

United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No. 1016 (Bertram Construction Company) and Charles Noble. Case 25-CB-5235

28 September 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 27 April 1984 Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering 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 the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified below.

The judge found that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by failing to represent fairly Charles Noble in connection with job referrals and by attempting to cause Bertram Construction Company not to hire Noble. The Respondent does not except to these findings. However, the General Counsel excepts to the judge's failure to find that the Respondent caused Bertram not to hire Noble.

We find merit in the General Counsel's exceptions. Absent an exclusive-referral hiring agreement or practice, affirmative evidence that the union caused or attempted to cause an employer to refuse to hire an employee is necessary to make out a violation of Section 8(b)(2). See *Crouse Nuclear Energy Services*, 240 NLRB 390, 397 (1979). We agree with the judge's finding that the Respondent attempted to cause Bertram not to hire Noble. However, we also find that all the elements of actual causation are presented in this case. Sterlie Bertram, president of Bertram Construction, testified that he did not hire Noble as a result of statements made about Noble by the Respondent's business representative Allen Bramlett, and because he did not want to stir up a controversy with the Union. He also testified that he ceased to consider hiring Noble after Bramlett's comments. Thereafter, Noble was not hired by, nor considered for employment with, Bertram Construction. Accordingly, we find that the Respondent not only attempted to cause but in fact did cause Bertram not to hire Noble in violation of Section 8(b)(2).

To remedy the violations, the judge recommended that the Respondent cease and desist from its unlawful conduct and that it make Noble whole for any loss of wages and benefits he would have received had he been hired for the Albany project.¹ The Respondent excepts to the backpay order, contending that absent a finding of causation it is not liable for backpay. As we have found that the Respondent caused Bertram not to hire Noble and is thus clearly liable for backpay, we need not pass on the Respondent's contention. The General Counsel also excepts to the backpay order, contending the judge inappropriately limited backpay to the Albany project. In accord with Board precedent, we find the limitation of backpay inappropriate and shall modify accordingly the judge's recommended Order. See *Sheet Metal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773 (1981), *Plasterers Local 121 (Associated Building Contractors)*, 264 NLRB 192 (1982).

AMENDED REMEDY

Having found that the Respondent violated Section 8(b)(1)(A) and (2) we shall order it to cease and desist from engaging in such activity and to take certain affirmative action to effectuate the policies of the Act.

Having found that the Respondent unlawfully attempted to cause and caused Bertram Construction Company not to hire Charles Noble, we shall order that the Respondent notify Bertram Construction in writing, with a copy to Noble, that it has no objection to the hiring of Noble, and that it requests Noble be hired. The Respondent shall be ordered to make Noble whole for any loss of wages and benefits he may have suffered as a result of the Respondent's action until Noble has been hired by Bertram Construction or he obtains substantially equivalent employment elsewhere. The amount of backpay shall be computed in the manner set forth in *F W Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977).²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No.

¹ In limiting the Respondent's backpay liability to the Albany project, the judge stated that it was unknown whether Bertram would have hired Noble absent the Respondent's action but assumed that Noble would have been hired instead of apprentice Michael Franklin and that Noble would have worked those hours that Franklin did.

² See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

1016, its officers, agents, and representatives, shall take the action set forth in the Order as modified

1 Substitute the following for paragraph 2(a)

“(a) Make Charles Noble whole for any loss of wages or other rights and benefits he may have suffered as a result of the Respondent’s conduct in the manner set forth in the section of the Board’s Decision and Order entitled ‘Amended Remedy’”

2 Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs

“(b) Notify Bertram Construction Company in writing, with a copy to Charles Noble, that it has no objection to the employment of Charles Noble, and that it requests Noble be hired”

3 Substitute the attached notice for that of the administrative law judge

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice

Section 7 of the Act gives employees these rights

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities

WE WILL NOT restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act which includes the right to run for union office and to distribute dissident literature

WE WILL NOT breach our duty of fair representation of members in connection with job referral

WE WILL NOT cause or attempt to cause any employer to discriminate against members because those members have exercised rights guaranteed them by Section 7 of the Act

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

WE WILL make whole Charles Noble for any loss of wages or other rights and benefits he may have suffered as a result of our attempting to cause and causing Bertram Construction Company not to hire him in June 1983, with interest, until he has

been hired by Bertram Construction or he obtains substantially equivalent employment elsewhere

WE WILL notify Bertram Construction Company, in writing, with a copy furnished to Charles Noble, that we have no objection to the employment of Charles Noble by Bertram Construction Company, and that we request Noble be hired

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO, LOCAL UNION No 1016

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge This matter was tried before me at Muncie, Indiana, on January 16 and 17, 1984, on the General Counsel’s complaint which alleges that United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No 1016 (Local 1016) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, 29 USC § 151 et seq., in connection with work referral of the Charging Party

During the course of the hearing, the General Counsel moved to amend the complaint to include as a party respondent Carpenters’ District Council of Eastern Indiana, United Brotherhood of Carpenters and Joiners of America (the District Council)

Both Respondents denied they engaged in any activity violative of the Act. On behalf of the District Council, counsel notes that the alleged unfair labor practices occurred more than 6 months prior to the amendment to the complaint and there was no charge ever filed alleging a violation of the Act by the District Council nor was a charge ever served on the District Council. Thus it is argued that Section 10(b) is a bar as to the District Council. The General Counsel contends that the District Council is the alter ego of Local 1016, hence charging Local 1016 and service on it suffices.

On the record as a whole, including my observation of the witnesses, and the briefs, and arguments of counsel, I issue the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I JURISDICTION

United Brotherhood of Carpenters and Joiners of America (the United Brotherhood) accepts into membership individuals who work as carpenters and millwrights in the building trades. On application, an individual is assigned to membership in the appropriate local union (either construction or industrial) within the geographical jurisdiction of that local.

Material to this matter, four local unions make up the District Council which is responsible for representing members of various local unions in collective bargaining and other matters relating to wages, hours, and terms and conditions of employment with employers doing business in its geographical area.

Each local union elects delegates to the District Council proportional to the local's membership and in turn those delegates elect the District Council officers. The officers and business representatives of the District Council are charged with negotiating (along with local union members of the negotiating committee) and servicing collective-bargaining agreements on behalf of the members of the several local unions. The chief executive officer of the District Council is the secretary-treasurer (also referred to in the bylaws as the executive secretary). One business representative is elected by members of Local 1016, one by members of Local 912, and one by all members of the District Council to be the millwright representative. Allan Bramlett is Local 1016's elected business representative, but in this capacity he works for and is paid by the District Council and is subordinate to the District Council's secretary-treasurer. The officers must be elected delegates to the District Council. The business representatives need not be, but in practice are.

Among other contractors, the District Council (as well as the United Brotherhood) has had a collective-bargaining relationship with Bertram Construction Co., Inc., which annually receives goods, products, and materials directly from outside the State of Indiana in excess of \$50,000 and annually performs services valued in excess of \$50,000 for employers who in turn meet the Board's jurisdictional standards. The Respondents admit, and I find, that Bertram Construction Co., Inc. is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 1016 is a labor organization representing employees of employers engaged in interstate commerce within the meaning of Section 2(5) of the Act.

There is some question, however, concerning whether or not the District Council is a labor organization, and initially the General Counsel argued that it is not. It does not appear to have employee members but rather exists as an administrative subdivision of the United Brotherhood. Nevertheless, at a minimum the District Council is an agent of Local 1016 and certainly the individual elected as a business representative by the membership of Local 1016 is its agent within the meaning of Section 2(13) of the Act.

II THE ALLEGED UNFAIR LABOR PRACTICES

A *The Facts*

Charles Noble joined Local 1016 in 1977 and since that time has worked within the general geographical area of Local 1016 principally on pre-engineered steel buildings. It appears that, at the time he joined Local 1016, Noble was a member of the International Association of Bridge, Structural and Ornamental Iron Workers which organization has competing craft jurisdiction with the United Brotherhood for this type of work. It also appears that Noble, along with his brother, was engaged as a contractor erecting pre-engineered steel buildings. In August 1983,¹ following the facts giving rise to this dis-

pute, Noble became a party to the District Council's Pre-Engineered Metal Building Agreement.

In April, apparently dissatisfied with the incumbent leadership of the District Council, Noble wrote and distributed at jobsites a letter in which he castigated the leadership for a number of perceived faults. He urged the membership to vote against Ronald Liggett (the District Council's secretary-treasurer) for delegate to the District Council. Though the letter was signed "A Member Who is Concerned" Noble's authorship was commonly known, at least to the District Council leadership—Liggett and Bramlett.

At a District Council meeting around the first of May, Noble announced his intention to run for millwright business representative. However, according to Liggett, Noble's announcement did not conform to the requirements of the District Council's bylaws and therefore he was rejected as a candidate.

On March 14, Bertram Construction Company was awarded the contract to build a new city building in Albany, Indiana. Sterlie Bertram testified that, in early May, Noble came to the jobsite and asked him if he was going to need help. Bertram told Noble that he might later on.

Then, during the first week of June, Bertram had a conversation with Bramlett. While both testified to a conversation on or about this date, Bertram said it took place at the jobsite whereas Bramlett testified that Bertram called him at home—a substantial but immaterial variance. Whichever, the subject matter concerned Bramlett referring additional carpenter employees for use by Bertram on the project.

While the District Council does not maintain an exclusive hiring hall, it does keep an out-of-work list. And, Bertram's master contract with the United Brotherhood provides that employers will seek qualified employees from the local union in the area. The District Council's contract with the Muncie Contractors Association (of which Bertram was a member) allows (or requires) contractors to hire an apprentice once three journeymen are employed.

Bertram asked Bramlett if there were any union members available who were qualified on pre-engineered steel construction. According to both, Bramlett named four individuals including one Michael Franklin, an apprentice, and three journeymen (one of whom apparently was working elsewhere). Bertram indicated an interest in Franklin, inasmuch as Franklin had worked for him before. Then, according to Bertram, he asked Bramlett, "Who's this Charles Noble?" (In Bramlett's version, the question was phrased, "What about this Noble character?") Bramlett answered "He's bad news, and don't f— with him." And, "He's trying to stir up trouble."

While admitting to having told Bertram that his assessment of Noble was "he's bad news," Bramlett denied the rest of the statement attributed to him. Bramlett contends that he meant that Noble was operating as a nonunion contractor and understood that Noble was seeking to subcontract from Bertram, though Bertram testified without contradiction that he generally does not subcontract such work.

¹ All dates are in 1983 unless otherwise specified.

Following this conversation, Bertram hired Franklin to work on the building in question and did not further consider Noble

The General Counsel argues that the statement by Bramlett to Bertram coerced and restrained employees' rights to engage in protected activity, was an attempt to cause Bertram not to hire Noble because he had engaged in protected activity, and amounted to a failure to represent an employee/member all in violation of Section 8(b)(1)(A) and (2) of the Act

B *Analysis and Concluding Findings*

1 The allegations against the District Council

As noted above, no charge was filed and served on the District Council alleging it had engaged in any unfair labor practices. Not until the second day of the hearing in this matter did the General Counsel move to amend the complaint to allege that the District Council as an independent entity violated the Act.

This amendment was occasioned by the Respondent's contention at the hearing that the District Council, and not Local 1016, is the bargaining agent of employee members. But given the findings herein such is not particularly material, though it is clear that Local 1016 through its business representative does represent employee members and is represented on the District Council negotiating committee.

While there is some question of the District Council's status as a labor organization within the meaning of the Act, inasmuch as it does not appear to have employee members, this issue need not be decided. I conclude that, as a separate entity, the District Council cannot be found to have committed the unfair labor practices involved in this matter because more than 6 months elapsed between those events and any formalization of allegations against it.

The General Counsel seeks to finesse the 10(b) defense by arguing that the District Council is the alter ego of Local 1016, hence filing against and service of a charge on Local 1016 suffices to toll the limitation period. While there is clearly a close relationship between the two, they are just as clearly distinct—the District Council being an administrative subdivision of the United Brotherhood composed of three local unions in addition to Local 1016. Further, the allegations are against the District Council as a separate entity and not as Local 1016's alter ego.

I conclude that the District Council is not the alter ego of Local 1016 and cannot be found to have committed the unfair labor practices herein. Nevertheless, the District Council and its representatives clearly were acting as agents on behalf of Local 1016 at all times in this matter. *Carpenters Local 64 (Western Dry Wall)*, 204 NLRB 590 (1973). Further, Bramlett was elected by the Local 1016 membership to be a District Council business representative. Accordingly, Local 1016 is responsible for the acts of Bramlett, specifically, as well as other agents of the District Council acting in their representative capacity.

2 The allegations against Local 1016

While there are somewhat divergent accounts of some material facts, indisputably Noble wrote and distributed a letter critical of the Union's leadership, a fact which was known to Bramlett and Liggett. In fact, Bramlett testified that he assumed that some of Noble's statements were aimed at him. And Noble subsequently announced his intention to be a candidate for business representative. In short, during the material time Noble engaged in dissident activity as a member of Local 1016 and attempted to run against one of the incumbent business representatives (though not Bramlett). Such is protected activity. E.g., *Plumbers Local 137 (Hames Construction)*, 207 NLRB 359 (1973).

Also undisputed is the fact that Sterlie Bertram had a conversation with Bramlett in which, among other things, he asked about Noble as a potential employee. And Bramlett even admits that he told Bertram that Noble is "bad news." At a minimum, such is an implicit suggestion to the employer not to hire Noble. Beyond that, however, I credit Bertram's testimony that Bramlett further said, "He's trying to stir up trouble" and "don't f— with him." Such is a clear attempt to cause Bertram not to hire Noble.

In addition to finding Bertram's demeanor generally more positive than that of Bramlett, I further note that Bertram was an independent, even reluctant, witness with no apparent stake in the outcome of this matter.

Given Noble's protected dissident activity followed shortly by Bramlett's statement to a potential employer that he is "bad news," "is stirring up trouble," and "not to f— with him," I conclude that the General Counsel made out a prima facie case that Bramlett breached the Union's duty of fair representation, restrained and coerced employees' rights to engage in protected activity, and attempted to cause an employer not to hire Noble because Noble had engaged in protected activity.

The Respondent argues that the General Counsel's prima facie case has been rebutted by showing (a) Bramlett's concern was not Noble's having engaged in dissident activity but rather his doing business as a nonunion contractor, and (b) under the manning provisions of the collective-bargaining agreement, Bertram was entitled (or required) to hire an apprentice rather than another journeyman, therefore whatever statement may have been made by Bramlett could not have affected Noble's employment. I reject these two contentions.

There is some evidence that Noble had engaged in the erection of pre-engineered steel buildings as a subcontractor without having signed a collective-bargaining agreement, and he continued to maintain membership in the Iron Workers Union. Both reasonably would invoke the ire of the Union's leadership. Nevertheless I do not believe these factors were the basis of Bramlett's statement to Bertram.

There is no evidence that Bramlett reasonably thought Noble was seeking to subcontract from Bertram other than Bramlett's disputed testimony of what Bertram allegedly said to him—which I discredit. I do not believe Bertram told Bramlett that Noble was seeking to subcontract the work. I believe Noble was seeking a job, as

both he and Bertram testified² If, as I conclude, Noble was seeking only to be an employee, there appears no reason that later Bertram would tell Bramlett that he wanted "to sub the work"

Further, the Respondent brought forth no other evidence to suggest that Noble's alleged nonunion contracting was of particular concern at the time of the Bertram/Bramlett talk The matter of membership in the Iron Workers had come up when Noble announced his candidacy and he was given 30 days to withdraw Before that, it had been of no apparent concern I therefore do not believe Bramlett's assertion

The manning provision of the agreement allows (or requires) an employer to use one apprentice after having hired three journeymen At the time of the conversation between Bertram and Bramlett, Bertram had "three carpenters, one laborer and one operator" on the job But he was sending one carpenter and the laborer to another job Thus his request to Bramlett was in the context of needing "another person to fill out the crew" Therefore, according to the contract, he was required to hire another journeyman, yet with Bramlett's blessing he hired Franklin, admittedly an apprentice

In addition to mentioning Franklin, Bramlett named as available two or three other members, all of whom were journeymen Thus even if Bramlett thought Bertram already had three journeymen he admittedly suggested the availability of others Such does not make sense if the Respondent's apprenticeship argument is credited I conclude that the apprenticeship contention is an after-the-fact assertion to disguise Bramlett's true meaning

Finally, presumptively at least Noble was a more qualified employee on this work than Franklin inasmuch as Noble was a journeyman and Franklin still an apprentice There is no evidence to the contrary Thus Bramlett's disparaging reference to Noble must have related to matters beyond the scope of Noble's work ability or matters of legitimate concern to the Respondent Accordingly, I must conclude that the Respondent's rebuttal of the General Counsel's prima facie case is unpersuasive and should be rejected

Where, as here, the employee referral system is nonexclusive, failure to refer an individual for reasons proscribed by the Act is a breach of the union's duty of fair representation in violation of Section 8(b)(1)(A) *Plumbers Local 13 (Mechanical Contractors of Rochester)*, 212 NLRB 477 (1974) But, in such a case, an 8(b)(2) violation is made out only if there is actual evidence of an attempt to cause the employer not to hire the individual E.g., *Crouse Nuclear Energy Services*, 240 NLRB 390 (1979) I find the statement "don't f— with him" is evidence of such an attempt I conclude that, through Bramlett, the Respondent violated Section 8(b)(1)(A) and (2) of the Act

² Richard Thornberry, a Delaware County commissioner (in which Albany is located), happened to be present when Noble approached Bertram in May He testified there was no reference to subcontracting, thus corroborating Bertram and Noble

III THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found above, occurring in connection with the representation of employees in an industry affecting interstate commerce by Local 1016, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act

IV THE REMEDY

Having concluded that the Respondent violated Section 8(b)(1)(A) and (2) in connection with Charles Noble's potential employment with Bertram Construction Company in June 1983, I shall recommend that it cease and desist from engaging in such activity and make whole Noble for any loss of wages and other rights and benefits he may have suffered as a result of the Respondent's action Although it is unknown whether Noble would have been hired by Bertram absent the Respondent's acts in this matter, for purposes of remedy it must be assumed that he would have been hired instead of Franklin and would have worked those hours that Franklin did work Therefore, for purposes of backpay it is ordered that the Respondent make whole Noble in an amount equal to the hourly pay rate that he would have received for those hours worked by Franklin on the Albany City Hall project under the formula set forth in *F W Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977)³

On these findings of fact and conclusions of law and on the entire record, I issue the following⁴

ORDER

The Respondent, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No 1016, its officers, agents, and representatives, shall

1 Cease and desist from

(a) Restraining and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act which includes the right to run for union office and to issue and distribute dissident literature

(b) Failing to represent members in connection with job referrals

(c) Causing or attempting to cause employers to discriminate against employees because they have engaged in activity protected by Section 7 of the Act

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act⁵

³ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962)

⁴ If no exceptions are filed as provided by Sec 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

⁵ The acts of Respondent in this matter are not sufficient to suggest a proclivity to violate the Act Therefore the narrow injunctive relief seems appropriate See *Hickmott Foods*, 242 NLRB 1357 (1979)

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

(a) Make whole Charles Noble for any loss of wages or other rights and benefits he may have suffered in accordance with the formula set forth in the remedy section above

(b) Post at its office copies of the attached notice marked "Appendix"⁶ Copies of the notice, on forms provided by the Regional Director for Region 25, after

⁶ 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"

being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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

(c) Furnish to the Regional Director sufficient signed copies of the attached notice for posting at the premises and projects of Bertram Construction Company, if it is willing

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply