

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION LOCAL 1242, AFL-CIO
(PHILADELPHIA MARINE TRADE
ASSOCIATION)

and

Case 4-CB-65887

CHRISTIAN KOWALKO, An Individual

Henry R. Protas, Esq.,
for the General Counsel.
Lance Geren, Esq.,
for the Respondent.

DECISION

Statement of the Case

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on April 3, 2012, in Philadelphia, Pennsylvania. The complaint alleges that Respondent violated Section 8(a)(1)(A) and (2) of the Act by failing to have objective standards for its "must call" referral list and failing to notify employees of the existence of the "must call" list or whether they were placed on such list, thus breaching its duty of fair representation; and by failing and refusing to refer employees on the "must call" list for employment from its exclusive hiring hall. Respondent filed an answer denying the essential allegations in the complaint. After the close of the hearing, the parties submitted briefs, which I have read and considered. Based on the entire record, including the testimony of the witnesses, and my observation of their demeanor, I make the following

Findings of Fact

I. Jurisdiction

Respondent admits that it is a labor organization within the meaning of Section 2(5) of the Act and that it has a collective-bargaining agreement with the Philadelphia Marine Trade Association (PMTA), an association of employers engaged in stevedoring and related operations in ports in southeastern Pennsylvania, southern New Jersey, and Delaware. Respondent also admits that, in a representative 1-year period, the employer-members of PMTA collectively purchased and received, at their Pennsylvania

facilities, goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find, as Respondent also admits, that PMTA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5

II. Alleged Unfair Labor Practices

A. *The Facts*

10

Background

The Respondent has collective-bargaining agreements with PMTA that permit it to operate what is admitted to be an exclusive hiring hall for shipping clerks and checkers, who are supplied to PMTA employers. Tr. 12-13, 39, GC Exhs. 2 and 4. The hiring hall, which lists employees by seniority in the unit, services about 120 members of Respondent; since February 2005, it has been administered by Business Agent Phillip (Flip) Renzi. After receiving calls from employers as to how many workers are needed, Renzi goes down his list and calls individual registrants by seniority. Respondent now follows “year for year” seniority rather than seniority by groups in 5-year increments labeled by letters. In order to earn a year of seniority, an individual must work 700 hours. Members with high seniority generally have regular jobs. The seniority list mostly impacts what are called “registered casuals,” who are called the day before for work the following day. Tr. 6-7, 37, 53-58, 119.

25

Although the applicable collective-bargaining agreements discuss generally the operation of the hiring hall, the most specific hiring hall rules are set forth in the following document that was admitted in evidence as GC Exh. 3:

SENIORITY[sic] RULES CLERKS AND CHECKERS LOCAL 1242

30

SENIORITY RIGHT TO GET HIRED FIRST BY YOUR NUMBER OF YEARS.

WHEN HIRING IN A GROUP CHIEF CLERK HAS THE RIGHT TO REQUEST CERTAIN INDIVIDUALS.

35

SENIOR [sic] MAN MUST BE OFFERD [sic] THE TOP RATE IF TURNED DOWN CAN BE GIVEN ANY JOB.

40

A MEN [sic] MUST GO ON THE LIST TO WORK WEEDEND’S [sic]. THE MONDAY RULE IS IN EFFECT IF NO CLEANHEADS ARE HIRED AT THAT PIER THEY CANNOT GO BACK TO THE PIER THEY LEFT ON FRIDAY.

45

ON OVERTIME DAYS DURING THE WEEK JUST LIKE DAILY HIRE BY SENIORITY. A MEN [sic] MUST GO ON LIST TO WORK AT ANOTHER PIER OVERTIME DAYS. IF THEY WANT TO WORK THE PIER THEY ARE

WORKING THEY MUST TELL THE CHIEF CLERK BUISNESS [sic] AGENT WILL NOT HIRE THEM ON THE SAME PIER THEY ARE IN THE CARE OF THE CHIEF CLERK.

5 NIGHT HIRES GO FIRST TO ANYONE WHO DID NOT WORK THAT DAY BY SENIORITY. IF UNION IS OUT THE HIRE WILL BE DONE ON THE PIER WHERE THE NIGHT WORK IS BY SENIORITY. THEN IF NEEDED OTHER PIERS WILL BE CALLED BY SENIORITY BEFORE CLEANHEAD [sic] ARE USED AT THAT PIER.

10 TO WORK WEEKEND MUST MAKE YOUR SELF AVAILABLE BY FRIDAY AT 4 OCLOCK.

15 12 MIDNIGHT AND 1 AM HIRES ARE THE FIRST HIRE OF THE DAY. TO GET SECOND HIRE OF THE DAY UNION MUST BE OUT. 2ND HIRE WILL BE BY SENIORITY.

20 1.15 AND BLENDED RATE DO NOT COME INTO PLAY FOR JOBS BY SENIORITY.

25 According to Renzi, there are no additional hiring hall rules. The rules set forth above in GC Exh. 3 were voted on and accepted at a membership meeting on an undetermined date. Those rules are still in effect, but they are nowhere posted. Nor are they distributed to members unless there is a request for them. Tr. 49. When Renzi was asked if there were any additional rules governing the hiring hall, he responded, "No. Like I said we're telephonic and fought very hard for that." Tr. 51.

30 Renzi's normal procedure is to call an individual for a job at 4 p.m. the day before a job is scheduled to begin. The jobs normally begin at 7 or 8 a.m. If Renzi gets no answer to his initial call, he leaves a message for the individual to call him back, either at his office phone or his cell phone. Tr. 64, 115. Renzi checks his office answering machine or cell phone every morning at about 6 a.m. to see if he has any call backs. Tr. 65-67. Renzi also sometimes makes so-called "late calls" on the morning that certain jobs begin in order to fill job orders for that day. Tr. 67. He also leaves call-back messages on late calls if the individual does not answer his initial call. Late calls have some urgency because he must obtain workers on short notice. Tr. 68.

The "Must Call" List

40 Nothing in the written hiring hall rules mentions a "must call" list, which is the subject of this litigation. As indicated, Renzi normally calls individuals for jobs in seniority order. It is not unusual for individuals to turn down jobs due to unavailability; this does not preclude future referrals. Renzi testified that he has "no problem" with people "calling off," that is, turning down jobs, even repeatedly, but he objects when he cannot "find" the individual. Tr. 70-71. According to Renzi, he deems some individuals "unreliable" because they are often unavailable or do not answer his calls, so he places them on a "must call" list, which means that he does not call them; they must call him.

Tr. 64, 147. Renzi instituted the “must call” program sometime in 2008, and it remains in effect today. Tr. 69. He conceded that there are no writings that would show how the “must call” list “would work” (Tr. 70), or even whether someone is on the list (Tr. 83). He does not call anyone to tell them that they are going to be put on the “must call” list. Tr. 110. And the subject is not mentioned at general membership meetings. Tr. 83.¹

Renzi testified that he makes notations about the status of individuals using the hiring hall, including their “must call” status, on his referral sheets, a group of which were admitted into evidence. GC Exh. 5(a)–(d). The referral sheets in evidence cover weekly periods from May 30, 2011 through December 2011. They have preprinted on them the names and seniority rankings of the individuals entitled to work out of the hiring hall; also noted are the jobs to which they are assigned. Some individuals are banned from working for certain employers and a notation to that effect appears on the referral sheets. Those sheets also contain the notation “NA,” meaning that individuals were unavailable for certain days or weeks. Renzi testified that when he calls an individual who for some reason is unavailable for a job or for a period of time, he places the notation “NA” after the person’s name. Tr. 64.

There appears to be little or no difference underlying the “NA” and the “must call” notations on the referral sheets. For example, Renzi testified that an employee named Brennan was marked “NA” because he was unavailable for a week, thus “generating a must call.” Tr. 90. When asked why he did not note “must call” after Brennan’s name, thus putting him on the “must call” list, Renzi testified that he knew Brennan’s absence was not going to be “indefinite.” Tr. 91. Renzi testified about another employee, D. Reimer, who had an “NA” after his name on day and question marks after the next 4 days. Renzi said he had “lost him” and thus Reimer had to call Renzi. Tr. 92. Yet, here again, D. Reimer was not labeled a “must call.” When asked about this seeming inconsistency, Renzi testified, “I’m operating on these things in my head half the time So the ones that get must-calls I really can’t find. That’s what generates me putting down must-call. I just don’t do it because in [sic] a week or two. I do it over an extended period of time.” Tr. 92. Renzi’s testimony also suggested some kind of special treatment for Reimer that kept him off the “must call” list because of a relationship Renzi has with Reimer’s father, who was a chief clerk for one of the PMTA employers. Tr. 102–103.

Renzi’s testimony about the distinctions between those with not available notations next to their names and those with “must call” notations was vague, contradictory, and unsatisfying. See Tr. 93–95, 99–100, 101–103. When I asked him how individuals knew they were on the “must call” list, he answered, [F]ive minutes after they don’t have a job and they don’t get called. It’s just known. It’s not written down . . . but it’s in the world that I live in.” Tr. 98. Later when asked by counsel for the Acting

¹ The Acting General Counsel issued a subpoena asking for documents “showing notice to employees using the Union hiring hall during the period April 1st 2001 to March 31 2012 seeking employment if they were on or had been removed from the must-call list, including the dates that notice was given.” Renzi conceded there were no such documents. Tr. 80–81.

General Counsel if there was a standard for being placed on the “must call” list, Renzi testified, “I would say three, four days I guess, if I couldn’t find you, if I tried to give you work. There’s no set rule. Nothing written down.” Tr. 101.

5 According to Renzi, the “must call” list was instituted because “people were getting lost. I couldn’t find them. I’d be calling two, three, four days a week and getting no answer. . . . And I said I’m not going to try to track these people down. If I can’t find them I’m not going to call them until they call me and tell me they’re back in town, wherever they are or whatever happened.” Tr. 69. As indicated above, on one
10 occasion (Tr. 92), Renzi testified that he imposed the “must call” requirement for an extended unavailability, not just a week or two (Tr. 92). And, on another, he testified he imposed it after 3 or 4 days of unavailability (Tr. 101). Nor could Renzi explain precisely what would cause an individual to be placed on the “must call” list, except his own subjective evaluation that individuals either did not call back after he left messages or
15 his own view that he could “not find” the individuals (Tr. 70–71). See also Tr. 78–82. Such inconsistency and vagueness marked much of Renzi’s testimony, casting considerable doubt on his credibility as a witness. More importantly, the testimony shows the absence of a meaningful or objective standard for placing individuals on the “must call” list.

20

Respondent’s Treatment of Charging Party Christian Kowalko; and He is Placed on the “Must Call” List

25 Charging Party Christian Kowalko is a member of Respondent who first registered with the Respondent’s hiring hall in 2004. Tr. 164. Kowalko had often complained about the operation of Respondent’s hiring hall. On October 14, 2008, he appeared before Respondent’s executive board to make an official complaint about his treatment under the hiring hall, particularly his failure to obtain enough hours of work to enhance his seniority. The minutes of that meeting (GC Exh. 6) are barren of any
30 useful information, except to state that, at the meeting, which began at 6:30 p.m., Renzi explained the “hiring and seniority system” to Kowalko and someone else explained the applicable grievance procedure, presumably also to Kowalko. The minutes also state that Kowalko left the meeting at 6:50 p.m. because he was not permitted to tape record the meeting. The meeting continued until 7:30 p.m., concentrating on other matters.
35 Contrary to Respondent’s contention, nothing in the minutes shows that there was a discussion or even an explanation of a “must call” list and certainly nothing setting forth the rationale, procedures, or standards behind such a list. In these circumstances, I cannot accept Renzi’s testimony that the procedure behind the “must call” list was discussed in that meeting. Renzi’s testimony on this point was vague and somewhat
40 contradictory. He first stated that the executive board approved the “must call” procedure, but later he noted that the executive board was simply informed of his institution of the procedure, perhaps informally, because he has wide latitude in this area under applicable by-laws. Tr. 69, 76, 77, 83.

45 Kowalko credibly testified that he had never heard of a “must call” list until he was informed by a Board agent of such a rule in the investigation of this case. Tr. 171. When asked about the October 14 meeting, Kowalko denied that the “must call” list was

discussed at that meeting. He testified that Renzi answered his complaint that he was not getting sufficient hours of work by stating that Kowalko was “calling off” too many jobs, that is, he was not available for certain jobs or certain periods of time. Tr. 178. I found Kowalko, who was very candid, clearer and more detailed in his testimony than Renzi, much the more credible witness and I accept his testimony about what occurred at the October 14 meeting.

Renzi attempted to explain why Kowalko did not “make his hours,” the basis of Kowalko’s complaint at the October 14, 2008 meeting. He testified that Kowalko did not “make his hours” because he allegedly “called off 74 days, was not available 15 days and at least 10 of them I couldn’t find him.” Tr. 78, 130. It also appears that one employer in PMTA refused to have Kowalko work for it. Tr. 132. But neither of these factors had anything to do with Kowalko being placed on the “must call” list because Renzi conceded that Kowalko was not on the “must call” list at the time of the October 14, 2008 meeting. Tr. 78. And there is no suggestion that having one of the PMTA employers refuse to take a particular individual had anything to do with the individual’s right to use the hiring hall or being placed on the “must call” list. Indeed, Renzi conceded that the “must call” list was not instituted at the time of the October 14 meeting, but only at some other, undetermined, date in 2008. Tr. 77, 69.

The referral sheets for the relevant timeframe, from May through December 2011, do not show that Kowalko was on the “must call” list until Monday, June 27, 2011. Tr. 107, 109, 150. The previous Friday, Renzi called him for work and Kowalko called off, thus indicating that Kowalko actually called Renzi back. Tr. 110. It is thus perplexing why Kowalko was put on the “must call” list at this time. In any event, Renzi admitted he did not call Kowalko to tell him that he was on the “must call” list and therefore he, Kowalko, had to call Renzi in order to get a job. Tr. 110. Kowalko apparently remained on the “must call” list until December 9, 2011, when he called Renzi. At that time, Renzi offered Kowalko a job, but since he turned it down, Kowalko remains on the “must call” list, according to Renzi (Tr. 147, 149). Renzi admitted that Kowalko has not worked out of the hiring hall since September 2011. Tr. 157. But Renzi’s testimony about Kowalko’s being on the “must call” list, discussed above, as well as the referral sheets show that he has not worked out of the hiring hall since he was placed on the “must call” list. See GC Exhs. 5(a)–(d).

In response to questions from Respondent’s counsel, Renzi attempted to explain why he placed Kowalko on the “must call” list in June 2011. His answer reflected his typically vague testimony in this case. Renzi testified that Kowalko was “either calling off too much or I couldn’t [keep] in touch with him, or he was turning me down for work by calling after so many times . . . [or] he had probably attended a couple of meeting[s] and probably said something and then I would start calling him again.” Tr. 154–155. But, as indicated above, on the work day immediately before he was placed on the “must call” list, Kowalko actually called Renzi back. Renzi’s testimony shows that he cannot give a coherent explanation of why Kowalko was placed on the “must call” list.²

² At one point in his examination of Renzi, Respondent’s counsel tried to establish that

5 Kowalko testified that, after he appeared before Respondent's executive board to complain about the operation of the hiring hall in the fall of 2008, Renzi called him about a job. In that conversation, Kowalko again complained about the operation of the hiring hall as it applied to his seniority and that of others who were getting jobs. According to Kowalko, Renzi "screamed" at him and said, "I'm going to do everything I can F'ing do to get you out of this union." Tr. 166. Kowalko's testimony on this point was entirely credible. On direct, he was definite and emphatic. Tr. 166. And he firmly confirmed that testimony on cross. Tr. 179. More significantly, his testimony on this point was uncontradicted; thus, I credit it.

10 Kowalko's understanding of the Respondent's hiring hall policy was consistent with Renzi's testimony discussed above. According to Kowalko, Renzi calls him and other individuals when a job is available on a day-to-day basis. Tr. 167. It is sufficient for the individual to receive a voice mail message, but, if an individual is not available, he or she must call Renzi back before the beginning of the work day. Tr. 168. Kowalko credibly testified that he has always called back in those circumstances. Tr. 168-169, 174-176. I reject Renzi's testimony to the extent that it is inconsistent with that of Kowalko on this point, based on my overall assessment of their reliability as witnesses. Kowalko was clear, detailed, and straightforward in his testimony. In contrast, as I have noted above, Renzi was often vague, rambling, and inconsistent.

20 From Kowalko's perspective, when he did not get a call from Renzi, he assumed that there were no jobs for him. Tr. 169-170. This was a reasonable assumption and consistent with Renzi's description of how the hiring hall operated. Nor was Kowalko ever told he was on a "must call" list or that he had to call Renzi if he wanted a job. Tr. 25 171. That is also consistent with Renzi's testimony that he never notified individuals on the "must call" list that they were on such a list or why they were placed on it. As I have indicated above, the first time Kowalko ever heard about the existence of a "must call" list or that he was on it was during the investigation of this case. Tr. 171. Kowalko also testified that, because he was not getting calls from Renzi, he tried to find out by other means whether there was work in the port of Philadelphia. This showed his willingness to accept employment during the time when he was not getting calls for work from Renzi. Tr. 172-173.³

Kowalko came off the "must call" list in September 2011, because the referral sheets for September 26 do not have "must call" after his name. Tr. 154, GC Exh. 5(c). However, when asked to explain why Kowalko was taken off the "must call" list at that time, Renzi drew a complete blank. He testified, "I don't know. I must have talked to him I guess. I don't know. I'd have to . . . I got all these things I got to research my memory. Tr. 154. It is clear to me that Renzi had no idea what his counsel was talking about and his testimony here, like that elsewhere in this record, was vague and thus as unreliable as most of his other testimony. It is clear from the documentary evidence that Renzi simply did not make consistent notations as to Kowalko's status; indeed, it shows he did not make consistent distinctions between unavailability and must call status with respect to other individuals on the referral sheets. I conclude that Renzi did not take Kowalko off the "must call" list in September of 2011, and that he remained on that list, except for the brief period discussed above in December 2011.

³ As shown above, the main witnesses in this case were Renzi and Kowalko. Respondent

Discussion and Analysis

5 A union that operates an exclusive hiring hall, as the Respondent admittedly does in this case, has a fiduciary duty to represent all individuals seeking to use that hall in a fair and impartial manner. Notwithstanding the absence of specific discriminatory intent, any departure from established exclusive hiring hall procedures that results in a denial of employment to an applicant inherently encourages union membership, breaches the duty of fair representation, and absent legitimate justification, violates Section 8(b)(1)(A) and (2) of the Act. *Cell-Crete Corp.*, 288 NLRB 262, 264 (1988).
 10 See also *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688, 691 (1999), reaffirmed in 336 NLRB 549 (2001). In such cases, the union's inherent power over the very livelihood of the users of its exclusive hiring hall by its control of access to employment results in an encouragement of union membership within the meaning of Section 8(b)(2), unless the union shows that its actions were "necessary to the effective performance of its function of representing its constituency." *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1, 2 (2000), quoting and citing authorities.

20 A union's fiduciary duty in operating an exclusive hiring hall requires it to refrain from the arbitrary application of rules. The Board has found arbitrary conduct and a breach of the duty of fair representation where a union fails to use objective standards in operating its exclusive hiring hall. See *Ironworkers Local 505 (Snelson-Anvil)*, 275 NLRB 1113, 1113-1114 (1985), *enfd.* 794 F.2d 1474 (9th Cir. 1986); and *Teamsters Local 25*, 358 NLRB No. 15, slip op. 12-13 (2012). Likewise, the Board has found arbitrary conduct and a breach of the duty of fair representation where a union fails to give timely notice of a significant change in referral procedures. *Cell-Crete*, above; and

also offered the testimony of Gustave Rosanio, a member of Respondent who worked out of the hiring hall from December 2003 until December 2010. Rosanio testified generally about what happened when he declared himself unavailable for work. According to Rosanio, he was told by Respondent's hiring hall officials, including Renzi, that, if he was unavailable for a period of time, he should give them "a call when you're good to go." Tr. 16. It is unclear what Respondent sought to establish through that testimony. If it was meant to imply that Rosanio was on the "must call" list and knew about it, this would run counter to Renzi's own testimony that he did not notify individuals that they were on the "must call" list. But, in any event, I cannot rely on Rosanio's testimony because I found him to be a thoroughly unreliable witness. From his testimony and his demeanor, I thought that he was fabricating a scenario to justify the legitimacy of Respondent's "must call" list. His testimony was particularly defensive when he stated he could not recall a conversation with Board attorney Henry Protas, in which he allegedly denied ever hearing about a "must call" rule. Later, he claimed to have seen a "must call" notation after his name when he saw referral sheets in Renzi's office sometime in the summer of 2011, well after he stopped working out of the hiring hall. He testified he looked at the referral sheets on that occasion simply out of curiosity. Tr. 32. Although it would have been difficult to make any relevant factual findings from that testimony, I found it to be inherently incredible, especially since Rosanio was no longer using the hiring hall at the time. Rosanio was also a biased witness with a barely concealed anger at having to defend what he perceived a frivolous claim against Renzi. He admitted calling Renzi after his conversation with Protas because he was "upset" at the Board's investigation of the hiring hall. Tr. 32. For all these reasons, I cannot accept any of Rosanio's testimony in this case.

Operating Engineers Local 3 (Perini Corp.), 305 NLRB 1111, 1115-1117 (1992). As the Board has stated in *Sheet Metal Workers Local 19*, 321 NLRB 1147 (1996):

5 “When a union changes the rules governing its operation of an exclusive hiring hall, it must make a good faith effort to give timely notice of the rule change in a manner reasonably calculated to reach all those who [use] the exclusive hiring hall.” *Plumbers Local 230*, 293 NLRB 315 (1989).

10 Applying the above principles to the facts of this case, I find that Respondent violated Section 8(b)(1)(A) and (2) of the Act by breaching its duty of fair representation in a way that restricted referrals from its exclusive hiring hall and thus caused a loss of employment.

15 In accordance with the allegation in paragraph 5(a) of the complaint, I find that, since on or about April 3, 2011,⁴ Respondent maintained a “must call” list that requires employees on such list to telephone Business Agent Renzi in order to obtain referrals from Respondent’s exclusive hiring hall. Renzi’s testimony clearly shows, and the hiring hall referral sheets confirm, the existence of the “must call” list, which Renzi admittedly instituted several years before. Christian Kowalko was placed on the list on June 27, 20 2011. It is uncontested that employees on the “must call” list were not called for jobs, contrary to the normal procedure for job referrals, and therefore could not be employed unless they first called Renzi.

25 In accordance with paragraphs 5(c) and (d) of the complaint, I find that Respondent failed to notify Kowalko and other employees of the existence of the “must call” list or that they were placed on the “must call” list. This is established by Renzi’s own testimony, in which he admits that he never notified Kowalko or other employees either of the existence of the “must call” list or whether they were on it. Kowalko’s testimony confirms his lack of notification or knowledge. Nor perforce were the 30 employees notified that they were off the “must call” list or how to get off the list.

35 In accordance with paragraph 5(b) of the complaint, I find that Respondent had no objective standards for determining which employees were placed on the “must call” list. I also find that there were no objective standards for coming off the “must call” list. This is established by Renzi’s testimony. He gave vague and inconsistent reasons for placing or not placing employees, including Kowalko, on the “must call” list. Nothing 40 pertaining to such a list was ever written or discussed generally in membership meetings and the standards both for being placed on the list and being taken off the list were at best based on Renzi’s subjective views of the availability of particular individuals. He himself testified that there was “no set rule” on the matter and he was “operating on these things in my head half the time.” The law requires something more

⁴ The “must call” list was instituted sometime in 2008, but the complaint may only reach conduct on and after April 3, 2011, because the Sec. 10(b) period can only extend that far, the charge having been filed on October 3, 2011.

than mind reading when applying hiring hall rules that govern the very livelihood of the participants in an exclusive hiring hall.

5 In view of the failure to set objective standards for the use of the “must call” list and the failure to notify employees of the existence of or their placement on the “must call” list, I find that Respondent’s maintenance of the “must call” list was based on arbitrary considerations. Respondent has thus breached its duty of fair representation to the users of its exclusive hiring hall in violation of Section 8(b)(1)(A) of the Act. The employees placed on the “must call” list were also denied the opportunity to obtain job referrals because they were not called for jobs that would otherwise be available and they had no idea that they would not be called for jobs—the normal hiring hall procedure—or that they had to initiate calls to the hiring hall. They thus lost work and additional hours that would have added to their seniority. Accordingly, Respondent’s breach of its duty of fair representation also amounted to a violation of Section 8(b)(2) of the Act. See *Denver Theatrical Stage Employees’ Union No. 7 (Carol A. Miron)*, 339 NLRB 214, 216–217, 210 (2003) (violations involving a similar set of circumstances).

20 I also find that Respondent did not satisfy its burden of showing that the “must call” rule and its application were necessary to the effective performance of its function of representing its constituency. At best, Respondent’s position amounts to a contention that availability problems required the use of the “must call” list in order to effectively run its exclusive hiring hall. I reject that notion. As shown in the factual statement, Renzi could not adequately distinguish between those individuals whom he labeled not available and those whom he placed on the “must call” list. And he failed utterly in explaining what kind of unavailability landed an individual on the “must call” list. In its brief (Br. 17), Respondent contends that employees knew they had to make themselves available for work in order to use the hiring hall, in reliance on the discredited testimony of Rosanio and the purely hypothetical and unreliable opinion testimony of Renzi as to what he thought other people knew. But that testimony neither justifies the use of the “must call” list nor establishes that the list was necessary to represent Respondent’s constituency. It is insufficient to avoid the notice requirements set forth in the Board cases cited above. Moreover, asserted opinion evidence that members knew that they had to be available does not establish notice or even knowledge of the existence of a “must call” list, what it took to be placed on it, or whether a person was on it or not. Nor does a general need for employees to make themselves available justify the way the “must call” list was used by Renzi—without objective standards and strictly based on his subjective view of an employee’s availability.⁵

⁵ At the hearing, Respondent also contended that employees knew they had to make themselves available for work in order to use the hiring hall, in reliance on what was introduced into evidence as R. Exh. 1. That undated exhibit, with accompanying testimony, shows that, when employees were admitted to membership, they pledged to comply with seven specific requirements, including accepting the applicable collective-bargaining agreement, agreeing to live up to the constitution of Respondent and its parent union, agreeing to the Respondent’s seniority system, and agreeing to perform picket duty in the event of a labor dispute. One of the

Citing *Plumbers Local 342*, above, Respondent further contends (Br. 15) that, at most, Renzi's failure to refer Kowalko was a "mistake" and did not rise to the level of arbitrariness required to show a breach of the duty of fair representation and thus did not also amount to an encouragement of union membership. That contention is without merit and the cited case is distinguishable from the situation presented here. First of all, the complaint and the supporting evidence do not deal solely with the treatment of Kowalko. They deal with the use of the "must call" list as it applied not only to Kowalko, but all employees who were secretly placed on that list, without notification, and without any objective standards beyond Renzi's own subjective views of an employee's availability. The promulgation and application of the "must call" list was thus not a simple "mistake." Contrary to Respondent's contention, its use of the "must call" list amounted to unabashed arbitrary conduct. It was part of an overall deliberate and volitional policy that violated the duty of fair representation because no one knew that they were on such a list and placement on the list lacked objective standards. Placement on such list also deprived employees of work opportunities and thus encouraged union membership. Those are the very factors that are present here, and not present, but condemned by the Board, in *Plumbers Local 342*. See 329 NLRB at 691.

Conclusions of Law

1. By failing to set objective standards for its use of a "must call" list and failing to notify employees of the existence of the "must call" list or their placement on it, Respondent breached its duty of fair representation in a way that restricted referrals from its exclusive hiring hall and thus caused a loss of employment, in violation of Section 8(b)(1)(A) and (2) of the Act.

2. The above violations constitute unfair labor practices within the meaning of the Act.

pledges, and the one Respondent relies on here, stated that the new member would be "ready and available for work at all times and at all locations." Those pledges do not provide a defense to the allegations in the complaint about the improper use of the "must call" list. There is no relationship between the pledge to make oneself available for work and the institution of the "must call" list. Nothing in the pledges mentions a "must call" list. Indeed, the availability pledge predated the institution of the "must call" list in 2008, something Renzi admitted was never discussed in membership meetings. Moreover, someone's availability is a vague and imprecise term, as shown by much of Renzi's testimony in this case. It cannot thus provide an objective standard by which to measure application of the "must call" list. Nor does anything in either the availability pledge or any of the other pledges mention whether a member may lose the opportunity to obtain employment without being notified about what makes him or her unavailable. Accordingly, I reject any attempt by Respondent to rely on its Exh. 1 as a defense to the alleged violations in this case.

Remedy

Having found that the Respondent has engaged in unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Because employee Christian Kowalko and others on the “must call” list were denied employment and other benefits, including enhanced seniority, due to their placement on that list, they are also entitled to backpay to compensate them for their losses.⁶ Backpay will be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest compounded daily as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). The Respondent will also be ordered to notify employees on the “must call” list that they are no longer on such list and will not be placed on such list until and unless objective standards are promulgated for placement on such list and proper notification of their placement is given. In addition, Respondent will be required to post a notice in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010). See *Teamsters Local 25*, 358 NLRB No. 15 (2012).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁷

ORDER

Respondent, its officers, successors, and representatives, shall:

1. Cease and desist from

(a) Using its “must call” list to deprive employees of referrals from its exclusive hiring hall without providing objective standards for placing or removing them from the “must call” list.

(b) Failing to notify employees using its exclusive hiring hall of their placement on or off the “must call” list, along with the reasons for such determinations.

(c) Failing or refusing to refer Christian Kowalko or other employees using its exclusive hiring hall to jobs they would otherwise be entitled because of their placement on the “must call” list.

⁶ The exact number of employees on the “must call” list who lost employment opportunities because of the Respondent’s violations and how much work was lost may be determined in the compliance phase of this case.

⁷ If no exceptions are filed as provided in 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.

(d) In any like or related manner, failing to abide by its duty of fair representation or otherwise restraining, coercing, or interfering with employees in the exercise of their rights under Section 7 of the Act.

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

(a) Promulgate objective standards for placing and removing employees using its exclusive hiring hall on or from its “must call” list, and notify all users of its hiring hall of such standards.

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(b) Notify any employee using its exclusive hiring hall when they have been placed or removed from its “must call” list, together with its reasons for doing so.

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(c) Make Christian Kowalko and any other individual who has been placed on the “must call” list since April 3, 2011, whole for any loss of earnings or seniority or other benefits suffered as a result of being placed on the “must call” list, with interest, in the manner set forth in the remedy section of this decision.

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(d) Notify employees on its “must call” list that they are no longer on such list and will not be placed on such list until and unless objective standards are promulgated for placement on such list and proper notification of their placement is given.

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(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all hiring hall and referral records, and any other records and documents, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(f) Within 14 days after service by the Region, post at its office and hiring hall in Philadelphia, Pennsylvania copies of the attached notice marked “Appendix.”⁸ Copies of the notice, on forms provided by the Regional Director for Region 4, 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 employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other

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⁸ 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.”

material. In the event that, during the pendency of these proceedings, the Respondent has ceased operating the hiring hall involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former members whose names appeared on the Respondent's hiring hall list at any time since April 1, 2011.

(g) Within 14 days after service by the Region, sign and return to the Regional Director for Region 4 sufficient copies of the notice for posting by PMTA employers, if willing, at all places where notices to employees are customarily posted.

(h) 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., May 23, 2012.

Robert A. Giannasi
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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 with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT use the “must call” list to deprive employees of referrals from our exclusive hiring hall without providing objective standards for placing or removing them from the “must call” list.

WE WILL NOT fail to notify employees using our exclusive hiring hall of their placement on or off the “must call” list, along with the reasons for such determinations.

WE WILL NOT fail or refuse to refer employees using our exclusive hiring hall to jobs they would otherwise be entitled because of their placement on the “must call” list.

WE WILL NOT in any like or related manner, fail to abide by our duty of fair representation or otherwise restrain, coerce, or interfere with employees in the exercise of their rights under Section 7 of the Act.

WE WILL promulgate objective standards for placing and removing employees using our exclusive hiring hall on our “must call” list, and notify all users of its hiring hall of such standards.

WE WILL notify any employee using our exclusive hiring hall when they have been placed or removed from our “must call” list, together with our reasons for doing so.

WE WILL make any individual who has been placed on the “must call” list since April 3, 2011, whole for any loss of earnings or seniority or other benefits suffered as a result of being placed on the “must call” list, with interest.

WE WILL notify employees on our “must call” list that they are no longer on such list and will not be placed on such list until and unless objective standards are promulgated for placement on such list and proper notification of their placement on that list is given.

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION LOCAL 1242, AFL-CIO
(PHILADELPHIA MARINE TRADE
ASSOCIATION)

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404
(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.