National Electrical Contractors Association (Hudson-Bergen Division of the New Jersey Chapter of NECA) *and* Martin Bleier and James Masterson and Local Union No. 164, International Brotherhood of Electrical Workers, AFL–CIO, Party to the Contract

Local Union No. 164, International Brotherhood of Electrical Workers, AFL–CIO *and* Martin Bleier and James Masterson and National Electrical Contractors Association (Hudson-Bergen Division of the New Jersey Chapter of NECA), Party to the Contract. Cases 22–CA–3803, 22–CA–3918, 22–CB–1502, and 22–CB–1565

April 29, 1971

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND BROWN

On February 10, 1971, Trial Examiner Melvin J. Welles issued his Decision in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision with a supporting brief, and the Respondent Local Union No. 164, International Brotherhood of Electrical Workers, AFL–CIO, filed cross-exceptions and a brief in support thereof and in opposition to the General Counsel's exceptions.

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 proceeding to a three-member panel.

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 herby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and cross-exceptions, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Trial Examiner: This case was heard at Newark, New Jersey, on October 26, and December 21 and 22, 1970, based on charges filed by two individuals, Martin Bleier and James Masterson, on May 20, 1969, and a complaint issued September 25, 1970. The hearing began on October 26 before Trial Examiner Robert Cohn. At that time Respondent Union, joined by Respondent Company, moved to dismiss the complaint on the ground that the alleged violations of the Act occurred more than 6 months preceding the filing of the charges herein, and were accordingly barred by Section 10(b) of the Act. No evidence was taken on that day; the parties arguing orally before Trial Examiner Cohn on the motion which had been filed. Trial Examiner Cohn postponed the hearing in order to study the allegations of the complaint and rule on the motion. On November 25, 1970, Trial Examiner Cohn denied the motion on the ground that the issues should be resolved on the basis of record testimony. The case was then resumed before me on the aforesaid dates. The complaint alleges that Respondent Company violated Section 8(a)(1) and (3) of the Act and Respondent Union violated Section 8(b)(1)(A) and (2) of the Act. Both Respondents filed answers denying any violations of the Act and raising the affirmative defense to the 10(b) statute of limitations. The General Counsel, the Association, and the Union filed briefs with me.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

National Electrical Contractors Association (Hudson-Bergen Division of the New Jersey Chapter of NECA) is an association of employers whose members are engaged in the building and construction industry performing electrical construction work both in and outside the State of New Jersey. The Association, pursuant to delegation from its members, conducts collective-bargaining negotiations on their behalf and enters into a single collective-bargaining agreement with the Union. During the preceding 12 months employer-members of Respondent Association have both received and purchased goods from points outside the State of New Jersey valued in excess of $50,000. On these admitted facts, I find that Respondent Association is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNION INVOLVED

Local Union No. 164, International Brotherhood of Electrical Workers, AFL–CIO, is, as it admits, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES ALLEGED

The Issues and the General Counsel's Theory

Respondent Association and Respondent Union have been in contractual relationship for many years. The 1961 contract between the two contained a referral procedure which made the Union the exclusive source of referrals of applicants for employment, and contained a system of priority for such referrals. At that time the priority order was in four groups. The first provided that all applicants with 5 or more years' experience in the trade, who were residents of the geographical area, who had passed a journeymen's examination given by any duly constituted local union of the IBEW, and who had been employed for a period of at least 1 year during the

preceding 4 years under the collective-bargaining agreement between the parties, were to receive preference over all other groups. The second preference group contained all applicants with 5 or more years' experience in the trade who had passed the journeymen's examination given by any duly constituted local of the IBEW.[1]

In 1963 the parties amended the referral procedures of this contract by adding a new Group 1, which contained the same requirements as had Group 1 of the 1961 contract except that the journeymen's examination had to be given by Local 164, the Respondent Local here, in order to qualify an applicant for the new Group 1. The old Group 1 became Group 2 after this amendment, and each other group went down one level in priority thereafter. This amended priority grouping was carried over into the 1964 contract between the parties and has been maintained in subsequent contracts between Respondent Association and Respondent Union.

The General Counsel concedes the validity on its face of this order of preference as it has existed since 1963. The General Counsel contends, however, that the adoption of this new Group 1 without taking into consideration the competency of those men who had been working as journeymen electricians for a long period of time, such as the Charging Parties, was unfair and arbitrary, and therefore in violation of the Union's statutory duty fairly to represent all employees, under the principle of *Miranda Fuel Co.,* 140 NLRB 181, enforcement denied 326 F.2d 172 (C.A. 2). The General Counsel does not contend that the change was designed to discriminate against the Charging Parties or any other applicants for employment on the ground that they were not members of Local 164, or indeed on any other basis peculiar to them as individuals or as a group. Essentially, the General Counsel's claim is that although the new priority system was lawful on its face, and could even be lawful as to people who used the union hiring hall thereafter, and people who may have used the hall only for a short time, the Union and the Company should have had a "grandfather clause," keeping the Charging Parties or anyone similarly situated in Group 1, even though they did not meet the qualification required therefor of passing an examination administered by Local 164. As to Respondent Association, the General Counsel's theory of a violation is perhaps best expressed by quoting from its brief to me. "It is submitted that NECA, by being party to an agreement which, by its arbitrary and invidious application to the Charging Parties, under the circumstances of this case, accords unlawful preference in referrals, violated Section 8(a)(1) and (3) of the Act."

As indicated above, Respondent's Association and Union both moved to dismiss the complaint on the ground that the charge was filed more than 6 months after the amendment to the contract in 1963. In view of my disposition of the substantive question in this case, I find it unnecessary to decide the 10(b) issue. Accordingly, I make no resolution of the conflict in the testimony between the Charging Parties and witnesses for the Respondents with respect to whether or not either of the Charging Parties knew or should have known of the change long before 6 months prior to May 20, 1969, when the original charges in this case were filed.

Concluding Findings

In support of his theory of the case, the General Counsel at the hearing adduced evidence from the Charging Parties to show that they had worked for relatively long periods of time under the jurisdiction of Local 164, having been referred to jobs all during the period prior to the 1963 amendment as Group 1 applicants without any question. Thus, the General Counsel's affirmative case, as indicated above, rests solely on the theory that the Union acted unfairly in not continuing the Group 1 priority to the Charging Parties when they had already demonstrated their qualifications for the job by being referred to jobs by Local 164 in the period prior to the change.

In his brief to me, the General Counsel contends that Local 164's reasons, adduced at the hearing through its witnesses, for adding the new Group 1 in 1963 were either unsupported by competent testimony or were themselves arbitrary and unfair, and, therefore, that the General Counsel's *prima facie* case is bolstered by the failure of Local 164 adequately either to explain the charge or to advance cogent reasons for the change.

For the reasons set forth below, I am constrained to find that the General Counsel has not made out a *prima facie* case. I do not, therefore, find it necessary to resolve the conflicts in the testimony concerning the competence of Bleier and Masterson, the Charging Parties, nor do I find it necessary to decide whether or not they actually passed journeyman examinations at other IBEW locals, whether or not they were actually in Group 1 prior to the 1963 change, and whether or not Respondent's asserted reasons for the change are borne out by the facts. My conclusion is based on the assumption, although not the finding, that Charging Party Bleier has been employed as a journeyman electrician for some 29 years and has been Local 164's hiring hall for approximately 25 years, and that Charging Party Masterson has worked as a journeyman electrician for some 12 years, and has been using Local 164's hiring hall for approximately 9 years.

In my opinion, the General Counsel's theory of this case is self-refuting. It is conceded that the new groupings 1 through 5 are lawful on their face.[2] It is further conceded that they were not adopted with any intent to discriminate on the basis of union membership or any attribute thereof of any persons using the Union's hiring hall. It is similarly conceded that there was nothing in the change designed to discriminate in any sense of that word against any particular individual or groups of individuals. The only basis on which the change is viewed as unfair by the General Counsel and therefore in violation of the Union's obligation fairly to represent all employees is the asserted vested right of Bleier, Masterson, and others similarly situated to retain their position in Group 1 because they had worked for a relatively long period of time out of that grouping.

The mere fact that a change in the priority system was effected cannot, in my view, serve as a basis for finding that the Union unfairly represented the Charging Parties or anyone else. To find to the contrary would require that a union be stuck forever with whatever requirements it first invoked, or obtained from an employer in an agreement on becoming the bargaining representative, for any change in the priority system necessarily is going to affect the priority of some employees *vis-a-vis* other employees who use the exclusive referral system. Accepting the General Counsel's view that the Union should preserve the prior standing of at least those applicants for employment who had been in a higher ranking group for a relatively long period of time would lead to a completely unworkable and chaotic situation. It would mean that each time a union (or employer) decided to change a priority system for whatever nondiscriminatory reason it may have in doing so, it would have to exempt from the operation of the change all people who had been in different categories

[1] The third and fourth groups' requirements need not be set forth

[2] This concession accords with the Board's holdings in *Local 367, IBEW (NECA),* 134 NLRB 132, 135, *Local Union No. 269, IBEW (NECA),* 149 NLRB 768, *Local No. 42, International Association of Heat & Frost Insulators & Asbestos Workers (Catalytic Construction Co.),* 164 NLRB 916

previously. As more and more changes were made, this would result in an almost insuperable bookkeeping problem. The effect of such a holding would also be to substitute the judgment of some other body, a trial examiner or the Board, for example, for that of the parties to the agreement as to just what is fair with respect to those applicants or employees who may be in a lower category by application of a change in the system. Interestingly, in this case, there is no evidence at all that either Bleier or Masterson failed to get referred as a result of being in Group 2, or any other group rather than Group 1, for the period from the change in the groupings to the time of the hearing in this case. Although, of course, being placed in a lower grouping for a discriminatory reason would be a violation even if by chance being in the lower grouping did not adversely affect the employment of the individual concerned, that fact does serve to emphasize that the Union was not out to "get" either Bleier or Masterson by the 1963 change. As indicated, the General Counsel does not so contend in any event. I must consider also that, as the Supreme Court said in *Ford Motor Co.* v. *Hoffman,* 345 U.S. 330, "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." The action of the Union in this case in obtaining the new priority system in 1963 does not, in my view, fall outside that "wide range of reasonableness." Indeed the conceded validity of the new system itself serves to demonstrate that the system can be adopted without the sort of saving clause or "grandfather clause" that the General Counsel in his view of what is fair would have the Board impose here.

Finally, there is no basis in this record nor does the General Counsel contend that Bleier or Masterson or any other user of the Union's referral system was precluded from taking Local 164's journeyman examination. Thus, there was nothing in the change that forever froze Bleier or Masterson into an inferior grouping from that which they had enjoyed earlier. Either could have, by taking Local 164's examination and passing it, become again a Group 1 priority man. For all these reasons, I am constrained to find that the General Counsel has not carried his burden of proof of demonstrating either by logic or by evidence that the change in the priority referral system in this case was unfair within the meaning of the Board's *Miranda* doctrine.[3]

In view of my conclusion that the Union has not breached its duty of fair representation by the 1963 change, obviously the Company has not violated the Act by agreeing to this change.[4]

CONCLUSIONS OF LAW

1. Respondent Association is an employer and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. Respondent Association and Respondent Union have not engaged in and are not engaging in violations of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2), respectively, of the Act.

RECOMMENDED ORDER

It is hereby ordered that the complaint herein be, and it hereby is, dismissed in its entirety.

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[3] *New York Typographical Union Number Six, I.T.U. (The New York Times Co.),* 144 NLRB 1555; affd. *sub nom. Cafero* v. *N.L.R.B.,* 336 F.2d 115 (C.A. 2).

[4] Even if I am wrong in concluding that the Union has not breached its duty of fair representation, I doubt whether the Company would automatically be guilty of an unfair labor practice when it entered into concededly lawful contractual agreement, and there is no evidence of unlawful administration of that agreement. However, I need not decide that question at this point.