

Local Union 469 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada [Associated Plumbing, Heating and Piping Contractors of Arizona] and Joe Correa. *Case No. 28-CB-275. October 22, 1964*

DECISION AND ORDER

On May 20, 1964, Trial Examiner Herman Marx issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety, as set forth in the attached Decision. Thereafter, the General Counsel filed exceptions to the Decision and a supporting brief, and the Respondent filed cross-exceptions and a supporting and answering brief.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in this case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

[The Board dismissed the complaint.]

¹ However, we do not adopt the Trial Examiner's finding that the Respondent Union received the requisite notice of Correa's 622 hours of employment by Twin Butte Contracting Company, so as to entitle Correa to be placed on the Union's preferential "A" hiring list for unemployed workers rather than its "B" list. (The union contract required a minimum of 2,000 hours of employment for the previous 3 years for placement on the "A" list, which minimum Correa could satisfy with a total of 2,474 hours only if his 622 hours of Twin Butte employment were included.) As found by the Trial Examiner, there is no affirmative evidence that Twin Butte actually notified the Union of Correa's employment, which notice was required under the contract. Correa testified that when he was hired a representative of Twin Butte said he would notify the Union, but neither this representative of Twin Butte nor any other was called to testify that this was actually done. Moreover, there is no testimony or other evidence that the administrator of the health and welfare fund established by the contract, which administrator customarily receives copies of a report of hours worked, followed its customary practice of transmitting to the Union a copy of a report of hours worked by Correa for Twin Butte. To the contrary, the union representative testified that the Union did not receive notice of Correa's Twin Butte employment, and the Union's records kept in the regular course of business do not reflect such hours of employment. Thus, the only actual evidence in the record is that such notice was not given. In such circumstances, and also in view of the Trial Examiner's own statement on the record near the close of the hearing, concurred in by the General Counsel, that there could be no presumption of notice in such circumstances, the Trial Examiner improperly, and inconsistently to the prejudice of the Union, applied such a presumption in his Decision to support his finding that the notice was actually given. We find, therefore, that the General Counsel failed to prove that the Union received notice of Correa's 622 hours of employment by Twin Butte; thus that Correa was not entitled to be placed on the "A" hiring list rather than the "B" list; and accordingly that the Union did not discriminate against Correa by placing him on the "B" list rather than the "A" list. For these reasons we concur in the Trial Examiner's ultimate finding that the record does not establish by a preponderance of the evidence that the Union caused or attempted to cause employers to discriminate against Correa by its "B" listing rather than "A" listing of Correa.

DECISION OF THE TRIAL EXAMINER

STATEMENT OF THE CASE

The complaint alleges that the Respondent, a labor organization named Local Union 469 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (herein called the Union), has violated Section 8(b)(2) of the National Labor Relations Act, as amended (29 U.S.C. 151 *et seq.*, herein called the Act by causing and attempting to cause employers subject to hiring provisions of a collective-bargaining agreement with the Union not to hire one Joe Correa because he was not a member of the Union, and because it had levied a fine against him; and that by such conduct the Union has restrained and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act, thereby violating Section 8(b)(1)(A) of the statute.¹ The Respondent has filed an answer which, in material substance, denies the commission of the unfair labor practices imputed to it in the complaint; and asserts that, in any case, the complaint should be dismissed because Correa has "never exhausted the grievance procedures available to him under the . . . agreement."

Pursuant to notice duly served by the General Counsel of the National Labor Relations Board upon all other parties, a hearing has been held in this proceeding before Trial Examiner Herman Marx at Phoenix, Arizona. The General Counsel and the Respondent appeared through respective counsel, and all parties were afforded a full opportunity to be heard, examine and cross-examine witnesses, adduce evidence, file briefs, and submit oral argument. I have read and considered the respective briefs of the General Counsel and the Respondent filed with me since the close of the hearing. The Charging Party, Joe Correa, has not filed a brief.

Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Associated Plumbing, Heating and Piping Contractors of Arizona (herein called the Association) is a corporate organization of employers who are engaged in business in Arizona as plumbing, heating and piping contractors. The Association's purposes include the negotiation and execution of collective bargaining agreements with labor organizations, on behalf of its members, and it has entered into such contracts with the Union, prescribing terms and conditions of employment, including the hiring provisions involved in this proceeding. As the members of the Association have manifested a desire to be bound in their bargaining relations with labor organizations by joint, rather than individual, action, through the instrumentality of the Association, the latter and its principals constitute, and have been at all material times, a single employer within the meaning of Section 2(2) of the Act; and it is thus appropriate to base the assertion of such jurisdiction on the interstate operations of any of the Association's members.²

During the year immediately preceding the issuance of the complaint, at least one such member, a corporate enterprise named J. H. Welsh & Son Contracting Company, which maintains its principal place of business in Phoenix, Arizona, "purchased and received directly from points outside . . . Arizona goods and services whose value exceeded \$50,000"; and "sold and distributed goods and services" valued in excess of \$50,000 outside the said State. By reason of Welsh's interstate operations, described above, the Association and its bargaining principals are, and have been at all times material to the issues, engaged in interstate commerce within the meaning of Sections 2(6) and (7) of the Act. Accordingly, the Board has jurisdiction of the subject matter of this proceeding.³

¹ The complaint was issued on September 25, 1963, and is based upon a charge filed with the National Labor Relations Board by Joe Correa on July 24, 1963. Copies of the complaint and charge have been duly served upon the Respondent.

² *Northern California Chapter, Associated General Contractors*, 119 NLRB 1026, 1049; *Local Union 49, Sheet Metal Workers Association, et al.*, 122 NLRB 1192, 1201; *Insulation Contractors of Southern California, Inc., et al.*, 110 NLRB 638, 639.

³ The complaint alleges, and the answer admits, that Welsh is a member of the Association. However, a stipulation at the hearing pertaining to the commerce facts, describes Welsh not as a member of the Association but of an organization named "Plumbing and Air Conditioning Contractors Association" (presumably the organization described in General Counsel's Exhibit No. 3 as "Plumbing and Air Conditioning Contractors of Arizona"). Perhaps the Association has changed its name, or has been succeeded by another organization, but if either is the case, the record does not establish it. In any event, the commerce facts in the stipulation combined with the admission regarding Welsh's membership in the association support the jurisdictional findings made.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Prefatory findings

The Union represents and bargains for plumbers, steamfitters, welders, refrigeration fitters, and corporation fitters (pipefitters who work on municipal projects) in northern and central Arizona; and it has collective-bargaining relations with approximately 250 employers, some of whom are not members of the Association.

On June 1, 1960, the Association, on behalf of its members, entered into a collective-bargaining contract with the Union (and another labor organization not involved here), prescribing for a 3-year period ending May 31, 1963, terms and conditions of employment of individuals employed by the Association's members in "plumbing, heating, refrigeration and piping work . . . in Arizona." In all, approximately 250 employers became parties to the contract, some by force of their membership in the Association, others independently. (For convenience of reference, the contract is described on occasion below as the 1960 Pipe Trades Agreement, and the employers as signatory contractors.)

The hiring provisions mentioned in the complaint are contained in article II of the contract and schedule B appended to the agreement. To the extent material here article II provided:

* * * * *

(B) 1. The Contractors (employers) shall requisition all employees who are to be employed in the bargaining unit from the local hiring hall of the Union having area jurisdiction of the particular craft or skill involved. The Union will immediately dispatch such employees as have been requisitioned on a non-discriminatory basis in accordance with the dispatching rules attached hereto as Schedule B and made a part thereof by reference. However, it is understood and agreed that all such dispatching and operation of any hiring halls . . . shall be subject to . . . the following conditions:

(a) 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 . . . or any other aspect of Union membership, policies or requirements.

* * * * *

(d) So long as the employee hired by a contractor is at the moment of employment a former employee, the contractor may employ that employee directly upon advising the hiring hall by telephone that he is doing so and by sending a written confirmation note to the hiring hall.

As amended in 1961, schedule B of the contract divided job referrals from the Union's hiring hall into three categories, and provided in section 3 that registrants be dispatched by category in the following order of preference:

(a) Workmen whose names are entered on the list, and who have been laid off or terminated in the State of Arizona by a Contractor covered by this Agreement who now desires to re-employ the same persons, provided that such workmen are then available for employment. It is understood and agreed that the work covered by this agreement involves skilled trades and that any particular Contractor covered by the Agreement should have, without any restraint whatsoever, the right to employ persons previously employed by him and relied upon by him when such persons are available and desire to be employed.

(b) When no person previously employed by the employer has been requested by him or is available, workmen whose names are entered on the list and who have been employed by contractors covered by this Agreement in the State of Arizona for a total of at least two thousand hours in the three years immediately preceding their inclusion on this list.

(c) When no men are available under the two preceding categories, all other workmen whose names are entered on the list and who are available for employment. The right to be on the list shall, however, be conditioned by the qualification provisions contained in these rules.

In addition, schedule B imposed upon the "dispatcher" at the hiring hall the responsibility for initial determination of the category in which to list a job registrant, and provided machinery for review and settlement of grievances arising from their listing.

The grievance procedure required that a dissatisfied registrant file a written request for review with the "dispatching office," which was then obligated to refer the matter to the "Area Joint Labor-Management Committee," a body consisting of an equal number of union and management representatives, established under Article VI of the 1960 Piping Trades Agreement for the determination of "matters . . . which may arise from the interpretation, application or operation" of the contract. Upon review of a registrant's grievance under the terms of schedule B, the committee's determination was "conclusive," but in the event the body was "unable to come to a decision," the registrant was entitled to request arbitration by an arbiter "mutually agreed upon by the registrant and the Union," or, in the event of inability to agree upon a choice, one selected by them "pursuant to the rules of the Federal Mediation Service."

Upon its expiration, the contract was succeeded by another (General Counsel's Exhibit No. 3; herein called the 1963 Pipe Trades Agreement), dated June 1, 1963, which is now in effect. The hiring provisions of the current agreement differ somewhat from those of its predecessor, but the only difference that need be noted here is that those entitled, under the former contract, to priority of dispatch because they worked 2,000 hours within the 3-year period preceding registration must now work 2,500 hours during such a period to qualify for the priority under the present agreement. The provisions for review and arbitration of referral grievances are in material respects the same as in the prior contract.⁴

The Union operates a hiring hall in Phoenix, Arizona, for the registration and dispatch of employment applicants under its contractual arrangements with employers, and has maintained the facility at all times material to the issues. A job applicant registers by notifying the Union at the hiring hall of his availability, and may do so in person or by mail or telephone. Upon such notification, the Union records the registrant's name in a book, and thereafter periodically prepares and posts at the hall lists of the registrants, grouping them in either an "A" or a "B" classification in the order of registration. The "A" group consists of those entitled to priority of dispatch because they have worked the requisite number of hours in the 3-year period preceding registration. The other registrants are placed in the "B" group. Except for registrants requested by an employer by name, as permitted by contract, the Union's dispatch procedure requires that registrants be dispatched in their occupational category according to group priority in the order in which they are listed from the top of the roster for their group. They are customarily informed of dispatch by telephone or messenger if they are not at the hall when their turn comes.

To determine whether a registrant belongs on the "A" list, the Union customarily depends upon a monthly report of hours worked, prepared by each signatory contractor for each employee subject to the contract, and sent, in several copies, to a designated bank by the employer together with his payment to a health and welfare fund established under the collective-bargaining agreement. The bank, under customary procedure, sends copies of the report to an agency that administers the fund, and the administrator, in turn, sends a copy to the Union, which posts the hours for the given employee in a folder maintained for his employer. To compute the number of hours for the employee, the Union refers to a record maintained for him, showing the names of the signatory contractors for whom he has worked, and then derives the hours from the folders of the employers involved.

Joe Correa has been a corporation fitter for some 20 years, and became a member of the Union in 1954. In September 1960 he was charged by a representative of the organization with an infraction of the constitution of the international labor body of which the Union is a local affiliate, with the result that the latter fined him \$1,000 in the following month or shortly thereafter. The action was sustained in or about February 1961 by the Union's parent body. Correa has never paid the fine. So long as it is unpaid, he is ineligible to pay dues under the Union's regulations, and by force of these, he was automatically expelled from membership in February 1962, purportedly for nonpayment of dues. Actually, however, as he was ineligible to pay dues while the fine remained unpaid, his expulsion resulted from his failure to pay the fine.

About a month or so after the filing of the charges against him, Correa became unemployed, and, according to his testimony, in or about the beginning of November 1960, he registered at the hiring hall by reporting his unemployment to a member of the Union's staff at the dispatcher's window in the hall. However, his name does not

⁴ As noted earlier (footnote 3), the name of the organization of employers which is a party to the current agreement (General Counsel's Exhibit No. 3) differs from that of the Association, but the record does not explain the variance. Neither that, nor any other, difference between the two contracts materially affects the issues.

appear on more than a dozen of the Union's lists, purporting to be all those for the period between October 24, 1960, and April 11, 1961, produced by the Union at the hearing pursuant to subpoena.

Notwithstanding the records, there is good reason to believe that Correa registered as he claims. For one thing, on November 10, 1960, the Union certified to the Arizona unemployment compensation authorities, on an official form provided by the State, that Correa "is registered for work, and is seeking work as required by this local union." For another matter Correa's name is fourth (fifth, according to some of the testimony) on lists dated April 18 and May 10, 1961, appearing, significantly, ahead of registrants listed in earlier rosters. There is some indication in the record that Correa wrote a letter (not produced at the hearing) about April 11, 1961, requesting registration. But on that date, he also filed a charge with the Board, served on April 13, alleging an unlawful refusal by the Union to refer him to a job with a specified signatory contractor.⁵

The Union, which should have special knowledge of its own records, leaves one in the dark as to the reason for the particular position of Correa's name on the April 18 and May 10 lists. The organization's business manager, Ray Sanders, testified that he is unable to explain the matter, doing no more than to suggest that Correa's position "could have been a (secretarial) typographical error." But no secretary was called, nor other evidence produced, to support what is at best a speculation. Nor is an explanation to be found in a claim by Sanders to the effect that the Union drops the name of a registrant when it learns that he has employment of any kind, whether at his trade or otherwise. (Correa was employed during a period beginning in December 1960 and ending in April 1961 at an occupation over which the Union does not assert jurisdiction, securing the job through a laborers' local.) One need not pause here to consider the plausibility of this testimony, which is at least open to doubt, for the fact is that the alleged practice is not offered as an explanation for the omission of Correa's name from the lists preceding that of April 18.⁶

Particularly in the absence of any explanation by the Union, Correa's relative position on the April 18 and May 10 lists and the Union's certification of November 10, 1960, to the State unemployment compensation authorities give strong support to his claim to the effect that he registered at the hiring hall about the early part of November 1960, and I credit his testimony in that regard. Moreover, bearing in mind that the list of April 18 was the very next one prepared after April 13, the date the charge was served upon the Union, and taking into account its failure to explain his relative position on the list, and that it did not produce the book in which it customarily enters the names of registrants, it is fair to conclude, and I find, that its failure to list Correa over a period of months prior to April 18 was no mere oversight or inadvertence, and that the charge was responsible (perhaps together with the letter he wrote) for his inclusion in the April 18 list, and for his relative position on it.⁷

In May 1961, Correa obtained employment as a pipefitter with a signatory contractor named Twin Butte Contracting Company, securing the job through his own efforts. He had previously worked for the company. At the time he was hired, he discussed the necessity for a referral from the Union with one of the "owners" of Twin Butte, Harold Gustafson, who told him that no referral was necessary because Correa had previously worked for the company, and that he, Gustafson, would notify the Union of Correa's employment. Gustafson disposed of his interest in Twin Butte

⁵ There are references in Sanders' testimony to a settlement agreement resulting from the charge. The agreement was excluded at the hearing, and no findings herein are based on it.

⁶ A number of witnesses who have been members of the Union, and have used its hiring hall, for a considerable number of years gave credible testimony from which it is evident that they never heard of a practice of dropping the name of a registrant when he secures some employment outside the contractual hiring provisions involved here. In any case, the material issues require no determination whether it is plausible that the Union would maintain a practice that could have the effect of keeping registrants totally jobless as a condition of maintaining their availability for dispatch from the hiring hall to a job in their trade.

⁷ Correa gave testimony to the effect that he saw his name on a number of the lists between the time of his registration and the latter part of January 1961. The lists produced do not bear out this claim, but, on the other hand, it is evident, for reasons stated above, that the lists do not reliably reflect Correa's registration. Sanders' unsupported speculation that Correa's position on the lists of April 18 and May 10 "could have been a typographical error" of itself suggests that the lists are not as reliable as they should be. As Correa's testimony regarding the lists does not alter the ultimate conclusions reached below, I deem it unnecessary to make any findings in the premises.

not long thereafter. He was not called as a witness, and there is no affirmative showing that either he or any other representative of Twin Butte ever informed the Union of Correa's employment.

Correa worked for Twin Butte under its new management until the firm ceased operations in October 1961, although the records of the health and welfare fund administrator show August 1961 as his last month of employment by Twin Butte.⁸ According to these records, Twin Butte reported a total of 622 hours of work for Correa for a 4-month period through August 1961. There is no evidence that the fund administrator followed its customary practice of transmitting to the Union a copy of a report of hours worked by Correa for Twin Butte. At the hearing, the Union produced, and the evidence includes, a card maintained by it, purportedly listing the names of signatory contractors for whom Correa has worked, and the periods of employment. His employment by Twin Butte in 1961 is not reflected on the cards.

On December 14, 1961, Correa wrote a letter to the Union requesting that he be placed on the "out-of-work list."⁹ His name was placed on the next list which is dated December 19, 1961, and appears as the last of five corporation fitters listed. It also appears in the next eight lists, moving up to first place in his classification in a list dated February 15, 1962, and remaining there on four more successive lists ending with one dated March 27, 1962. His name does not appear in the next list, which is dated April 14, 1962. He was not dispatched from any of the nine lists, although there was a total of some 15 referrals from about half of the lists of men in his classification junior to him in registration.

In June 1962, he entered the employ of a signatory contractor named "Roy Suiter," for whom he had worked previously. Suiter notified the Union of the employment, and made the requisite reports of the number of hours worked by Correa. The Union's records reflect these reports. Correa worked for Suiter until November 1962.

He secured employment from another signatory contractor, Tucson Concrete Pipe, in January 1963, through his own efforts. It does not appear that he had previously worked for the enterprise. He held the job until the latter part of the following month, working a total of 128 hours in the employment. The Union has a record of these hours, receiving the information, as it is reasonable to infer, from health and welfare contribution reports submitted by the employer.

On May 3, 1963, Correa wrote a letter to the Union, requesting registration on the "unemployed list." As of that date, in the preceding 3 years, Correa had worked 2,474 hours in employment subject to the 1960 Pipe Trades Agreement; if one includes the 622 hours he worked for Twin Butte and the 128 hours of employment by Tucson Concrete Pipe.

Sanders testified, in substance, that after receipt of the letter, he referred to Correa's "employment-record card" (which, as noted earlier, does not list his job with Twin Butte in 1961); computed the hours worked by Correa for those listed, including Tucson Concrete Pipe, at 1,855; and concluded that because Correa did not have the requisite minimum of 2,000 hours for an "A" listing, he should be placed on the "B" list. Actually, Correa's card does not list the Tucson Concrete Pipe employment, and it is thus obvious that Sanders must have derived his knowledge of that employment from some other source.

On May 6, 1963, Sanders, replying to Correa's letter, wrote him to the effect that his name had been entered on the "B" list in the order of registration, and that he would be referred to employment "only if and when a requisition for a pipefitter is placed with this Local and you are then eligible under the prevailing Hiring Hall agreement and uniform practices to be referred."

Following the filing of the charge in this proceeding on July 24, 1963, Sanders made inquiry of the health and welfare fund administrator as to the number of Correa's working hours reflected in the fund records, and the upshot was that the administrator sent a letter to the Union, dated August 26, 1963, listing Correa's

⁸ Correa testified that he worked for Twin Butte until the latter part of November. One of the purchasers of Gustafson's interest testified that the firm ceased operations between October 16 and 18, 1961. The relevant finding is based on the purchaser's testimony as his recollection in the premises appeared to me to be firmer than Correa's. There is some indication that Twin Butte was in straitened financial circumstances, and that may account for the fact that the fund administrator's records show no report of hours worked by Correa for Twin Butte after August 1961.

⁹ Correa testified that he registered orally at the hiring hall in November, and that he could not recall requesting registration by mail. There is credible evidence that he wrote a letter to the effect set forth above, and that it is not available because it has been inadvertently lost or mislaid; and I am satisfied that he sought registration by letter dated December 14, 1961. The decisional results here are the same whether he registered by that means or orally in the preceding month.

jobs, and the hours worked in each, including the time in the Twin Butte and Tucson Concrete Pipe employments, as given to the fund agency during the relevant 3-year period; and reporting a total of 2,474 hours.

Corera has not been referred to any job from the hiring hall since his last registration, nor, in fact, has he ever been dispatched from the hall as a result of any of his registrations beginning with the one in November 1960.

He has not pursued the relevant review and arbitration procedures prescribed by the 1960 Pipe Trades Agreement or by its successor.

B. Discussion of the issues; concluding findings

The ultimate issues here are (1) whether Correa had the requisite number of hours to qualify for the "A" list on May 6, 1963, when the Union placed him in the "B" group; and (2) if he was thus qualified, whether the Union assigned him to the "B" list rather than to the preferential "A" roster because he had not paid his fine or lacked membership in the Union. If both these questions are answered in the affirmative, the Union's action was unlawful, for in administering the contractual registration and referral provisions it acts not only for itself but as agent of the signatory contractors, and thus if it discriminates for the reasons alleged by the General Counsel, it unlawfully causes such discrimination by the signatory contractors.¹⁰

The Union, nevertheless, takes the position that apart from the merits of the issues, the Board should dismiss or "abate" the complaint because Correa has failed to avail himself of the contractual review and arbitration procedures to seek correction of any impropriety in his listing. This contention, it may be assumed, is an appeal to the Board's discretion, and not a denial of its authority, for Section 10(a) of the Act provides that the agency's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."

No doubt, public policy favors the voluntary adjustment of disputes arising over the application or interpretation of collective-bargaining agreements,¹¹ but it is also national policy, and the Board's duty under the Act, to prevent and suitably remedy unfair labor practices. The Board has sought to strike a balance between these two national goals in various types of cases in which arbitration has taken place, adopting a policy of deference to arbitral results when "the (arbitration) proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act" (*Spielberg Manufacturing Company*, 112 NLRB 1080).

But what the Respondent seeks here goes much beyond the *Spielberg* doctrine, requesting not mere deference to an *existing* arbitration award, binding, by prior agreement, upon "all parties," but that the Board, as an expression of "national policy," close its doors to Correa, whatever his wishes, at least until he has traveled the route, in search of redress, prescribed for him in the contract between the Union and the signatory contractors.

I find no warrant in the cases for such a course, and, on the contrary, see a number of reasons that argue persuasively against it. One that readily comes to mind is that findings of job discrimination, as experience tells us, often turn an extensive pretrial investigation, subtle evaluations of motive, and skilled resolution of conflicting testimony. It is an interesting commentary on the Respondent's position that in this very case it evidenced reluctance to produce pertinent documentary evidence (the "out-of-work" lists), doing so only after denial of a petition by it to revoke a subpoena requiring production of the material. One may assume that the Respondent sincerely believed that its petition rested on sound legal grounds (its position was erroneous, in my judgment), but that does not alter the fact that it manifested reluctance to produce the documents. One is led to wonder how Correa would go about overcoming such reluctance, without the aid of compulsory process, in seeking review of this grievance in the manner the Respondent would prescribe for him.

Be that as it may, it would be an absurdity in various types of cases to expect the average worker to have the resources, whether investigative or financial, so often necessary to unearth unlawful discriminatory motives, and, obviously, the lack of such facilities can operate to defeat arbitral justice, no matter how skilled the arbiter. Thus one may reasonably believe that to require job seekers victimized by hiring-hall discrimination to exhaust applicable review and arbitration procedures

¹⁰ *N.L.R.B. v. Waterfront Employers of Washington, et al.*, 211 F. 2d 946, 953-954 (C.A. 9); *Morrison-Knudsen Company, Inc. v. N.L.R.B.*, 275 F. 2d 914, 917 (C.A. 2), cert. denied, 306 U.S. 909

¹¹ See 29 U.S.C. Sec 173(d); e.g., *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574.

before turning to the Board's processes for redress would in some instances give them nothing more than delay, to that extent aggravating any injustice already done them—delay that could also lead them and the public interest to the dead end of unavailable witnesses, or other vanished or weakened memory.

Moreover, job discrimination strikes at the very heart of rights guaranteed employees by the Act,¹² and thus, particularly bearing in mind that hiring halls are at the nerve center of the hiring process in large sectors of American industry (building construction, for example), it is important to the public interest that findings of unlawful hiring-hall discrimination be harnessed to suitable cease and desist orders restraining such misconduct in the future. That, of course, is the role of the Board and of judicial enforcement of its orders.

From what has been said it is evident that the policy the Respondent urges upon the Board is at best of dubious worth, without regard to the particular grievance and arbitration provisions involved here, but one may put aside the general policy considerations I have canvassed, and the contract language itself provides reason enough to reject the Respondent's position. The point of the matter is that the contractual procedures fall short of assuring a fair determination of claims such as that of Correa. To be sure, a dissatisfied job registrant is given a hand in the choice of an arbitrator, but his claim, whatever his wishes, may not even reach the point of arbitration, for under the procedure a unanimous determination by the Area Joint Labor-Management Committee, which consists solely of representatives of the Union and the signatory employers, is "conclusive." As the claim inevitably imputes misconduct to the contracting parties (employers, at least indirectly, since the Union acts for the signatory employers in administering the hiring hall provisions) the review provisions could obviously have the effect of placing the employee at the mercy of agents of parties that have a community of interests and are charged, either directly or indirectly, with the misconduct. To say this is not to impugn the integrity of those who may serve on the review body, but only to make the point that its membership neither includes a representative of the claimant's choice nor any person who can be regarded as truly disinterested; that the review machinery thus lacks adequate safeguards to assure a fair determination of claims of unlawful application of the hiring provisions; and that that deficiency of itself warrants rejection of the Respondent's thesis that Correa be denied access to the Board's processes at least until he runs the course the Respondent would lay out for him.¹³

Turning to the merits of the case, at their threshold, one meets the question whether Correa had the requisite minimum of 2,000 hours of employment as of May 6, 1963, to make him eligible for the "A" list under Section 3(b) of Schedule B of the 1960 Pipe Trades Agreement, as amended. Sanders admittedly included the 128 hours Correa worked for Tucson Concrete Pipe in determining Correa's listing status and, in its brief, the Respondent makes no point that his direct employment by that concern violated the contract. In any case, the resolution of the question hinges on a decision whether the 622 hours Correa worked for Twin Butte should be counted.¹⁴ I am of the opinion that that time should be included, notwithstanding the absence of any affirmative evidence that Twin Butte actually notified the Union of the employment, and that article II of the contract provided that "the operation of hiring halls . . . shall be subject to, and shall be governed by" the condition, among others, that a signatory employer may directly hire a former employee "upon advising the hiring hall by telephone that he is doing so and by sending a written confirmation note to the hiring hall." No doubt, as the Union points out, these notification provisions are important to help it police compliance with its contracts, but the nub of the matter is that Twin Butte had a right to employ Correa directly as a former employee, and that the record warrants an inference that the requisite notices were given.

"The modern tendency of the courts . . . is to favor a presumption that a person has performed a duty enjoined upon him by law or by private contract, unless

¹² E.g., *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4).

¹³ See *Lummas Co.*, 142 NLRB 517; *Roadway Express, Inc.*, 145 NLRB 513.

¹⁴ In procuring the Tucson Concrete Pipe job, Correa presented a paper to his employer indicating that he had been referred for employment by an organization named "Independent Associated Plumbers and Fitters." There is no such organization, and, according to Correa, he used that device because he "couldn't procure a referral from Local 469." As the inclusion or exclusion of the 128 hours does not affect the results in this proceeding, I deem it unnecessary to decide whether Correa's direct employment by Tucson Concrete Pipe violated the 1960 Pipe Trades Agreement.

the contrary appears" (20 Am. Jur., *Evidence*, Sec. 227). The use of the presumption is particularly appropriate here, it seems to me, because of the Union's special knowledge whether it received the required notification from Twin Butte.

Applying the presumption, as I do, the burden is upon the Respondent to go forward with evidence that Twin Butte did not in fact comply with its contractual obligation.¹⁵ Examining what there is of pertinence to the matter in the record, I am unable to escape the impression that the Union steps gingerly around the subject. Its staff consists of six individuals, including Sanders and two business agents who "police the territory" or, in other words, visit projects where men like Correa work to check for compliance with contracts by signatory employers such as Twin Butte; yet of the staff of six, the Union called only Sanders as a witness. His testimony on the subject of his knowledge of Correa's Twin Butte employment reflects some noteworthy omissions. Interestingly enough, it includes no express denial that he was aware of the employment *prior* to the "B" listing in May 1963, although the Respondent went to some pains to make the point, through Sanders, that Correa, who had no obligation in the premises, never informed Sanders of the job.¹⁶ The critical question of Sanders' knowledge appears during the Respondent's case in somewhat tangential fashion. He was asked why he has not changed Correa's listing since discovery of the Twin Butte employment, and he replied, ". . . because after searching the records for a referral slip or a request slip . . . I find that there was never a request or never a referral issued and in my . . . opinion he is not entitled to credit for those hours." This, obviously, supplies no answer to the question whether Twin Butte informed him or another staff member by telephone of Correa's employment, as required by article II of the contract. Moreover, whether the Union issued "a referral slip" or Twin Butte sent a "request slip" is quite beside the point, for the company, having previously employed Correa, had a right, under the contract, to hire him directly, without either a "referral" by the Union or the submission of a "request" for Correa. The question to keep in view is whether Twin Butte made the requisite telephone call and sent the required "written confirmation note," and on that important issue, the Union's case is silent, except that Correa's employment history card contains no entry of the Twin Butte job. That, plainly, is insufficient to meet the presumption, for the omission could be the result of neglect to post information from Twin Butte to the card. Significantly, in that regard, Sanders knew enough about the Tucson Concrete Pipe employment, without the card, to refer to that company's fund reports in the course of computing Correa's hours. I make no point that he derived this knowledge from any notice sent by the contractor to the Union in conformity with the contract; but, rather, that the card is something less than a reliable guide to the Union's knowledge of Correa's jobs. In short, the mere absence of a notation of the Twin Butte employment on the card does not suffice to negate the presumption.

Thus, with the presumption, the record warrants an inference, and I find, that Twin Butte notified the hiring hall of Correa's employment in 1961 as required by the contract; that he is entitled to include the hours he worked for Twin Butte for the purposes of determining his eligibility for the "A" list; and that as of May 6, 1963, when he was notified of his listing on the "B" roster, he had worked more than 2,000 hours within the preceding 3 years in employment subject to, and permissible under, the 1960 Pipe Trades Agreement, and was therefore entitled to an "A" listing.

There remains the ultimate question whether Sanders assigned the "B" listing to Correa for discriminatory ends. The history of Correa's experience with the hiring hall points to a discriminatory attitude by the Union toward him. As previously indicated, there is good reason to believe that his name was deliberately omitted from "out-of-work" lists at the hall for a period of some months not long after he was fined. In addition, it is a suspicious circumstance to say the least, that there were some 15 referrals of corporation fitters with listings junior to Correa's over a period of some months following his registration in December 1961. It may be, of course, that the fitters involved had previously worked for the employers to whom they were dispatched, and were requested by name, and that thus their dispatch was in order, but it is noteworthy that the Union, which obviously has special knowledge of the circumstances of their referral, presented no probative evidence explaining the preferential dispatches. There is also ground for suspicion, at least, in the fact that although Correa has been registered at the hall for substantial periods since the

¹⁵ Obviously, the requirement that the Respondent meet the presumption does not have the effect of relieving the General Counsel of the burden of proving the material allegations of the complaint.

¹⁶ Under cross-examination, Sanders testified that the first time the employment was called to his attention during the summer of 1963 was "around the 25th or 26th of August." This is not a denial he was aware of the matter prior to the summer.

imposition of the fine, as of the time of the hearing 3 years later, he had not received so much as one referral from such registration.¹⁷ Moreover, as indicated previously, Sanders, contrary to his testimony, did not secure the name of Tucson Concrete Pipe from Correa's employment history card, and this casts a large shadow of doubt over the credibility of his claim that he relied on the card as a guide to the employers' fund reports needed for computation of Correa's hours. There may be an innocent explanation for this deficiency in Sanders' testimony, but if there is, the Respondent has not offered it.

However, these factors are not enough to make the General Counsel's case, for they leave unanswered the central question whether Sanders, who made the decision to place Correa on the "B" list, did so with knowledge that he was entitled to an "A" listing. On that score, the fact that the record warrants an inference that Twin Butte fulfilled its contractual obligation to notify the Union of Correa's employment in 1961 does not inevitably establish a probability that some 2 years later Sanders had personal conscious knowledge of the employment. Although I have some reservation about the reliability of the employment history card as a guide to the Union's knowledge of Correa's jobs, and that Sanders has been wholly candid on the subject of his knowledge of Correa's employment by Twin Butte and the steps he took to compute Correa's hours, it is a fact that the card does not list the Twin Butte job, and that the authenticity of the card as a record kept in the regular course of business is not challenged.

Taking these matters into account, it is at least as consistent with the evidence to believe that Sanders was genuinely led by the absence of any notation of the Twin Butte job on the card to omit any reference to that company's fund reports in computing Correa's hours as it is to conclude that he had knowledge of the employment, and, possessing it, deliberately ignored the reports. To find such knowledge on the record made would be as much as to permit suspicion to write the decision here, and this, needless to say, is a course forbidden the factfinder, whatever his moral convictions may be. In short, the record is insufficient to support a finding that Sanders had an unlawful motivation in placing Correa on the "B" list.

Nor is there sufficient basis for a conclusion that his continued "B" listing after the fund administrator's report of August 26, 1963, was unlawful. By that time, the 1963 Pipe Trades Agreement, with its requirement of 2,500 hours to qualify for the "A" list, had gone into effect, and the administrator's report shows that Correa had 2,474 hours, including those he worked for Tucson Concrete Pipe. It may be that he would have achieved the requisite minimum had he been properly listed between his registration in November 1960 and April 18, 1961, or that he was denied a sufficient number of hours by improperly preferential dispatches of his juniors while he was registered during the early months of 1962, but such a conclusion would be speculative, since it is not established that there was any work available for him during the first period mentioned or that the preferential dispatches were not in accordance with contract priorities, albeit one may suspect that the preferences were improper.

Summarizing the matter, the record does not establish by evidence of preponderant weight that the Union has caused or attempted to cause employers to discriminate against Correa, and I shall thus recommend dismissal of the complaint.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following conclusions of law:

1. The Union is, and has been at all times material to this proceeding, a labor organization within the meaning of Section 2(5) of the Act.
2. The Association and its members are, and have been at all times material to this proceeding, an employer within the meaning of Section 2(2) of the Act.
3. Each of the signatory contractors named in the findings above is, and has been at all times material to this proceeding, an employer within the meaning of Section 2(2) of the Act.
4. The record does not establish that the Respondent has engaged in the unfair labor practices imputed to it in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record in this proceeding, it is recommended that the Board enter an order dismissing the complaint.

¹⁷ Correa's employment history card at the hiring hall shows that he held a substantial number of jobs over a period of some years prior to the fine. It is not established, however, that he secured these jobs through the hall.