

undermines, union strength" he may erode that strength and relieve himself of his duty to bargain.⁵

In the case before us the employer has bargained with the certified union for only 6 months. It has, largely through its refusal to bargain, taken from the Union a substantial part of the period when Unions are generally at their greatest strength—the 1-year period immediately following the certification. Thus to permit the Employer now to obtain an election would be to allow it to take advantage of its own failure to carry out its statutory obligation, contrary to the very reasons for the establishment of the rule that a certification requires bargaining for at least 1 year. We shall, therefore, in this and in future cases revealing similar inequities, grant the Union a period of at least 1 year of actual bargaining from the date of the settlement agreement.⁶

[The Board dismissed the petition.]

MEMBERS RODGERS and LEEDOM took no part in the consideration of the above Decision and Order.

⁵ *Ray Brooks v N.L.R.B.*, *supra*, p 100

⁶ To the extent that this Decision is inconsistent with *The Daily Press Incorporated*, 112 NLRB 1434, and similar cases, the latter are hereby overruled. Since the Petitioner, in the instant case has already bargained for 6 months with the Union, its obligation to bargain continues for at least an additional 6 months from the resumption of negotiations.

Local Union No. 41, Sheet Metal Workers' Association, AFL-CIO, and its business agents, Roy Stringer and Joseph O'Neill and Clyde Guinn and Sheet Metal, Air Conditioning and Roofing Contractors' Association of Central Indiana, Inc.; Iowa Sheet Metal Contractors, Inc.; and Air Conditioning Engineering Company, Alloy Architectural Products Co., Brooks Steel Erection, C & S Metal Equipment Co., Capitol Neon Sign Co., M. S. Churchman Co., Commercial Floor Covering & Acoustics Co., General Sheet Metal Fabricators, McFerran-Kane Co., Inc., Skirvin Sheet Metal Co., Staley Sign Company, Taylor Lumber & Supply Co., Town Equipment Company, Triad Sheet Metal & Roofing Co., Clifford Van Osdol Co., Walters Heating Co., Warfel Sheet Metal Co., Wells Sheet Metal Co., and Woodburn Roofing & Sheet Metal Co., Parties to the Contract. Case No. 25-CB-333. April 4, 1962

DECISION AND ORDER

On July 12, 1960, Trial Examiner John F. Funke, issued his Intermediate Report in the above-entitled proceeding, a copy of which is 136 NLRB No. 77.

attached, finding that the Respondent Union, Local Union No. 41, Sheet Metal Workers' Association, AFL-CIO, and its business agents, Roy Stringer and Joseph O'Neill, had not engaged in any of the unfair labor practices alleged in the complaint and recommended that the complaint be dismissed in its entirety. The General Counsel filed exceptions to the Intermediate Report and a supporting brief.

The Board¹ has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions:²

1. The General Counsel excepts to the Trial Examiner's finding, based largely upon the credited testimony of Field Superintendent Norman Burton, Foreman Max Grdolnik, and Business Agent Joseph O'Neill, that Iowa Sheet Metal Contractors, Inc., herein referred to as Iowa, refused to employ Clyde Guinn at the Fidelity project solely because Guinn did not possess the qualifications needed at the job at the time of his application. We find, contrary to the General Counsel's exceptions, that the clear preponderance of all the relevant evidence does not demonstrate that the Trial Examiner erred in crediting the testimony of those witnesses³ and accordingly adopt his credibility rulings.

2. The Trial Examiner found that no discriminatory hiring practice existed between the Respondent and the Association and non-Member contractors. We agree. The evidence presented by the General Counsel will not justify a conclusion that referral or clearance by the Respondent was a precondition to obtaining a job with the contractor. We therefore cannot conclude that the Respondents violated Section 8(b)(2) by maintaining and enforcing a discriminatory hiring practice.

3. The Trial Examiner refused to find that a clause contained in an appendix to the 1959-60 contract providing for the payment of a travel expense allowance to "members" was violative of the Act. It appears from the record that the Respondent Union had deleted the word "member" wherever it had appeared in the earlier contract. Business Agent Stringer testified that the use of the word "member"

¹ Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its power in connection with this case to a three-member panel [Chairman McCulloch and Members Leedom and Brown].

² We do not adopt the Trial Examiner's comments with respect to the manner in which the General Counsel's representatives tried the case, particularly his remarks casting reflections on their professional ethics. As we have said before, it is "not our policy . . . to condone such unfounded remarks by a Trial Examiner in an Intermediate Report." See *The Ingalls Steel Construction Company*, 126 NLRB 584, 585

³ *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545, enfd. 188 F. 2d 362 (CA 3).

in the appendix had been inadvertent and that the Respondent Union had insisted that all "employees" receive the travel benefits. During the course of the hearing counsel for the Respondent Union offered to delete the word "member" from the clause and substitute therefor the term "employee." This offer was not accepted by the General Counsel. As the record thus shows that the term "member" was used inadvertently, that it had not been discriminatorily enforced against nonmembers, and that the Respondent Union has agreed to delete the term we find it unnecessary to determine whether the travel allowance clause was unlawful.⁴

4. The General Counsel contended after all testimony had been taken and the record closed, that certain working rules of the Respondent Union, which were incorporated into the 1958-59 contract between the Respondent Union and the Association established closed-shop conditions. The Trial Examiner found that this allegation was not set forth in the complaint or litigated at the hearing and he therefore refused to find a violation of Section 8(b)(2) of the Act.

We agree with the Trial Examiner that the General Counsel did not properly allege that the contract and the working rules were in and of themselves violative of the Act. The complaint is couched in terms of the maintenance and enforcement of preferential hiring and layoff conditions rather than in language reasonably susceptible to the interpretation that the collective-bargaining agreements themselves established closed-shop conditions. And at the hearing the General Counsel did not adequately clarify his position although given an opportunity to do so. Thus, although we have reservations concerning the working rules, particularly rule 6, considerations of fairness constrain us to dismiss this proceeding.⁵

[The Board dismissed the complaint.]

⁴ *Sinclair Refining Company*, 115 NLRB 380, 381

⁵ *Consolidated Edison Co v. N.L.R.B.*, 305 U.S. 197, 234-235, cf. *N.L.R.B. v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 351

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This proceeding was heard before the duly designated Trial Examiner on April 18 and 19, 1960, at Indianapolis, Indiana.

The complaint, as amended at the hearing, alleged that Local Union No. 41, Sheet Metal Workers' Association, AFL-CIO, herein called Local 41 or the Respondent Union, and its business agents, Roy Stringer and Joseph O'Neill, violated Section 8(b)(1)(A) and (2) of the Act. It alleged that Local 41 and the Sheet Metal, Air Conditioning and Roofing Contractors' Association of Central Indiana, Inc., herein called the Association, and certain contractors who are nonmembers of the Association, herein called the non-Members, entered into collective-bargaining contracts and that pursuant to said contracts the Respondent Union, the Association and the non-Members maintained and enforced preferential hiring and layoff conditions by which the Association and non-Members were required to hire only employees referred by the Respondent Union and were required to lay off employees

according to their "paid-up" membership status in Respondent Union. It further alleged that Iowa Sheet Metal Contractors, Inc., herein called Iowa, and Respondent Joseph O'Neill, business representative of Local 41, orally agreed that Iowa would be bound by the 1958-59 agreement between Local 41 and the Association. It then further alleged that on or about November 19, 1958, Respondent Union attempted to cause and did cause Iowa to refuse to hire Clyde Guinn, the Charging Party, because he was not referred nor cleared for employment with Iowa by the Respondent Union. The amended complaint alleged that the contract between Local 41 and the Association entered into in 1959 (the 1959-60 agreement) discriminated between union members and non-Members in the payment of travel expense.

The answer, as amended, denied these allegations.

Respondent rested at the conclusion of the General Counsel's case and called no witnesses. Respondent moved to dismiss the complaint on the ground that the General Counsel had failed to prove a *prima facie* case. This motion was denied on the ground that the Board, as the reviewing authority, did not favor dismissal upon motion and upon the further ground that the Trial Examiner did not understand the theory upon which the General Counsel predicated his *prima facie* case nor the evidence relied upon to establish a violation of the *Mountain Pacific* rule,¹ and therefore needed to study the transcript and the General Counsel's brief. Neither did the Trial Examiner understand what evidence was relied upon to establish that the travel expense clause in the 1959 contract was discriminatory.

Upon the entire record in this case and my observation of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE EMPLOYERS

It was stipulated that the Association was an association of employers representing its members in collective bargaining with Local 41 and that members of the Association annually receive in excess of \$50,000 worth of goods and materials from points and places outside the State of Indiana.

It was stipulated that Iowa Sheet Metal Contractors, Inc., is an Iowa corporation having its principal office and place of business at Des Moines, Iowa, and that during the past 12 months Iowa shipped goods and/or performed services outside the State of Iowa which goods and services were valued in excess of \$50,000.

I find that the Association and Iowa are engaged in commerce within the meaning of the Act.

II. LABOR ORGANIZATION INVOLVED

Local Union No. 41, Sheet Metal Workers' Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The facts

1. The refusal to hire Guinn

At the time of hearing Clyde Guinn, the Charging Party and a journeyman sheetmetal worker who had been a member of Local 41 for 7 or 8 years, was employed by Limbach Company at the State Office Building project in Indianapolis. Guinn had been hired at the jobsite by Foreman Max Grdolnik, also a member of Local 41, in October of 1959. After Grdolnik hired him he told Guinn to check with Business Agent O'Neill at the union hall. Guinn did report to O'Neill and was put to work the next day.² He was told to report to O'Neill so that his name

¹ *Mountain Pacific Chapter, et al.*, 119 NLRB 883, remanded 270 F 2d 425 (C.A. 9). Since so-called *Mountain Pacific* cases are referred to the office of the General Counsel before authority to issue complaint is granted the Regional Director, the Trial Examiner assumed that the General Counsel had a theory which raised a triable issue.

² A major issue in this case is whether or not the Respondent Union was given exclusive hiring privileges by the Association and the non-Members. The General Counsel claimed that employment with Association and non-Member contractors was conditioned on referral or clearance by Respondent Union. This claim he sought to support by evidence that journeymen employed directly by the contractors at the jobsite were told to report their hiring to O'Neill.

would be taken off the "loafing list" (the list of members who were unemployed) and O'Neil would know where he was working.³

The allegation of discriminatory refusal to hire Guinn stems from his application for employment at the Fidelity Bank Building project in Indianapolis. Iowa was the subcontractor at that job and its first field superintendent at the project was Norman Burton. Its first foreman was Grdolnik (the same Grdolnik who hired Guinn at the State Office Building project). Iowa commenced work at Fidelity in the late summer or early fall of 1958. In November of 1958 Guinn, then unemployed, went to the Fidelity jobsite to see a friend, Joseph Rogers, employed by Iowa as a sheet metal worker on the project. According to Guinn's testimony, Rogers told Field Superintendent Burton that Guinn was a good man and was looking for work. Burton gave Guinn an application form to fill out and told him to check the classifications of sheetmetal work he was capable of performing. Guinn checked welding, fieldman, and blueprint reading.⁴ Guinn asked Burton if he was going to hire any more men and was told four more men would be hired in the future. He made the usual request that Burton call him and let him know when the men would be hired and received the usual promise. Burton did not inquire of his union membership nor did he tell Guinn that referral was necessary. Not hearing from Burton, Guinn went back to the jobsite on or about November 20 (Guinn stated it was either on a Tuesday or a Wednesday), saw Burton and was told that he (Burton) would hire four men on Thursday. Guinn asked Burton if he would request him by name when he called the hall and testified he was assured that he would be requested by name. Guinn then went to the hall on Wednesday afternoon since he expected that Burton would put in the call for men to work Thursday at that time. He did not hear of any call nor was any man sent out from the hall while he was there. He went to the hall the next morning at 8 o'clock and again there was no call from Burton so he went to the jobsite. There Rogers told him four men⁵ had been put to work that morning so Guinn asked Burton why he had not called for him and was told by Burton that he had had a conversation with O'Neill the day before and O'Neill has asked him not to request men by name. Three or four days later Guinn asked O'Neill why he had not been sent and O'Neill told him Iowa had requested the four men who had been sent. Guinn told O'Neill he thought that was a "damn lie" and O'Neill replied that he would not argue further.

This is the sum of Guinn's testimony to support his charge that Respondent Union caused and attempted to cause Iowa to refuse to hire him.

Patently there is an absence of any motive which would cause Respondent Union to request Iowa to discriminate against Guinn, since Guinn was admittedly a member in good standing at the time. To establish such motive the General Counsel offered the testimony of Guinn with respect to his employment at Bloomington, Indiana. Guinn was employed on construction work there by Sink and Edwards, contractors, until October 15, 1958.⁶ While he was employed on the Bloomington Job Guinn, who was dissatisfied because he was not receiving mileage in accordance with the Association—Local 41 contract, complained to Business Agent Stringer, named as a Respondent herein. Guinn received no satisfaction from Stringer but he met him again at the union hall a few days after termination of the Bloomington project and again voiced his complaint that he had failed to receive mileage. Although Guinn did not testify to what Stringer said he apparently again received no satisfaction. Later a special meeting of Local 41 was called to discuss the mileage issue since

³That this was the purpose is made clear from the testimony of Guinn himself:

Q. (By the TRIAL EXAMINER) Did he (Grdolnik) mean for you to go down to tell O'Neill you were no longer on the loafing list? What did he mean, check with O'Neill down there?

A. Well, it's normal procedure to notify the union that you got a job.

Q. You went to the union hall and notified O'Neill that you had the job?

A. I notified Mr. O'Neill, yes.

Q. That you *had been* employed? [The emphasis is supplied but the Trial Examiner underscored the tense in the questioning.]

A. Yes, sir.

⁴On cross-examination Guinn admitted that he was generally known as a welder among the business agents and the foreman.

⁵These were Longworth, Struby, and Wiley (the fourth was not known to Guinn), all were members of Local 41.

⁶The complaint herein named Sink and Edwards as members of the Association.

other members of Local 41 had been employed by Sink and Edwards at Bloomington. When this meeting failed to produce any action on the part of Local 41, Guinn requested a meeting with the executive board. According to Guinn, he was told by the Board that there was nothing he could do and "they flatly refused to do anything about it." Guinn then told the Board that he would file a civil suit against Sink and Edwards to get the money, to which Stringer responded that if he did he would be blackballed by every contractor in the jurisdiction of Local 41. He was also told that he could not expect any help from the Union because he was "trying to tear it down." It is from this dispute with Local 41 and with Stringer that a subsequent discriminatory motive is to be inferred, resulting in a refusal to clear him for employment at Fidelity.

Other witnesses were called by the General Counsel in his diligent efforts to establish that Respondent Union caused Iowa to discriminate against Guinn.

Norman Burton, field superintendent for Iowa at the Fidelity project in November 1958, was first called. Burton, however, was *not* asked by the General Counsel why he did not hire Guinn and there is no testimony that his failure to hire Guinn was due to any request made by Respondent Union or by Stringer or O'Neill. Burton testified, credibly, that Guinn applied for work at the jobsite in November, was given an application form, and that Guinn asked him to call the union hall when he needed men. But Burton's testimony does not establish that he agreed to call the union hall and ask for Guinn by name, it only establishes that he agreed to call the hall and ask for a certain number of men. On cross-examination Burton testified that Guinn's application card showed that he was qualified for welding, rigging, and blueprint reading. Burton, new to the Indianapolis area, relied on Grdolnik's estimate of applicants and testified that Grdolnik told him that Guinn was a welder. In November Burton had no need for a welder and, questioned by the Trial Examiner, testified that the reason Guinn was not hired was that Grdolnik told him there were better mechanics available than Guinn. Burton's testimony, uncontradicted, is fully credited.

Foreman Max Grdolnik was called by the General Counsel. Grdolnik, whose recommendations as to hiring were necessarily given great weight by Burton was *not questioned* by the General Counsel as to the reasons Guinn was not employed. On cross-examination, however, Grdolnik testified that he knew Guinn as a welder and that there was no full-time welding job available at Fidelity when Guinn applied. He testified that he did the hiring while he was foreman at Fidelity; that he did not discriminate against Guinn (there is nothing to indicate Grdolnik knew of Guinn's dispute with Local 41); that no agent of Local 41 told him not to hire Guinn; and that he later hired Guinn at the State Office Building job (the Limbach job) when Guinn applied for work there.⁷ Like Burton, Guinn was a credible witness, his testimony is uncontradicted, and it is credited in full. I therefore find that Grdolnik did not hire Guinn because he did not need a welder and for no other reason.

Business Agent Joseph O'Neill, named an individual Respondent herein, was called by the General Counsel. Significantly, O'Neill was not asked by the General Counsel if he knew why Guinn was not given employment at Iowa. O'Neill did testify that he recalled that Guinn inquired for work at the union hall after the termination of work at Bloomington. On cross-examination he testified that he did not attempt to dictate to the foreman at Iowa which men should be employed. He testified that he did not know why Guinn was not employed at Fidelity but that he did not cause Iowa to discriminate against Guinn. This testimony is credited.

This concludes the relevant testimony as to the failure to employ Guinn on the Iowa job. On the basis of the credited and uncontradicted testimony of the General Counsel's own witnesses I can make no other finding than that Respondent Union neither caused nor attempted to cause Iowa to refuse employment to Guinn because he was neither cleared nor referred for employment by Respondent Union. I find that Guinn was refused employment at the Fidelity project by Iowa solely because his qualifications were not among those needed at the job at the time of application.

2. The hiring practice

The General Counsel alleged that a hiring practice or arrangement existed between Local 41 and the Association and non-Member contractors which required the Association and the non-Members to hire only those sheetmetal workers who were referred or sponsored by the Respondent Union and that this requirement of referral or sponsorship established an exclusive hiring hall which operated without the safeguards required by the Board's *Mountain Pacific* decision, *supra*. General Counsel

⁷ Grdolnik testified that when Guinn first applied for work at Limbach he told Guinn that he did not need a welder but Guinn told him he had not been on welding for some time. When a job was available he hired Guinn.

further alleged that the contracts between Local 41 and the Association established a practice under which employees were required to be laid off according to their paid-up membership status in Respondent Union.

When Iowa started employing sheetmetal workers at Fidelity it received and adopted the contract between Local 41 and the Association.⁸ This contract specifically provided that the members of Local 41 had the right to solicit jobs from local contractors.⁹ The contract nowhere provided that only union members should be hired or that only union members referred by the union should be hired.¹⁰

Since the contract itself is not alleged to provide for an unlawful hiring arrangement the General Counsel is required to prove an unlawful practice. He first called Field Superintendent Norman Burton, previously found to be a credible witness. Burton, in charge at Fidelity when the first sheetmetal workers were hired, testified that he at that time had a conversation with Business Agent O'Neill and told O'Neill he would need three men right away. Since Iowa was a stranger in Indianapolis it followed the usual practice of seeking skilled craftsmen from the union of the particular craft. O'Neill agreed to supply the men and also supplied Grdolnik, the first sheetmetal foreman. Thereafter Burton hired through Grdolnik and the successive foremen, all of whom were members of Local 41. The foremen hired men at the jobsite and also by calling the hall. The only request made by O'Neill to Burton was that Burton request a certain number of men and not request men by name, a procedure which left the selection of the individuals to O'Neill and which avoided the discontent which arose when men were requested by name were hired who had not been on the loafing list as long as other members. There is no testimony or other evidence that when men were hired through the hall O'Neill selected men on any basis of discrimination. The hiring at the jobsite followed the procedure applied to Guinn. The applicants filled out their forms, setting forth their special qualifications, and Burton then consulted with his foremen, who knew the men, before hiring them. As to those who were hired at the jobsite, Burton or the foremen would tell them to report their employment to their union business agent as required by the contract. Since the purpose of this reporting was, as this record establishes, to keep the Union's loafing list and its records of employment current no discrimination can be found. The testimony of Grdolnik supports that of Burton and the testimony of neither is contradicted.¹¹ Another foreman employed by Iowa at Fidelity was called by the General Counsel. Ray McCollister testified that he first asked O'Neill for a job with Iowa (as journeyman) in September of 1958. He was not sent to Iowa by O'Neill at this time (the reason is not clear) but subsequently he and another journeyman were sent to Iowa by O'Neill and were hired by Iowa. McCollister had not applied at the jobsite nor was he told that he had to be referred by O'Neill—he was on the loafing list and sent to Iowa when a request for men came to the hall. While McCollister was working at Fidelity and before he became a foreman he suggested to Burton that he (Burton) hire a journeyman named Ted Wells. Burton complied with this request and Wells was hired. McCollister testified that after he became foreman he would call O'Neill when he needed men and that this was pursuant to instructions he received from Slater, who succeeded Burton as field superintendent. McCollister then testified to his hiring experience prior to employment at Fidelity. In September 1958, he and Ted Wells applied for work at Triangle-Leahy at Bloomington, Indiana. Pate, Triangle's hiring foreman, asked them if they had been sent out by Local 41 to replace two journeymen who had quit. They told Pate they had not been sent by Local 41, but Pate told them that if Local 41 had not already sent two men he would hire them. McCollister then called the hall and found that no men were on their way and he and Wells were hired.¹² McCollister

⁸ General Counsel's Exhibit No. 3.

⁹ Article IV, section 2:

All men are to notify the business representative of any change of their employment. All members have the privilege to solicit their jobs from local contractors

¹⁰ Apart from the amended complaint alleging discrimination with respect to travel time, no allegation that the contract itself was discriminatory was made until Respondents had rested

¹¹ According to Grdolnik, the General Counsel's witness, the practice of soliciting work at the jobsite was common in the jurisdiction of Local 41 and was not in violation of any union rule. As he testified, "They (the sheetmetal workers) go and solicit any place they want to" (See, however, testimony of Welk, *infra*, footnote 13)

¹² Although McCollister testified that he asked the Union's secretary if it was all right to take the job there is no evidence that Pate required such assurance or asked him to get clearance from the Union. This was a purely voluntary act on McCollister's part, but not unnatural for a member of the Union.

also testified that while he was employed on this job a journeyman from Louisville was hired without clearance or referral from Local 41. (O'Neill requested that this employee transfer his membership card, which the employee agreed to do.)

Theodore Wells corroborated McCollister's testimony that he had been hired at the hall when Burton requested him by name when he was on the loafing list and also testified that most of the sheetmetal workers at Fidelity had solicited their jobs at the jobsite.¹³

Frank Pate, a field superintendent for Triangle-Leahy,¹⁴ was called to testify to the hiring practice of that firm at the University of Indiana construction project at Bloomington. He testified that the first three men hired at that job were hired by him without any referral from or notice to Local 41. Two of these men he simply transferred from a Westinghouse job he had just completed and the other was a regular employee of Triangle-Leahy. As he needed more men he hired them by calling Local 41, the only place he knew to get experienced journeymen.¹⁵ Questioned as to the hiring practice on the Westinghouse job at Bloomington, Pate testified that he had hired two nonunion men, one of whom was a former union member who had dropped his card and operated a shop of his own. No objection was made by Local 41 to the hire of these men. Pate, on cross-examination, testified that he had five men presently employed at a gymnasium construction job at Bloomington and that none of them were hired through the union hall and that three of them were hired at the jobsite without the knowledge of any business agent of Local 41.

This summarizes the testimony offered by the General Counsel to prove that an illegal hiring practice had been established by agreement between the Association and Local 41.¹⁶ Not a single witness called by the General Counsel testified that he had ever been required to clear through the Union before being employed.¹⁷ Not a single witness testified that either referral or sponsorship by the Respondent Union had been required by contractors who were not members but who accepted either the 1958-59 or the 1959-60 contracts as terms of employment.

I find, again on the basis of the testimony of the General Counsel's own witnesses, that neither referral nor clearance by the Respondent Union was required under either the 1958-59 or the 1959-60 contracts or any arrangement or practice thereunder. The only requirement which I find was made was that at Iowa employees who were hired at the jobsite were advised to call the union hall to notify the business agents that they were no longer on the loafing list and to advise them where they were employed.

¹³ Wells testified that Grdolnik told him it was against the rules for members to solicit out-of-State contractors at the jobsite but on cross-examination testified that most of the men were soliciting their own jobs at the site (Fidelity).

¹⁴ Named in the complaint as "Triangle-Leary Plumbing & Heating Corp.," a member of the Association.

¹⁵ Pate's testimony:

Q. (By Mr. LANKER) Have you received any instructions?

By TRIAL EXAMINER:

As to how you were to hire men at Bloomington at the tower job?

A. No. How we come to do that [call the hall] is due to the fact that in our contract [sheetmetal subcontract] specifications it says that we will hire experienced men only for the type of work we do, and there is just no place to find experienced men except the hall; so therefore if I need men and there is none available I call the hall. It's the only source of experienced men on that type of construction work that I know of.

Q. You are not going around looking for inexperienced men?

A. Well, we are not supposed to hire them to begin with.

The brief of the General Counsel makes no reference to Pate's reasons for hiring through the union hall nor to the fact that Pate did hire nonunion men without clearance through the hall.

¹⁶ Clarence Dillehay, Jessie Smith, Mike Pappas, and Louie Gifford were called by the General Counsel and testified that they had been employed at the Fidelity project. All testified that they had been on the loafing list and had been sent to the Fidelity job by O'Neill, presumably when Iowa had requested men. Edward O'Brien testified that he had been employed by Iowa at the jobsite and had been requested to inform the union hall he had been employed.

¹⁷ Jessie Smith, after vigorous prompting, testified that Burton told him he had "to clear me through the Hall." Since Smith had first testified that he was not sure of the words used by Burton I do not credit this statement.

The complaint also alleged a discriminatory practice with respect to layoffs. Rule 14 of the Working Rules of Local 41, referred to in the 1958-59 contract, reads:

A foreman shall give due consideration to qualified paid-up members when laying off men. Every consideration shall be given to all stewards of Local #41.

No testimony was offered nor has any claim been made that an employee suffered discrimination by reason of rule 14, nor is there any evidence that employees were laid off according to their paid-up membership status. The clause is ambiguous on its face since no indication of what is meant by "consideration" appears in the text. In the face of this patent ambiguity some evidence that the discrimination in the layoff procedure is required, evidence concededly lacking.

3. The travel expense clause

The Trial Examiner granted General Counsel's motion to amend the complaint at the hearing to allege that the clause of the 1959-60 agreement between Local 41 and the Association was discriminatory.¹⁸ This clause reads as follows:

JOB SITE HIRING

Any member, when hired on the job site who lives within five (5) radius miles of the job site, will not receive any expenses. If the member lives beyond five (5) radius miles, he shall receive ten (10¢) cents per mile for each mile beyond the five mile radius. For example, if a member lives twelve (12) miles from the job site, he would receive expenses for seven (7) miles, or one dollar and forty cents (\$1.40) per day. For shift work, if started before 7:00 p.m. each member shall receive eight (8) hours pay at the minimum rate of wages specified in Section One (1) of Article VIII of the Standard Form of Agreement for seven (7) hours work. If the shift work is started at 7:00 p.m., or after, each member shall receive eight (8) hours pay for six (6) hours work.

No evidence or testimony was offered that this clause was ever made effective or that any discrimination between members and nonmembers was practiced by the Association.¹⁹ The General Counsel contended, however, that the word "employee" should be substituted for the word "member" to remove any discriminatory inference which might be drawn. Counsel for the Respondent Union stated that it had and would agree to the substitution which the General Counsel requested but the General Counsel, for reasons not made known, did not accept the offer.

B. Conclusions

This record contains no evidence to support the allegation that the allegation that the Respondent Union or its agents, Stringer and O'Neill, caused or attempted to cause Iowa to refuse to hire Guinn because he was neither referred nor cleared for employment by the Respondent Union.²⁰ I have found that the only reason Iowa did not employ Guinn was its belief that Guinn was primarily a welder and that it had no need for a welder when he applied for employment. As to his other qualifications, Iowa had no reason to doubt Grdolnik's statement that better mechanics were available. There is no evidence that Grdolnik was motivated by discrimina-

¹⁸ This motion to amend was admittedly a belated one since, as counsel for Respondent Union pointed out, the contract had been in the possession of the General Counsel almost from the inception of the case. Since the Respondent could not plead surprise as to the provisions of a contract to which it was signatory, the motion was granted, although not without some question as to why this issue was not properly pleaded in the first instance.

¹⁹ I credit the testimony of Business Agent Stringer that the Union insisted that every employee receive the travel benefits and that the use of the word "member" instead of the intended word "employee" was inadvertent.

²⁰ Counsel for the General Counsel has gone to unusual lengths to establish discrimination. He contends in his brief that O'Neill admitted that his statement to Guinn (that four men had been requested by Burton by name) was "a damn lie." O'Neill made no such admission. He did tell Guinn he would not argue further and he was under no compulsion to continue so obviously futile an argument. What Guinn told O'Neill was that *he thought* O'Neill's statement was "a damn lie," an allegation impossible for O'Neill to deny since he could hardly be said to be privy to Guinn's thinking. Wigmore on Evidence has been misconstrued.

tion nor that he was acting in collusion with Stringer and O'Neill. I shall therefore recommend dismissal of the allegations in paragraph 8 of the complaint.

The complaint herein alleged an unlawful hiring and layoff practice. Neither the 1958-59 nor the 1959-60 contracts provided, on their face, for any unlawful hiring practice either by way of exclusive hiring privileges or by a necessity for referral or clearance. Neither contract provided, on its face, for any discrimination in layoffs. No evidence was offered that the Association or the non-Members, including Iowa, agreed to hire exclusively through Respondent Union or required referral from Respondent Union as a condition of employment. The credible testimony in this case, including the testimony of Guinn himself, is that members and nonmembers were hired at the jobsite without referral by both local and out-of-State contractors. Similarly there is no evidence that Respondent Union caused any employer to lay off employees according to their paid-up membership in the Union. Rule 14, relied upon by the General Counsel to prove a discriminatory practice, is not discriminatory *per se* and no evidence of discrimination pursuant to the rule was offered. I shall recommend that the allegations in paragraph 6 of the complaint be dismissed, both as to unlawful hiring and layoff practices.

The complaint was amended to allege that the "jobsite hiring" clause discriminated between members and nonmembers in the payment of mileage fees. Admittedly the word "members" had been used inadvertently of "employees" in the contract. No evidence of discrimination in practice was offered. The only testimony as to practice was the credited testimony of Stringer that he insisted upon payment of mileage to all employees. I am unwilling to find a violation of the Act solely upon the inadvertent selection of language and in the face of testimony that the clause was effectuated as it was intended to be drafted—without discrimination. The rejection by the General Counsel of Respondent Union's offer to clear this latent ambiguity by stipulated correction indicates only that the General Counsel was more interested in proving a violation of the Act than in achieving compliance with it. I shall recommend that paragraph 9-a of the amended complaint be dismissed.²¹

The foregoing are the only allegations of violations set forth in the complaint as amended. The General Counsel, nevertheless, urges in his brief that findings of violations be made by the Trial Examiner based upon matters not alleged in the complaint nor litigated at the hearing. It was not until all the testimony had been taken and the record closed that the General Counsel alleged that article IV, sections 6, 7, and 10 and rule 6 of the Working Rules constituted violations of the Act and established a closed-shop contract. Nowhere in the complaint herein is any mention made of article IV, sections 6, 7, and 10 or of rule 6 of the Working Rules; nowhere is it alleged that the contract incorporated the Working Rules and that this incorporation served to establish closed-shop conditions.²² The propriety of the General Counsel's conduct in advancing posthearing allegations is seriously questioned for I do not agree that attorneys for the Government are not bound by the same code of ethics which apply to other members of the bar. I therefore reject *in toto* all the allegations in General Counsel's brief which refer to provisions of the contract and the Working Rules which were not alleged as violations in the complaint.²³ The only issues pleaded and litigated were those on which I have already ruled, i.e., the hiring and layoff practice and arrangement; the failure of Iowa to hire Guinn; and the "jobsite hiring" clause which provided for travel expense.

²¹ See *Argo Steel Construction Company*, 122 NLRB 1077, where the Board (Member Bean dissenting) found the travel clause discriminatory, not on its face, but on the ground that the clause brought home to employees the monetary value of securing referral through the Union and thereby *reenforced the unlawful closed-shop conditions of the contract*. The conditions which supported the Board's finding in *Argo* did not exist in the instant case.

²² Prior to the opening of the hearing and in the presence of counsel for both parties the Trial Examiner remarked that the pleadings indicated that *only* the hiring practice was attacked and that the contract itself was not under attack. Counsel for the General Counsel agreed that this was the theory of the case. Again, and on the record, the Trial Examiner asked if this was not a *Mountain Pacific case*, i.e., a case in which the exclusive hiring practice was attacked, and he was assured that it was.

²³ Section 5 of the Administrative Procedure Act provides:

In every case of adjudication required by the statute to be determined on the record after opportunity for any agency hearing . . . (a) Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted.

Misstatements of fact are contained in the brief of the General Counsel.

(1) Rule 14 of the Working Rules does not cause the Association to lay off employees "according to their paid-up membership." Rule 14 only requires that a foreman who is a member of Local 41 shall "give consideration to qualified paid-up members when laying off men." The clause as written is ambiguous, as cited in the brief it is discriminatory.

(2) Neither article IV, section 7, nor any provision of the Working Rules requires that foremen shall automatically be ruled off the job if they hire employees other than members in good standing in the Union. This allegation is unsupported by any provision in the contract or the Working Rules.

(3) O'Neill did not testify that the Union *selected* a man from the Local to act as foreman so he would know how to select men for hiring and layoff. O'Neill testified that he *suggested* a foreman to Iowa, an out-of-State contractor, but that he did not designate foremen and did not tell foremen whom to lay off.

(4) Nothing in the Working Rules requires the foremen to hire only members in good standing and the record contains uncontradicted testimony that employees who were not members of Local 41 were hired by parties to the contract.

(5) There is nothing in this record to support the allegation that Iowa had need for Guinn and would have hired him except for the referral requirement.

I find a sorry contrast between the conduct of the General Counsel in this case and the full and complete disclosure of all information requested which the record reveals was made by the Respondent Union during the investigation, the voluntary submission of full affidavits by Business Agents Stringer and O'Neill to agents of the Board, and the free and forthright testimony given by Stringer and O'Neill at the hearing.

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

CONCLUSIONS OF LAW

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

2. Respondents Roy Stringer and Joseph O'Neill are agents of Respondent Union.

3. Sheet Metal, Air Conditioning and Roofing Contractors' Association of Central Indiana, Inc., and Iowa Sheet Metal Contractors, Inc., are employers within the meaning of Section 2(2) of the Act.

4. Respondents have not engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

RECOMMENDATIONS

It is hereby recommended that the complaint herein be dismissed in its entirety.

**The May Department Stores Company d/b/a The May Company
and Retail Store Employees Union, Local 880, AFL-CIO,
Charging Party**

**The May Department Stores Company d/b/a The May Company
and Retail Store Employees Union, Local 880, AFL-CIO and
Office Employees International Union, Local 17, AFL-CIO,
Joint Petitioners. Cases Nos. 8-CA-2155 and 8-RC-3788. April
4, 1962**

DECISION AND ORDER

On November 30, 1960, Trial Examiner James T. Rasbury issued his Consolidated Intermediate Report in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices as alleged, recommending that the complaint be dismissed in its entirety and that the Board overrule the Joint Petitioners' objec-