved the three individuals known

to have requested referrals, as "the 8(b)(2) 'refusal to refer' portion of the complaint."⁷

In sum, it is clear that the General Counsel has failed thus far in this proceeding to litigate the issue of whether Respondent Union's general refusal to refer individuals to Respondent Employer for employment independently violated the Act. Thus, Respondent Union was without adequate notice from the hearing and the briefs to the Administrative Law Judge and the Board that its general refusal to refer was at issue in this case as an independent violation of the Act and was deprived of the opportunity to present relevant evidence in its defense. Assuming the General Counsel had intended to request that the Board consider this issue on review of the Administrative Law Judge's Decision, the General Counsel failed to comply with the Board's Rules and Regulations by not filing a specific exception concerning it.⁸ On this record, it would be difficult to infer that the General Counsel ever intended to maintain this issue as a part of the theory of this case as it was originally presented to the Board.⁹

In light of these factors, especially the failure to file adequate exceptions to the Administrative Law Judge's finding that Respondent Union's general refusal to refer did not violate the Act, we conclude that it would be an improper exercise of our power to remand this case for a second hearing. To

⁷ The only exception of the General Counsel which might be deemed in any way to apply to the Administrative Law Judge's finding on the general refusal to refer was an exception to the dismissal of all allegations of the complaint not found to be violations of the Act. Specifically, exception 15 was to that part of the Administrative Law Judge's Decision "in which the Administrative Law Judge ordered that the Complaint be dismissed insofar as it alleges violations not specifically found." This exception lacked the specificity required by the Board's Rules and Regulations and was not adequate notice of a request to consider the issue. See Sec. 102.46(b) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended. *N.L.R.B. v. Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344, 350 (1953); *N.L.R.B. v. Giustina Bros. Lumber Co.*, 253 F.2d 371, 374 (9th Cir. 1958). Cf. *N.L.R.B. v. Children's Baptist Home of Southern California*, 576 F.2d 256, 261-262 (1978). See also *Carbana Mining Corporation*, 198 NLRB 293 (1972); *American Federation of Unions Local 102, a/w National American Federation of Unions, Inc. (Quinco, Inc.)*, 205 NLRB 1174 (1973); *Dutch Witch of Central Illinois, Inc.*, 248 NLRB 452 (1980).

⁸ As noted above, there was no motion for reconsideration filed by any party to the Board's failure to address this issue. That this issue was never presented to the Board appears to have been touched upon by the court in its remand. At fn. 7 of the remand, the court noted

It may be, for example, that the appropriate characterization of the problem here should have been abuse of the hiring hall process rather than the strike/labor dispute issue addressed below.

⁹ We note in passing, in light of certain further comments at fn. 7 of the court's remand order, that were we now or at some later time to find that Respondent Union's general refusal to refer employees was an independent violation of the Act, this would still not alter Respondent Employer's backpay liability. For an illegal refusal to refer, Respondent Union would be held solely liable. However, Respondent Employer would be secondarily liable for its ultimate acquiescence in Respondent Union's demand to discharge the direct hires. See, e.g., *Bulletin Company*, 181 NLRB 647 (1970). This is a liability unaffected by the separate issue of an alleged illegal refusal to refer individuals for employment.

do so would violate Board procedures and Section 10(e) of the Act and would substantially delay the resolution of a case which involves 24 proven discriminatees, who have gone uncompensated for almost 6 years, in order to allow the litigation of a theory which the General Counsel has never properly advocated to us. Accordingly, we affirm our original Decision in this case that Respondent Union violated Section 8(b)(2) and (1)(A) of the Act by refusing to refer three named applicants for employment to Respondent Employer and by demanding that Respondent Employer replace certain employees it had hired directly with union referrals and that Respondent Employer violated Section

8(a)(3) and (1) of the Act by acquiescing in this demand.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent Employer Wismer and Becker, Contracting Engineers, Grand Coulee, Washington, its officers, agents, successors, and assigns, and Respondent Union International Brotherhood of Electrical Workers Local Union 497, Wenatchee, Washington, its officers, agents, and representatives, shall take the actions set forth in the Board's Decision and Order of March 16, 1977, reported at 228 NLRB 779.