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Local 190, Laborers International Union of North America, AFL-CIO (VP Builders, Inc.) and Ramsis Berghela. Case 3-CB-8687

August 18, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER
AND PEARCE

On December 27, 2007, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel 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,¹ and conclusions only to the extent consistent with this Decision and Order.

This case involves an allegation that the Respondent violated Section 8(b)(2) of the Act by attempting to cause and causing VP Builders (VP) to terminate Charging Party Ramsis Berghela's employment because he was not referred to the "School 19 project" jobsite from the Respondent's out-of-work list. The judge concluded that the Respondent violated the Act as alleged. Central to the judge's conclusion was his reliance on the absence of any written agreement between VP and the Respondent containing hiring hall/referral arrangements and his finding that VP was not bound to the Project Labor Agreement (PLA), which contains union referral provisions that are applicable to contractors working on the School 19 project. Contrary to the judge, we find that VP was contractually bound to the PLA and its hiring hall procedures. Accordingly, for the reasons discussed below, we reverse the judge and dismiss the complaint.

I. FACTS

MLB Construction Services (MLB) was the general contractor for the School 19 project for the City School District of Albany. As such, it was signatory to a PLA with the Respondent and other construction trade unions.

¹ The Respondent implicitly has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The PLA provided that MLB include in any subcontract a requirement that the subcontractor sign, and be bound by, the terms of the PLA for work performed within the scope of the PLA.

In May 2007,² MLB executed a subcontract with VP to perform demolition work at the School 19 project.³ The subcontract identifies the scope of the work to be performed as "all interior demolition and removals," to be completed "in strict accordance with the contract documents, drawings and specifications." Although the subcontract does not specifically mention the PLA, "Note #3" of the subcontract provides that the project "has union labor agreement requirements as outlined in specifications." One of those specifications was the PLA.

Prior to MLB's submission of its bid for the School 19 project, James Dawsey, vice president of operations for MLB, met with VP co-owners Larry Nix and Joseph Riley. Dawsey testified that he provided Nix and Riley with copies of all of the "front-end specifications" for the project, including the PLA.⁴ Neither Nix nor Riley directly contradicted Dawsey's testimony that he gave them a copy of the PLA.⁵ Further, Dawsey testified that

² All dates herein are in 2007, unless otherwise indicated.

³ The judge stated that VP and MLB executed the subcontract on May 9. However, the evidence demonstrates that the VP representatives signed the document on May 29.

⁴ The judge erroneously stated that Dawsey testified that VP was given this information after, rather than before, the execution of the subcontract.

⁵ Although Riley testified that he had never seen a copy of the PLA, he clarified that position on cross-examination by the Respondent's counsel:

Q: Well, the contract, General Counsel's GC-2 said you're bound by the contract document specifications, right?

A: Right.

Q: Did you know the specifications before you started the job on July 2nd?

A: Right.

Q: So, had you looked at some documents with MLB's office or Pike-Heery?

A: Some of them documents, like them documents there, I don't go over all that stuff, it's not in my area in the company to go over everything like that. I'm mostly out in the field working.

Similarly, after testifying that Dawsey had not given him a copy of the PLA "that he knew of," Nix responded to the Respondent's counsel's questions as follows:

Q: He [Dawsey] gave you copies of the specifications for the job, right?

A: Yeah, he probably did and we got somebody else that usually goes through those and not myself.

Q: He's testified that part of those specifications was the Project Labor Agreement that applied to you; are you aware of that?
A: I became very well aware of it, I mean, and we may have had it, it may be something that we just didn't sit down and read and go through. You know what I mean, I'm not saying that we didn't have it, but we may have had it, it may be something that

he specifically told Nix and Riley that VP would be bound to the PLA if VP were awarded the subcontract. Riley conceded that he knew that the subcontract bound VP to the PLA.

Later, prior to VP's execution of the subcontract with MLB, representatives of the Respondent, MLB, and VP met for a pre-job conference in the offices of the school district's construction manager. At that meeting, the parties principally discussed a specific provision of the PLA which, according to the testimony of the witnesses at the hearing, required the use of 80 percent "union" labor and 20 percent "non-union" labor on covered projects. As a result of their discussions at that meeting, the parties orally agreed to modify that requirement for VP to a 50/50 percent ratio. According to the credited testimony of Nix and Riley, Respondent's president Patrick Kieper also indicated at this meeting that if VP knew any individuals it wanted to hire, it could do so, provided that the individuals were members of the Respondent.

On Friday, June 29, Riley called Ramsis Berghela to ascertain his interest in working on the School 19 project. Riley had obtained Berghela's name from an employee at another VP project. Riley asked Berghela whether he was a member of the Respondent and, when Berghela confirmed that he was, Riley hired him to begin work on July 2.

On the same day, Nix went to the Respondent's office. He told the Respondent's Business Manager Anthony Fresina that VP would be commencing work on the School 19 project on July 2 and that it needed some laborers. Fresina told Nix that the Respondent would provide a shop steward for the project and would provide as many laborers as VP needed. Nix then told Fresina that he had someone (apparently Berghela) whom he wanted to employ on the project. Fresina responded that the Respondent had an out-of-work list and hiring procedures that must be followed, and that Nix should have called the Respondent to obtain workers for the project.

On July 2, VP began work at the project site. The work crew on that date consisted of Doug Ryan (a regular employee of VP), Berghela, and two or three other union members who had been referred to the project by the Respondent. When the onsite steward realized that Berghela had not been referred from the Respondent's hiring hall, he called Kieper. Kieper met with Dawsey and Nix at the jobsite and told them that he wanted Berghela removed from the job and replaced by the next individual on the Respondent's out-of-work list.

we just didn't put that type of emphasis on at the time until we began to start really having problems with it.

Thereafter, Riley, who had been called to the jobsite by Dawsey, joined the discussion. Riley told Kieper that it was his understanding that VP could hire individuals directly, as long as they were members of the Respondent. Kieper said that was not what he had told Riley; rather, he had told him that VP could directly hire individuals who previously had worked for VP. Riley directed Ryan to dismiss Berghela. According to Berghela, Ryan told him that VP had to let him go because the Respondent was threatening to picket the job.

II. JUDGE'S DECISION

The judge stated that whether the Respondent Union violated Section 8(b)(2) of the Act by causing Berghela's discharge "depends on whether VP was bound by the terms of the PLA," which the judge had previously described as containing a provision requiring "employers under contract with the Union to hire Union members from the Union's out-of-work referral list." Relying on the absence of any written agreement between the Respondent and VP, the judge concluded that the Respondent violated Section 8(b)(2). He rejected the Respondent's contention that VP was bound to the PLA's referral provisions by virtue of the MLB-VP subcontract. He concluded that neither Note #3 in the subcontract nor Nix's conversation with Fresina prior to the commencement of work on the project was "sufficiently detailed or specific enough to bind VP to the requirements of the PLA."

III. ANALYSIS

Section 8(b)(2) of the Act provides, among other things, that it is an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act. It is well established that, in the absence of an exclusive hiring hall arrangement, a union violates Section 8(b)(2) by insisting that an employer refuse to hire, or terminate, an individual and replace him or her with an individual referred by the union. See, e.g., *Kvaerner Songer, Inc.*, 343 NLRB 1343, 1346 fn. 10 (2004). Conversely, where an employer and a union have agreed to an exclusive hiring hall arrangement, and the hiring hall is operated in a nondiscriminatory manner, it is not a violation of Section 8(b)(2) for the union to cause the employer to discharge an employee who was not hired through the union's hiring hall. See, e.g., *Hoisting and Portable Engineers Local 302 (West Coast Steel Works)*, 144 NLRB 1449, 1452 (1963). The party asserting the existence of an exclusive hiring hall arrangement bears the burden of establishing this fact. *Carpenters Local 537 (E.I. DuPont & Co.)*, 303 NLRB 419, 429 (1991).

The relevant complaint allegation states: “Respondent engaged in the conduct described above in Paragraph VII [attempted to cause and caused Berghela’s discharge] because Berghela was not referred by the Respondent for hire by VP although VP was not a party to a valid collective-bargaining agreement containing an exclusive hiring hall provision,” at least suggesting that the Respondent would have the affirmative burden of proving not only that VP was bound to a labor agreement but also that this agreement contained an exclusive hiring hall provision. In fact, the Respondent’s answer to the complaint states that VP was bound to the PLA as MLB’s agent and was “therefore bound by the hiring hall practices of the collective bargaining agreement.” However, at the outset of the hearing, the General Counsel had the following exchange with the judge:

GC: This case does not involve the operation of the hiring hall, per se, it’s in the background, but there’s no allegation here that the operation of the hall somehow violates the Act. That is not the case. It is solely that in the absence of a collective bargaining relationship.

Judge Biblowitz: So your position is that because there’s no bargaining relationship between VP and the Union the Union had no legal right to have him fired?

GC: Correct, your Honor.

Judge Biblowitz: Whereas I assume MLB has an agreement with the Union?

GC: Yes, your Honor.

Judge Biblowitz: So if MLB had been told—was doing the job and was told to fire him under the same circumstances that might be—

GC: If he was not—yes, your Honor.

Thereafter, the General Counsel litigated this case on the theory that VP was not bound to the PLA, and the Respondent defended its conduct based on the hiring hall arrangement imposed by the PLA through the MLB subcontract with VP. At no point during the hearing or in subsequent briefs did the General Counsel argue that, even if VP was bound to the PLA, the agreement did not impose any exclusive hiring hall requirements that would privilege the Respondent to seek Berghela’s removal from the jobsite because he was not referred to VP from the hiring hall’s out-of-work list. Similarly, the General Counsel did not contend that there was a written or oral exception to the PLA’s hiring hall requirements that would permit VP to hire Berghela directly. Consistent with the narrow theory of violation that was litigated, the General Counsel did not except either to the judge’s fac-

tual statement that the PLA “requires employers under contract with the Union to hire Union members from the Union’s out-of-work referral list” or to the judge’s statement that whether the Union violated Section 8(b)(2) “depends on whether VP was bound by the terms of the PLA.”

Contrary to our dissenting colleague, we find that there is no open issue with respect to whether the PLA contained an exclusive hiring hall provision. Were we at this stage of the proceedings to find a violation on a theory not argued by the General Counsel—that the PLA did not contain an exclusive hiring hall provision precluding Berghela’s direct hire—we would deprive the Respondent of the due process to which it is entitled. The General Counsel’s representations at the hearing, his conduct in litigating the case, and his arguments on brief would reasonably have led the Respondent to believe that it would not have to defend on this point. See *Sierra Bullets, LLC*, 340 NLRB 242, 243 (2003); *Raley’s*, 337 NLRB 719 (2002).⁶ Further, were we to remand this case for the judge to address the heretofore unlitigated theory, we would be giving the General Counsel an unwarranted “second bite of the apple” by permitting litigation of an issue that he has effectively chosen not to pursue. E.g., *Paul Mueller Co.*, 332 NLRB 1350, 1350–1351 (2000).

In accord with the theory of violation that was litigated, the judge correctly stated in his analysis that the legality of the Respondent’s conduct “depends on whether VP was bound by the terms of the PLA.” The judge found that VP was not bound. We disagree.

It is true that VP did not sign any agreement with the Respondent, VP did not receive any copy of the PLA *from the Union*, the subcontract executed by VP and MLB was the only document signed by VP in connection with work on the School 19 project, and the subcontract does not contain any explicit reference to the PLA. However, Note #3 of the subcontract states: “This project

⁶ We do not share our colleague’s view of the record and of the cited precedent. As described above, in concluding that the General Counsel litigated this case on the narrow theory that the PLA did not bind VP, we rely on more than the colloquy between the General Counsel and the judge at the beginning of the hearing. The General Counsel never argued here that the PLA’s hiring hall provisions would not permit the Respondent’s action even if VP was bound to that contract. Rather, as in the cited cases, the General Counsel pursued a theory of violation that required the Respondent only to prove a particular defense, i.e., that VP was bound to the PLA by its subcontract with MLB.

Contrary to the dissent, the judge did not credit testimony that VP and the Respondent “agreed” that VP could hire any union member it wanted to. As discussed below, the judge found that this is what the Respondent’s president Kieper said to VP officials at a pre-job conference prior to execution of the MLB subcontract. The judge did not find that VP had an agreement with the Respondent.

has union labor agreement requirements as outlined in specifications.” In addition, the subcontract specifically provides that VP’s work on the project must be completed “in strict accordance with the contract documents, drawings and specifications.” MLB Vice President Dawsey testified that the PLA was among the contract specifications that MLB provided to VP prior to the execution of the subcontract. Further, Dawsey testified that he specifically told Nix and Riley that VP would be bound to the PLA if it were awarded the subcontract, and Riley conceded that he knew that the subcontract bound VP to the PLA.⁷ Thus, in our view, the evidence as a whole supports the conclusion that VP received a copy of the PLA and was aware that it was bound to that document prior to the parties’ execution of the MLB-VP subcontract. Furthermore, all witnesses who testified regarding the pre-job conference (including Riley and Nix) indicated that the focus of that meeting was the 80 percent “union”—20 percent “nonunion” labor-supply ratio for the project, a requirement emanating from the PLA. There would have been no need for VP to have this meeting if it was not bound by the PLA. Similarly, there would have been no need for Riley and Nix to ask the Respondent’s officials if they could hire union members directly if VP was not aware that the subcontract would bind it to the PLA and its hiring hall procedures. The fact that Respondent’s president Kieper may have misstated an exception to these procedures at the pre-job conference, or that Riley may have misunderstood what Kieper said, is insufficient to alter the written terms of the PLA, particularly in light of the undisputed fact that, subsequent to this meeting but before Berghela began work at the School 19 project jobsite, Respondent’s business manager Fresina told Nix that VP would have to follow hiring hall procedures in hiring union members for this project.

For these reasons, we conclude that the MLB-VP subcontract’s explicit reference to “union labor agreement requirements” and its directive that the work be completed in strict accordance with the subcontract specifications, which included the PLA, support the conclusion that the PLA was incorporated by reference into the subcontract. The Respondent therefore acted lawfully in seeking Berghela’s removal from the School 19 project jobsite because VP did not hire him in accord with the exclusive hiring hall requirements of the PLA. Accord-

ingly, we shall reverse the judge’s decision and order that the complaint be dismissed.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 18, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

I join my colleagues in reversing the judge to find that the Respondent was bound to the terms of the Project Labor Agreement (PLA) for performance of subcontract work on the School 19 Project. However, that is not, or at least should not be, the end of the matter. There remains the question of whether the PLA imposed exclusive hiring hall requirements pursuant to which the Respondent could lawfully seek to remove employee Ram-sis Berghela from the School 19 jobsite.

The complaint alleges that the Respondent Union violated Section 8(b)(2) when it demanded the termination of Berghela. My colleagues concede that a violation is established in the absence of an exclusive hiring hall arrangement. They further concede that the existence of such an arrangement is an affirmative defense on which the Respondent Union bears the burden of proof as a matter of black letter Board law. The complaint specifically alleges that “VP was not a party to a valid collective-bargaining agreement containing an *exclusive hiring hall provision*.” The Respondent has never directly asserted, either at the hearing or in its briefs to the Board, that the hiring hall arrangement in this case was exclusive, and, indeed, the credited facts plainly support a conclusion to the contrary.¹ Nor has the Respondent ever specifically contended that the General Counsel stipulated to or conceded the issue of exclusivity. Nonetheless, my colleagues reach out to relieve the Union of its burden of proof based upon a vague colloquy between counsel for the General Counsel and the Judge at the commencement of the hearing.² Because my colleagues’

⁷ The judge credited the testimony of Riley and Nix wherever it conflicted with the testimony of the Respondent’s president Kieper. He made no credibility finding with respect to Dawsey’s testimony. In any event, as set forth above, Riley and Nix did not contradict Dawsey’s testimony that he gave them a copy of the PLA. They simply indicated that they did not *read* the binding specifications given them.

¹ The judge credited testimony establishing that the Respondent and VP agreed that VP could hire directly anyone it wanted to, so long as the individual was a member of the Respondent Union.

² Worse still, in stating that the General Counsel “never argued here that the PLA’s hiring hall provisions would not permit the Respon-

benevolence is not warranted by either the facts³ or the law,⁴ I respectfully dissent. At a minimum, I would remand this case to the judge for specific factual findings as to whether the Respondent proved that the PLA contained an exclusive hiring hall arrangement permitting the Respondent to cause Berghela's removal from the School 19 jobsite, and, if such an exclusive arrangement existed, whether VP hired Berghela pursuant to a legitimate exception to that arrangement.

Dated, Washington, D.C. August 18, 2010

Peter C. Schaumber, Member

Alfred Norek, Esq., for the General Counsel.
James Long, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on October 30, 2007,¹ in Albany, New York. The complaint herein, which issued on September 19, and was based upon an unfair labor practice charge that was filed on July 5 by Ramsis Berghela, an individual, alleges that Local 190, Laborers International Union of North America, AFL-CIO (the Union) and/or (the Respondent), attempted to cause, and caused, Berghela to be fired from his job with VP Builders, Inc. (VP), although VP was not a party to a valid collective-bargaining agreement with the Union containing an exclusive hiring hall provision, in violation of Section 8(b)(2) of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that VP has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

dent's action even if VP was bound to that contract," my colleagues essentially inappropriately shift the burden of proof to the General Counsel to allege the *nonexclusivity* of the hiring hall procedures.

³ I am aware of no case, and my colleagues point to none, in which a brief and vague preliminary exchange, such as the one at issue here, between a judge and counsel for the General Counsel, was found to relieve a party from establishing an essential element of an affirmative defense. Particularly in a case such as this, where the credited record evidence seriously calls into question the validity of the defense.

⁴ Not one of the Board decisions cited by my colleagues involved relieving a respondent of proving an element of an affirmative defense. Rather, in each of the cases they cite, the Board refused to find a violation based on an alternative theory advocated by a party or adopted by a judge under circumstances where the General Counsel explicitly restricted his theory of the case to a different argument. See *Sierra Bullets, LLC*, 340 NLRB 242, 243 (2003); *Raley's*, 337 NLRB 719 (2002); *Paul Mueller Co.*, 332 NLRB 1350, 1350-1351 (2000).

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2007.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Simply stated, VP obtained a subcontract from MLB Construction Services, LLC (MLB), to perform demolition work for the city school district of Albany, School 19 (the jobsite). MLB has a contract with the Union; a Project Labor Agreement (PLA), is part of that contract. One provision contained in the PLA requires employers under contract with the Union to hire union members from the Union's out-of-work referral list. VP is a nonunion employer that had not signed any agreement with the Union to be bound by its contract or the PLA. Berghela, a union member, was hired directly by VP to perform work at the jobsite. On his first day of employment at the jobsite, he was terminated. Counsel for the General Counsel alleges that he was terminated by VP because of threats from the Union that if he was not removed from the job the Union would engage in activity at the jobsite that would affect the job. The Union defends that it was privileged to request Berghela's termination; Berghela had not been properly hired because he was a union member and the Union's contract requires that employees be referred from the Union's out-of-work list. The Union also denies threatening VP.

On May 9, VP, by Penny Moore, one of its owners, and MLB, by Thomas Eckert, executed a Subcontract providing for VP to perform certain interior and demolition work at the jobsite. The attachment to this subcontract contains 22 items relating to VP's responsibilities on the job. The only one relevant to the issue herein is Note # 3: "This project has union labor agreement requirements as outlined in specifications."

Berghela testified that in about the end of June, a friend told him that he had been hired by VP to work at the jobsite. When Berghela expressed an interest in the job, his friend discussed it with Riley, who called Berghela on about June 29. Riley asked him if he was a member of the Union, he said that he was, and Riley hired him. He started working at the jobsite on Monday, July 2. He began work at 7:30 a.m. on that day together with three other laborers. At about 11, Riley left to go to a meeting with Patrick Kieper, the union president, and Berghela worked the full day. As he was leaving at 3:30 p.m., Doug Ryan, the job superintendent, called him over, said that he was sorry, but he had to let him go. When Berghela asked why, Ryan said that a union representative came on the job and said that if they didn't lay him off, the Union would pull the men and picket the job. Before Berghela left, Riley apologized to him, but said that he didn't want any problems on the job. That was the only day that he worked for VP. He testified that about a month or 2 earlier he signed the Union's out-of-work list, but has no idea what position he held on the list.

Riley, one of the owners of VP along with Moore and Larry Nix, testified that VP has never been party to a contract with the Union and is not a member of any employer association. The work at the jobsite began on July 2, and was expected to be completed shortly before the end of the year. Riley attended a prejob meeting in May in the office of Pike-Heery, the construction manager for the Albany school district, which in-

cludes School 19. Also present were Nix, Kieper, and Anthony Fresina, from the Union, James Dawsey, vice president of MLB, and William McMordie, vice president of the Pike Company, which was engaged in a joint venture with Heery International. Fresina said that since VP had been awarded the subcontract for the job, they had to abide by the PLA, and the principal subject discussed was its requirement that the breakdown of union and nonunion employees on jobs be 80/20 percent. Riley said that breakdown was not fair and he proposed a 20/80 percent breakdown instead. After some further negotiating, they agreed on a 50 percent Union, 50 percent nonunion breakdown for the job. Riley further testified that at this meeting, Kieper said: "If I knew somebody in the Union I could hire them . . . if I felt comfortable, if I knew them then I could hire them as long as they were in Local 190, it wasn't a problem." VP never entered into any written agreement with the Union, they were never given a copy of the PLA, nor did they sign anything agreeing to be bound by the union contract or the PLA, although the Union did send him a booklet setting forth the benefits that VP would have to pay to its union employees. Sometime between the meeting at the Pike-Heery office and the start of the job, Nix met with the Union and, afterward, informed Riley that the Union said that they had to hire from the union hall. When asked why he hired Berghela directly rather than going through the union hiring hall, and its out-of-work list, he testified that the Union told him at the Pike-Heery meeting that he could hire directly, and he felt that it wasn't right for them to change it after he hired Berghela.

The relevant portions of the PLA provide, at Article 2, Section 3:

This Agreement shall be binding on all signatory Unions, the Construction Project Manager and all signatory Contractors performing on-site Project work as defined in Article 3, including site preparation. The Contractors shall include in any subcontract that they let, for performance of subcontractors, of whatever tier, that said subcontractors become signatories and bound by this Agreement with respect to subcontracted work performed within the scope of Article 3.

The PLA, at Article 4, Section 2, also states that the Contractors (defined as all signatory contractors and their subcontractors, engaged in construction work within the scope of the agreement) agree to hire employees covered by the agreement through the job referral system and hiring hall established in the local union's collective-bargaining agreements.

When the job started on July 2, the only nonunion employee working at the jobsite on the first day was Doug Ryan, a regular employee of VP. Berghela and two or three other union members were also working that first day. For that week, VP employed Berghela and four other members of the Union. Before the job started Riley asked some of his employees if they knew any union members who might be interested in working on the job and one gave him Berghela's name. He called Berghela, who said that he was interested, and Riley said that he would hire him as long as he was a member of the Union, and Berghela said that he was. On July 2, Riley received a telephone call from Dawsey telling him that there were problems on the job and the Union was going to picket the job and shut it

down. Riley said that there shouldn't be a problem because he had hired union people. He went to the jobsite and met with Nix, Kieper, and Dawsey. He asked what the problem was and Kieper said that he had to let Berghela go because he was not hired from the Union's out-of-work list. Riley said that it was his understanding they he could hire directly, as long as the employee was a union member. Kieper said that was incorrect, that what he said was that VP could hire employees directly, but only if they had previously worked for the company. Riley said that was not his understanding, but if they wanted Berghela to be let go, they should tell him. Kieper said that he was VP's employee, so Riley would have to tell him. Riley responded that, "If he works for me, I'm saying the guy can still work." Kieper said: "it's a problem, you have to let him go." Riley testified that he wasn't happy with it, but he told Ryan to let Berghela go. Riley testified that nobody from the Union ever threatened to picket, or shut down the job.

McMordie testified that the initial meeting with VP, MLB, and the Union took place in about March. He was asked:

Q. And at the meeting was it made clear that as a subcontractor, VP Builders was bound by the Project Labor Agreement?

A. At that meeting, my recollection was we did not talk about the terms of the Project Labor Agreement. What we did talk about was actually the 80/20 clause of the Project Labor Agreement and we had come to an agreement on a 50/50 agreement at that meeting.

Q. My question was, was it clear from your point of view, that VP Builders understood that they were bound by the Project Labor Agreement as modified to 50/50?

A. Yes, in my opinion, yes.

I then asked McMordie:

Judge Biblowitz: Did anybody at that meeting say to the VP people, Mr. Riley and Mr. Nix, that you understand you are bound by this agreement? Do you recollect that statement being made to Mr. Riley or Mr. Nix?

The Witness: I don't know if those exact words were used, but it was the assumption in the room that everyone—

Judge Biblowitz: Did anyone ever say to them anything about the PLA?

The Witness: I cannot recollect that.

He testified that the discussion at the meeting was principally about the union/nonunion split, where the parties eventually agreed on the 50/50 split.

Dawsey was asked when he first informed VP about the PLA and its terms:

A. I can't give you any actual dates, but prior to the job being bid. Larry and Joe are not signatories with 190, or any other union entity, and this job has a PLA, which meant that if a contractor was not signatory, they would have to enter an agreement where they would be bound 80/20 or whatever other agreement they could make with the Union that they would be needing personnel from.

Q. Did you make that clear to Larry and Joe prior to their granting of the subcontract?

A. Yes.

Dawsey testified that the Pike-Heery meeting took place in about April. The initial discussion was about the PLA requirement of 80/20, union and nonunion employees. After some discussion, there was agreement on a 50/50 split. There also was discussion about the fact that since it was a prevailing wages job, VP agreed to pay the prevailing wages and the benefits for the union employees on the job to the employees and the Union, while for its nonunion employees on the job, the benefits would be paid directly to the employees. In answer to some questions from me, Dawsey testified that in his initial meeting with Nix and Riley, he told them that they would be bound by the PLA, but he never specifically addressed the out-of-work list maintained by the Union. He further testified that after the execution of the subcontract, VP was given a copy of the contract specifications of the work and the PLA. He was called to the jobsite on July 2, where he met Nix and Kieper. Kieper said that VP had hired a union member without going through the Union's out-of-work list, and he wanted him removed from the job and the next person on the list to replace him. Nix and Dawsey spoke and decided that Berghela would be let go at the end of the day. On the following morning, Kieper sent another employee to the jobsite, apparently from the out-of-work list. Dawsey testified that Kieper did not threaten any picketing or work action at the facility on July 2.

Nix testified that during bidding for the work at the jobsite, Dawsey told him that it was operating under the PLA. Like Riley, he testified that at the Pike-Heery meeting they were told that if they knew any union members, they could hire them to work at the jobsite. In answer to questions from counsel for the Respondent, Nix testified that shortly prior to starting the job he went to the union hall to speak to Fresina about hiring policies. Nix told Fresina that VP had a certain individual that it wanted to hire² and Fresina told him that when VP needed employees for the jobsite they would have to call the Union, which would refer employees from its out-of-work list. Subsequently, he testified:

JUDGE BIBLOWITZ: Mr. Nix, would it be fair to say that prior to July 2, when the job started, you knew that the Union people that you employed under the PLA had to be taken from the out-of-work list?

THE WITNESS: Not prior to that. That happened after we started work. The only time that I heard about it about a day before I discussed it with Anthony and told him that we had someone from the Union which we thought that we picked up, in the meeting that we had with them, that we could use those people if we knew them. I told him we had somebody we were going to use and may be needing additional people and he told me how to go about doing it.

JUDGE BIBLOWITZ: Okay, let's back up. Putting aside this exception that may have existed for people you knew, let's say there were people you didn't know and you were looking for a Union guy. Did you know that under the PLA, again prior to

starting the job, that you had to hire off of the out-of-work list?

THE WITNESS: No, I didn't.

JUDGE BIBLOWITZ: You didn't know that?

THE WITNESS: Huh-uh.

JUDGE BIBLOWITZ: You first learned that when?

THE WITNESS: After we had trouble at the job and then the thing came up, you know what I mean, that everybody has to be brought off the list. I didn't even know nothing about the list until we had the problem.

JUDGE BIBLOWITZ: So, it wasn't until July 2nd, with the situation with Mr. Berghela, that you knew—you found out for the first time that if you hired a Union person as one of the 50% Union, you had to get it off the Union's out-of-work list, that was the first you knew that?

THE WITNESS: Yeah, after we got started was the first I knew about the out-of-work list.

JUDGE BIBLOWITZ: Mr. Dawsey never told you about that requirement of the out-of-work list?

THE WITNESS: No, he never told me.

Counsel for the Respondent then questioned Nix about this meeting with Fresina at the union hall:

Q. He showed you the forms that they fill out when you call in so that they can send someone out?

A. I don't recall them showing me the forms . . . I know he and I had a conversation about me being able to use the Union people on the job and what he has to do.

JUDGE BIBLOWITZ: When was this meeting, what it after July 2nd or before July 2nd?

THE WITNESS: That was before we started work.

Counsel for the Respondent then resumed his questioning of Nix about this meeting:

Q. And at that meeting you started to bring up the name of Ramsis Berghela?

A. Yes, I did.

Q. And, Mr. Fresina stopped you and said it doesn't matter who, I don't need to know that name, he told you you had to call the hall to take off the out-of-work list?

A. He indicated that he did not want me to use that guy on the job. Being that my partner does the hiring for the job, said he'd already set up for this guy to come to work . . . and that at the prior meeting we had with the Union and Pike and MLB, that they stated that if he knew other people he could hire them—other people that were in the Union he could hire them to work, . . . it was his deal, he hired the guy and I wasn't going to go against him and tell him he couldn't put the guy on the job . . .

Q. So, it was your intention when you met with Anthony, to hire this person who was not on the out-of-work list, right—to

² Although not named, Berghela is the individual that he was referring to.

hire Mr., Berghela? That was a done deal when you went down to the Union hall, right?

A. Yea, as far as I know Joe had already set up for this guy to come to work.

Q. After the Union told you that you couldn't hire him because he wasn't next on the out-of-work list, you still hired him, right? He still hired him?

A. Correct, Joe put him to work because he had dealt with him for him to come to work, right. . .

Q. Did you leave that meeting with Mr. Fresina at the Laborers Union hall with the understanding that if you knew four members of the Union you could just hire them and never call the hall?

A. I mean I really didn't think about it when I left there. When I left there I knew that if we needed any other help, other than what we already had, we were going to try to get them through Anthony, we were going to call the hall and get them through the Union hall.

Fresina testified that Nix came to the union office on June 29. Nix said that VP would be starting work at the jobsite and needed laborers. Fresina said that he would have a shop steward for the job and would send as many laborers as VP needed. Nix then said that he had somebody that he wanted to employ on the job and started to mention a name. Fresina, “. . . stopped him, I said I don't even want to know who it is. I said, we have an out-of-work list. . . I explained to him the procedures that would have to be followed.”

Kieper testified that at the Pike-Heery meeting, which he felt occurred in about early to mid-June, he told Riley and Nix that hiring was to be done through the union hall, with the exception that VP could hire employees it had previously employed. On July 2, he received a telephone call from the union steward at the jobsite saying that VP employed an individual at the jobsite who had not been referred by the union hall. He went to the jobsite and met with Nix and “Gary,” the MLB superintendent:

I explained to them both that we had a hiring process that we have to go by through the hall. If an individual worked for the company before, it was all right to hire them, but if he hadn't worked for them before, under the PLA Agreement, that VP Builders has to go through the hall and request their laborers through the hall. . . whoever was highest on the list was called first and, apparently, this individual had jumped the list, was currently on the list at 80, and now on your job. It wasn't fair to the men on the list that they should go in accordance to the list.

He testified that he “absolutely” did not threaten a strike or work action. On cross examination he was asked what he asked VP to do about the situation on July 2:

Q. . . . did you request that Mr. Berghela be removed from the job because he didn't come through the hall?

A. I'm trying to think exactly how it went, it's been some time. Yes, I believe I did say that according to the list he has bumped the list and that we need to have—the first guy that was supposed to be there in his spot.

Q. Did you say, therefore you have to remove Mr. Berghela from the job?

A. I don't remember exactly how it was said.

Q. Do you recall what was the reference to Mr. Berghela by name? Did you refer to Mr. Berghela by name?

A. I don't know if I said Mr. Berghela . . .

Q. You were made aware in this meeting that VP would remove Mr. Berghela from the job?

A. I remember Jim Dawsey saying that he has to follow the same rules—he was referring that to Joe Riley and Larry that we have to follow the same rules—that VP Builders has to follow the same rules that MLB has to follow on the job as far as hiring on the jobsite. After that, Joe said something like, well, he was a 190 man or something like that, I don't remember exactly what he. . . said, but he didn't come off the list. That's what I said, that he didn't come off the list and that everybody is required to come off the list on the job.

Q. You went there for the purpose of informing VP that this individual should be removed; is that correct?

A. No, I went there to find out how the individual got on the jobsite . . .

Q. So, when you went to the meeting, it was for the purpose of having Mr. Berghela removed from the job because he wasn't hired through the hall, correct?

A. The purpose of me was to find out how this individual was going to work for VP Builders when he didn't come through the hall . . .

Q. Then, you had the expectation that he would be removed from the job, correct, that's why you went to this meeting?

A. I came there to find out what was going on, that's what I was doing there.

Q. You went there to insure that no member of Local 190 worked on this job unless they had been referred through the hall; is that correct?

A. Yes, you could say that.

IV. ANALYSIS

Initially, I credit the testimony of Nix and Riley over Kieper. Although Nix was clearly confused about the date of his meeting at the union office (I find that it occurred on Friday June 29) the balance of his testimony, and Riley's, was clear, credible, and believable. Additionally, Riley and Nix had nothing to gain from this hearing. If anything, it would be in their best interest to support the Union with whom it has to deal at the jobsite. On the other hand, I found Kieper to be a less than credible witness, not because all of his testimony was incredible, but rather because of his unwillingness to admit that he had anything to do with Berghela's discharge. Although there is no direct evidence that Kieper threatened a strike or job action at the jobsite if VP failed to discharge Berghela, Kieper clearly was at the jobsite to tell Riley that Berghela had to be replaced because he was not hired off of the Union's out-of-work list,

but he refused to admit even this in response to numerous questions from counsel for the General Counsel.

Counsel for the General Counsel, in his brief, cites *Ironworkers, Local 340 (Consumers Energy Co.)*, 347 NLRB 578 (2006), to establish that Kieper's conduct at the jobsite on July 2, violated the Act even if he made no express threat to VP if they refused to fire Berghela. It is clear that Kieper, at the least, told Riley that because Berghela was not hired off the Union's out-of-work list he had to be replaced by someone from the list. Whether this action by Kieper violates Section 8(b)(2) of the Act depends on whether VP was bound by the terms of the PLA. VP never signed any agreement with the Union. Moore signed the Subcontract with MLB on behalf of VP, but the only relevant provision of that subcontract is Note #3 which states: "This project has union labor agreement requirements as outlined in specifications." Counsel for the Respondent, in his brief, alleges that this provision binds VP to the terms of the agreements with the Union, including the PLA. I disagree and find that this provision is not sufficiently detailed or specific enough to bind VP to the requirements of the PLA. Nor is the fact that Nix was told of the contractual requirement of hiring union members from the Union's out-of-work list a few days before they began working at the jobsite.

Counsel for the General Counsel, in his brief, also cites *Bricklayers, Local 2 (Glenshaw Glass Co.)*, 205 NLRB 478 (1973); *Pile Drivers Local 2396 (Tri-State Ohbayashi)*, 287 NLRB 760 (1987); and *Kvaerner Songer, Inc.*, 343 NLRB 1343 (2004). These cases state that absent a valid collective-bargaining agreement containing an exclusive hiring hall arrangement, a union may not interfere with an employer's choice of employees. As there was no written agreement between VP and the Union, the Union had no authority to tell VP to terminate Berghela. By causing Berghela's termination on July 2, the Union violated Section 8(b)(2) of the Act.

CONCLUSIONS OF LAW

1. VP has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. By attempting to cause, and by causing, VP to terminate employee Ramsis Berghela on July 2, 2007, the Respondent violated Section 8(b)(2) of the Act.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist from engaging in these activities, and that it be ordered to take certain affirmative action designed to effectuate the policies of the Act. In that regard, I recommend that Respondent be ordered to notify VP, in writing, that it has no objection to Berghela being hired by VP. Additionally, I recommend that Respondent be ordered to make Berghela whole for any loss of wages or other benefits that he suffered as a result of its having caused him to be fired by VP, by paying to him a sum of money plus interest equal to that which he would have earned but for Respondent's discrimination against him, less interim earnings, in accordance with the principals enunciated by the Board in

Florida Steel Corp., 231 NLRB 651 (1977) and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Local 190, Laborers International Union of North America, AFL-CIO, Albany, New York, its officers, agents, and representatives shall

1. Cease and desist from

(a) Causing or attempting to cause any employer with which the Union does not have a written agreement containing an exclusive hiring hall arrangement to terminate the employment of, or refuse to hire, any employee because the employee failed to obtain the work through the Union's hiring hall; and

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

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

(a) Notify VP Builders, in writing, that it has no objection to their employment of Berghela.

(b) Make Berghela whole for any loss of earnings and other benefits that he sustained as a result of the Union's discrimination against him, less interim earnings, plus interest.

(c) Within 14 days after service by the Region, post at its union office in Glenmont, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 3, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current members and former members employed by VP at any time since July 2, 2007

(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.

Dated, Washington, D.C., December 27, 2007

APPENDIX

³ 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.

⁴ 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."

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT cause, or attempt to cause, VP Builders, Inc. ("VP"), or any other employer, to refuse to hire or terminate any employee because that employee did not obtain his/her employment through our hiring hall, unless we have a collective-bargaining agreement containing an exclusive hiring hall with that employer.

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

WE WILL notify VP that we have no objection to their employment of Ramsis Berghela.

WE WILL make Ramsis Berghela whole for any loss of earnings or other benefits suffered by reason of our discrimination against him, with interest.

LOCAL 190, LABORERS INTERNATIONAL UNION OF
 NORTH AMERICA