J. J. Hagerty, Inc. *and* Peter Batalias
Nassau and Suffolk Contractors' Association, Inc. *and* Garnett Nagle and Employer-Members of Nassau and Suffolk Contractors' Association, Inc. listed in Appendix A of the Complaint, Parties in Interest
J. J. Hagerty, Inc. *and* Thomas Eichacker
John C. Peterson Construction Co. *and* William Herbert Wilkens
Nassau and Suffolk Contractors' Association, Inc. and its Employer-Members Listed in Appendix A of the Complaint; Welfare Fund of Local 138, International Union of Operating Engineers, AFL-CIO, and Trustees William C. DeKoning, Girard Douglas, John Gunning, Verner Sofield, John Buchanan, Edwin Regnell, Jr., Paul Roche and Herman Switzer *and* Robert Christensen and Local 138, International Union of Operating Engineers, AFL-CIO; Building Trades Employers Association of Long Island, Inc., and its Employer-Members Listed in Appendix B of the Complaint, Parties in Interest
Local 138, International Union of Operating Engineers, AFL-CIO *and* Peter Batalias *and* Garrett Nagle *and* Thomas Eichacker *and* William Herbert Wilkens and Nassau and Suffolk Contractors' Association, Inc. and its Employer-Members listed in Appendix A of the Complaint; Building Trades Employers Association of Long Island, Inc., and its Employer-Members Listed in Appendix B of the Complaint, Parties in Interest
Local 138, International Union of Operating Engineers, AFL-CIO *and* Robert Christensen and Nassau and Suffolk Contractors' Association, Inc., and its Employer-Members listed in Appendix A of the Complaint; and Building Trades Employers Association of Long Island, Inc., and its Employer Members listed in Appendix B of the Complaint, Parties in Interest
Local 138, International Union of Operating Engineers, AFL-CIO; and Welfare Fund of Local 138, International Union of Operating Engineers, AFL-CIO, and its Trustees William C. DeKoning, Girard Douglas, John Gunning, Verner Sofield, John Buchanan, Edwin Regnell, Jr., Paul Roche and Herman Switzer *and* Robert Christensen and Nassau and Suffolk Contractors' Association, Inc., and its Employer-Members Listed in Appendix A of the Complaint and Building Trades Employers Association of Long Island, Inc., and its Employer-Members Listed in Appendix B of the Complaint, Parties in Interest. Cases 29-CA-6 (formerly 2-CA-6301), 29-CA-7 (formerly 2-CA-6302), 29-CA-8 (formerly 2-CA-6323), 29-CA-9 (formerly 2-CA-6376), 29-CA-16 (formerly 2-CA-7474), 29-CB-5 (formerly 2-CB-2423), 29-CB-6 (formerly 2-CB-2424), 29-CB-7 (formerly 2-CB-2440), 29-CB-8 (formerly 2-CB-2472), 29-CB-9 (formerly 2-CB-2931), and 29-CB-10 (formerly 2-CB-2948)

February 28, 1969

ORDER REMANDING BACKPAY PROCEEDING FOR FURTHER HEARING

BY CHAIRMAN MCCULLOCH AND MEMBERS JENKINS AND ZAGORIA

On October 31, 1962, the National Labor Relations Board issued a Decision and Order in the above-entitled case,[1] directing, *inter alia,* that Respondent make whole certain discriminatees for losses suffered as a result of discrimination against them. Thereafter the Board's Order was enforced, as modified, by the United States Court of Appeals for the Second Circuit.[2] Following the issuance of a Backpay Specification a hearing was held before Trial Examiner George L. Powell who issued a Supplemental Decision on October 31, 1966. Upon a motion duly made by the General Counsel, and granted by the Board, the case was reopened on October 12, 1967. The Trial Examiner continued a further hearing on this case, herein called *J. J. Hagerty,* pending completion of the remanded supplemental proceeding in a related case, herein called *Nassau-Suffolk.*[3]

In the course of the hearing in *Nassau-Suffolk,* Respondent Union, Local 138, made a settlement offer in the two backpay proceedings 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 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. Thereafter, as more particularly set out in the companion case, *Local 138, International Union of Operating Engineers, AFL-CIO (Nassau and Suffolk Contractors' Association, Inc.)*[4] the Trial Examiner closed the record in the instant case and in *Nassau-Suffolk,* and indicated his intention of recommending that the Board accept the proposed settlement.

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 *J. J. Hagerty* and *Nassau-Suffolk* cases for the sum of $95,000 distributed *pro rata* to the discriminatees in proportion to their interests, as set out in his Decision, and he further recommended 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,

[1] 139 NLRB 633.
[2] 321 F 2d 130
[3] *Local 138, International Union of Operating Engineers, AFL-CIO,* Cases 29-CB-1, 2, 3, and 4; 29-CA-1, 2, 3, 4, and 5
[4] 174 NLRB No. 111.

Local 138, filed an answering brief in opposition to the General Counsel's exceptions.[5]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel

In his exceptions and brief the General Counsel requests the Board to reject the proposed settlement, [6] and remand the cases herein to the Trial Examiner with direction to reopen the record for the purpose of permitting General Counsel to complete presentation of evidence on the backpay specification and the Respondent to present its defense.

For the reasons set forth in the *Nassau-Suffolk* decision[7] the Board finds merit in the General Counsel's excpetions. Accordingly, we shall remand this case for the purpose of taking evidence pursuant to our order of October 12, 1967.

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 taking evidence pursuant to the Board Order of October 12, 1967.

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 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.

[5]The Charging Parties filed no formal exceptions or briefs to the Trial Examiner's Decision. See fn. 7, *Local 138, International Union of Operating Engineers, AFL-CIO (Nassau and Suffolk Contractors' Association, Inc.)*, 174 NLRB No. 111.

[6]The General Counsel does not oppose a settlement limited to the payment of $95,000 to the discriminatees, but objects to conditioning this with a withdrawal of the contempt proceeding which he avers should be settled independently.

[7]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 J. J. Hagerty, at this time is whether the Board should accept a money settlement including the withdrawal of a pending civil contempt proceeding,[1] 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 Nassau-Suffolk,[2] pending before this Trial Examiner for which a separate Trial Examiner's Second Supplemental Decision and Recommended Order is issuing simultaneously with this Decision.

Background

The decision of the National Labor Relations Board, herein called the Board, in which the unfair labor practices were found and for which the remedy therefor gave rise to this proceeding, is reported at 139 NLRB 633 (October 31, 1962).

The United States Court of Appeals for the Second Circuit, herein called the Court, enforced the Boards' Order in a decision reported at 321 F.2d 130. Chief Judge Lumbard summarized the cases as follows:

III. DISCRIMINATION AGAINST PARTICULAR MEN

The trial examiner [Ralph Winkler] found that Local 138 violated Sec. 8(b)(1)(A) and (2) of the act by failing to refer employees Batalias, Nagle, Eichacker, and Christensen on the same basis as other men, and further violated Sec. 8(b)(1)(A) by threatening employees Nagle, Christensen and Wilkens that they would be denied referrals.[3] The Board sustained these findings. All of the above employees are identified in the union as members of a Reform Group; each has participated in one fashion or another in previous congressional or board proceedings against the union. All except Christensen are members of the union; Christensen was a "permit man" until July 1959, when he stopped paying the permit fee. The union does not deny that these men were not referred to jobs during the periods in question. It asserts, however, that they were not discriminated against and that their failure to secure jobs was due to nonpayment of dues or (in the case of Christensen) permit fees, failure to file out-of-work cards, lack of qualifications for the jobs available, and so forth. Against this is the testimony of the men that they had done everything required of them and were otherwise qualified to obtain jobs and would have done so but for the union's discrimination against them. All but one of the men testified to conversations with union officials, who were reported to have said in blunt language that the men would not be given jobs so long as their reform activities continued. The union officials who testified denied that these conversations took place.

[12-15] We cannot overturn reasonable credibility determinations made by the trial examiner and accepted by the Board. The union's argument that it offends common sense to assert "that union officials, knowing of the propensity of these men for filing charges with the Board would repeat in almost identical language the very acts condemned by the Board," Brief p. 9, would have more force if Local 138 did not have a history of persistent violations. We grant enforcement of the

[1]*N L R.B* v. *Local 138, IUOE*, 71 LRRM 2335, before the United States Court of Appeals for the Second Circuit.

[2]*Local 138, International Union of Operating Engineers, AFL-CIO, (Nassau and Suffolk Contractors' Assn)*, Cases 29-CB-1, 2, 3, and 4, and 29-CA-1, 2, 3, 4, and 5.

[3]The trial examiner found that the evidence did not sustain the charge that Wilkens had in fact been denied referrals by the union

Board's order that the union cease and desist from discrimination or threatening to discriminate against these men, and that it give appropriate notice to that effect. In addition, we grant enforcement of the order that the union, as directed by the Board, make Batalias, [4] Nagle, Eichacker, and Christensen[5] whole for any loss of pay rising from the discrimination against them.

[4]Batalias was transferred in December 1958 from one construction job for the Peterson Construction Co. to another job of shorter duration The Board found on substantial evidence that the transfer was due to his reform activities and found, contrary to the trial examiner that Peterson rather than the union was responsible Peterson has not appeared in this appeal. We grant enforcement of the Board's order directed against Peterson, including the provision that Peterson make Batalias whole for any loss resulting from the discriminatory transfer We grant enforcement also of the provisions requiring the union and Peterson, jointly and severally with the union primarily liable, to make Batalias whole for any loss caused by Peterson's failure to re-employ him later, this being primarily the responsibility of the union as was the union's attendant failure to refer him to other jobs

[5]In the case of Christensen, his failure to pay permit fees were excessive and, in any event, there was discrimination against permit men, Christensen's nonpayment of fees does not absolve the union of responsibility for his failure to find work.

On October 31, 1966, Trial Examiner George L. Powell issued his Supplemental Decision (TXD-646-66) following a five-day trial between May 2 and 6, 1966, instituted by the filing of a Backpay Specification on August 20, 1965 This decision was pending before the Board on exceptions duly filed at the time the Court remanded the said Nassau-Suffolk case to the Board. Upon motion duly made by the General Counsel, and granted by the Board, this case was reopened on October 12, 1967 and was continued until the completion of the case of *Nassau-Suffolk*.

On January 9, 1968, while testifying in the remanded *Nassau-Suffolk* case, William Wilkins made the following extemporaneous statement.[3]

THE WITNESS [Wilkins]: 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 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 Wilkins 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. Haggerty 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.

[3]Transcript pp. 1848-50. At this point of time in the trial, about two more weeks were estimated to complete the testimony in *Nassau-Suffolk* and commence the testimony in the instant case of *J. J Hagerty*

On January 30, 1968, the *Nassau-Suffolk* case reopened with all counsel of the cases of *J. J. Hagerty* present pursuant to advance notice given. 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 old (Nassau-Suffolk was 14 years 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.

The Instant J. J. Hagerty Case and Nassau-Suffolk

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 awards made in the proceedings in *J. J. Hagerty and Nassau-Suffolk* 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 Robert Christensen. The amounts of backpay found to be due each discriminatee in J. J. Hagerty and the liability therefore is as follows:

Name	Amount Payable	Payable by whom
Batalias	$ 307.06	Peterson[4] Jointly
Batalias	$ 4,503.23	and severally by Union and Peterson with the Union Primarily liable.
Batalias	$22,551.01	Union
Christensen	4,737.45	Union
Eichacker	8,757.00	Union
Nagle	4,787.00	Union

The amounts of backpay found to be due each discriminatee, with the Union primarily liable, in *Nassau-Suffolk* is as follows:

Peter Batalias	$16,123.00
Albert J. Bruder	13,266.00
John H. Dekoning	3,194.85
Thomas Eichacker	12,490.00
Walter W. Miller	9,277.20
Garrett Nagle	9,666.00
Charles Skura	13,069.00
William H, Wilkens	7,987.54
Frank Ziegelbauer (now deceased)	10,612.00
Total net backpay	$95,685.59

The following chart is prepared to consolidate the net backpay of both *J J. Hagerty* and *Nassau-Suffolk* payable by the Union as the one primarily liable.

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		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		13,06900	9.2
Wilkens	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	100.0

[4]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

The Settlement History

The first settlement offer in *Nassau-Suffolk and J. J. Hagerty* 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 Wilkens 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 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 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 opened the *J. J. Hagerty* case and closed the record in both it and *Nassau-Suffolk* 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.[5] 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 of 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 this 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

[5] "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 and 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."

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 in a 3-month period. The instant 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 discriminatee in both cases was $141,021.28. The settlement sum agreed upon by the Charging Parties and the Union was $95,000, or approximately 68 percent 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 the 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 (C.A. 6).

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 the 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 the Respondent Union violates the Courts' decrees, civil contempt would then 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.[6]

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 and,

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;

3. That no action be taken by Respondent Union or the Charging Parties pursuant to this Recommended Order

[6] 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.

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 Region 29 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 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; and

4. Respondent Peterson be ordered to pay Batalias $307.06 compliance therewith to be made by sending the money by check to the Regional Director, Region 29, Brooklyn, New York