

Laborers International Union of North America, AFL-CIO, Local No. 294 (Associated General Contractors of California, Inc.) and Donnell Williams. Cases 32-CB-4457, 32-CB-4487, and 32-CB-4560

May 26, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On September 10, 1996, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions, cross-exceptions, and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.¹

The judge found, *inter alia*, that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by dispatching three individuals out of order to jobsites, thereby violating its contract with employers and the published and posted rules governing operation of its exclusive hiring hall.² In so concluding, the judge, *inter alia*, rejected the Respondent's affirmative defense that the Board should defer to two arbitration decisions. The judge declined to defer because she found that the *Spielberg*³ "fairness" criterion had not been met. For reasons given below, we find deferral appropriate.

The consolidated complaint alleges that the Respondent dispatched three individuals to jobsites, in violation of its contract and hiring hall rules, and thereby bypassed other employee-registrants who were entitled to the dispatch. Specifically, the allegations concern the dispatch of Noah Batts and Thomas Lucas to the Valley Fence job and the dispatch of Kevin McDaniel to the Fresno Paving job.

The facts, as more fully set forth by the judge, may be briefly summarized as follows. The relevant contractual hiring hall provision generally provides that persons shall be referred in the order in which they are registered on the out-of-work list. There are certain exceptions under which an employer may request that a specified individual be referred.

Regarding the Valley Fence dispatch, on September 6, 1995, David Cash, a part owner of Valley Fence, a sig-

natory to the contract with the Union, called Union Representative Cook and asked him to dispatch two experienced link fence builders. On the following day, Batts and Lucas reported from the hiring hall. They did not have referral slips with them. Later that day, Union Representative Cook called Cash and stated that he needed to request the dispatched individuals by name. Cash replied that he had no names. Cook then faxed Cash two dispatch slips. In return, Cash added a handwritten notation to his letter of September 6, 1995, stating, "P.S. Artis Cook informs me that Noah Batts and Thomas Lucas have substantial experience in chain link fence construction. Based on this information I am requesting them at Central High School." Cash faxed this letter to Cook on September 7.

In regard to Fresno Paving, William Anderson, the owner of Fresno Paving, a signatory to the contract with the Union, called the hiring hall on July 20, 1995, and requested that a raker be referred to the job on the following day. According to Anderson, he did not specify any particular employee by name. Kevin McDaniel reported the following day with a dispatch slip from the Union. On July 24, 1995, Union Representative Cook called Anderson and asked him to send a written request for McDaniel for the raker position. Anderson complied, dating his letter July 20, 1995, the date of his request for a raker. However, he actually sent the letter on July 24. According to Anderson, Cook did not request him to date the letter as he did.

The General Counsel alleges that other employees should have been dispatched to the Valley Fence and Fresno Paving jobs, and that by bypassing them, the Respondent violated Section 8(b)(1)(A) and (2). The judge found these violations.

In urging that the complaint allegations regarding the dispatches be deferred, the Respondent introduced two arbitration awards.⁴ In regard to referrals to the Valley Fence job, employee-grievants Manual Molina and Roger Stephenson filed grievances against Respondent Union. They alleged that the Union, by dispatching Batts and Lucas, had improperly bypassed them for referral. At the arbitration proceeding, the employee-grievants were represented by independent counsel. The arbitrator ruled that Molina and Stephenson were improperly denied referral to the Valley Fence job to which Batts and Lucas were referred. The arbitrator found that the employee-grievants had lower numbers on the out-of-work list than Batts and Lucas. Therefore, the arbitrator sustained the grievance. As a remedy, the arbitrator awarded the grievants the pay that Batts and Lucas received for their days of work. Since both Batts and Lucas worked only 1 day at Valley Fence before being laid off, the arbitrator

¹ We modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). In addition, in view of the violations that we find in this case, we conclude that a narrow cease-and-desist order, rather than the broad order recommended by the judge, is appropriate, and we modify the Order accordingly.

² The judge also found violations regarding certain conduct involving a fourth individual (Charging Party Williams). There is no arbitral award as to these matters, and we affirm the judge's findings.

³ 112 NLRB 1080 (1955).

⁴ The awards were pursuant to the contract between the Respondent and the Employers. An employee can arbitrate disputes with the union if the dispute grows out of a claim grounded in the contract.

awarded the employee-grievants 1-day's wages and benefits at the same rate paid to Batts and Lucas.

Regarding referral to the Fresno Paving job, employee-grievant Everardo Hernandez filed a grievance against Respondent Union. Hernandez alleged that he had been improperly bypassed for referral. At the arbitration hearing, he was represented by independent counsel. The arbitrator denied Hernandez' grievance. The arbitrator found that grievant Hernandez was not a qualified raker and therefore was not entitled to any relief with respect to the dispatch of McDaniel to the Fresno Paving job. The arbitrator noted that the practice of the Union was to dispatch individual registrants in order of the date registered, as long as the employees were registered on the out-of-work list and had qualified themselves for the position. The arbitrator found that grievant Hernandez was not qualified on his registration as a raker. Thus, the arbitrator concluded that the union's dispatcher had properly proceeded to the first qualified raker on the out-of-work list (i.e., McDaniel).

Analysis

At issue is whether the Board should defer to the two arbitration awards. To resolve this issue, we look to the standards for deferral set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). Under *Spielberg/Olin*, (1) the arbitration proceedings must have been fair and regular; (2) all parties must have agreed to be bound; (3) the arbitral decision must not be clearly repugnant to the Act; (4) the contractual issue before the arbitrator must be factually parallel to the unfair labor practice issue; and (5) the arbitrator must have been presented generally with the facts relevant to resolve any unfair labor practice.⁵ Under *Olin*, the burden of proof is on the party or parties who seek nondeferral to the arbitration award.⁶

Here, the judge concluded that deferral to arbitration was not appropriate. She focused on the "fairness" criterion set forth in *Spielberg*. Finding a lack of fairness, she declined to defer to the arbitration decisions. She found it unnecessary to decide whether there was any other basis for declining to defer to the arbitration awards.

In assessing fairness, the judge noted that where there is hostility or an adverse interest between a union and the employee/grievant, the Board will not defer. In regard to hostility or adverse interest, the judge relied on cases where the union represents the grievant before the arbitrator, and yet the union's interests are adverse to the grievant.⁷ However, in the instant case, the grievants

pursued grievances *against* the Union and were represented by independent counsel. Thus, while the union's interests were adverse to the grievants, the Union did not represent the grievants. There is no showing that independent counsel failed to fully support and advocate the grievants' positions and hiring hall rights.

The judge further suggested that the arbitrations were not fair because the issues to be resolved were dependent on the cooperation of the Union and access to the hiring hall records. The judge thus implied that the arbitrator rendered his decisions without the necessary records. Based on our review of the arbitration awards, we find it clear that the arbitrator had all the relevant records to permit a fair resolution of the issues. There is no evidence that any records were withheld. We note particularly that the employee-grievants' independent counsel (and ultimately the arbitrator) had access to the out-of-work list, which access gave counsel an opportunity to demonstrate that registrants were dispatched out of order. In these circumstances, we see no basis for finding that a lack of relevant evidence prevented a fair resolution of the issues.

Finally, the judge reasoned that fairness was lacking because Charging Party Williams was not a party to the arbitration proceedings. However, Williams' rights and interests were not shown to be at stake in the arbitration proceedings. There is no allegation before us that Williams was improperly bypassed for referral. Thus, Williams was not a necessary party for purposes of the *Spielberg* fairness criterion.

Based on the above, the proceedings before the arbitrator appear to have been fair and regular. We conclude that the *Spielberg* fairness criterion has been met. Accordingly, we reverse the judge on this issue.

Turning to the other *Spielberg/Olin* factors,⁸ we find as follows. All parties to the arbitrations agreed to be bound by those arbitrations. Again, as Charging Party Williams was not a party to either arbitration, there is no issue regarding whether he agreed to be bound. The parties to the arbitrations—the Respondent Union and the employee-grievants—agreed to be bound and the criterion is satisfied.

The contractual issue before the arbitrator was factually parallel to the unfair labor practice issue. The arbitrator, in both cases before him, noted that the issue involved the "application and interpretation of a collective-bargaining agreement which regulates the hiring hall practices of the Union and sets forth the rights of grievants to use that hiring hall." The arbitrator considered and resolved the issue of whether the Union—in making dispatches to Fresno Paving and Valley Fence—ignored the hiring hall rules and improperly bypassed other employee-registrants who were more entitled to the dispatch. The General Counsel's com-

⁵ As set forth in *Olin*, the final two factors are reviewed to ensure that the arbitrator has adequately reviewed the unfair labor practice issue.

⁶ In the instant case, those parties are the General Counsel and the Charging Party.

⁷ See, e.g., *Ross Togs, Inc.*, 253 NLRB 767 (1980). There, the union represented discharged employees in their grievances protesting their discharge by the employer. Because the union's interests were adverse

to those of the employee-grievants, the Board refused to defer to the arbitration awards.

⁸ We shall save for last our consideration of the repugnancy issue.

plaint alleged that the Respondent Union, in violation of Section 8(b)(1)(A) and (2), dispatched certain individuals to jobsites “in violation of the Agreement and Rules, and thereby bypassed other employee-registrants who were entitled to such dispatch.” The General Counsel’s unfair labor practice theory was based on an allegation that the Union ignored the hiring hall rules in making the Valley Fence and Fresno Paving dispatches. The critical point of both the contractual grievance and the unfair labor practice was that the Respondent Union violated the hiring hall rules in making specific dispatches to Valley Fence and Fresno Paving. Thus, the arbitrator considered substantially the same issue as that raised by the General Counsel’s complaint.

The arbitrator also had before him and reviewed the same facts that would be relevant to the unfair labor practice. As reflected in his arbitral awards, the arbitrator reviewed the contract, the hiring hall rules, and the out-of-work list. Significantly, employer officials from Fresno Paving and Valley Fence testified at the arbitration proceedings regarding the circumstances of the dispatches. Thus, witnesses who were not a party to the arbitrations provided a full factual account of the dispatches. Other critical facts—all before the arbitrator—provided a basis for determining who was dispatched from the hiring hall, where those dispatched individuals were on the out-of-work list, what the circumstances of the dispatches were, and whether the grievants were lower on the out-of-work list and nonetheless bypassed for referral. The arbitrator’s awards demonstrate—and the General Counsel has not established otherwise—that the arbitrator had full access to these relevant facts and that he fully considered the same facts as those that would be relevant to resolving the unfair labor practice.

Finally, there is the difficult issue of repugnancy. The “clearly repugnant” standard does not require that the arbitrator’s award be totally consistent with Board precedent. Rather, the Board will refuse to defer if an arbitrator’s decision is “palpably wrong” and “not susceptible to an interpretation consistent with the Act.” See *Olin*, supra.

As noted, the arbitrator denied the grievance in the Fresno Paving referral. The arbitrator concluded that it was:

the practice of the [Union] to dispatch individuals in order of their position on the out-of-work list based on their qualifications. Since Mr. Hernandez was not qualified as a raker, it was appropriate for [the Union] to skip over Mr. Hernandez and proceed to the first person on the out-of-work list who was qualified.

In resolving the grievance, the arbitrator specifically found that the Union in fact dispatched the first qualified raker. Thus, the arbitrator concluded that the Union ultimately complied with its hiring hall rules and no registrant entitled to a dispatch was bypassed. In these circumstances, the

award was not clearly repugnant to the purposes and policies of the Act.⁹

The Valley Fence arbitration award is more troublesome. As noted, the arbitrator sustained this grievance. He found that the Union, in dispatching to this job, ignored the hiring hall rules and improperly bypassed the grievants who were lower on the out-of-work list and therefore entitled to the dispatches. The arbitrator’s finding of a contractual violation was substantially the same as the 8(b)(1)(A) and (2) violation sought by the General Counsel. Thus, the arbitral award’s finding of a violation of hiring hall rules is certainly not clearly repugnant to the purposes and policies of the Act.¹⁰

However, there is a substantial issue regarding whether the arbitrator’s remedy is repugnant to the Act. Deferral may be appropriate even where an arbitrator has not imposed the same remedy that the Board would impose. Here, the question is whether the Valley Fence award’s remedy is repugnant because it may not extend to those registrants most entitled to a remedy. That is, the arbitrator noted—as do we—that the two grievants in the Valley Fence arbitration, while lower on the out-of-work list than those dispatched, were not the lowest on the list. Thus, there may have been other registrants on the out-of-work list who were more entitled to the dispatch than the grievants.

In *American Commercial Lines*, 291 NLRB 1066, 1072–1076, and fn. 44 (1988), the Board found deferral to arbitration inappropriate. In so doing, the Board reasoned that the remedial portion of an arbitration board’s award—which dealt with alleged employer violations of hiring hall requirements—was “arbitrarily limited.” The arbitration board had sought to remedy only alleged hiring hall violations occurring during the term of the parties’ contract. The arbitration board viewed its authority as limited by the contract’s expiration date and it did not address post-contract violations. However, the Board had before it the issue of postcontract statutory violations and the Board was called on to remedy those violations. Given the “arbitrary” nature of the arbitration board’s remedy, the Board found it inappropriate to defer to the arbitration award. Nonetheless, the Board added that it would not automati-

⁹ In ruling on the merits of the General Counsel’s allegation regarding the Fresno Paving dispatch, the judge found a violation of Sec. 8(b)(1)(A) and (2). Essentially, the judge relied on Union Representative Cook’s soliciting a request for a name dispatch from Fresno Paving. The judge found that Cook’s action was contrary to the hiring hall rules. However, in our view, the arbitrator could reasonably conclude from the same facts that the Union complied with the hiring hall rules. That is, regardless of Cook’s solicitation, the Union ultimately dispatched the proper individual pursuant to the hiring hall rules. As the Board observed in *Andersen Sand & Gravel Co.*, 277 NLRB 1204 fn. 6 (1985):

Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining.

¹⁰ The judge’s finding of a statutory violation was parallel to the arbitrator’s finding of a contractual violation.

cally refuse to defer to arbitration awards that contain incomplete remedies or remedies otherwise not fully consistent with Board precedent.¹¹

On the other hand, in *Specialized Distribution Management*, 318 NLRB 158 (1995), the Board deferred to an arbitrator's award involving the discharge of employees. The arbitrator, finding a contractual violation, awarded reinstatement but no backpay. In excepting, the General Counsel argued, inter alia, that the arbitrator's failure to grant backpay rendered the decision repugnant. The Board affirmed a judge's conclusion that the arbitrator's remedy did not make deferral inappropriate.¹²

Having carefully considered this matter, we cannot conclude that the arbitrator's remedy in the Valley Fence arbitration was clearly repugnant to the Act. First, registrants Molina and Stephenson, the two grievants in the Valley Fence case, were part of the same class of persons as those for whom the General Counsel would seek a remedy. That is, they were hiring hall registrants who were lower on the out-of-work list and more entitled to a dispatch than the individuals dispatched. Second, on the record before us, we simply do not know if any other employee-registrant lost work because of the union's Valley Fence dispatches. Although there were registrants lower on the out-of-work list than the grievants, we do not know if any lower-down registrant was in fact qualified¹³ and available for work at Valley Fence and would have accepted a dispatch. Thus, on this record, it is speculative whether any other registrant is more entitled to a remedy than the grievants. Unlike in *American Commercial Lines*, supra, we cannot conclude here that the arbitrator's remedy was "arbitrarily limited." In *American Commercial Lines*, the General Counsel established before the Board that there were in fact statutory violations not remedied by the arbitration board's award. Here, the General Counsel has failed to demonstrate any statutory violations that have not been remedied. The General Counsel has not shown that any other hiring hall registrant, who was lower on the hiring hall out-of-work list than grievants Molina and Stephenson, was qualified

¹¹ For a similar result, see also *Cone Mills Corp.*, 298 NLRB 661 (1990). (The Board found repugnancy and declined to defer to arbitration. The Board noted, inter alia, that the arbitrator's decision was "inherently inconsistent" and failed to award backpay to a discharged employee.)

¹² For a similar result, see *Crown Zellerbach Corp.*, 215 NLRB 385 (1974). (The Board deferred to arbitration and rejected the General Counsel's argument that an arbitral award was repugnant because its backpay remedy did not "measure up" to Board standards.)

See also *Malrite of Wisconsin*, 198 NLRB 241 (1972), enfd. in relevant part 494 F. 2d 1136 (D.C. Cir., 1974). There, the Board deferred to arbitration. An arbitration panel sustained a union grievance filed against an employer. However, the employer failed to comply with that award. The Board rejected the General Counsel's argument that deferral was inappropriate because of the employer's noncompliance with the award. Here, there is no allegation that the Respondent has failed to comply fully with the arbitrator's Valley Fence award.

¹³ As previously noted, Valley Fence requested experienced link fence builders. In sustaining the Valley Fence grievance, the arbitrator found that grievants Stephenson and Molina were experienced fence builders.

and available to accept the Valley Fence dispatch. As the party seeking nondeferral has the burden of showing repugnancy, we conclude that the burden has not been met. Accordingly, we shall defer to the arbitrator's awards.¹⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Laborers International Union of North America, AFL-CIO, Local No. 294, Fresno, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing to fairly represent employees and job referral applicants utilizing the hiring hall by implying that it would not dispatch Donnell Williams from the Visalia subhiring hall in retaliation for a statement he made regarding operation of that subhiring hall.

(b) Failing to fairly represent employees and job referral applicants utilizing the hiring hall by refusing to permit Williams to examine the Fresno hiring hall dispatch book for the preceding 3 months.

(c) Failing to fairly represent employees and job referral applicants utilizing the hiring hall by refusing to permit Williams to examine and take notes from the business agent reports.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Respond timely, fairly, and completely to requests for relevant information from represented employees or referral applicants concerning the referral process and requests to take notes from referral documents. Responses to such requests shall:

(i) Indicate whether the information sought exists or not and, if not, what information and or records do exist.

(ii) Provide any additional information or explanation necessary to *not* mislead or unreasonably confuse the requesting individual regarding the information requested, and

(iii) Provide information concerning copies of and/or access to all requested information which is relevant to employee and or referral applicant management of their affairs respecting their current or potential employment in a represented unit.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying job registration and referral records and any other documents or records showing job referrals and

¹⁴ Member Hurtgen has substantial doubts concerning the procedural issues of: (1) whether the General Counsel properly raised the issue of "repugnancy" before the judge, and (2) if it was so raised, whether it was properly raised by exceptions to the Board. However, on the merits, he agrees with the disposition of the "repugnancy" issue, i.e., he agrees that the General Counsel has not established "repugnancy." Accordingly, he does not pass on the procedural issues.

work assignments, and the basis for making such referrals and assignments of members, employees, job applicants, and registrants, which are necessary to compute and analyze the amount of backpay and benefits due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its business offices, hiring halls, and meeting places in Fresno and Visalia, California, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a trial before an administrative law judge at which we appeared, argued, and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and ordered us to post and abide by this notice.

Accordingly, we give our members and job referral applicants the following assurances:

The National Labor Relations Act provides that a labor organization which operates a hiring hall or referral process which is an exclusive source of employment referrals to positions with employers and which represents employees of employers must fairly represent such employees by referring them for jobs in a manner consistent with the contract and with the hiring hall rules without acting arbitrarily, discriminatorily, or in bad faith and by providing them with: (1) requested information concerning the operation of the hiring hall, its rules, procedures, and such other information as is necessary to determine the requesting individual's position or priority of dispatch within the referral system and to further determine whether the referral process is being operated properly and (2) an opportunity to take notes from dispatch re-

ords when an employee reasonably believes that dispatches have been improper.

WE WILL NOT fail to fairly represent employees and job referral applicants utilizing the hiring hall by implying that we would not dispatch Donnell Williams or any other employees from the Visalia subhiring hall in retaliation for a statement he made regarding operation of that subhiring hall.

WE WILL NOT fail to fairly represent employees and job referral applicants utilizing the hiring hall by refusing to permit Donnell Williams to examine the Fresno hiring hall dispatch book for the preceding 3 months.

WE WILL NOT fail to fairly represent employees and job referral applicants utilizing the hiring hall by refusing to permit Williams to examine and take notes from the business agent reports.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL fairly, timely, and completely respond to requests for information from users of our referral process concerning the rules governing and the general operation of our referral process, explaining as necessary what records exist and do not exist, so as to allow users to understand the process, determine where their position in the dispatching process is and determine how the process has operated and WE WILL permit users of our referral process to take notes from these records.

LABORERS INTERNATIONAL UNION OF NORTH AMERICAN, AFL-CIO LOCAL NO. 294

Barbara D. Davison, Esq., for the General Counsel.
Paul D. Supton, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Fresno, California, on July 9, 1996. The charge in Case 32-CB-4457 was filed by Donnell Williams, an individual, against Laborers International Union of North America, AFL-CIO, Laborers Local No. 294 (the Union or the Respondent) on April 17, 1995,¹ and complaint issued on May 24. The charge in Case 32-CB-4487 was filed by Williams against the Union on July 5, and the complaint issued on August 7, together with an order consolidating it with Case 32-CB-4457. A bilateral settlement agreement in Cases 32-CB-4457 and 32-CB-4487 was approved on October 17. The charge in Case 32-CB-4560 was filed by Williams against the Union on February 9, 1996. Approval of the bilateral settlement agreement was rescinded on March 21, 1996, and an order consolidating Cases 32-CB-4457, 32-CB-4487 and 32-CB-4560 and a reissued, consolidated complaint issued that date.² Set forth in the consolidated complaint are various ~~allegations that the Union has violated~~ Section 8(b)(1)(A) and

¹ All dates are in 1995 unless otherwise indicated.

² Cases 32-CB-4126 and 32-CB-4228 were consolidated with Cases 32-CB-4457, 32-CB-4487, and 32-CB-4560 by order of March 21, 1996.

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

gations that the Union has violated Section 8(b)(1)(A) and (2) of the Act in the operation of its exclusive hiring hall by failing to permit Williams to examine dispatch books, implying that Williams would not be dispatched in retaliation for his statement regarding operation of a hiring hall, bypassing registrants, and preparing a false dispatch request.

On the entire record,³ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the General Counsel and counsel for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Associated General Contractors of California, Inc. (the Association) has been an organization composed of various employers engaged as contractors in the construction industry, one purpose of which is to represent its constituent employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Northern California District Council of Laborers. During the 12 months preceding March 21, 1996, the constituent employer-members of the Association collectively purchased and received goods or services valued in excess of \$50,000 directly from suppliers located outside the State of California. The Respondent admits and I find that the Association and each of its constituent employer-members are an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Northern California District Council of Laborers (the District Council) has been an organization composed of various labor organizations, one purpose of which is to represent its constituent member-labor organizations in negotiating and administering collective-bargaining agreements with various employers engaged in the construction industry in California, including the Association. At all times the Union has been a constituent member-labor organization of the District Council. The District Council and the Union each have been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

Background

The District Council has been the designated exclusive collective-bargaining representative of an appropriate unit of the

By order of June 20, 1996, Cases 32-CB-4126 and 32-CB-4228 were severed and postponed indefinitely.

³The Union did not present any testimonial evidence in this case but alleges certain affirmative defenses including deferral to arbitration, laches, failure to exhaust contractual and administrative remedies, and contractual and statutory time bars. The Union objected to proceeding with its defense because it did not want an individual who remained in the hearing room to have the benefit of hearing its testimony. I refused to exclude this individual from the hearing room. Although the witnesses were sequestered, this unidentified individual was not among those to be called as a witness. Accordingly, I allowed this individual to remain in the hearing room. Although an administrative law judge has the discretion to close a hearing to the public pursuant to Rule 102.34, the Union did not specifically request that all members of the public be excluded. Rather, the Union wanted one individual excluded. In any event, because the union's concern about this individual's presence was based on its objection that she hear their evidence and because the transcript of this proceeding would have been available a short time after the hearing, I find that no cause existed, assuming this individual should have been deprived of pretrial discovery in other litigation, for excluding her from the actual hearing.

employees of the constituent employer-members of the Association. The District Council has been recognized as such representative by the Association and its constituent employer-members and has accepted such recognition. This recognition has been embodied in a collective-bargaining agreement effective by its terms for the period June 16, 1992, to June 30, 1997. The District Council, by virtue of Sections 9(a) and 8(f) of the Act, has been and is now the exclusive collective-bargaining representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. Artis Cook occupied the position of Respondent's business manager until approximately June 4, 1996, and was an agent of the Respondent within the meaning of Section 2(11) of the Act.

The contract contains a provision requiring that the District Council, through its constituent member-labor organizations, be the sole and exclusive source of dispatches of employees to unit employment and calls for the operation of exclusive hiring halls by the District Council. Included among the hiring halls is one located in Fresno, California, and a subhiring hall located in Visalia, California. These halls are operated by the Respondent as an agent of the District Council. The Respondent has published and posted written rules governing the operation of the hiring halls including rules setting forth registration, priority, and referral procedures.

Section 3(B)(6) of the contract provides,

The appropriate hiring hall of the Local Union of the Union having work and area jurisdiction will furnish in accordance with the request of the individual employer such qualified and competent workers of the classifications needed from among those entered on said lists to the individual employer by use of a written referral in the following order of preference:

Persons shall be referred in the order in which they are registered if their registration indicates that they are qualified for and desirous of taking such referral, unless they are not available for referral, subject to the following conditions:

First, (a) notwithstanding any other provision of this Agreement, the individual employer may request a person by name, out of order, and such person must be dispatched if such person is registered on the out-of-work list and if such person was employed previously by such individual employer or member of a joint venture within 3 years prior to such request within the territorial jurisdiction of the appropriate Local Union of the Union.

(b) In addition to requests permitted by the provision of subsection 6(a), the individual employer may request any person registered on the out-of-work list out of order for any reasons; provided, however, that at no time shall any job contain more than 50 percent of persons requested under subsection 6(b). It will not be a violation of this agreement for an owner (one person) to perform laborers' work when needed, provided that said owner is performing work with at least (one) additional laborer on the jobsite.

Statutory Framework

The consolidated complaint alleges violations of Section 8(b)(1)(A) and (2) of the Act. Those provisions are:

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]; *Provided*, that this paragraph shall not impair the right

of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Section 8(a)(3) provides in relevant part:

It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

In *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963), the Board held that the doctrine of fair representation applied to unions when acting in a statutory representative capacity. Accordingly, it is an unfair labor practice in violation of Section 8(b)(1)(A) and (2) for a union to take action against an employee for irrelevant, invidious, or unfair reasons. 140 NLRB at 185. Moreover, in the context of operation of an exclusive hiring hall, the union's additional powers give rise to additional responsibility. *Breninger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 89 (1989). As the Board stated in *Operating Engineers Local 406 (Ford, Bacon & Davis Const. Corp.)*, 262 NLRB 50, 51 (1982), enf. 701 F.2d 504 (5th Cir. 1983):

Even assuming the absence of specific discriminatory intent, a violation must be found in the circumstances of this case. The Board has held that any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function.

(footnote omitted).

With these statutory and legal precepts in mind, each of the alleged violations will be discussed seriatim.

Alleged Implication that Respondent would not Dispatch Williams in Retaliation for a Statement by Williams about Operation of the Hiring Hall

The consolidated complaint alleges that on or about March 6, 1995, at a monthly meeting of members conducted at the Fresno hiring hall, Cook, in retaliation for a statement by Williams regarding operation of the Visalia subhiring hall, implied that Williams would never be dispatched from the hall thus, violating Section 8(b)(1)(A) of the Act.

Donnell Williams testified that he attended a regular membership meeting of the Union on the first Monday in March. Another member attending the meeting, Joe Velasquez, suggested to President Angel Padilla that the list of people who had been dispatched be posted at the Visalia hall as well as the Fresno hall. Williams told Padilla that Larry Guinn, the secretary/treasurer, said he had no problem with posting the list in Visalia but he would not commit to doing so. Cook interjected,

“Donnell, you don't have to worry about it, you'll never get a job off that out-of-work list.” Williams testified that Cook then mumbled, “F—k you, Donnell,” and walked away. Williams asked Cook to repeat what he had said but Cook declined. Another member present at that meeting, Olan Ray Reese, recalled that Cook stated to Williams that he would never work in this hall again. I credit the un rebutted testimony of Williams and Reese on this point.

In March, at the time of this conversation, Williams was not registered at the Visalia hall. The employees were required to register at either Fresno or Visalia. They could not register at both places. Williams was registered in Fresno, and since March he had not tried to switch his registration. However, employees could switch their registrations at any time. Williams had been registered from Fresno for 15 years. For a brief period in the 1980s, Williams had been registered from Visalia. Both Williams and Reese testified that the exchange between Williams and Cook was heated. I find that Cook's statement cannot be construed, under those circumstances, to simply state the obvious fact that Williams would not be referred from Visalia because he was not registered there. Rather, I find that the import of the statement was an implication that Cook was not going to dispatch Williams from Visalia if Cook decided to switch his registration there.

Based on the above-credited testimony, I find, as alleged, that the Union violated Section 8(b)(1)(A) by implying that it would not dispatch Williams from the Visalia subhiring hall in retaliation for a statement he made regarding operation of the Visalia subhiring hall. As noted above, the duty of fair representation in connection with operation of an exclusive hiring hall requires that no arbitrary actions adversely affect dispatch. Moreover, a union's refusal to dispatch an employee because he questions the dispatch policy is violative of the Act. *Operating Engineers Local 406 (Ford, Bacon & Davis Const. Corp.)*, 262 NLRB 50 (1982). In accord, I find that Cook's statement to Williams implying an intent to dispatch arbitrarily, is violative of Section 8(b)(1)(A).

Alleged Refusal to Permit Examination of Dispatch Books in June 1995

The consolidated complaint alleges that on or about June 26 and 27, 1995, Williams orally requested permission to examine the dispatch book for the Fresno hiring hall. It further alleges that Respondent has refused to allow this examination in violation of Section 8(b)(1)(A).

Williams testified that on June 26 he went to the union hall between 7 and 9 a.m. Manny Molina, a member of the executive board, was also present about 15 feet away from the conversation which ensued between Williams and Cook. Williams asked Cook to let him see the dispatches for the last 3 months. Cook replied, “If you want to see any dispatching records, you can see the names posted on the bulletin board. That's all I'm going to let you see.” Williams responded that he wanted to see the regular dispatching records. Cook walked away from the service window of the office to his private office. Molina substantially corroborated Williams' testimony.

Williams testified that the dispatch record on the bulletin board, referred to by Cook, was a list of the names of people who had been dispatched to various jobs without supporting documentation. He testified that he needed to see the actual dispatch records in order to be certain that no manipulation of the system had occurred. He also stated that the dispatch records were more up to date than the list on the bulletin board.

Williams returned on June 27 between 7 and 9 a.m. Jose Aquino was present as well. When Williams approached the service window saying, "Hey Artis, I'd like to talk to you," Cook walked away into a private office. Williams asked Rachel Lone, the secretary in the office, to tell Cook that he wanted to see the dispatch records for the past 3 months. Lone went toward the private office and came back, waived her arms in the air, palms up, with some body language which caused Williams to ask, "Rachel, are you ignoring me to see the dispatching records?" Lone responded by shaking her head up and down. Aquino substantially corroborated this testimony.

Respondent objected to any actions or statements of Lone being used against it. Counsel for the General Counsel noted that Lone was not alleged as an agent of the Respondent and stated for the record that the actions of Cook constituted sufficient denial of the request for the records because Cook was well aware of the reason for Williams approaching the window and asking to speak with him. Counsel for the General Counsel also argues in brief that such conduct by a clerical employee demonstrates apparent authority to speak for the agent, relying on *Albertson's Inc.*, 307 NLRB 787 (1992). In addition, counsel argues that the fact that Cook did not personally deny access does not mitigate the alleged violation, relying on *Tyson Foods*, 311 NLRB 552, 560-561 (1993). Were it necessary to utilize Lone's actions to find a violation, I would find that it was reasonable for Williams and Aquino to conclude that Lone was conveying a negative response to the dispatch request pursuant to Cook's instructions. However, in agreement with Counsel for the General Counsel, I find that in the context of the other discussions between Williams and Cook about seeing the dispatch books, Cook's walking away to a private office constituted a refusal to allow the inspection.

A union must, on request, disclose referral system rules. *Plumbers Local 198 (Jacobs/Weise)*, 268 NLRB 1312, 1320 (1984). Moreover, a union must disclose records of hiring hall operations sufficient to determine if the system is operating fairly and, in addition, must disclose records sufficient to determine what a particular individual's place in the system is and when his referral is likely to occur. *Electrical Workers IBEW Local 575 (Coleman Electric)*, 270 NLRB 66 (1984); *Bartenders Local 165 (Nevada Resort Assn.)*, 261 NLRB 420 (1982); and *Operating Engineers Local 324 (Michigan Chapter, AGC)*, 226 NLRB 587 (1976). I find that Williams was seeking to ascertain whether he and other members had been fairly treated with respect to obtaining job referrals. By refusing to provide this information to Williams, the Union violated Section 8(b)(1)(A) of the Act.

Alleged Dispatches in Violation of the Contract and Rules, thus, Bypassing Other Employee Registrants; Alleged Request of a False Written Dispatch Request

The consolidated complaint alleges that Respondent dispatched three individuals to jobsites in violation of the contract and published and posted written rules governing operation of the hiring hall thereby bypassing other employee-registrants who were entitled to the dispatch. Specifically, the allegations concern dispatch of Batts and Lucas to the Valley Fence job and dispatch of McDaniel to the Fresno Paving job. Respondent contends that these allegations should be deferred to two arbitration decisions. Counsel for the General Counsel argues that deferral is inappropriate because the interests of the Union were adverse to the interests of the employees.

Deferral

Pursuant to *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board will defer to an arbitration award when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the Act. The *Spielberg* "fairness" criteria is at issue here. The Board has consistently refused to defer in advance of arbitration where the union representative is hostile to the grievant. See, e.g., *Amsted Industries*, 309 NLRB 860 fn. 3 (1992); and *Consolidated Edison Co.*, 286 NLRB 1031, 1038 (1987). Moreover, the Board has refused to defer to arbitration awards when the union's interests were adverse to those of the employees. *Russ Togs, Inc.*, 253 NLRB 767, 768 fn. 8 (1980); and cases cited therein; cf., *Bailey Distributors*, 278 NLRB 103 (1986).

In support of deferral, the Union introduced two arbitration awards. In one case, the arbitrator found that the two individual grievants, Molina and Stephenson, were improperly denied referral to the Valley Fence job to which Batts and Lucas were referred. Molina and Stephenson were awarded 1 day's wages and benefits. In the other case, the arbitrator found that grievant Hernandez was not a qualified raker and therefore was not entitled to any relief for the dispatch of McDaniel to the Fresno Paving job. The grievants were represented by counsel. However, the issues in the arbitration were dependent on cooperation of the Union and access to hiring hall records for their success. Finally, Williams, the charging party, was not involved in the grievance proceedings. Accordingly, I find that the *Spielberg* criteria have not been met and refuse to defer to the arbitration award.

Moreover, the arbitrator found in both proceedings that the Union had failed to follow its rules by inducing employers to name employees rather than following the listing order. Were I to defer to this finding, the Union requests that I defer to the remedy of the arbitrator as well. There has been no determination at this point regarding which individuals may have been entitled to the referrals. At the compliance stage, the General Counsel will seek to show that other applicants were denied the referrals even though available and qualified. See, e.g., *Iron Workers Local 433 (AGC of California)*, 228 NLRB 1420, 1438 (1977), enf. 600 F.2d 770 (9th Cir. 1979), cert. denied 445 U.S. 915 (1980); *Boilermakers Local 101 (Stearns-Roger Corp.)*, 206 NLRB 30 (1973). At the compliance stage, it will be determined who would have been referred and how much any such individuals are entitled for the work. If it is determined that grievants Molina and Stephenson are discriminatees, any payments to Molina and Stephenson by the Union would be relevant at that point.

My refusal to defer is based on the *Spielberg* fairness criteria. Without passing on whether the arbitral contractual issue was factually parallel to the unfair labor practice at issue here,⁴ I note that the arbitrator appeared to be deciding the personal rights of the grievants to the specific referrals at issue rather than the statutory issue of failure to refer pursuant to the contract and rules, thus, bypassing unnamed registrants. However, the arbitrator did decide that Valley Fence was "induced to name [Batts and Lucas] by the representations of Mr. Cook which is inconsistent with the intent and practice of an open hiring hall." The arbitrator also decided, utilizing a *Wright Line*⁵ analysis, that grievant Hernandez who was first on the out-of-work list at the time of the Fresno

⁴ See *Olin Corp.*, 268 NLRB 573, 574 (1984).

⁵ 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Paving referral was not a qualified raker and, thus, not qualified for the referral. The arbitrator found that the next person on the out-of-work list qualified for the referral was, in fact, the employee referred, McDaniel.

Were the *Spielberg* fairness criteria not a reason to refuse to defer, deferral would be a much more difficult issue. It is clear with regard to the Valley Fence referral that the arbitrator did not attempt to find out who was ultimately qualified for the referral. Rather, the arbitrator decided that the grievants were more qualified than the employees referred. Indeed, the arbitrator noted, "There may have been other individuals on the out-of-work list who had better claim to the work than either Stephenson or Molina, but Stephenson and Molina were the only two individuals to file a grievance protesting the Union's action." However, with regard to the Fresno Paving referral, the arbitrator's decision does determine that McDaniel was ultimately qualified for the referral. At this point in the proceedings, without knowing whether the arbitrator was provided all the information necessary to make his decision, there is no evidence regarding which individuals may have been ultimately qualified and whether there were any referents whose rights were superior to those of the grievants. Accordingly, it appears that the factual parallelism issue as to the remedy is not capable of resolution.

1. July 20 and 24

The consolidated complaint alleges that on or about July 20 Respondent dispatched Kevin McDaniel to a jobsite in violation of the contract and published and posted written rules governing operation of the hiring hall thereby bypassing other employee-registrants who were entitled to the dispatch. It is further alleged that on or about July 24 Respondent asked for a false written dispatch request regarding the July 20 dispatch. These actions are alleged as violative of Section 8(b)(1)(A) and the dispatches are alleged as violative of Section 8(b)(2) as well.

William J. Anderson Jr., owner of Fresno Paving Company, a signatory to the contract, called the hiring hall on about July 20 and requested that a raker come to a job on the following day. Anderson testified that he did not specify any particular employee by name. Kevin McDaniel reported on the following day with a dispatch slip from the Union. Anderson received a call from Artis Cook on July 24 asking that Anderson send a written request for Kevin McDaniel for the raker position. Anderson complied, dating the letter July 20, the date of his request for a raker, although he actually sent the letter on July 24. Anderson was not requested by Cook to date the letter as he did.

I find, as alleged, that Respondent dispatched McDaniel in violation of the contract and published and posted written rules governing operation of the hiring hall and thereafter requested a false written dispatch record of Anderson thus, violating Section 8(b)(1)(A) and (2).

2. September 6

The consolidated complaint alleges that on or about September 6, Respondent dispatched Noah Batts and Thomas Lucas to a jobsite in violation of the contract and published and posted written rules governing the operation of the hiring hall.

Valley Fence Company was a signatory to the contract. On September 3 or 4, David Cash, part owner of Valley Fence, spoke with Artis Cook about qualified fence installers in the Union. Cook stated that he had some qualified fence installers. Cash expressed pessimism. However, on September 6, Cash called Cook and asked him to dispatch two experienced chain link fence builders. Cook said he would do so. Cash sent a

letter confirming the conversation that same day. The letter stated, "This letter is to request two (2) laborers to work at the Central High School for Valley Fence Company. This letter is to request that the two (2) laborers have substantial experience in the construction of Commercial Industrial chain link fence." The following day Noah Batts and Thomas Lucas reported from the hiring hall. They did not have referral slips with them.

Cook called Cash later that day and said that Cash needed to request the dispatched individuals by name. Cash said he had no names and Cook faxed Cash two dispatch slips. In return, Cash added a handwritten notation to his letter of September 6 stating, "P.S. Artis Cook inform me that Noah Batts and Thomas Lucas have substantial experience in chain link fence construction. Based on this information I am requesting them at Central High School." Cash faxed this to Cook on September 7.

I find that Respondent violated Section 8(b)(1)(A) and (2) by dispatching Batts and Lucas in violation of its written hiring hall rules thereby potentially bypassing other employee registrants who were entitled to dispatch.

Alleged Refusal to Permit Examination of the Dispatch Books in March 1996

The consolidated complaint alleges that the Respondent has refused to provide the "business agent report" to Williams pursuant to his request on or about March 1, 1996. This report sets forth employee-registrant dispatch numbers after roll call. The complaint further alleges that Respondent denied Williams' request to take notes from the reports. Both actions are alleged to violate Section 8(b)(1)(A).

Williams testified that he asked Cook for the dispatch records and Cook gave him a box with several years of records from 1994 to 1996. Williams made an attempt to take notes from the documents he was examining and Cook told him he could not copy. Williams asked if this meant no notes and Cook said, "Yeah, no copying." Williams argued that he had permission from the Board to take notes and Cook replied that he was told not to allow any notes. Williams then asked for the business agent report which he understood showed what any particular member's out-of-work number is after each roll call. Cook said he didn't have any of those documents. Williams said, "Artis, I want the documents that show what a person's roll call number is after each roll call." Cook responded that he did not have anything like that. Williams argued, "Artis, you know what I'm talking about, I'm talking about what the person's number is after each roll call." When Cook ignored him and began speaking with someone else, Williams said, "Artis, I know you understand English, I says, I want to see the dispatching records and if you don't let me see them, I'm going to file a charge against you. And he says, you're going to do that anyway and he just ignored me and I left."

I credit the testimony of Williams and find that Williams was seeking access to the job referral information in order to determine that referral rights were being protected. By failing to provide the business agent reports and allow Williams to take notes from those reports, the Union has violated Section 8(b)(1)(A) of the Act. *Boilermakers Local 197 (Northeastern State Boilermaker Employers)*, 318 NLRB 205 (1995) (union acts arbitrarily by denying a member's request for job referral information and by denying photocopies of hiring hall information). No legitimate union interests were shown to require that Williams not be allowed to make notes.

CONCLUSIONS OF LAW

1. By implying that it would not dispatch Williams from the Visalia subhiring hall in retaliation for a statement he made regarding operation of that subhiring hall, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

2. By refusing to permit Williams to examine the Fresno hiring hall dispatch book for the preceding 3 months, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

3. By dispatching employees in violation of the contract and hiring hall rules and by requesting a false written dispatch request as to one of those dispatches, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the Act.

4. By refusing to permit Williams to examine and take notes from the business agent reports, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated the Act by unlawfully referring Kim McDaniel, Noah Batts, and Thomas Lucas in violation of the contract and hiring hall rules, I shall recommend that any registrants who should have been referred be reimbursed for any loss of earnings and benefits suffered as the result of the Respondent's unlawful referral of McDaniel, Batts, and Lucas. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because the Respondent has a proclivity for violating the Act (see, e.g., *Laborers', Local 294*, approved by Order of July 6, 1995, enforced by Order of November 9, 1995 (9th Cir.), and because of the serious nature of the violations demonstrating a general disregard for the employees' fundamental rights in the context of an exclusive hiring hall, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]