

**Bricklayers' and Stonemasons' International Union, Local No. 8, B.M. & P.I.U. of America (California Conference of Mason Contractor Associations, Inc.) and William Waters. Case 32-CB-10 (formerly 20-CB-4143)**

April 20, 1978

**DECISION AND ORDER**

BY CHAIRMAN FANNING AND MEMBERS  
JENKINS AND PENELLO

On November 18, 1977, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply 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, and conclusions<sup>1</sup> of the Administrative Law Judge,<sup>2</sup> and to adopt his recommended Order<sup>3</sup> as modified herein.

**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, as modified below, and hereby orders that the Respondent, Bricklayers' and Stonemasons' International Union, Local No. 8, B.M. & P.I.U. of America, Oakland, California, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified.

1. Substitute the following for paragraph 1(b):

"(b) In any other manner restraining or coercing employees in the exercise of their rights guaranteed to them in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

<sup>1</sup> Chairman Fanning concurs in finding that Respondent violated Sec. 8(b)(1)(A) and (2) of the Act by refusing to allow Waters to sign the out-of-work list at its exclusive hiring hall, and by refusing to refer Waters to employment because of his nonunion status and because he had not paid a fine to a sister local of Respondent. He therefore finds it unnecessary to reach the additional rationale of the Administrative Law Judge concerning the application of *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962), and subsequent cases cited.

<sup>2</sup> The Respondent 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), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>3</sup> In his recommended Order the Administrative Law Judge inadvertently failed to use the broad language. We shall modify his recommended Order and the notice accordingly.

**APPENDIX**

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

WE WILL NOT operate our hiring hall in a discriminatory manner or in such a manner as to cause or attempt to cause any employer subject to the jurisdiction of the National Labor Relations Board to deny employment to any employee or applicant for employment because of lack of membership or payment of union dues or fines, except to the extent permitted by Section 8(a)(3) of the Act.

WE WILL NOT in any other manner restrain or coerce employees in the exercise of their rights guaranteed to them in Section 7 of the Act.

WE WILL operate our hiring hall in a nondiscriminatory manner.

WE WILL make William Waters whole for any loss of earnings and other benefits he may have suffered as a result of our refusal to allow him to sign our out-of-work list and our refusal to refer him to work.

**BRICKLAYERS' AND  
STONEMASONS'  
INTERNATIONAL UNION,  
LOCAL NO. 8, B.M. &  
P.I.U. OF AMERICA**

**DECISION**

**STATEMENT OF THE CASE**

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard in San Francisco, California, on June 21, 1977. The charge, first amended charge, and second amended charge were filed respectively on November 15, 1976, January 28 and February 28, 1977, by William Waters, an individual. The complaint, which issued on January 28, 1977, and amended on March 7, 1977, and at the hearing, alleges that Bricklayers' and Stonemasons' International Union, Local No. 8, B.M. & P.I.U. of America, herein called Respondent, violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended.

**Issues**

The primary issues are:

1. Whether Respondent operates an exclusive hiring hall.

2. Whether Respondent violated Section 8(b)(1)(A) and (2) of the Act by refusing to dispatch William Waters because of his lack of membership in Respondent.

3. Whether Respondent violated Section 8(b)(1)(A) and (2) of the Act by refusing to refer Waters to employment in violation of its duty of fair representation.

The parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE EMPLOYER

Respondent has a collective-bargaining agreement with California Conference of Mason Contractor Associations, Inc., herein called the Association. The employer-members of the Association employ bricklayers, stonemasons, and other employees with related skills. That contract contains a hiring hall arrangement under which employees are referred from a hiring hall operated by Respondent. The complaint alleges that Waters was unlawfully refused referral from that hiring hall.

The Association is a voluntary association of employers in the building and construction industry. It exists, in part, for the purpose of representing its employer-members in collective bargaining and in negotiating and administering collective-bargaining agreements with various labor organizations including Respondent. During the last calendar year employer-members of the Association purchased and received goods valued in excess of \$50,000 directly from suppliers located outside California. During the same period employer-members of the Association purchased and received goods valued in excess of \$50,000 directly from suppliers within California, who, in turn, purchased and received the same goods directly from suppliers located outside California. The complaint alleges, the answer as amended admits, and I find that the Association is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

##### II. THE LABOR ORGANIZATION INVOLVED

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

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Hiring Hall; Findings and Conclusions*

At all times material herein, Respondent has been a party to a collective-bargaining agreement with the Association.<sup>1</sup> That contract covers bricklayers, stonemasons, and employees with related skills who are employed by employer-members of the Association, as well as by other employers who have agreed to be bound by the contract.

<sup>1</sup> The contract from July 1, 1975, through June 30, 1977, lists the names of 393 employers who have authorized the Association to bargain on their

With regard to referrals from the hiring hall, the contract provides:

#### ARTICLE XI — REFERRAL OF EMPLOYEES

Section 1. When an employer needs bricklayers, stone masons, blocklayers, tuck pointers or terrazzo workers, he shall notify the Local Union in whose jurisdiction the job is located by notice given at least twenty-four (24) hours in advance, if possible; upon such notice being given, the Local Union agrees that it will furnish an adequate supply of qualified journeymen if they are available. Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on or in any way affected by Union membership, by-laws, rules or regulations, constitutional provisions, or any other aspect or obligation of Union membership, policies, or requirements. The employer reserves the right to reject for good cause any job applicant referred by the Union and the employer shall be the sole judge of the qualifications of the employees on his job.

The contract also provides:

Article IX Section 8 — Any outside employer, who is not a member of the CCMCA, coming into this jurisdiction shall be permitted to bring with him one foreman. All other employees shall be referred by the Union.

The contract contains a union-security clause that requires employees, as a condition of continued employment, to become members of and maintain membership in Respondent after the seventh day of employment.

Respondent contends that it does not maintain an exclusive referral hall. Representatives of three employers testified concerning their practice with regard to hiring.

Kenneth Ellingsen is construction manager for A. P. Green, Services Division, Bigelo-Liptak Corp., a member of the Association. When Ellingsen needs employees he recalls employees who formerly worked for that company. About 99 percent of his jobs are manned by his regular employees. If additional employees are needed for a job within Respondent's jurisdiction, he calls Respondent and asks for referrals. That happens about six times a year. On those occasions, he generally does not ask for individuals by name. He does not hire off the street or advertise for workers, and he does not hire employees referred by other contractors. He has never refused to put someone to work who has been sent by Respondent. As is set forth in more detail below, Ellingsen was approached by the alleged discriminatee, William Waters, for a job and Ellingsen told Waters that when his company needed people in Respondent's jurisdiction he called the union hall and requested people.

Robert Grahn is general foreman for G. T. Thorpe, Inc., another member of the Association. Grahn's testimony was similar to that of Ellingsen. When Grahn needs employees, he recalls employees who recently worked for that compa-

behalf. In addition it lists the names of 56 independent employers who agreed to be bound by the contract.

ny. For additional employees, he calls Respondent. During March and April 1977, he called the hall 6 or 10 times. He does not ask for specifically named people. Grahn does not hire off the street or advertise for help. He has never refused to put to work a man who was referred by the Union except in cases such as drunkenness. He recalls employees who have previously worked for him 90 to 95 percent of the time. The balance of the employees are obtained from Respondent.

Don Sullivan is a self-employed masonry contractor who is a member of the Association. He is president of a chapter of the Association and chairman of the Association's labor relations committee for northern California. Sullivan obtains his employees by rehiring employees who worked for him before, by hiring employees who are referred to him by men who have worked for him, by hiring men who solicit for a job, by trading employees with other contractors, and also by hiring from the hall. He calls the hall about once a year.

Sam Mandel, the business manager of Respondent,<sup>2</sup> testified that he uses Respondent's out-of-work list to refer employees for work about 75 percent of the time. He averred that he also uses it to establish who has been looking for work for unemployment insurance purposes. When an employer calls Respondent for employees, Mandel goes down the out-of-work list until he finds people who he can send. He testified that members of the Union also get jobs on their own. Stella Fisher works at the union office. When Mandel is not there, she refers employees to contractors who call in. She starts at the top of the referral list and calls the employees listed.

The contract establishes an exclusive hiring system. The language is mandatory. When an employer needs bricklayers, he *shall* notify the Union; the Union *agrees* that it will furnish an adequate supply of qualified journeymen if they are available; selection of applicants for referral *shall* be on a nondiscriminatory basis; and the employer reserves the right to reject *for good cause* any job applicant referred by the Union. As to nonmembers of the Association coming into Respondent's jurisdiction, the contract requires that all employees except for one foreman *shall* be referred by the Union.

Of the many employers who use the hiring hall, three testified. Two averred that their practice was to obtain all employees from the hall except for former employees that they recalled on their own. One testified that he rarely uses the hall. That employer was simply ignoring the clear language of the contract.

An exclusive hiring hall can exist where an employer has a contractual right to call for specifically named workers who have been recently laid off or terminated by the employer. *Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 576 (Westfield Thriftway Supermarket)*, 201 NLRB 922 (1973). An exclusive hiring hall can also exist where an employer has the contractual right to bring in a certain number or percentage of men onto a job, and where on occasion the union tells

applicants that they can obtain jobs on their own. *Heavy Construction Laborer's Local 663, AFL-CIO (Robert A. Treuner Construction Co.)*, 205 NLRB 455 (1973). The situation is the same where the hiring hall provision applies only to new men employed on a job and the hiring hall provisions are not always fully complied with. Cf. *Local No. 78, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Murray Walter, Inc.)*, 223 NLRB 733 (1976). In that case, the Board adopted the Decision of the Administrative Law Judge which held [at 736]:

No amount of talking by the parties in interest, sworn statements or not, can serve in the least to make disappear the written contract in effect and binding Walter and Local 78 to an exclusive hiring hall. Their bland assertions that nobody paid any attention to that contract clause, and only that contract clause, serves only to discredit the defense all the more.

In sum, I find that at all times material herein Respondent, pursuant to its contract with the Association, operated an exclusive referral hall.

#### B. Waters' Attempt To Use the Hiring Hall

William Waters has been a bricklayer for over 25 years. He has wide experience in the various aspects of the bricklayer's trade and specializes in firebrick work. At different times prior to coming to California in August 1976, he was a member of sister locals of Respondent in other States. In 1975, Waters was a member of Bricklayers Local 21 in Chicago, a sister local of Respondent. Local 21 fined Waters, and Waters did not pay the fine. Waters moved to Indiana where he attempted to join Bricklayers Local 6, another sister local of Respondent. Local 6 refused Waters' dues tender and informed him that the International had expelled him because he had not paid the fine to Local 21. As of the time Waters came to California, he was not a member of a union.

Shortly after his arrival in California in August 1976, Waters went to Respondent's hiring hall looking for work. Respondent's business manager, Sam Mandel, was not there at the time so Waters spoke to Stella Fisher. She works at the union office in a number of different capacities and refers applicants through the hall when there is no one else present. Waters asked her for a copy of the union contract, and she gave one to him. Waters saw a ledger book on the counter and asked Fisher whether Respondent had a hiring hall. She replied that they did, and he asked whether he could sign the list. She asked if he was a member of Respondent. He said that he was not. She told Waters that he could not sign the ledger. He asked to see the business agent, and she said that he was not in.<sup>3</sup>

On August 19, 1976, Waters sought work from Kenneth Ellingsen, the construction manager for A. P. Green, Services Division, Bigelo-Liptak Corp., a company for whom Waters had previously worked in Chicago. Ellingsen said that they did not require people. He also told Waters

he could not sign. Fisher also testified that she did not remember whether she asked him if he was a member of a union. Waters impressed me as an accurate and fully credible witness. I believe that his recollection of the event was more reliable than was Fisher's and I credit him.

<sup>2</sup> The answer admits and I find that Mandel is an agent of Respondent.

<sup>3</sup> These findings are based on the testimony of Waters. Fisher testified that she told Waters that there would be little use in his signing because there were so many people already on the list, and that she did not tell him

that the bulk of the firebrick work was done in the east bay area within Respondent's jurisdiction and that when the company needed people in that jurisdiction they called the union hall.

On August 23, 1976, Waters returned to Respondent's hiring hall and spoke to Business Manager Sam Mandel. Waters said that he was from Chicago and was looking for work. Mandel replied that work was slow. Waters then asked about the hiring hall and in reply Mandel asked to see Waters' union book. Waters told Mandel that he had been fined, that he did not pay the fine, and that he did not have his book with him. Mandel said that Waters could not sign the out-of-work list until he became a member of Respondent.

The above findings are based on the testimony of Waters. Mandel testified that he told Waters that if he (Waters) signed the list he would be at the bottom and that he did not tell Waters that Waters could not sign. Mandel also averred that, in the course of discussion, Waters mentioned that he was a good bricklayer; that Mandel replied, "You must belong to some union then"; that Waters said he belonged to a local in Ohio; that Mandel asked to see his book; and that Waters turned around and walked out the door. Mandel testified that he does not monitor the people who sign the list and that some people walk in and sign the book without talking to him. Doubt is shed on Mandel's credibility by a prior written statement that Mandel signed which stated: "We permit any member of Local 8 or any member in good standing of any other Bricklayer Union local to sign our out-of-work list, though we do ask to confirm that the person signing is a member of a union local in good standing." In addition, on September 3 and 23, 1976, Waters sent letters to Mandel asking that his name be sent to an employer. In those letters, Waters pointed out that Mandel had not allowed him to sign the out-of-work list until he became a member of Respondent. Mandel did not reply to those letters. I credit Waters' version of the conversation.<sup>4</sup>

Thereafter, Waters attempted to secure employment on his own. In attempting to obtain work at J. T. Thorpe, he was told by a Mr. Dawson to go back to the local. In September 1976, he obtained work for 3 or 4 weeks on a nonunion job through a newspaper ad. On November 15, 1976, he filed the initial charge in the instant case. On December 14, 1976, Waters returned to Respondent's hiring hall after being told by an National Labor Relations Board investigator that if he went to the hall he could sign the list. Waters asked Mandel for the out-of-work list, and Mandel pointed to the book. Waters put his name and phone number on the list.<sup>5</sup>

On December 17, 1976, Waters obtained a job on his own with Pete Paletta, Inc., a member of the Association. That job lasted until February 10, 1977.

<sup>4</sup> Mandel testified that he put a circle next to the names of applicants on the out-of-work list when he did not know the applicant and that as to those individuals he did not know whether they were members of any local. The hiring hall records show a number of such circles. Whatever reason Mandel may have had for allowing those applicants to sign the book, on the basis of Mandel's admission against interest contained in his written statement and on the testimony of Waters, I find that Mandel did tell Waters that he could not sign the out-of-work list.

On February 14, 1977, Waters went back to Respondent's hiring hall and signed the out-of-work list. Waters told Mandel that he was thinking of joining Respondent. They discussed the cost of reinstatement to Local 6 and of joining Respondent. On February 17, 1977, Waters spoke to Mandel again at the hiring hall. Waters said that he had been informed by Local 6 that it would cost about \$300 to be reinstated. Mandel said that he thought that was too much, and he volunteered to call the International. Mandel placed a call to the International but was unable to reach anyone.

Waters returned to the hiring hall on February 22, 1977, and saw that his name had been placed on the out-of-work list under a new date.

On March 1, 1977, at Respondent's hiring hall, Mandel told Waters that arrangements had been made for Waters to pay about \$100 which would cover 3 months' back dues to Local 6 and the fine, and that Waters could then join Respondent with an initiation fee of \$220. Waters said that he would probably bring it in the next day, and Mandel replied: "Why don't you get it now and I will send you on a job in Richmond." Waters agreed to do so, and he went to a bank where he obtained two cashier's checks, one payable to Respondent for \$50.25, and other payable to the International for \$50. Waters returned to the hiring hall and gave the checks to Mandel. Mandel then gave Waters a note to a bricklayer foreman on an Inland Masonry job in Richmond which introduced Waters to the job and said that he was joining the Union and that it was "okay." Waters took that note to the jobsite and was hired for a job that lasted 3 or 4 weeks.

The above findings are based on the credited testimony of Waters which was, in large measure, corroborated by Mandel. Mandel testified that, before he would refer Waters to the job on March 1, 1977, he wanted to know Waters' intentions concerning whether or not he was going to join Respondent. He explained that by that time Waters had worked for more than 7 days for Paletta and that under the union-security clause of the contract Waters should have made his intentions known, as to whether he was going to join. Mandel also testified that, when Waters said that he would join, he (Mandel) referred him to the job even though Waters did not pay the initiation fee until later. However, Mandel also made it clear that, in order to join the Union, Waters had to clear up his problem with the fine. Mandel averred that Waters could not have joined Respondent without clearing up his past problems, including the fine, with Local 6 and Local 21. Thus, in order to obtain referral, Waters not only had to pay dues and initiation fee pursuant to the union-security clause, he had to clear up the problem of the fine with the sister local.<sup>6</sup> As Respondent stated in its brief:

<sup>5</sup> Mandel testified that, on some date before Waters signed the list, Waters had left his address and phone number and that he (Mandel) had attempted to dispatch him but was unable to reach him. Waters denied that he left his phone number before signing the list. I do not credit Mandel's assertion that he attempted to phone Waters.

<sup>6</sup> Mandel testified that he would have sent Waters out on March 1, 1977, in any event because they were very busy. In the light of the remainder of his testimony and the testimony of Waters, I do not credit that assertion.

As to the incident on March 1, 1977, the union's position is that it did refuse to dispatch Mr. Waters on that day until he made his intentions clear that he intended to join Local No. 8 and once his intentions to join Local No. 8 were made clear, he was in fact dispatched to work on that day. The union further contends that it was entitled not to dispatch him to a job that day without membership in Local No. 8 because he had worked more than seven (7) days within the jurisdiction of Local No. 8 without being a member and the collective bargaining agreement required membership in Local No. 8 before he was entitled to work under that agreement within the jurisdiction of Local No. 8.

\* \* \* \* \*

As the uncontradicted evidence shows, the International Bricklayers Union would not accept an application for membership in Local 8 until all past fines and dues from other locals had been taken care of (RT 124). In seeking to comply with the requirements of the International Union to which it was subject, the local union was only doing that which was necessary to clear the way for Mr. Waters to become a member of Local 8.

While Waters was working at the Inland Masonry job, Mandel came to the jobsite and asked for the initiation fee. On March 11, 1977, Waters sent Mandel a check for \$110 to cover half of the initiation fee; on March 18, 1977, he sent Mandel a check for the remaining \$110. Since then he has continued to pay monthly dues.

The job with Inland Masonry ended about March 18, 1977, and soon thereafter Mandel sent Waters to a job with Masonry Builders in Freeport. Waters had been on that job up to the date of the hearing.

### C. Analysis and Conclusions

#### 1. The refusal to register Waters and to refer him from the exclusive hiring hall

An exclusive hiring hall gives a great deal of authority over the hiring process to a union, but such authority is not in itself violative of the Act.<sup>7</sup> However, under such a hiring hall system a union cannot lawfully refuse to refer an

<sup>7</sup> *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Los Angeles-Seattle Motor Express] v. N.L.R.B.*, 365 U.S. 667 (1961).

<sup>8</sup> *Seafarers International Union of North America, Atlantic, Gulf, Lakes & Inland Waters District, AFL-CIO (Isthmian Lines, Inc.)*, 202 NLRB 657 (1973), enfd. 496 F.2d 1363 (C.A. 5, 1974). In addition, referral may be conditioned on the payment of a reasonable nondiscriminatory hiring hall fee. *Boston Cement Masons and Asphalt Layers Union No. 534 (Duron Maguire Eastern Corp.)*, 216 NLRB 568 (1975), remanded 526 F.2d 1189 (C.A. 1). However, there is no contention in this case that Waters failed to pay any "dobie" fees required of him.

<sup>9</sup> *Mayfair Coat & Suit Co.*, 140 NLRB 1333 (1963).

<sup>10</sup> Cf. *Fishermen & Allied Workers' Union, Local 33, International Longshoremen's and Warehousemen's Union (S. G. Guiseppe Fishing, Inc.)*, 180 NLRB 851 (1970), enfd. 448 F.2d 255 (C.A. 9, 1971); *Bricklayers', etc., Local No. 11 (Rochester Floors, Inc.)*, 221 NLRB 133 (1975).

<sup>11</sup> Cf. *International Brotherhood of Electrical Workers, AFL-CIO, Local 648 (Foothill Electrical Corporation)*, 182 NLRB 66 (1970), enfd. 440 F.2d 1184 (C.A. 6, 1971); *International Brotherhood of Electrical Workers, AFL-CIO, Local 82 (National Electrical Contractors Association, Dayton, Ohio*

applicant because of union considerations unless that refusal is based on a valid union-security clause.<sup>8</sup> A union may lawfully refuse to refer an applicant in a situation where that union could, pursuant to a lawful union-security clause, require immediate discharge of that employee for failure to pay dues under a contract governing his employment,<sup>9</sup> but the applicant cannot be required to pay back dues for a period when dues were not validly required as a condition of employment.<sup>10</sup> Referral cannot lawfully be refused because an applicant is not a member of or current in his dues or fines with a sister local of the same International as the referring union.<sup>11</sup> Where a union refuses to register or refer an applicant because of improper union considerations, the General Counsel need not prove that jobs were available at the time of the request for referral.<sup>12</sup>

Pursuant to its contract with the Association, Respondent operates an exclusive hiring hall. On August 23, 1976, Respondent's business manager, Mandel, prevented Waters from obtaining access to jobs through that hiring hall by refusing to allow him to sign Respondent's out-of-work list because of Waters' nonunion status. On March 1, 1977, Respondent, through Mandel, conditioned Waters' referral through the hall on Waters' payment of a fine due to a sister local and on his agreement to join Respondent. While Respondent had the right to require adherence to the union-security clause, it went beyond that right by insisting that Waters clear up his fine with a sister local as a condition precedent to joining Respondent and being referred to work. Respondent refused to refer Waters through the hall until he cleared up that fine.

I find that Respondent violated Section 8(b)(1)(A) and (2) of the Act by refusing to allow Waters to sign the out-of-work list at its exclusive hiring hall from August 23 to December 14, 1976, and by refusing to refer Waters to employment through that hall from August 23, 1976, to March 1, 1977,<sup>13</sup> because of his nonunion status and because he had not paid a fine to a sister local.

#### 2. The duty of fair representation

The General Counsel argues that, even if no exclusive hiring arrangement was present in the instant case, Respondent would have violated the Act by failing to fairly represent Waters. I find that theory has merit.

*Chapter*, 182 NLRB 59 (1970), enfd. 440 F.2d 1184 (C.A. 6, 1971); *Local 1437, Carpenters (Associated General Contractors of California, Inc., et al.)*, 210 NLRB 359 (1974).

<sup>12</sup> *Utility and Industrial Construction Company*, 214 NLRB 1053 (1974), and cases cited therein. In the *Utility and Industrial Construction Company* case, the Board held [at 1053]:

The Administrative Law Judge reasoned that, because the Respondent Company never again requested any employees from the Respondent Union's referral system, the violation was merely a theoretical one and dismissed the allegations of the complaint in regard thereto. This conclusion must be rejected. We have consistently held that to establish a violation, it is unnecessary to show that jobs were available at the time of the request for referral. . . . The stated reason for the Union's refusal to register and refer was nonmembership. Hence, we find that by refusing . . . to register and refer [the applicant], the Respondent Union violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

<sup>13</sup> On March 1, 1977, Waters paid the fine, agreed to join the Union, and was referred to work.

A union owes a duty of fair representation to employees in a bargaining unit it represents and that duty extends to applicants for employment through a union hiring hall. *Local No. 324, International Union of Operating Engineers, AFL-CIO, (Michigan Chapter, AGC)*, 226 NLRB 587 (1976). The Board has held that, in the absence of a compulsory hiring hall, the granting or withholding of work permits is an internal union matter. See, for example, *United Construction Company*, 169 NLRB 1 (1968), *enfd.* 415 F.2d 479 (C.A. 6, 1969). However, in more directly applicable cases, the Board has applied the "duty of fair representation" concept to find that a union violates the Act by refusing to refer employees even in the absence of an exclusive hiring hall. In *Local Union No. 13, an Affiliate of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Mechanical Contractors Association of Rochester, Inc.)*, 212 NLRB 477 (1974), the Board adopted in pertinent part the Decision of the Administrative Law Judge which held:

As stated above, I do not find sufficient evidence present in this case to conclude that Local 13's arrangement with the associations was an exclusive hiring hall arrangement. However, as a nonexclusive hiring hall Respondent owed a duty of fair and impartial representation to those who seek to use its services. This duty was violated on or about April 16, 1973, by Business Manager Farrell's refusal to accept Winter's travel card and refusal to give him a referral slip to an employer. Such action by Respondent violated Section 8(b)(1)(A) of the Act. See *Houston Maritime Association, Inc. and Its Member Companies*, 168 NLRB 615 (1967).

A union may not discriminatorily refuse assistance through its nonexclusive hiring hall arrangement to certain employees in the represented bargaining unit because they engage in activities protected by the Act. *Delaware Valley Printing and Graphic Communications Union, Local 1776 (Carlettini)*, 226 NLRB 476 (1976); *International Association of Bridge, Structural Reinforcing and Ornamental Iron Workers, Local 75, AFL-CIO (Tyler)*, 232 NLRB 1194. As the Board held in *Hoisting and Portable Engineers, Local No. 4 and Its Branches of the International Union of Operating Engineers (The Carlson Corporation)*, 189 NLRB 366 (1971), *enfd.* 456 F.2d 242 (C.A. 1, 1972):

The Board held in *Chauffeurs's Union Local 923*<sup>2</sup> that a respondent union violated Section 8(b)(1)(A) of the Act when it, acting as the statutory exclusive bargaining representative, discriminatorily refused assistance through its nonexclusive hiring hall arrangement to certain employees in the represented bargaining unit because they had opposed reelection of the Union's officers. The Board reasoned:

It does not follow, however, that a union's discriminatory refusal to assist certain represented employees in their effort to find new jobs lacks coercive impact merely because the employees might have obtained jobs without the union's assistance. An employee who knows that he is

reducing his chance for future employment by supporting a particular candidate is being restrained and coerced in the exercise of his Section 7 rights, notwithstanding the fact that the coercion would be even greater if the discriminating union were party to an exclusive hiring arrangement.

That case is dispositive of the present proceeding.

\* \* \* \* \*

We believe the Union is obligated to offer to all of its members the same access to and use of those services which it provides members to facilitate their acquisition of employment, as for example, a hiring hall, and may not treat certain members disparately because they have engaged in activities which are protected by the Act.<sup>4</sup>

\* \* \* \* \*

Once the Respondent has undertaken the task of helping to find jobs for its members it has accepted the correlative duty that it must act in an "even-handed" manner toward all its members without discrimination based on the exercise of Section 7 rights.

<sup>2</sup> *Chauffeurs Union Local 923, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Yellow Cab Co.)*, 172 NLRB 2137 (1968).

<sup>4</sup> Respondent Union argues that without evidence of a contract, understanding, or commitment with Carlson which obligates the statutory bargaining representative to refer prospective employees, the refusal to do so, no matter the reason, is not a violation of the Act. It relies on several Board decisions to support its contentions including *United Construction Company and United Brotherhood of Carpenters and Joiners of America, Local No. 171*, 169 NLRB 1, and *Hoisting and Portable Engineers, Local 302 (West Coast Steel Works)*, 144 NLRB 1449. These cases are not applicable to the present case. In *Chauffeur's Union Local 923* at fn. 3, the Board stated that in the cases cited by the respondent union the General Counsel had only alleged a violation of Sec. 8(b)(1)(A) as the derivative of conduct alleged to be an 8(b)(2) violation. These cases do not consider the question of whether disparate treatment for discriminatory reasons is independently violative of Sec. 8(b)(1)(A). The Board in *Chauffeur's Union Local 923* found, as we find here, that disparate treatment of job referrals from a nonexclusive hiring hall because of discriminatory reasons is an independent violation of Sec. 8(b)(1)(A).

The evolution of the "duty of fair representation" concept was described in *International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433 (The Associated General Contractors of California, Inc.)*, 228 NLRB 1420, 1438 (1977), in which the Board adopted the Administrative Law Judge's Decision which held:

The duty of fair representation was first enunciated by the United States Supreme Court in *Steele v. Louisville & Nashville Railroad Co., et al.*, 323 U.S. 192 (1944), which arose under the Railway Labor Act. In that case, which involved racial discrimination, the Supreme Court held that the same statute that gave the union the right to act as exclusive bargaining agent, inherently required the union to represent nonunion or minority members in the craft fairly, impartially and in good faith. In *Ford Motor Company v. Huffman*, 345 U.S. 330, 338 (1953), the United States Supreme Court applied the same doctrine where a seniority question

was raised that involved a union whose status as exclusive representative derived from the National Labor Relations Act. The Court pointed out that "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." See also *Walter C. Humphrey etc., et al. v. Moore*, 375 U.S. 335 (1964). Though the Supreme Court cases cited above held that unions have a duty to represent fairly all the employees for whom they bargain, none of them dealt specifically with the question of whether a breach of that duty violated any of the unfair labor practice sections of the Act. The Board addressed itself to that question in *Miranda Fuel Company, Inc.*, 140 NLRB 181, 185 (1962), enforcement denied, 326 F.2d 172 (C.A. 2, 1963). In that case, the Board found that a union caused an employee's seniority status to be reduced in a manner that violated its collective-bargaining contract. The Board held that the duty of a statutory representative to represent all employees in a bargaining unit had to be viewed in the context of the right guaranteed employees in Section 7 of the Act to bargain collectively, through representatives of their own choosing. The Board then held:

Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on the statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious or unfair.

The Board further held that a union violates Section 8(b)(2) of the Act where its failure to represent employees fairly adversely affects the employment status of an employee, saying:

We further conclude that a statutory bargaining representative and an employer also respectively violate Section 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee.

In essence the Board held that where a union causes an employer to adversely affect an employee's employment status in such a manner that no legitimate employer or union purpose is served, that the foreseeable result is an unlawful encouragement of union membership. In the Board's words:

As we read *Local 357*, the Supreme Court did not overrule its holding in *Radio Officers* that union membership is encouraged or discouraged when-

ever a union causes an employer to affect an individual's employment status. What it does hold, in our opinion, is that an 8(a)(3) or 8(b)(2) violation does not necessarily flow from conduct which has the foreseeable result of encouraging union membership, but that given such "foreseeable result" the finding of a violation may turn upon an evaluation of the disputed conduct "in terms of legitimate employer or union purposes." Unlike our colleagues, we do not interpret the Court's opinion as permitting unions and their agents an open season to affect an employee's employment status for any reason at all—personal, arbitrary, unfair, capricious, and the like—merely because the moving consideration does not involve the specific union membership or activities of the affected employee. [Footnote omitted]

Though the Court of Appeals for the Second Circuit refused to enforce the *Miranda* decision, a majority of that Court did not rule on the question whether a breach of the duty of fair representation was an unfair labor practice. In *Manuel Vaca, et al. v. Sipes*, 386 U.S. 171 (1967), the United States Supreme Court decided a preemption question involving a state court's jurisdiction over a union's allegedly arbitrary failure to process a grievance to arbitration. The high Court found that the state court had concurrent jurisdiction but that a failure to represent fairly had not been proven. In reaching that conclusion the Court reviewed the history of the *Miranda* doctrine in detail, tying that doctrine to the flow of cases dealing with the duty of fair representation which started under the Railway Labor Act. The Court held at 181: "when the Board declared in *Miranda Fuel* that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts." In *Kaj Kling v. N.L.R.B.*, 503 F.2d 1044, 1046 (C.A. 9, 1975), the Court in referring to *Miranda* stated: "Though enforcement was denied by the Second Circuit . . . the Board's *Miranda Fuel* doctrine appears to have won the day, as shown by the later favorable quotations in *Vaca v. Sipes*, 386 U.S. 171 at 177 . . ." The Board has consistently followed its *Miranda* doctrine.<sup>31</sup>

<sup>31</sup> E.g., *Delaware Valley Printing and Graphic Communications Union, Local 1776 (The Bulletin Company)*, 226 NLRB 476 (1976); *Local No. 324, International Union of Operating Engineers, AFL-CIO (Michigan Chapter, AGC)*, 226 NLRB 587 (1976).

In the instant case, Respondent accepted a contractual obligation to refer employees to the Association members and other employers. That contract provided that "Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on or in any way affected by, Union membership, by-law, rules or regulations, constitutional provisions, or any other aspect or obligation of Union membership, policies, or requirements." In defiance of its contractual obligation, it refused to register and refer Waters because of Waters' nonunion status and because he failed to pay a fine to a sister local.

The Union's action constituted not only a violation of contract but also a failure to represent Waters fairly. That failure in Respondent's duty of fair representation existed whether or not Respondent had an exclusive hiring hall.

Respondent violated Section 8(b)(1)(A) and (2) of the Act by refusing to register and refer Waters as found above.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the business operations of the employers set forth in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As the unlawful conduct of Respondent indicates a purpose to limit the lawful rights of applicants for employment, I recommend that Respondent be ordered to cease and desist from operating its hiring hall in a discriminatory manner or in such a manner as to cause or attempt to cause any employer subject to the Board's jurisdiction to deny employment to any employee or applicant for employment because of lack of union membership or payment of union dues or fines, except to the extent permitted by Section 8(a)(3) of the Act.

I recommend that Respondent be ordered to operate its exclusive hiring hall in a nondiscriminatory manner.

I also recommend that Respondent make Waters whole for any loss of earnings and other benefits he may have suffered between August 23, 1976, and March 1, 1977, by reasons of Respondent's unlawful refusal to allow him to sign Respondent's out-of-work list and its refusal to refer him to work. The amount of backpay shall be computed in the manner set forth in *N.L.R.B. v. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>14</sup>

It is recommended that Respondent be ordered to preserve and, upon request, make available to the Board or its agents, for examination and copying, all records pertaining to employment through its hiring hall and all records relevant and necessary for compliance with this recommended Order.

<sup>14</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>15</sup> 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, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become

#### CONCLUSIONS OF LAW

1. The Association and its member-employers are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. By refusing to allow Waters to sign its out-of-work list at its hiring hall from August 23 to December 14, 1976, and by refusing to refer Waters to employment through that hiring hall from August 23, 1976, to March 1, 1977, because of Waters' nonunion status and because he had not paid a fine to a sister local, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

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

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

#### ORDER<sup>15</sup>

The Respondent, Bricklayers' and Stonemasons' International Union, Local No. 8, B.M. & P.I.U. of America, Oakland, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Operating its hiring hall in a discriminatory manner or in such a manner as to cause or attempt to cause any employer subject to the jurisdiction of the National Labor Relations Board to deny employment to any employee or applicant for employment because of lack of union membership or payment of union dues or fines, except to the extent permitted by Section 8(a)(3) of the Act.

(b) In any manner restraining or coercing employees in the exercise of their rights guaranteed to them in Section 7 of the Act.

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

(a) Operate its hiring hall in a nondiscriminatory manner.

(b) Make William Waters whole for any loss of earnings and other benefits he may have suffered as a result of its unlawful refusal to allow him to sign the out-of-work list and its refusal to refer him to work, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records pertaining to employment through its hiring hall and all records relevant and necessary for compliance with this recommended Order.

(d) Post at its business offices, hiring hall, and meeting places copies of the attached notice marked "Appendix."<sup>16</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by

its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>16</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order

Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be

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."

taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.