

Dalziel Supply Company and John Frank Martin

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 287 and John Frank Martin. Cases 32-CA-507 (formerly 20-CA-11488) and 32-CB-87 (formerly 20-CB-3905)

March 13, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

On November 28, 1977, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a brief, Respondent Employer filed limited exceptions and a brief,¹ and Respondent Union filed limited cross-exceptions and a brief.

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 considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

¹ The Employer's request that it be reimbursed by the General Counsel for costs and legal fees incurred in connection with this proceeding is hereby denied because we do not consider the General Counsel's exceptions to be totally without merit or frivolous in nature.

² Counsel for the General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This matter was heard before me at San Francisco, California, on June 29, 1977, pursuant to separate complaints issued 235 NLRB No. 9

by the Regional Director of the National Labor Relations Board for Region 20. The complaint in Case 32-CA-507 (formerly 20-CA-11488)¹ was issued on September 29, 1976, based on a charge filed by John Frank Martin on May 20, 1976. The complaint in Case 32-CB-87 (formerly 20-CB-3905) was issued on March 17, 1977,² based on a charge filed by Martin on May 7, 1976. The cases were ordered consolidated by the Regional Director on March 17, 1977. The complaint against Dalziel Supply Company (herein called either Dalziel or Respondent-Employer) alleges that it violated Section 8(a)(1) and (3) of the Act by refusing to offer Martin employment because of his union activities. The complaint against International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 287 (herein called the Teamsters or Respondent-Union) alleges that it violated Section 8(b)(1)(A) of the Act when it refused to process a grievance filed by Martin, assertedly for arbitrary, irrelevant, capricious, or invidious reasons.

Issues

1. Whether or not Respondent-Employer refused to consider Martin for permanent employment because he was planning to run for union office or because he filed a grievance involving Respondent-Employer's failure to comply with a collective-bargaining agreement requiring it to utilize Teamsters-referred drivers to operate its delivery truck.

2. Whether or not Respondent-Union refused for arbitrary, irrelevant, capricious, or invidious reasons to process a grievance filed by Martin against Respondent-Employer alleging that it had refused to consider him for permanent employment because of his age.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Briefs, which have been carefully considered, were filed by all parties.

Upon the entire record of the case,³ I make the following:

FINDINGS OF FACT

I. RESPONDENT-EMPLOYER'S BUSINESS

Each Respondent admits, and I find, that Dalziel is a California corporation engaged in the wholesale plumbing supply business, with its principal office located in San Francisco. During the past year Dalziel, in the course and

¹ After this matter was heard and briefs filed, the Board opened its Oakland, California, office, Region 32. As the place of the alleged unlawful conduct, Campbell, California, is within the territory of Region 32, the cases have been assigned Region 32 docket numbers.

² The complaint in Case 32-CB-87 (20-CB-3905) is technically defective as the Regional Director failed to sign it, although on the same day she did sign an order consolidating it with Case 32-CA-507 (20-CA-11488). I conclude that such an omission is merely an oversight which could be corrected by an appropriate order. As I did not discover the defect until recently and as the matter has now been fully litigated, I see no reason to further delay the case, particularly in view of my decision on the merits. If counsel for the General Counsel wishes to correct the omission she may do so by appropriate application to the Board.

³ The General Counsel's unopposed motion to correct the record is hereby granted.

conduct of its business, purchased and received goods valued in excess of \$50,000 directly from suppliers located outside California. Accordingly, each Respondent admits, and I find, that Dalziel is, and has been at all material times, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Each Respondent admits, and I find, that at all material times the Teamsters has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Although Respondent-Employer's headquarters are located in San Francisco, it has at least six branches, five of which appear to be located in various communities in the San Francisco Bay area. Its president is E. O. "Ned" Myall who is officed at its San Francisco headquarters. The facility involved herein is the warehouse located in Campbell, California, a San Jose suburb. Its manager is Jed Myall, son of the corporate president. Jed Myall has managed the Campbell branch for 12 years. The Campbell branch regularly employs one truckdriver and four warehousemen.

Dalziel is a member of the Northern California Suppliers Association, a multiemployer collective-bargaining association. By virtue of its membership in that association, Dalziel is bound to at least one collective-bargaining contract with Respondent-Union; that agreement covers Dalziel's warehousemen, including those employed at Campbell. Dalziel also has a second collective-bargaining agreement (not in evidence) with Respondent-Union whereby the Union represents its truckdrivers, including those at Campbell.

Pertinent Contract Clauses

The warehousemen's contract contains two clauses which are pertinent here. The first is section 2(a) relating to hiring. That clause requires an employer to fill vacancies through the Teamsters hiring hall. It obligates the Teamsters to refer "competent and experienced" employees and further provides that if the Union is unable to furnish such employees within 24 hours after an employer's call, the employer is free to hire employees from other sources.

Section 4(j) prohibits an employer from refusing to hire, discharging, or otherwise discriminating against employees or applicants because of their "age, sex, race, religion, color, national origin, or union activities . . ."

B. John Martin

During 1976 John Martin was a 49-year-old individual with approximately 17 years' experience in the plumbing supply business. His experience included approximately 14-1/2 years as a warehouseman and 2-1/2 years as a truckdriver. He had recently been laid off by ITT Grinnell, another plumbing supply company, with facilities in San

Jose, having worked there for 10 years as a warehouseman. In order to seek employment he registered with the Teamsters hiring hall and the Union began referring him to various employers in its area. The record shows that from January through April 1976 the Union referred him to 18 jobs, mostly short-term work. Of these 18 referrals, five were to Dalziel's Campbell facility. His first referral to Dalziel was on February 2, where he worked for a short time as a driver. On February 13 he was again referred to Dalziel as a driver, having been requested by name. On March 1 he was referred to Dalziel as a warehouseman. On this occasion Dalziel had requested him by name and on an "open dispatch" basis, meaning that the job, although temporary, would last for an indeterminate period of time. In fact it lasted for 10 days. On April 19 he was again referred to Dalziel as a driver, having been requested by name. On April 20 he was again referred to Dalziel as a driver but Dalziel did not request him by name. Although he has not worked at Dalziel's Campbell facility since that time, he had been referred to Dalziel's Mountain View branch in 1977 and has worked there, though the record does not show for how long or on how many occasions.

While employed by ITT Grinnell, Martin was a union steward from 1968 to 1975. In December 1973 he ran unsuccessfully for the office of union business agent. As will be seen, in early 1976 he decided to run again.

C. Dalziel's Hiring Practices at Campbell

According to the undisputed testimony of Jed Myall, the Campbell manager, the employee complement at that location is relatively stable. As noted, there are four warehousemen and one truckdriver. All of these individuals are permanent employees. He testified that Dalziel generally tries to maintain two experienced warehousemen, together with two relatively inexperienced warehousemen. He testified that it is Dalziel's intent to teach the inexperienced warehousemen the business and to slowly move them into other jobs. This practice results in a limited amount of turnover.

Jed Myall further testified that, when seeking to fill the permanent warehouse positions, he uses the union hiring hall to do so. In addition, he said, he asks applicants for permanent employment to fill out employment applications. These individuals are interviewed by himself and by his superiors in San Francisco. The practice is somewhat different when the Employer hires temporary employees. Again, according to Jed Myall, the Company uses the union hiring hall to obtain such employees. However, they do not fill out employment applications nor are they interviewed by San Francisco management.

It is clear from the record that Don Boggini, the Union's business agent during the pertinent portion of 1976, was familiar with Dalziel's hiring practices and desires with regard to permanent employees. I reach this conclusion because of his following testimony:

The Dalziel Company would like, when they hire people in the warehouse, to be a qualified person who could work and do, maybe, a salesman or management position. They just don't like to hire people that are going to be a warehouseman for the next 25 years. So, I

give a list to the dispatcher to send several people who he thought might be qualified off of the "A" list and the dispatcher would send them out, not knowing who they were. If we didn't have somebody that was qualified, Dalziel Company would seek different people to hire that maybe were not in our union.

D. Evidence Regarding Dalziel's Alleged Discrimination Against Martin

At the Campbell warehouse, the truckdriver is Joe Harvick; he is also the union steward. During one of Martin's February 1976 periods of employment with Dalziel, he took a coffeekick with Harvick at a nearby coffeshop. During that break Harvick told Martin that he was planning to run for union business agent. Martin replied that he was going to do so, too, and thought it would be a good idea to start campaigning early, although the election was not to be held until December. Later, according to Martin, he mentioned his intention to three other Dalziel employees whom Martin knew only by their first names — Dale, Ray, and Steve. Martin virtually concedes that he told no one in management of his intention and Jed Myall testified that as of April 1976 he did not know that Martin intended to run for union office in December.

As noted earlier, on March 1 Martin was referred to Dalziel as a warehouseman and held that job for approximately 10 days. During the last portion of that employment period, Martin had a conversation with Wes Zimmer, who Martin said was a foreman at Dalziel.⁴ That conversation occurred in Zimmer's office at the warehouse. Martin asked Zimmer if Dalziel would be putting on any more help. Zimmer replied that they definitely needed a man at Campbell and probably one at Mountain View. Martin then asked Zimmer if he would put in a word for him and Zimmer replied that he would recommend Martin to management. On the following day they had another conversation in which Martin asked when he would have any further word about being hired. Martin testified that Zimmer replied that on the following week there would be a meeting in San Francisco to make a decision regarding hiring additional employees at Campbell and Mountain View. Martin recalls Zimmer saying that if anybody was to be hired, Zimmer would definitely hire Martin.⁵ The conversation ended with Zimmer telling Martin to call him

⁴ Jed Myall testified that Zimmer, who was not employed by Respondent at the time of the hearing, was not a foreman but was an office clerical. Based on that testimony, Respondent argues that Zimmer was not a supervisor and the testimony by Martin relating to what Zimmer said is inadmissible hearsay and was in any event not binding on Dalziel. Martin testified that it was Zimmer to whom he gave his referral slips and who initialed them for return to the union hiring hall. According to Martin, Zimmer also told him where he was to work and often told him how long a job would last.

It should also be observed that in Dalziel's March 30, 1976, letter to Boggini, regarding the hire of certain persons (set forth in full *infra*), Company President E. O. "Ned" Myall advised the Union that an applicant for permanent employment, Frank Battles, should report to Zimmer for an interview. Jed Myall was not asked about the meaning of that portion of the letter and E. O. "Ned" Myall was not called as a witness. Thus the nature of the interview to be conducted by Zimmer is unexplained and virtually unlitigated. It should be observed that the authority attributed to Zimmer by Martin, as well as Zimmer's apparent authority to interview employee applicants, do not conclusively prove Zimmer to be a supervisor. His

in the middle of the following week and he would let Martin know the outcome of the San Francisco meeting.

On the following Wednesday or Thursday Martin telephoned Zimmer who referred him to Jed Myall. According to Martin, Myall told Martin that Dalziel was not doing any hiring but would certainly keep him in mind. Martin thanked him and the conversation then ended.

Jed Myall recalled the incident in which Zimmer gave him the telephone to talk to Martin. According to Myall, he told Martin the Company at that time had no requirements for experienced help; that if he would like to fill out an application form, he was more than welcome to do so for future reference. It is undisputed that Martin did not file an application for employment. He testified that to do so would violate union rules against hustling jobs.

On April 19 Martin was again referred to Dalziel as a driver. Dalziel had called for him by name. When he reported for work at 8 a.m., Zimmer told him that he would probably work for the rest of the week because driver Harvick had cut his finger and they were not certain when Harvick would return. At the end of the shift, however, Zimmer told him not to report the following day but instead to return to the union hall.

The next day, April 20, Dalziel again called the hall for a truckdriver. This time, however, the Company did not request anybody by name. Nonetheless, the Union referred Martin.

Martin testified that when he arrived at the Campbell warehouse, Zimmer expressed surprise upon seeing him, saying the Company did not want two truckdrivers and did not want him to gain seniority. Martin explained that he couldn't gain seniority, that to do so an employee needed 20 days work within 60 days and this was only his second day. He said Zimmer replied that he'd already worked for the Company for 2 weeks. Martin explained that his previous employment was under the warehouse contract and under that agreement an employee needed 90 days within a year to gain seniority. Zimmer then told Martin to work for the rest of the day. At the end of that day he told Martin he couldn't have him back on the following day and, besides, nothing was going out that day.

Martin, aware that Harvick's injury would keep him off the job for at least a few more days, became suspicious of Zimmer's statement regarding no work the next day. He believed Dalziel still needed someone to drive the truck

accepting and signing referral slips is consistent with Myall's claim that he was a clerical, and his telling Martin where to work may not have involved independent judgment. Further, his interview of Battles may have had limited scope or may have been specifically delegated to him on that one occasion. The record is simply incomplete on these points, probably because the complaint gave Dalziel no notice that Zimmer was involved in the case. Nevertheless, it is likely that Zimmer was a supervisor and that Martin's testimony with regard to Zimmer is admissible for the truth of the matters asserted by that declarant. However, it is unnecessary to reach that conclusion because, even under Martin's version, Zimmer never made Martin a promise of employment.

⁵ In the previous footnote I state that Zimmer never made Martin a promise of employment. While Martin's testimony here appears to quote Zimmer as making such a promise, I do not so construe it. Taken in context with what was said before, it is apparent that Zimmer preferred Martin over others, but he also clearly said his preference could be overridden by higher authority. Thus his statement to Martin that if anybody would be hired it would be Martin can only be taken as an expression of Zimmer's personal desire. It was not a company commitment to Martin.

and feared Dalziel would assign the truck driving to a warehouse employee, thereby violating the truckdriver contract.

Accordingly, on April 21, he asked Business Agent Boggini to investigate the situation. Boggini, who was busy with other matters, refused, telling Martin that he didn't have time to do it that day. Later that day Martin went out to the Dalziel warehouse and observed that the truck was not there. By telephoning the union dispatcher he learned that no one had been dispatched to drive the truck.

On the following day he had another conversation with Boggini in which he reported what he had observed. Boggini told Martin he had no proof. Martin became angry and went to see the Union's chief executive officer, Pete Cancilla, the secretary-treasurer. Ultimately they all decided that there was insufficient proof, and Martin and another union member, Frank Battles, volunteered to go to Dalziel's Campbell warehouse to observe. While there, they saw the truck going in and out with material despite the fact that no driver had been referred from the hall.

On April 22 Martin and Battles filed a joint grievance (misdated April 21) alleging, in substance, that Dalziel had improperly assigned a nonunit employee to perform truck-driving work.

Shortly thereafter, the Union and Dalziel settled that grievance (known as the run-around pay grievance) when Dalziel agreed to pay one day's pay to the individual who was on top of the Union's out-of-work list. Neither Martin nor Battles received any of that money.

On April 26 Martin was present in Business Agent Boggini's office and saw a letter on Boggini's desk from Dalziel President E. O. "Ned" Myall to Boggini. The letter, dated March 30, reads as follows:

Dear Don:

Confirming our telephone conversation of this afternoon, wherein we discussed the following:

The fact that we have contacted your office for assistance of employing young inexperienced people interested in our type of work, it has been long past the time limit required by your union to supply us an acceptable worker, and so we have gone out on our own, as you have previously been advised, and have hired:

MOUNTAIN VIEW BRANCH

Dan Cassidy, who we will send to your office on April 5th for a permit to work in our Mountain View Warehouse, and on April 12, we are hiring Mike Lovisone, the young chap you sent in for an interview for warehouse work. Both of these people will be given a 90-day trial, and if acceptable, should become steady employees.

CAMPBELL BRANCH

On April 5th, we will send to you a Mr. Dave Caputo for permit to work in our Campbell Warehouse. As mentioned, we are still in need of an additional warehouseman in Campbell. It could be that we might actually need two more men, besides Dave. Your assistance would be greatly appreciated.

By copy of this letter, we are informing our Campbell Warehouse that the man that you made mention of

today, Mr. Frank Battles, will be sent in by you to Mr. Wes Zimmer for interview. [Emphasis supplied.]

Upon reading this letter, Martin became disturbed for two reasons. First, the letter was dated only several days after he had spoken to Jed Myall and had been told that the Company wasn't hiring. He believed Jed Myall had lied to him. Second, he was upset because of the letter's reference to Dalziel's interest in hiring "young inexperienced people." He believed that such a limitation violated the no-discrimination clause in the collective-bargaining agreement. Accordingly, he immediately filed a grievance against Dalziel alleging that they had refused to consider him for employment because of his age and had therefore violated section 4(j) of the collective-bargaining contract.

Dalziel's March 30 letter, as can be seen, mentioned that one of the young inexperienced people it had hired to work in Campbell in the absence of a referral by the Union was a Dave Caputo. President Myall also mentioned in the letter that the Campbell warehouse needed at least one additional warehouseman, and possibly two. Jed Myall testified that on April 14 and 22 he telephoned Boggini to ask him to send inexperienced individuals for interviewing — he referred to them as "beginners." Later, by memo dated April 27, Myall confirmed his earlier telephone calls and again requested the Union to send him "beginners" to be interviewed. He concluded his memo with the following sentence: "Again, I ask you send us prospective beginners for warehouse work." Boggini's testimony on this point is consistent with Jed Myall's. Accordingly, I find that between March and April 1976 Dalziel was attempting to hire, and indeed hired one, inexperienced warehousemen to work at its Campbell branch.

Expanding on one of the April telephone calls, Boggini testified that at some point in April he had a telephone conversation with Jed Myall. He was unable to specify the date the telephone conversation occurred. It is apparent, however, that it occurred prior to April 26, when Martin saw Dalziel's March 30 letter on Boggini's desk. It may have been one of the conversations referred to by Jed Myall, either April 14 or 22. Before recounting Boggini's testimony, it should be observed that Boggini, on the point in question, was reluctant, unresponsive, had poor recollection requiring refreshment by use of his affidavit, and was confused regarding to which he had spoken to President E. O. "Ned" Myall or Campbell Manager Jed Myall.

When counsel for the General Counsel asked Boggini if he had had a conversation with "Mr. Myall" in April about Martin working for Dalziel, Boggini replied, "I'm not positive. I think his name was mentioned." When the General Counsel asked him to recount what Myall said to him and what he said to Myall about Martin during that conversation, Boggini testified he could not recall. The General Counsel then asked whether he recalled if "Mr. Myall" said anything about Martin's running for business agent. Boggini testified that "it was brought up." The General Counsel then asked who brought it up and Boggini replied, "E. O. Myall." When the matter of which Myall was being referred to was cleared up, and the General Counsel asked if Boggini recalled what Jed Myall said to him about Martin in the telephone conversation, Boggini replied he did not recall.

His memory was then refreshed by showing him his affidavit which he had executed some time previously. He then testified that he recalled a telephone conversation which he had had with Jed Myall in April 1976 in which Martin was discussed. He testified: "Well, I was told that they would like to hire people that have the ability to sell and go into management, and that John Martin, they didn't want to interview John Martin because they already have one person named Joe Harvick that was a business agent,⁶ and with six people employed in a small company like that they didn't need two people that were going to run for union office."

On cross-examination Boggini was asked if Myall had told him the purpose of the call. Boggini testified "Well, at that particular point there, he was looking for young people to hire, and he wanted me to send him people to be interviewed." As a result of that call, Boggini told the Union's dispatcher to send some people to Dalziel for interviewing. However, Martin was not one of the individuals sent.

When Boggini was asked if it was true that Jed Myall did not tell him he would not employ Martin because Martin was too old, Boggini replied he could not recall. On April 26, according to Martin, while he was filing the age discrimination grievance, Boggini did not make any statement regarding his knowledge of why Dalziel had not hired him. In fact, Martin stated that Boggini did not even tell him that Jed Myall had made a statement about hiring inexperienced people until sometime in 1977, some 9 or 10 months after the age discrimination grievance was filed.

Jed Myall denied having any conversation with Boggini in April 1976 in which Martin was discussed. He further denied discussing Martin with Boggini at any time between February and September of 1976. He also denies ever telling Boggini that Dalziel would not consider Martin for permanent employment because it already employed an individual (Harvick) who was running for union office. He said that in April 1976 he did not know if Martin was planning to run for union office in December. In this regard it should be noted that Martin had only spoken to Harvick and other employees about his intention. He conceded that he did not even tell Zimmer of his intention. Aside from Boggini's testimony there is no evidence that management was aware of Martin's intention.

In observing Boggini testify, I was not impressed with his demeanor. He testified unresponsively, hesitatingly, and in low tones on this point. He was a most reluctant witness. The General Counsel attributes his reluctance to the fact that Boggini is no longer a business agent and is now a casual employee of Dalziel. However, in view of his inability to recall, requiring memory refreshment,⁷ his confusion about to whom he was speaking, as well as his odd behavior in not telling Martin what he now claims Jed Myall told him on the telephone, it appears to me that his reluctance may just as easily have been the result of not wishing to engage in a further fabrication. Indeed, it appears highly probable that he gave false testimony in his

⁶ As noted earlier in this Decision, Harvick was a union steward, not a business agent.

⁷ It is unlikely Boggini would have difficulty recalling Jed Myall's alleged statement that Dalziel did not wish to hire persons who intended to run for union office. Such a statement would have shocked Boggini if it had been

affidavit, most likely to curry favor with a potential union officer, Martin, who had found himself in uncertain circumstances, but who might win union office shortly. However, when the matter required actual testimony after Martin had lost in his bid for office, Boggini could not carry the chicanery further until confrontation with his affidavit placed him in an uncomfortable dilemma and he went through with it. While my observation here is not capable of absolute proof, it is clear that when Boggini's testimony is compared with that of Jed Myall, Myall's version is spotless compared to that of Boggini. Accordingly, I do not credit Boggini's testimony that Jed Myall told him that Dalziel did not wish to hire Martin because he intended to run for union office. On the other hand I do credit Jed Myall's denial.

E. *The Stipulated Facts with regard to Respondent-Union's Refusal to Process Martin's Age Discrimination Grievance against Dalziel*

The General Counsel and the Union entered into certain factual stipulations. Dalziel, however, did not participate in these stipulations and is not bound by them. Indeed, as will be seen, the General Counsel and the Union have stipulated to facts involving Dalziel which I have found in section D above did not occur. See items 3, 4, and 5 below.

The factual stipulation between the General Counsel and the Union is as follows:

1. Martin was dispatched to jobs at Dalziel and other employers from January 1976 through April 1976 as shown in Respondent-Union's Exhibit 1.

2. On March 30, 1976, Dalziel requested in writing to Boggini that Boggini refer applicants for permanent warehouse employment. See the March 30 letter quoted *supra*.

3. In the spring of 1976 Boggini informed Dalziel that he would refer Martin (among others) to apply for permanent employment.

4. Dalziel told Boggini that Martin would not be acceptable for permanent warehouse employment and the reasons given by Dalziel are those contained in the record in the complaint case against the Employer.

5. In view of Dalziel's stated position with regard to Martin, Boggini did not refer Martin to Dalziel for permanent employment.

6. On April 26 Martin submitted his age discrimination grievance after he had seen Dalziel's March 30 letter which he read at the Union's office on April 26. During that day Boggini discussed Martin's grievance with Secretary-Treasurer Cancilla and they decided that it would not be processed under the grievance provision of the warehouse contract for the following reasons:

(a) Martin had not attained seniority standing under the warehouse contract and the grievance procedure was, for that reason, not available to him.⁸

(b) The grievance could not, in any event, be sustained on its merits. Accordingly, Boggini told Martin that if he had a claim against Dalziel based on age discrimination he

made and he would have clearly and unhesitatingly recalled it. That he could not do so tends to show the statement was never made.

⁸ The contract itself contains no such limitation on the availability of the grievance procedure to employees without seniority.

should file it with the Federal government at the Federal building in San Francisco.⁹

7. The position of the Union with regard to its refusal to process Martin's grievance was not taken on the basis of personal animus. Neither Boggini nor Cancilla nor any other union representative consulted with legal counsel in connection with their consideration of Martin's grievance or their failure to process it.

IV. ANALYSIS AND CONCLUSIONS

A. Case 32-CA-507 (20-CA-11488)

The General Counsel argues that Respondent-Employer violated Section 8(a)(3) and (1) of the Act by refusing to consider Martin for permanent employment as a warehouseman because he intended to run for union office. The principal evidence in support of this theory is Boggini's testimony to the effect that Jed Myall, during an April telephone conversation, admitted that such was Respondent-Employer's intent. I have previously discredited Boggini's recollection in this regard and have credited Jed Myall's denial that Martin was ever discussed in any of the April telephone conversations. Aside from whether or not Jed Myall made such an admission, there is virtually no other evidence in support of that theory.

First, there is no evidence that Myall or anyone in Respondent-Employer's management was aware that Martin intended to run for union office. The General Counsel argues that, because of the small size of the operation, the small-plant doctrine applies and that, as a matter of law, Respondent-Employer should be presumed to have known that Martin intended to run for union office. I am unable to apply the small-plant doctrine in the circumstances of this case. The small-plant doctrine is generally applied to union organizing campaigns because of the high probability that an issue of such magnitude would not escape the scrutiny of management in a small operation. However, Martin's decision to run for union office in no way reaches the magnitude of a union organizing campaign. His decision was a personal matter as well as an internal union matter. As such, the probability of such information reaching management is far less than the likelihood of a union organizing campaign reaching management. Thus I reject the General Counsel's contention that the small-plant doctrine should be applied here, and accept Jed Myall's testimony that he was unaware of Martin's intention to run for union office.

Second, aside from the admission reported by Boggini, which I have discredited, there is no evidence that Respondent-Employer harbored any animus against employees who held union office. Third, even the timing of

the alleged decision is not particularly persuasive. Martin announced to Harvick his intention to run for union office in February. He may have spoken to other employees shortly after that time. However, Respondent-Employer continued to hire him, specifically calling for his services on March 1 for 10 days and April 19 for at least 1 day.¹⁰ It is true that on April 20 Zimmer expressed a fear that Martin would obtain seniority. Assuming, without deciding, that Zimmer's statement regarding Martin's acquiring seniority is binding upon the Company because of supervisory status, nonetheless a decision not to continue to employ a temporary/casual employee because of seniority considerations is not a violation of Section 8(a)(1) or (3) for it lacks the requisite of discriminatory intent or effect. See generally *Radio Officers' Union etc. (A. H. Bull Steamship Company) v. N.L.R.B.*, 347 U.S. 17, 43-48 (1954). Certainly such a statement carries with it no animus of the nature sought by the General Counsel.

Moreover, Jed Myall's statement to Martin in March that the Company had no requirements for experienced help is not inconsistent with other evidence. Indeed, Dalziel was looking for inexperienced help and Martin simply did not fill the bill. Boggini was well aware that Respondent-Employer wished to hire inexperienced help. In fact, the Union was unable to fill the request and Respondent-Employer was forced to exercise its right to hire from other sources and hired Caputo to work at its Campbell branch. (It also hired two other inexperienced employees to work at Mountain View, one of whom was hired through the Union and one of whom was hired from another source.) On April 27 Respondent-Employer sent the Union a memo reaffirming its request for "beginners."

In the face of these continuing requests it is not surprising that Boggini did not send Martin to be interviewed. He knew it would be an exercise in futility for Martin. Thus, given these facts, Respondent-Employer never even had an opportunity to consider Martin for employment. It is, therefore, only speculation to guess what Respondent-Employer would have done had the Union sent Martin to be interviewed. Accordingly, I am of the view that the General Counsel's proof with regard to the claim that Respondent-Employer refused to consider Martin for employment because he planned to run for union office is wholly without evidentiary support.

The General Counsel's alternative theory, that Respondent-Employer failed to consider Martin for employment because he filed the "run-around pay" grievance, also fails for the same reason. The Union never sent Martin to be interviewed and therefore Respondent-Employer never had the opportunity to discriminate against him.¹¹ Accordingly, I shall recommend that the complaint against Dalziel be dismissed in its entirety.

⁹ In fact, Martin did file such a complaint with the United States Department of Labor in San Francisco. At the time of the instant hearing his case was still being processed by that department.

¹⁰ His 1977 employment at Mountain View is a neutral factor in terms of significance to this case. It may be argued that his 1977 employment there shows Respondent-Employer lacked animus against Martin either because of his intention to run for union office or because he filed the "run-around pay" grievance. However, that hire came after Martin had filed an unfair labor practice charge against it, after the Regional Director had issued the instant complaint, and after he had lost the election. If Dalziel did discriminate against Martin in April 1976, a refusal to accept him in 1977

prior to the instant hearing would have been a foolish litigation risk, for that conduct would undoubtedly have been used against it. By the same token, the 1977 employment should not be construed as a positive factor in analyzing Respondent-Union's defense, for to do so would give excessive weight to an after-the-fact occurrence which is subject to possible manipulation.

¹¹ In late May or June an experienced plumbing warehouseman named Rick Rizzo became unemployed and Boggini attempted to find him employment. During the course of that search he spoke to Jed Myall, who did not then have a place for him. Shortly thereafter, the Campbell facility's most experienced warehouseman, Dale Goodart, gave notice that he

(Continued)

B. Case 32-CB-87 (20-CB-3905)

The General Counsel contends that Respondent-Union's failure to process Martin's age-discrimination grievance against Dalziel violated Section 8(b)(1)(A) because it was for arbitrary, irrelevant, or invidious reasons and therefore in violation of its duty to fairly represent all employees. See, generally, *Miranda Fuel Co., Inc.*, 125 NLRB 454 (1959).

The General Counsel points to the clause of the contract prohibiting age discrimination and to certain language in Dalziel's March 30 letter to reach the conclusion that Martin had a *prima facie* case of age discrimination against Dalziel. Further, the General Counsel notes that one of the two reasons advanced by the Union for refusing to process the grievance is legally insufficient.

In this regard, I note the General Counsel's observation that the first reason, Martin's not having attained sufficient seniority to warrant pursuing a grievance, is legally insufficient. If that were the only reason given, I would fully concur and find a violation, for a union which is the exclusive bargaining agent is obligated to fairly represent all employees in the bargaining unit, whether or not they are casual, temporary, probationary, or have attained contractual seniority. However, the fact that a union has an obligation to fairly represent all the people in the bargaining unit does not necessarily lead to the conclusion that its failure to process a grievance for valid as well as invalid reasons is an abrogation of that duty. However, before resolving that question, it should be observed, contrary to the General Counsel's contention, that the evidence before the Union at the time Martin filed his age-discrimination grievance did not amount to a *prima facie* case of age discrimination.

There is no question that Dalziel was looking for inexperienced employees which it could train to go into other areas of its operation. Boggini was well aware of that fact and knew Dalziel did not wish to hire someone who would remain a warehouseman forever. He knew Dalziel already employed two such individuals at Campbell and now wished to hire people with potential to perform in other areas of the business. Such a consideration had little, if anything, to do with the age of the individuals whom Dalziel wished to hire. When, in its March 30 letter, it referred to "young inexperienced people" Respondent-Union well knew the nature of the employees Dalziel wished to hire. Jed Myall testified that when he used the word "young" he was referring to individuals who were "young in the industry" and not to their age. Undoubtedly, Boggini so interpreted the similar phrasology appearing in the March 30 letter. Certainly, Jed Myall's April telephone calls were consistent with that interpretation. While it is true that Boggini and Cancilla made their decision on April 26 not to process the grievance because they believed it had

intended to quit. Myatt immediately contacted Boggini about Rizzo and in late June, after San Francisco management interviewed Rizzo, hired him as Goodart's replacement.

I do not regard Rizzo's hire as probative of anything in these cases. Martin was never presented to Dalziel for permanent employment and thus it did not treat Martin differently than Rizzo. Moreover, Boggini's successful attempt to find Rizzo permanent employment, while leaving Martin in the hiring hall, is subject to too much speculation to be of value in analyzing the case against Respondent-Union.

no merit, and without benefit of Jed Myall's April 27 memo, that memo ends any doubt about whether Respondent-Employer was using age as a criterion for hire. In that memo Myall noted he had asked Boggini to "send us beginners for warehouse work for interviewing Again I ask you send us prospective beginners for warehouse work." The use of the word "beginners" cannot, without more, be construed as evidence of age discrimination.

In *Ford Motor Company v. Huffman*, 345 U.S. 330 at 338 (1953), the Supreme Court, in discussing a union's duty of fair representation said: "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." It is clear to me that the union leaders' instincts here were accurate enough to satisfy their duty as set forth in *Huffman* and to justify their refusing to process the grievance on the ground that it lacked merit. Accordingly, I cannot find that Respondent Union violated its duty of fair representation in the face of such knowledge of the facts.

However, knowing that the grievance lacked merit, the Union nonetheless added a "make-weight" reason to justify its refusal to proceed with Martin's grievance, his not having contractual seniority. That the Union chose to add a make-weight reason does not, in my view, justify the conclusion that the Union breached its duty of fair representation. It merely warrants the conclusion that the Union is ignorant of the extent of its obligation.

There are two kinds of cases which it may be argued are analogous to the facts here. Both involve the intent of the respondent. The first is the typical mixed motive discrimination case. There the respondent has both lawful and unlawful motivations for its conduct.¹² The second is similar — cases where a respondent advances a false or hollow reason for its action.¹³ Both result in violations of the Act. In my view, however, neither of these kinds of cases affords assistance here. Both lines of cases involve a respondent's act penalizing an employee for having engaged in a protected right. Fair representation cases, particularly one such as this where the respondent's motive is not involved (the parties have stipulated that the Union had no personal animus against Martin), do not lend themselves to that kind of analysis.

Indeed, the elements of the violation are entirely different. A discrimination case requires proof of intent to penalize an individual for engaging in a protected right. Motive may be proven in various ways, including inversely by a showing that the assigned nondiscriminatory reason for the penalty is false or hollow. If that occurs, the trier of fact may infer that the action was taken for another reason, an unlawful reason. *Shattuck Denn Mining, supra*.

¹² E.g., *N.L.R.B. v. Great Eastern Color Lithographic Corp.*, 309 F.2d 352 (C.A. 2, 1962); *Betts Baking Co. v. N.L.R.B.*, 380 F.2d 199 (C.A. 10, 1967); *N.L.R.B. v. Fairview Hospital*, 443 F.2d 1217 (C.A. 7, 1971).

¹³ E.g., *N.L.R.B. v. Solo Cup Company*, 237 F.2d 521 (C.A. 8, 1956); *N.L.R.B. v. Shattuck Denn Mining Corporation (Iron King Branch)*, 362 F.2d 466 (C.A. 9, 1966).

However, fair representation cases are proven not by the respondent's motive, but by whether it met a duty of fair play as imposed upon it by law. If the duty was met, then it is immaterial that a second assigned reason for its action would not have met that duty. Use of a legally insufficient effort to meet the duty is not tantamount to the union's mixing illegal with legal motives, nor may that reason be used to justify an inference that an unlawful motive was the reason for the conduct, for motive is not an element of the alleged violation.

Thus, here, Respondent-Union's advancement of a legally insufficient reason for refusing to process the grievance cannot be deemed unlawful, for it fully met its duty of fair representation when it analyzed the facts available and concluded Martin's age discrimination grievance had no merit. Its coupling a legally insufficient reason to a legally sufficient effort to meet its duty was both unfortunate and unwise, but does not change the fact that the Union met its duty of fair representation here. Nor, in my opinion does the Union's conduct run afoul of the "complete good faith and honesty" required in *Huffman*.

Accordingly, I must conclude that Respondent-Union did not violate Section 8(b)(1)(A) when it refused to process Martin's grievance against Dalziel alleging that it had violated the contractual prohibition against age discrimi-

¹⁴ The Union's advice to Martin to file an age-discrimination complaint with the U.S. Department of Labor also tends to show that it did not act arbitrarily in refusing to process the grievance.

¹⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings,

mination,¹⁴ and I shall recommend dismissal of that complaint as well.

Upon the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent Dalziel Supply Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 287, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Dalziel has not engaged in any violations of Section 8(a)(3) and (1) of the Act.

4. Respondent Teamsters has not engaged in any violation of Section 8(b)(1)(A) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁵

The complaints are dismissed in their entirety.

conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.