

**Local 138, International Union of Operating Engineers, AFL-CIO and Thomas A. Eichacker and Nassau and Suffolk Contractors' Association, Inc., and its Members Listed in Appendix A of the Complaint, Parties to the Contract**

**Local 138, International Union of Operating Engineers, AFL-CIO and John J. DeKoning**

**Local 138, International Union of Operating Engineers, AFL-CIO and Walter W. Miller**

**Zara Contracting Co., Inc. and Walter W. Miller**

**Frank Marmorale, Inc. and Albert Bruder**

**Hendrickson Brothers, Inc. and Peter Batalias**

**Zara Contracting Co., Inc. and John J. DeKoning**

**Eastern Fireproofing Company, Inc. and Walter W. Miller**

**Local 138, International Union of Operating Engineers, AFL-CIO and Walter W. Miller.** Cases

29-CB-1 (formerly 2-CB-1651), 29-CB-2 (formerly

2-CB-1778), 29-CB-3 (formerly 2-CB-1792),

29-CA-1 (formerly 2-CA-5015), 29-CA-2

(formerly 2-CA-5018), 29-CA-3 (formerly

2-CA-5019), 29-CA-4 (formerly 2-CA-5020),

29-CA-5 (formerly 2-CA-5256) and 29-CB-4

(formerly 2-CB-1895)

February 27, 1969

#### ORDER REMANDING BACKPAY PROCEEDING FOR FURTHER HEARING

BY CHAIRMAN McCULLOCH AND MEMBERS  
FANNING, JENKINS, AND ZAGORIA

On June 1, 1959, the National Labor Relations Board issued a Decision and Order in the above-entitled case,<sup>1</sup> directing, *inter alia*, that Respondent make whole certain employees for losses suffered as a result of discrimination against them. Thereafter, the Board's Order was modified and enforced in part by the United States Court of Appeals for the Second Circuit on July 25 and November 9, 1961.<sup>2</sup> Thereafter, on March 23, 1965, the Board issued a Supplemental Decision and Order<sup>3</sup> determining the amounts of backpay due to certain employees, totaling \$95,685.00, plus 6 percent interest per annum from the date of its Supplemental Decision. On June 29, 1967, the United States Court of Appeals for the Second Circuit entered an opinion and decree,<sup>4</sup> in which it remanded the case to the Board with direction to permit the Union to examine any or all of the discriminatees concerning their job availability and interim earnings during the backpay period. On September 14, 1967, the Board remanded the case to Trial Examiner George L. Powell with direction to reopen the record for the purpose of complying with the remand of the Second Circuit.

<sup>1</sup>123 NLRB 1393

<sup>2</sup>293 F 2d 187

<sup>3</sup>151 NLRB 972

<sup>4</sup>380 F 2d 244

On January 9, 1968, in the course of the reconvened hearing, Respondent Union, Local 138, made a settlement offer in the instant backpay proceeding herein called *Nassau-Suffolk*, and a related backpay proceeding herein called *J. J. Hagerty*.<sup>5</sup> The offer, in essence, contemplated the payment of \$95,000 to be distributed to the discriminatees as settlement for all backpay claims, contingent upon the Board's withdrawing a civil contempt proceeding it had initiated, through the General Counsel, against Respondent Union, Local 138, on August 8, 1967, in the United States Court of Appeals for the Second Circuit. The contempt proceeding alleged violations of the decrees entered by the Court of Appeals in the *Nassau-Suffolk* and *J. J. Hagerty, Inc.*, cases.<sup>6</sup> Over the objection of the General Counsel, the Trial Examiner recessed the hearing to permit work on a settlement agreement. When the hearing was reopened on January 30, 1968, the General Counsel indicated his willingness to recommend approval of a settlement of \$95,000 to the discriminatees in the *Nassau-Suffolk* and *J. J. Hagerty* backpay proceedings which were before the Trial Examiner, but rejected a settlement if made contingent on the withdrawal of the contempt suit pending in the United States Court of Appeals. Although the taking of testimony from all the discriminatees had not been completed, the Trial Examiner, over the objection of General Counsel, closed the record in both *J. J. Hagerty* and *Nassau-Suffolk* cases and stated his intention of recommending that the Board accept the proposed settlement, including the withdrawal of the contempt proceeding.

On May 16, 1968, the Trial Examiner issued his Second Supplemental Decision and Recommended Order, in which he recommended that the Board approve the settlement of the *Nassau-Suffolk* and *J. J. Hagerty* cases for the sum of \$95,000, distributed pro-rata to the discriminatees in proportion to their interests, as set forth in his attached Decision, and he further recommended that the Board move for the withdrawal of the pending civil contempt proceedings. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief. The Respondent, Local 138, filed an answering brief in opposition to the General Counsel's exceptions.<sup>7</sup>

<sup>5</sup>*J. J. Hagerty, Inc.*, Cases 29-CA-6, 7, 8, 9, 16, and 29-CB-5, 6, 8, 7, 9, and 10

<sup>6</sup>Fn 2, *supra*, and 321 F 2d 130

<sup>7</sup>The Charging Parties filed no formal exceptions or briefs to the Trial Examiner's Decision. However, subsequent to the closing of the hearing record, but before the Trial Examiner's Decision was issued, the Charging Parties had filed a Statement of Position in which they agreed to the terms of the proposed money settlement but only if it did not affect the relief sought by the contempt proceedings. Although the Trial Examiner in his Decision stated the Charging Parties joined Respondent Union in seeking a withdrawal of the contempt proceeding, we find the Charging Parties' position up to the time of the Trial Examiner's Decision was as stated in its Statement of Position, i.e., the position of the General Counsel, and that it only supported the proposed settlement in so far as monetary payment to the discriminatees was concerned. Nevertheless, subsequent to

In his exceptions and brief the General Counsel requests the Board to reject the Trial Examiner's proposed settlement<sup>8</sup> and remand this case and the *J. J. Hagerty* case to the Trial Examiner with direction to reopen the record for the purpose of taking evidence concerning interim earnings and job availability of the discriminatees pursuant to the decision of the Court of Appeals.<sup>9</sup> The Board finds merit in the General Counsel's exceptions.

The instant case and the *J. J. Hagerty* case were the sole matters before the Trial Examiner. The civil contempt proceeding was and is in a different forum. Although the Trial Examiner, over the proper objection of General Counsel, permitted Respondent's counsel to make certain representations as to Respondent's compliance with the Court of Appeals decrees, the fact is that these issues were not, and indeed could not be, appropriately litigated before this Trial Examiner<sup>10</sup> whose authority under our Rules and Regulations, Section 102.35, extended only to cases assigned to him. Indeed, the Trial Examiner in his Decision acknowledges he is unfamiliar with the merits of the contempt proceeding.

While we are well aware of the long and tortuous history of this and the *J. J. Hagerty* cases, and fully desire the most expeditious resolution of the matters of backpay for the discriminatees, we are also cognizant of our responsibility to see that other purposes of the Act, and of Court decrees enforcing the Act, are not thwarted by a settlement approved in ignorance. Such information as is before us in the hearing record, the Trial Examiner's Decision, and the briefs of the parties, show that besides a relatively minor monetary payment to one of the discriminatees, the civil contempt proceeding involves important questions concerning compliance with the earlier Board decisions and the decrees of the Court of Appeals. These are not resolved by the self serving statements of the Respondent,

the issuance of the Trial Examiner's Decision, one of the Charging Parties, Peter Batalas, by letters of June 26, and July 5, 1968, indicated that under certain conditions, he would withdraw objections to the settlement proposed in the Trial Examiner's Decision. Thereafter, Batalas transmitted a similar letter to Thomas Sheehan, Esq., who in the latter stages of the hearing had acted as Counsel for the Charging Parties, and Counsel wrote the Board stating the remaining discriminatees approved this position. In view of our decision, although we note receipt of this correspondence, we find it unnecessary to pass upon its contents or rule whether its form and timeliness are within Board requirements for consideration as briefs in support of the Trial Examiner's Decision.

<sup>8</sup>The General Counsel does not oppose a settlement limited to the payment of \$95,000 to the discriminatees, but objects to conditioning such a settlement on the withdrawal of the contempt proceeding which he avers should be settled independently.

<sup>9</sup>Fn 4, *supra*

<sup>10</sup>In addition to the Respondent's representation as to its compliance with the decrees of the Court of Appeals, and its defenses to the contempt proceeding, the Trial Examiner permitted, over objection of General Counsel, a long and self-serving representation by Respondent as to the history of settlement negotiations. Both of these issues are extensively discussed in the Decision of the Trial Examiner. While both matters should have properly been excluded from the hearing record, we find it unnecessary, in view of our decision, to determine whether these errors were prejudicial

particularly when these are contested by the General Counsel, who bears a public responsibility to see that compliance is made with these decisions and decrees. Under these circumstances, we deem it inappropriate to approve a settlement the effect of which we are unable to gauge, and which may, in fact, negate much of the public policy purposes which necessitated this protracted litigation through the Board and the courts.

Accordingly, we shall remand this case for the purpose of taking further evidence pursuant to the decision of the United States Court of Appeals for the Second Circuit.

#### ORDER

It is hereby ordered that the record in this proceeding be, and it hereby is, reopened, and a further hearing be held before Trial Examiner George L. Powell for the purpose of completing the taking of evidence concerning interim earnings and job availability of any or all the discriminatees pursuant to the decision<sup>11</sup> of the United States Court of Appeals for the Second Circuit.

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 29 for the purpose of arranging such further hearing, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof; and

IT IS FURTHER ORDERED that, upon conclusion of the supplemental hearing, the Trial Examiner shall prepare and serve upon the parties a Third Supplemental Decision and Recommended Order, and that following the service of such Third Supplemental Decision and Recommended Order upon the parties, the provisions of Section 102.46 of the Board Rules and Regulations, as amended, shall be applicable.

<sup>11</sup>Fn. 4, *supra*

#### TRIAL EXAMINER'S SECOND SUPPLEMENTAL DECISION AND RECOMMENDED ORDER

##### STATEMENT OF THE CASE

GEORGE L. POWELL, Trial Examiner: The issue involved in these cases, herein called Nassau-Suffolk, at this time is whether the Board should accept a money settlement including the withdrawal of a civil contempt proceeding,<sup>1</sup> which withdrawal is opposed by the General Counsel. For the reasons hereinafter set forth, I recommend Board approval of the proposed settlement including a petition to withdraw the pending civil contempt matter.

Also involved in the same settlement is a series of other backpay cases, herein called *J. J. Hagerty*,<sup>2</sup> pending before this Trial Examiner for which a separate Trial Examiner's Second Supplemental Decision and Recommended Order is issuing simultaneously with this decision.

<sup>1</sup>*N.L.R.B. v. Local 138, IUOE*, No. 26,562, 27,914; and 27,947, before the United States Court of Appeals for the Second Circuit

<sup>2</sup>*J. J. Hagerty, Inc.*, Cases 29-CA-6, 7, 8, 9, 16, and 29-CB-5, 6, 7, 8, 9, and 10

The United States Court of Appeals for the Second Circuit summarized the background of the unfair labor practice cases following a finding by it that the Union was an organization of operators of heavy construction equipment — bulldozers, cranes, power shovels and the like — in Nassau and Suffolk counties on Long Island. Its summary was that:

Since about 1954 a small number of determined members, perhaps 10 of a total membership of some twelve hundred, whom we shall call, without implication, reformers, have waged an extensive campaign to overturn Local President William DeKoning, Jr., and other incumbent officers, for what the reformers consider to be gross mismanagement and improper administration of union affairs.

Following the abortive campaign to overturn the Union officers, these members were discriminated against by the Union and the employers because of their concerted activities. This was the finding in a decision of Trial Examiner Arthur E. Reyman, affirmed by the National Labor Relations Board, hereinafter called Board, on June 1, 1959 (123 NLRB 1393), and enforced in the United States Court of Appeals, Second Circuit, on July 25, 1961, in 293 F.2d 187.

The court order required that:

(1) "The Respondent Union shall make whole John J. DeKoning, Albert Bruder, William Wilkens and Walter W. Miller for any loss of pay these employees may have suffered as the result of the discrimination against them in the manner set forth in the section of the Board's Decision and Order entitled "The Remedy" and make whole William Wilkens, Thomas Eichacker, Charles Skura, Peter Batalias, John J. DeKoning, Albert Bruder, Walter Miller and any other member of the reform group<sup>1</sup> for loss of pay resulting from the discriminatory operation of its hiring hall as set forth in the section of said Decision and Order entitled "The Remedy," and

(2) Zara, Marmorale and Eastern shall make whole John J. DeKoning, Walter W. Miller and Albert Bruder, for any losses they may have suffered as the result of the discrimination against them in the manner set forth in the section of the Board's Decision and Order entitled "The Remedy," provided that primary liability for making the said employees whole shall rest upon the Respondent Union, and the above-mentioned Respondent Companies shall be liable to make them whole only should the Respondent Union fail to do so.

<sup>1</sup>Garrett Nagle and Frank Ziegelbauer are included under this category.

In order to determine the loss of pay resulting from the discriminatory operation by the Respondent Union of its hiring hall, a supplementary backpay proceeding was held before me on various dates from June 18 to December 10, 1963. The Trial Examiner issued his Supplemental Decision on June 29, 1964, finding two separate types of liability

As to the first type of net backpay due four individuals on certain jobs, Walter Miller was due \$65.20 on the East Meadow School project, William Wilkens was due \$91.54 on the Northville Dock project, John DeKoning was due \$3,194.85 on the Roosevelt Field project, and Albert Bruder was due no backpay on the Roosevelt Field project.

As to the second type of liability, the computation of

net backpay found to be due to members of the reformed group as a result of the discriminatory operation of the Union hiring hall, is set out in the tables below. The backpay period was found to begin on July 1, 1955, for all, but its terminal date varied by the individual. The following table has been prepared to show the terminal date of the backpay period as well as the net backpay awarded each of the individuals by the Trial Examiner:

Name	Terminal Date Backpay Period	Net Backpay Awarded
Peter Batalias	February 26, 1962	\$16,123.00
Albert J. Bruder	March 31, 1961	13,266.00
John H. DeKoning		3,194.85
Thomas Eichacker	December 31, 1960	12,490.00
Walter W. Miller	December 31, 1959	9,277.20
Garrett Nagle	March 31, 1960	9,666.00
Charles Skura	December 31, 1961	13,069.00
William H. Wilkens	March 31, 1959	7,987.54
Frank Ziegelbauer	June 30, 1959	10,612.00
		<u>\$95,685.59</u>

The Board on March 23, 1965, 151 NLRB 972, adopted the findings of the Trial Examiner but added a provision that interest would be paid at the rate of 6 percent per annum on the prospective awards from March 23, 1965. The case went for enforcement to the United States Court of Appeals, Second Circuit, where enforcement was denied and the cause was remanded to the Board by decision rendered June 29, 1967 (Docket No. 26562. No. 319 — September term 1966). The court stated, "On remand, the Union must be given the right to examine any or all of the reform discriminatees (not limited to the five present at the hearing below) concerning their activities (relating to job availability and interim earnings) during the backpay period."<sup>3</sup>

On September 14, 1967, the proceeding was remanded by the Board to the Regional Director for Region 29 for the purpose of arranging further hearings. Arrangements were made and additional hearings were held on 10 dates from November 28, 1967, to January 30, 1968, before Trial Examiner George L. Powell. Some 1114 pages of record transcript were made of testimony relating to job availability and interim earnings of all the discriminatees except Ziegelbauer, Wilkens, Miller, and Batalias, and Ziegelbauer had died in the interval since the last hearing in 1963.

On January 9, 1968, William Wilkens was the witness and the time of day was just before the break for lunch. About 2 more weeks of trial were estimated, i.e. a few more days for Wilkens and Miller and the remainder to take the testimony of Peter Batalias.<sup>4</sup> It was at this point in the case when the following extemporaneous outburst by Wilkens was made:<sup>5</sup>

THE WITNESS [WILKENS]: May I say something for the record, and I hope I'm not out of order in saying this, and I hope I can control myself without breaking down.

I would like to say, I am a union man for over twenty years, and this fight has been going on for

<sup>3</sup>Examination in these areas had been limited, in accordance with the Board's Rules, to issues fairly raised by the Union's answer to the backpay specification

<sup>4</sup>There was also a question of whether Batalias could be located at the time, but this factor has no bearing in the case.

<sup>5</sup>Tr. pp. 1848 to 1850. But no time was estimated to complete testimony in the case of J. J. Hagerty

thirteen years, and here about five weeks ago we had what we felt was the opportunity of settling.

You were gracious enough to let a committee of the union, and a committee headed by me to sit down and work this out. We were more than willing to settle it.

Now we were informed money was no object. Don't you smile and laugh at me, you did that for ten years.

TRIAL EXAMINER: You are referring to Mr. Corcoran?

THE WITNESS: To Mr. Kutner [attorney for Welfare Fund, Local 138] I am referring to. We had a golden opportunity to settle this. I think this is a disgrace, that a case like this can go on year after year after year, with lawyers asking us these questions one hundred times over and getting the same answers.

My book is an open book. The members of my group was an open group. We felt like it was time to settle it, stop fighting, and we still feel that way, but all I can say in all honesty is what you are doing here is creating an atmosphere of ill feeling.

We are not creating a good atmosphere here. I have a counsel here, he's a learned man, he's a learned man. Aren't we big enough, grown enough to sit down with you and with Mr. Bernie and my committee to sit down and work this out? Before we have to go through Supreme Court and contempt actions and thousands of dollars being wasted. Why is the—why is this necessary? What are you looking for? What are you people looking for? You keep us working, we are the happiest guys in the world, we couldn't care less what you have, a million dollars or a penny. Why are we at this stage of the game?

I am 45 years old, I am the youngest of the group, so it doesn't matter to me if we take another ten years, twenty years, where's it going to go?

Records, you speak of records. We have nothing to hide. You keep saying you have nothing to hide. Where are we going to go, to another court, another avenue, to the NLRB for the next ten years?

TRIAL EXAMINER: We hope this is the last case before the NLRB on this.

Whereupon the parties again discussed settlement during the luncheon recess and when the trial resumed thereafter the Trial Examiner summarized the settlement package as follows:

TRIAL EXAMINER: On the record.

Let the record note that since we recessed for lunch the parties have been together discussing settlement and not only among themselves but with their principals, and at the present time it seems that they are in agreement on a full package deal, which means that this case and the J. J. Haggerty [sic] case, and the present pending contempt case is a package to be all wound up in one complete settlement on compliance.

At this point the sum of \$95,000 had been agreed upon by the Charging Parties and the Union to settle the two backpay cases of Nassau-Suffolk and J. J. Hagerty and the pending contempt case in a package deal in order to "bury the hatchet." The last obstacle toward settlement had been removed. The Trial Examiner, under these settlement circumstances, found it inadvisable to continue the examination of Wilkens and of the other two witnesses and recessed the case until January 30, 1968, to permit the settlement to be reduced to writing. Mr. Fitzpatrick, counsel for the Charging Parties, advised that Mr. Wagman, the attorney for the General Counsel handling the contempt matter, would arrive from Washington,

D.C., the following day for the purpose of working out the necessary stipulation as to the contempt matter. He also agreed to join the Union in requesting a withdrawal of the contempt matter in order to settle the three proceedings. Mr. Berry, counsel for the General Counsel objected to any recess saying,

Although the parties may have agreed upon the amount of money which will be paid to discriminatees to settle this case, the Nassau and Suffolk Contractors Association case and the J. J. Hagerty case, this settlement, in my understanding, is basically made contingent upon a package of a settlement of these two cases along with the outstanding contempt proceeding now pending over in District Court.

His objections were overruled by the Trial Examiner. The Trial Examiner, Mr. Corcoran, Union's counsel, and Mr. Fitzpatrick, Charging Parties' counsel, agreed to hold themselves available . . . "to try to iron out any possible hurdles that may [yet] be involved . . . in this matter." Mr. Fitzpatrick, Mr. Corcoran (and officials of the Union), and the Trial Examiner did hold themselves in readiness the following day but were not called to assist the General Counsel.

On January 30, 1968, the case reopened. No witnesses were called as the Trial Examiner wished to see how the settlement had progressed. It turned out that virtually nothing had happened between the date of recess on January 9, 1968, until January 30, insofar as writing up the settlement terms which had been agreed upon on January 9. The General Counsel refused to seek a withdrawal of the contempt proceeding from the United States Circuit Court of Appeals for the Second Circuit where it was awaiting processing under Judge Walter Bruckhausen, United States District Judge for the Eastern District of New York, although as noted above this was to be part of the package of settling the two 14-year old cases for \$95,000. And indeed the General Counsel had served on the Union, a stipulation of four pages (plus a seven-page appendix plus a two-page notice to be posted) in which in essence: (1) the Union was to admit its guilt of civil contempt of the two circuit court decrees involved; (2) post the said notice; (3) notify the Charging Party, Peter Batalias (the same Peter Batalias involved in the two backpay cases, who brought the charge which led to the civil contempt proceeding), (4) pay Batalias \$500 to make him whole for the matter involved in the civil contempt proceeding; (5) pay the Board \$1,500 for costs and expenditures in the civil contempt proceedings; (6) make hiring and referral system records available (at the request of the Regional Director of the Board) for inspection, copying, photographing, or microfilming; (7) also, upon request of the Regional Director of the Board, make available for interview and depositions the three named dispatchers and all who acted under them; and to take the certain affirmative actions set forth in the seven-page appendix being, apparently, a complete blueprint of the way the Regional Director of the Board wanted the hiring hall to be run by the Union.

A second, entirely separate stipulation having no reference to the contempt proceedings but involving only the two backpay cases was also served on the Union by the General Counsel. Both stipulations were sent counsel for the Union with a transmittal slip dated January 18, 1968, asking counsel to contact Mr. Kaynard (Regional Director) or Mr. Richman (Regional Attorney). The Union immediately informed the Regional Director that the settlement proposed by him of the contempt case could not be accepted as it called for the Union to admit

to a wrong which it did not do. Thus the situation was at this impasse when the trial reopened on January 30, 1968

Robert Christensen The amounts found due and the liability therefore is as follows:

#### The J. J. Hagerty Case

Inasmuch as the proposed settlement between the Charging Parties and the Union involved not only a joint attempt to cause the withdrawal of the pending contempt matter but provided for the settlement of the Nassau-Suffolk and the J. J. Hagerty cases for the sum of \$95,000, it is necessary at this point to outline the backpay proceeding in the J. J. Hagerty case. Three of the same employees involved in Nassau-Suffolk, that is Batalias, Eichacker, and Nagle, are involved in backpay in the J. J. Hagerty case, plus an additional employee

Name	Amount Payable	Payable By Whom
Batalias	\$ 307.06	Peterson <sup>6</sup> Jointly and severally by Union and Peterson with the Union primarily liable
Batalias	\$ 4,503.23	
Batalias	\$22,551.01	Union
Christensen	\$ 4,737.45	Union
Eichacker	\$ 8,757.00	Union
Nagle	\$ 4,787.00	Union

The following table was devised to show the total amount of money awarded (without figuring the interest at 6 percent) in both backpay cases and the percentage each employee would have in the \$95,000 money part of the settlement.

Name	Net backpay awarded Nassau-Suffolk	Net backpay awarded J. J. Hagerty	Total award	Percent Total award
Batalias	\$16,123.00	\$27,054.24	\$ 43,177.24	30.6
Bruder	13,266.00		13,266.00	9.4
DeKoning	3,194.85	\$ 8,757.00	3,194.85	2.3
Eichacker	12,490.00	\$ 8,757.00	21,247.00	15.1
Miller	9,277.20		9,277.20	6.6
Nagle	9,666.00	\$ 4,787.00	14,453.00	10.2
Skura	13,069.00		13,069.00	9.2
Wilkins	7,987.54		7,987.54	5.7
Christensen	4,737.45		4,737.45	3.4
Ziegelbauer	\$10,612.00		10,612.00	7.5
	Grand total net backpay:		\$141,021.28	100.00

#### The Settlement History

The first settlement offer was made by Mr. Corcoran shortly after he became counsel for the Union in these matters. The amount offered at that time was \$50,000. Subsequently, the offer was increased to \$65,000, but negotiations broke down over the Charging Parties' request for a shop steward or a master mechanic. By November 30, 1967, the Charging Parties were willing to accept the sum of \$85,000 if the Union would make union membership cards available for Batalias and Christensen. (The Trial Examiner and counsel for Charging Parties and counsel for the Union worked long into the night to no avail.) Finally following the outburst of Wilkins on January 9, 1968, with the offer of \$95,000, the Charging Parties withdrew the request for membership cards, thus clearing the last hurdle in the settlement negotiations. It

was at this point that counsel for the Charging Parties agreed to join the Union in seeking a withdrawal of the contempt proceedings and settling all three cases for the sum of \$95,000 with the money to be divided among the discriminatees in the percentage of the previous awards. Just before the trial was closed on January 30, 1968, the Trial Examiner summarized the settlement as follows:

As I understand it, the offer of Respondent union is to settle the three cases, the present pending civil contempt case, the Nassau-Suffolk case, and the J. J. Hagerty case, for the \$95,000, and what we are talking about, of course, is that your union membership will have to approve such a settlement. A moment ago you said that you would present it to them, and urge their

<sup>6</sup>This sum of \$307.06 has not been included in the sum due by the Union and will be set out in the recommended order as payable by Peterson.

adoption of it. Can you assure us that there is a very good chance of it being approved?

MR. CORCORAN: I have been informed, Mr. Trial Examiner, by the administration, that if the contempt proceeding is withdrawn, a special meeting of the membership of the Respondent union will be immediately called and it will be recommended to them, and I will urge, as counsel, its acceptance, and I have reason that the settlement will be approved and ratified.

#### The Pending Civil Contempt Proceeding

The pending civil contempt proceeding is in its initial stages. It arose out of charges filed by Peter Batalias involving, according to the statement of Mr. Corcoran, ". . . four or five charges of violation of the seniority rule of some 19,950 referrals made before the contempt proceeding was initiated." Following the investigation of the charges, civil contempt proceedings were instigated rather than the issuance of an unfair labor practice complaint. According to the stipulation prepared by the General Counsel as his first and last offer to settle the contempt case, \$500 was the amount of money involved to make Batalias whole. Another of the discriminatees, Wilkens, charged that another was preferred over him in a union referral but after investigation of the Region, the case was dismissed for lack of merit. In its initial stages, the contempt matter is at the beginning of a long and tortuous journey having only been referred to a special master, Judge Walter Bruchhausen. A records' inspection and a discovery proceedings had been sought by the Board under Federal Rule 34 and the Union served notice it will move under the same rule for an examination of persons and documents necessary for the defense of its position which defense is ". . . that the Respondent Union never knowingly, intentionally or otherwise, violated [the decrees] of the Court of Appeals."

#### Closing the Record

On January 30, 1968, the Trial Examiner closed the record stating that it would serve no useful purpose to take additional testimony having to do with the establishment of the amount of backpay due the discriminatees in the cases of Nassau-Suffolk and J. J. Hagerty when the parties themselves were satisfied with the amount of money offered in full settlement of these two cases with a withdrawal of the contempt case. The policy of the Act was stated in the record.<sup>7</sup> The Trial Examiner referred to the severe budget cut of the agency and stating that although that was not the only reason for his decision, he noted on the record the tremendous cost to the Government of the present proceedings so far and the cost it would entail if it were to continue. He pointed out to the parties his responsibility to the Board to use imagination, initiative, and judicial ability to adjust these disputes, particularly those having to do with backpay, and he closed the hearing by telling the parties that he would recommend that the Board accept the settlement terms as offered and move the Honorable Judge Walter Bruchhausen to close the contempt proceeding on the basis of the settlement noting that the same person involved in the contempt case was also involved in the backpay proceedings, and was satisfied with the settlement

#### Present Operation of the Hiring Hall

As represented by Mr. Corcoran, an attorney at law and hence an officer of the court, the Board has powers of inspection of the hiring hall procedures under the two decisions of the United States Circuit Court of Appeals. The Board has inspected and has recommended certain changes and practices which have been adopted by the Union and put into effect. In addition, Mr. Corcoran has made good-faith representations, with respect to the discriminatees, that the Union wants to bury the hatchet and get on with the work in a new atmosphere. These considerations should suffice in a petition to Judge Bruchhausen for a withdrawal of the civil contempt matter, particularly when two very old cases also settle.

The Union, on the other hand, must be fully aware of the ever present danger of losing its right to control and operate the hiring hall in the industry, where no other sensible method has yet been devised to furnish qualified operators of heavy construction equipment, if it does not operate the hiring hall fairly. It is possible that some public authority could be created to make referrals on a nondiscriminatory basis and it is also possible that the Union could be barred from operating a hiring hall upon a proper showing of lack of or a failure of public responsibility. The Union now is providing a service both to its members and to employees in this industry. It wants to stay in business and it should be given this opportunity.

#### Analysis and Conclusions

To recapitulate, the two backpay cases of *Nassau-Suffolk* and *J. J. Hagerty* involve backpay beginning as far back as 1954 or some 14 years ago. The backpay case of *Nassau-Suffolk* had been heard and decided not only by the Trial Examiner and the Board but by the United States Court of Appeals for the Second Circuit which remanded it for further proceedings. These additional proceedings took 10 more days in a 3-month period. The backpay case of *J. J. Hagerty* had been heard and the Trial Examiner's decision was pending before the Board when it was remanded by the Board for the same type of testimony as was involved in the *Nassau-Suffolk* case. Sometime after the decisions in the two backpay cases had been made, additional charges had been brought by one of the discriminatees, Batalias, upon which a proceeding was brought involving alleged civil contempt of the United States Circuit Court of Appeals' decrees enforcing the unfair labor practices, referred to earlier.

The total net backpay award found by the Trial Examiner to be due the discriminatees was \$141,021.28. The settlement sum agreed upon by the Charging Parties and the Union was \$95,000, or approximately 68 percent

<sup>7</sup>It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define the prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce

of the total net award. Given the normal risks of litigation in the present cases and the certainty of years of delay in payment to the discriminatees if the hearings went to conclusion, the amount proposed in the settlement, by any standards, is a fair compromise and reasonable under all the circumstances, and certainly the representations by the parties of their desires to put an end to this protracted litigation and bury the hatchet are of great weight. Industrial peace is the aim of the Act. The United States Court of Appeals for the Sixth Circuit recently has said, "The Board concedes that [settlement] agreements are most often prompted by a desire to reach an amicable disposition of the matter without need for expensive and time consuming hearings and court review. Such agreements 'are not an admission of past liability,' but serve to regulate future responsibilities of the parties." *N.L.R.B. v. Bangor Plastics, Inc.*, 392 F.2d 772.

Inextricably involved in this settlement, is the desire of the Charging Parties and the Respondent Union to seek a withdrawal of the contempt matter in order to "bury the hatchet" and restore industrial harmony. The public interest to be benefited by the approval by the Board of such a settlement agreement lies in the restoration of industrial harmony in this vital industry and in the conservation of the Board's resources.

The Board has summarized certain principles and practices which guide it in the difficult area of settling unfair labor practice cases where less than the full amounts of backpay are arrived at. In the case of *Farmers' Co-Operative Gin Association*, 168 NLRB No. 64, the Board said:

The Board has long had the policy of encouraging settlements which effectuate the policies of the Act. *Wallace Corp. v. N.L.R.B.*, U.S. 248 323, 253-254. In considering settlements, the Board must weigh such factors as the risks involved in protracted litigation which may be lost in whole or in part, the early restoration of industrial harmony by making concessions, and the conservation of the Board's resources. Moreover, the Board must evaluate the legal and factual merits disclosed by the administrative investigation to determine whether the allegations of violations in the complaint can be so clearly proved that no remedy, less than the maximum, can be accepted. In arriving at this decision, the discretion of the Board is recognized as broad.

It is understood that I know nothing of the merits of the pending civil contempt proceeding. But I do know that insofar as the Charging Party, Batalias, is concerned, he could be made whole by the payment of some \$500. It makes no sense to the Trial Examiner to refuse to bring to a close these two old (14 years) cases for the sake of a present civil contempt case worth \$500 to a discriminatee. This civil contempt case is now the stumbling block to a settlement urged by the same Batalias and the other men who are willing to give up a possible greater amount of money due under the Board's make-whole order in order to bury the hatchet and heal old animosities — and get on with the job of living and working together. The Charging Parties are familiar with the present method of operation

of hiring hall and obviously believe they can live under it because they are willing to quash the civil contempt proceedings which might lead to reforms. Surely as much weight should be given them as should be given a Regional Director who does not owe his living to a hiring hall. It is my distinct impression that Respondent Union and the Charging Parties truly wish to bury the hatchet, the only obstacle to this being the problem of how to get the General Counsel's hands off the hatchet's handle. To continue these cases any longer is an unjustifiable sapping of strength not only of the Union but in the future, of the Board and of the persons whose rights are protected under the Act. If, in the future, the Respondent Union violates the courts' decrees, civil contempt would be available. Accordingly, I will recommend that the cases be closed on compliance upon satisfaction of the terms of the settlement agreement set out above. To pursue rights to the bitter end can only terminate in a bitter end.

The Board has the power necessary to do that which I recommend. There may be some who say the Board has not given me the necessary authority to bring this matter to its attention in this fashion. Even if true, which I deny, this is to ignore the substance for the form — a result inimical to the great equitable purposes and policies of the Act as applied to these particular cases at this particular point in history.<sup>8</sup>

#### RECOMMENDED ORDER

1. Upon the basis of the above analysis and conclusions, it is recommended that the Board approve the settlement of the Nassau-Suffolk case and the J. J. Hagerty case for the sum of \$95,000 to be distributed *pro rata* to the discriminatees in proportion of their interest in the total backpay award set out above;
2. That the Board move the Honorable Walter Bruchhausen, United States District Judge for the Eastern District of New York, for a withdrawal of the present civil contempt proceedings for the reasons that the settlement agreement will effectuate the policies of the Act; and
3. That no action be taken by Respondent Union or the Charging Parties pursuant to this Recommended Order until the Board has granted its approval thereof. If this Recommended Order is approved by the Board, Respondent Union should take the necessary steps to approve the settlement and pay over to the Regional Director of the Twenty-ninth Region of the Board the sum of \$95,000 within 20 days. Following this action, the General Counsel should move the court for a withdrawal of the civil contempt proceeding. Upon its withdrawal, the

<sup>8</sup>Cf. *N.L.R.B. v. Tennessee Packers Inc.*, 390 F.2d 787 (C.A. 6), wherein the United States Court of Appeals in St. Louis likewise was of the opinion that the Board should first pass upon a proposed settlement, which had not been approved by the General Counsel before petitioning for enforcement of the backpay order.

Regional Director for Region 29 of the Board shall distribute the said \$95,000 *pro rata* as the interest of each

discriminatee is set out in the table above, and issue a notice of full compliance to all of the parties.