International Brotherhood of Electrical Workers, Local 48, AFL–CIO (Oregon-Columbia Chapter of National Electrical Contractors Association) ***and*** **Paul Footlick** ***and*** **Dennis S. Coey** ***and*** **Patrick Mulcahy** ***and*** **Richard S. Smith** ***and*** **Brad Twigger** ***and*** **Terry Taylor** ***and*** **William Perry.** Cases 36–CB–1798–1, 36–CB–1947, 36–CB–1840–1, 36–CB–1798–2, 36–CB–1798–3, 36–CB–1798–4, 36–CB–1798–5, 36–CB–1859, 36–CB–1798–6, and 36–CB–1853

June 23, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On April 21, 2000, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

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

From October 1992 to May 1994 (the relevant period), dozens of employees were dispatched out of order from a Portland, Oregon hiring hall operated by International Brotherhood of Electrical Workers, Local 48, AFL–CIO (Local 48 or the Union). Some of these improper dispatches were knowing and deliberate; others resulted from negligent disregard of established hiring hall rules. Among the deliberately irregular dispatches, some were handed out in connection with Local 48's salting program. The complaint alleged violations of Section 8(b)(1)(A) of the Act for all of these deviations from the Union's hiring hall rules.[1] The judge dismissed these allegations. The General Counsel excepts. For the reasons explained below, we reverse.

I. FACTS

A. Dispatch Rules Governing Local 48's Hiring Hall

Local 48 operates an exclusive hiring hall for journeyman and apprentice electricians. The rules governing this operation are contained in the collective-bargaining agreement, as amended from time to time, between Local 48 and the Oregon-Columbia Chapter of the National Electrical Contractors Association, a multiemployer association. Included in these rules are the various requirements for registering in one of four groups, or "books." Taken together, these four books comprise the out-of-work list, or OWL, from which job referrals are made. Within each book, applicants are listed by sign-in date, with the most recent sign-ins at the bottom of the book. Although a few of the alleged irregularities in this case concern dispatches from book 2, most involve dispatches from the highest-ranking book, book 1.

To register on book 2, an applicant must have 4 or more years' experience in the trade and must have passed a journeyman inside wireman's exam or been certified as a journeyman inside wireman by an inside joint apprenticeship and training committee. Eligibility for book 1 requires the foregoing, and more. A book 1 registrant must reside within the geographical jurisdiction of Local 48. Before June 17, 1993, book 1 listing also required that an applicant have been employed at least 1 year out of the previous 4 by signatory contractors. As a shorthand, we will call this the "signatory 1 out of 4" rule. Beginning June 17, 1993, the signatory 1 out of 4 rule was replaced by a rule requiring employment at least 1 year out of the previous 4 within Local 48's geographical jurisdiction, regardless of whether the employers worked for were signatory contractors.

The cardinal rule of the Union's hiring hall is first in, first out. Thus, a referral must be offered first to the highest-listed registrant present in the hall—typically a registrant on book 1. The only exceptions to this rule are for age balancing (not relevant here) and for jobs requiring special skills. As to the latter, when a contractor calls for someone with a certain skill, the referral must be offered to the highest-listed applicant present in the hall who possesses the requested skill. Except to fill a foreman position, the dispatch rules do not permit Local 48 to refer applicants requested by name.

Two other hiring hall rules bear on the alleged dispatching violations in this case: the biannual re-sign rule and the short-call rule. The biannual re-sign rule provides that everyone listed on the OWL must sign in at the hall twice a year, in February and August, on pain of being dropped from the OWL. During the relevant period, the short-call rule provided that a registrant who was dispatched to a job that, through no fault of his own, lasted 40 hours or less would preserve his predispatch position on the OWL. Put differently, if a job lasted longer than 40 hours, the person dispatched to that job was supposed to roll to the bottom of his book when he signed back in after the job had ended. In November 1994, the short-call period was lengthened from 40 hours

[1] The complaint alleged a number of other 8(b)(1)(A) violations as well, some of which the judge found and some of which she dismissed. There are no exceptions to any of the judge's findings concerning these other allegations. Thus, absent exceptions, we adopt the judge's findings in secs. II,B,4, 5, 6, II,C, D, and E of her decision.

to 30 days. However, since no evidence was introduced concerning dispatches postdating May 16, 1994, for present purposes the applicable short-call rule is the 40-hour rule.

B. The Documentary Evidence

In reviewing the evidence supporting our findings herein, we will have occasion to refer to four principal kinds of documents contained in the record: the daily sign-in report (DSR), the daily dispatch report (DDR), the already mentioned out-of-work list, and the member master inquire (MMI). Some explanation of these documents will help orient the reader to the dispatching irregularities at issue here.

The Daily Sign-In Report: As its name suggests, the daily sign-in report for any given day lists, or should list, everyone who signed in that day. A few of the DSRs in the record are handwritten originals from the hiring hall, but most of them are typed counterparts prepared from the originals by a Local 48 secretary. "Signing in" on the DSR must be distinguished from "initialing" the OWL. An applicant *signs in* to signify his availability for work, such as after his previous employment has ended. Under certain circumstances, an applicant could properly receive a dispatch the very day he signs in. More typically, however, the newly signed-in applicant is not entitled to an immediate dispatch. Therefore, his name appears on the next day's OWL at the bottom of the highest-ranking book for which the applicant is eligible, and next to his name is printed his sign-in date. When the applicant comes to the hiring hall on that day and successive days, he *initials* the OWL next to his name to signify his presence in the hall and availability for dispatch.

An applicant also signs in to comply with a February or August re-sign requirement. When he does so, the applicant is issued a re-sign "slip" evidencing that he has met his biannual re-sign duty; and his name will appear on that day's DSR, typically with a handwritten notation indicating "re-sign." Confusingly, successive OWLs frequently substitute the most recent biannual re-sign date for the applicant's last sign-in date. DSRs are therefore crucial for determining actual sign-in dates and, correspondingly, an applicant's proper position on the OWL.

The Daily Dispatch Report: The daily dispatch report is just what the name says: a list of everyone dispatched on a given day. Dispatches are also evidenced in other ways. The name of the contractor to which an applicant was dispatched is generally written next to that individual's name on the OWL. Also, the dispatched applicant is given an introduction slip, and he may also sign an authorization for withholding of union dues. In some instances, the record contains an introduction slip and a dues withholding authorization uncorroborated by a DDR entry. Where that is the case, the logical inference is that the dispatch has been handled "off the books."

The Out-of-Work List: The OWL for any given day should list all applicants who have signed in (as documented on earlier DSRs), have met all intervening biannual re-sign obligations (again documented on prior DSRs), and are currently unemployed by a signatory contractor. Because of the short-call rule, the OWL will also list persons very recently dispatched. As explained above, an employee signing in after a short call preserves his previous OWL position. Thus, to avoid needless deletion and reinsertion of names, Local 48 keeps applicants listed on the OWL for a time after they have been dispatched. The record contains OWLs for almost but not quite all days the hall was open for business during the relevant period. According to Gerald Bruce, Local 48 business manager beginning in 1996, no hard copy OWL was generated on days when all available jobs had already been "passed," or rejected.

The Member Master Inquire: Local 48 keeps an MMI for every Local 48 member, as well as for "travelers"—i.e., members of other IBEW locals who have traveled into Local 48's geographical jurisdiction and signed in at its hiring hall. The MMI contains a wealth of information, including, as relevant here, a chronological listing of the jobs the individual in question has worked, the contractors worked for, and the starting and ending dates of each employment. This information makes it possible to determine whether particular book 1 registrants had met the signatory 1 out of 4 requirement for registering on book 1. The MMI also may indicate the date on which an individual either completed his apprentice training or passed the journeyman inside wireman's exam, one or the other of which is also prerequisite to Book 1 registration.

C. Deliberate Departures from the Hiring Hall Rules

Category 1: Local 48 maintained a "salting" program during the relevant period. Salting is a practice in which union members take jobs with nonunion employers in order to organize their employees.[2] There is no dispute that Local 48 intentionally gave preferential dispatching treatment to persons who served as salts. There is also no dispute that Local 48 extended similar treatment to so-called peppers.[3] According to Edward Barnes, business manager of Local 48 from 1992 to 1995, a "pepper"

[2] *Little Rock Electrical Contractors*, 336 NLRB 146, 150 (2001), enfd. mem. 171 LRRM 3215 (4th Cir. 2002).

[3] The following is a nonexhaustive list of individuals who received preferential dispatching treatment as salts or peppers: Patrick Anderson, Dennis Yandle, Clyde Eng, Howard Green, Paul Starr, Ray Jones, and Mike Bateman.

is somebody "that's working for a nonunion shop that's helping the Union organize" that shop. Put differently, a pepper is a newly organized employee of a nonsignatory employer who remains with that employer for a time to engage in organizing.

The judge found that Local 48 gave preferential dispatching treatment in connection with its salting program in two ways. First, at a time when the signatory 1 out of 4 rule was still in effect, salts and peppers were given credit for their time with nonsignatory employers for purposes of satisfying that rule and thus registering on book 1 after their "salting" or "peppering" employment ended. Second, salts and peppers sometimes received dispatches without having registered on the OWL at all.[4]

The judge made no findings concerning deliberate out-of-order dispatches unrelated to Local 48's salting program. Based on our review of the record, however, we find that Local 48 knowingly made numerous out-of-order referrals for a variety of reasons other than the recipient's having served as a salt or pepper. Some of these dispatches fall into well-defined categories, as follows.

Category 2: According to Bruce's uncontradicted testimony, certain former employees of Tigard Electric—including without limitation Paul Starr and John Holmes III—who had been "stripped" during an organizing campaign were returned to Tigard off the books shortly after it recognized the Union.[5]

Category 3: Some individuals—including without limitation Troy Rorabaugh, John Vitro, and Marvin Schreifels—received off-the-books dispatches at or about the time they joined Local 48. Unlike the peppers discussed above, persons in this category did not join the Union and then remain with their nonsignatory employers for a time to engage in organizing. Rather, the evidence indicates that they received off-the-books dispatches simply as a reward for joining the Union.[6] With respect to Rorabaugh and Vitro, our finding is based on Rorabaugh's uncontradicted testimony. Rorabaugh testified that in 1992, when he was working as a supervisor for a nonunion contractor, Local 48 official, Mel Conner, approached him and guaranteed him a year's work if he joined the Union. Rorabaugh accepted Conner's offer and received a dispatch without ever being placed on the OWL. Rorabaugh also testified that John Vitro came with him and received the same deal.[7] Schreifels similarly testified, without contradiction, that he joined Local 48 at Conner's prompting in January 1993 and received an immediate dispatch to Team Electric.[8]

Category 4: Bruce testified that Bill Wynkoop, Everett Johnston, and Steven Shiprack, without having registered on the OWL, were dispatched back to an employer that had just discharged them.

Category 5: Some individuals—including without limitation Merle Cook, Dale Polzin, Curtis Nappe, Marius Michael, John Robertson, Louis Roumagoux, Roger Bement, Ralph Robbins, and Alex Melnick—

[4] The General Counsel contends there was a third way in which Local 48 gave salts preferential treatment in dispatching: salts who were registered on book 1 when their "salting" employments began were permitted to remain on the OWL and work their way up the list during those employments. Our dissenting colleague defends this practice, taking the view that allowing salts to stay on the OWL during their salting employments did not contravene the hiring hall rules because, technically speaking, a salt working for a nonunion contractor has not been dispatched. In light of the judge's undisputed finding that Local 48 gave salts and peppers preferential dispatching treatment in other ways that plainly did contravene hall rules, we need not pass on the legality of this particular practice. However, even assuming that remaining on the OWL during a salting employment does not in itself violate the rules of the hiring hall, registrants so situated would still be obliged to meet their biannual re-sign duty. Keeping a salt on the OWL despite his having failed to satisfy that duty would constitute an improper dispatching practice; and, as explained more fully below, the General Counsel may allege and prove additional instances of that practice at compliance.

[5] "Stripping" is the practice of persuading employees of nonunion employers to join the union and leave their employer. *Wolgast Corp.*, 334 NLRB 203, 212 (2001), enfd. 349 F.3d 250 (6th Cir. 2003), cert. denied 124 S.Ct 1656 (2004). In its brief, Local 48 admits that it agreed to return four "stripped" former employees to Tigard. The other two may have been Charles Gaty and Howard Cook, but at this stage the record is insufficient to so find.

[6] In addition to Rorabaugh, Vitro, and Schreifels, this category may also include Dennis Gross, Mark Vesico, Charles Parker, Michael Quinonez, Gary Rossman, and Craig Yundt. Alternatively, one or more of these six individuals may have served as a pepper. We need not resolve this uncertainty because the remedy would be the same regardless of the category. Whether rewarded as peppers or simply for joining the Union, these six individuals received deliberate out-of-order dispatches, as shown by the following evidence. *Dennis Gross*: Mel Conner, head of organizing for Local 48 from 1990 to 1998, admitted that Gross was dispatched off the books. *Mark Vesico*: Conner admitted that Vesico was dispatched off the books. *Michael Quinonez*: MMI shows Quinonez starting at Team Electric on September 15, 1993, but there is no hiring hall record of this dispatch. *Charles Parker, Gary Rossman, and Craig Yundt*: MMIs show Parker, Rossman, and Yundt starting at Team Electric on September 7, 1993, but there are no hiring hall records of these dispatches. This listing is not necessarily exhaustive. Others also may have received preferential dispatching treatment as a reward for joining Local 48.

[7] Documentary evidence tends to corroborate Rorabaugh's testimony. Rorabaugh signed in at the hall on December 15, 1992, and was dispatched that same day. No OWL was generated on that date. However, the DSR for that date shows that eight persons signed in, and the DDR for that date shows that of these eight, only Rorabaugh received a dispatch. As for Vitro, there is no evidence that he ever signed in at the hall, but his MMI nevertheless shows that he started work with a signatory contractor shortly after Rorabaugh on January 4, 1993.

[8] As with Rorabaugh, documentary evidence corroborates Schreifels' testimony. The DSR and DDR for January 22, 1993, show Schreifels signing in as a new applicant and receiving a dispatch to Team Electric that same day.

appear to have retained OWL positions they should have lost as a result of missing a biannual re-sign. For each of the named individuals in this category, the General Counsel introduced into evidence an OWL listing that individual as having re-signed on a given date in February or August—the biannual re-sign months—and a DSR for that same date omitting the individual's name. For example, the OWL for April 20, 1993, lists Roger Bement as having met his February 1993 re-sign duty on February 10; but the DSR for February 10 omits Bement's name. The Union countered this evidence by speculating that Bement might have been mistakenly omitted from the February 10 DSR—presumably by the Local 48 secretary who prepared the DSR from the hiring hall original—and Bement, discovering the error, presented his re-sign slip to the dispatcher and was restored to his place. Similar evidence, similarly countered, was introduced as to the other named individuals in this category.[9] However, Local 48 presented no evidence that its speculations as to what might have happened did, in fact, happen. Thus, we infer from the evidence that the individuals in question were intentionally permitted to retain OWL positions they should have lost by virtue of missing a biannual re-sign.

Category 6: Some individuals—including without limitation Paul Demos, Dean Wilhite, and Patrick Kerner—received off-the-books dispatches in response to name requests, where the jobs to be filled were not foreman positions and therefore did not qualify for name-request dispatching. The evidence concerning these dispatches reveals the following.

Heil Electric asked for Demos by name, and he was dispatched accordingly on March 2, 1993. Bruce claimed this referral was a "special skills" dispatch. As explained above, a "special skills" dispatch must be offered to the highest-listed registrant present in the hall who possesses the requested skill. There is no evidence that Demos was the highest-listed qualified registrant on the OWL on March 2, 1993. Indeed, no OWL was even printed that day.

Wilhite was dispatched on April 12, 1993, to a jobsite some distance from Portland. Wilhite had worked for this contractor at this jobsite before, and the contractor asked him to come back. This dispatch was handled off the books: Wilhite was not even present in the hiring hall on April 12, 1993, and his name does not appear on that day's DDR.

Kerner worked out his own employment arrangement with Far West Electric and was "dispatched" accordingly.

Finally, there were a number of deliberate dispatching irregularities during the relevant period that cannot be categorized. As to these, the record suffices to prove a deliberate departure from the hiring hall rules, but each instance thus proved appears to be sui generis.[10] The evidence upon which we rely in finding these uncategorizable dispatching irregularities is quite voluminous. For that reason, and for reasons explained in section II,C, "Compliance Issues," we will identify all of the individuals in this "category" and summarize the relevant evidence in an evidentiary appendix to this decision, below.

D. Mistaken Departures from the Hiring Hall Rules

In addition to the numerous deliberate dispatching irregularities outlined above, Local 48 also mistakenly departed from its hiring hall rules in two respects. First, it unwittingly permitted a number of applicants to register on book 1 despite their not having satisfied one or more of the requirements for book 1 eligibility. These individuals include, without limitation, those listed in section 2 of the evidentiary appendix, below. Local 48 was unaware that book 1–ineligible applicants were registered on that book because it ran the hall on what Bruce characterized as an "honor system," trusting the applicants themselves to make sure that they complied with the eligibility rules. Unfortunately, that system failed badly. As the MMIs on file in the union office reveal, a number of applicants signed up on book 1 without having passed the journeyman inside wireman's exam. Others should have been excluded from book 1 for failure to meet the signatory 1 out of 4 rule. Still others registered on book 1 were expressly identified on their MMIs as ineligible for that book. It bears repeating that an individual's MMI reflects the starting and ending dates of

[9] *Merle Cook*: Listed on the February 17, 1993 OWL with a sign-in date of February 16, 1993; DSR for February 16 does not list Cook. *Dale Polzin*: Listed on the April 23, 1993 OWL with a sign-in date of February 22, 1993; DSR for February 22 does not list Polzin. *Curtis Nappe*: Listed on the June 11, 1993 OWL with a sign-in date of February 5, 1993; DSR for February 5 does not list Nappe. *Marius Michael*: Listed on the September 1, 1993 OWL with a sign-in date of August 5, 1993; DSR for August 5 does not list Michael. *John Robertson*: Listed on the December 13, 1993 OWL with a sign-in date of August 12, 1992, but Robertson failed to re-sign in both February and August 1993; MMI shows that he actually re-signed on September 27, 1993. *Louis Roumagoux*: Listed on the February 22, 1994 OWL with a sign-in date of August 26, 1993; DSR for August 26 does not list Roumagoux. *Ralph Robbins*: Listed on the July 22, 1993 OWL with a sign-in date of February 16, 1993; DSR for February 16 does not list Robbins. *Alex Melnick*: Listed on the June 10, 1993 OWL with a sign-in date of February 17, 1993; DSR for February 17 does not list Melnick. This listing is not necessarily exhaustive.

[10] One or more individuals in this group may have been salts or peppers, but the evidence is insufficient to resolve that uncertainty. In any event, even if we have included some salts and peppers in the category of "uncategorizables," the mistake is harmless because it would have no effect on the remedy.

each job to which that person has been dispatched. Necessarily, therefore, the MMIs are consulted and updated on a regular basis.

Additionally, a number of individuals worked jobs in excess of the 40-hour short-call limit without rolling to the bottom of their book. These individuals include, without limitation, those listed in section 3 of the evidentiary appendix, below. These departures from the contractual short-call rule resulted from Local 48's mistaken application of a 30-day short-call limit throughout the relevant period. As stated above, however, the short-call limit was not extended from 40 hours to 30 days until November 1994, well after the end of the relevant period.

II. ANALYSIS AND DISCUSSION

A. Deliberate Departures from the Hiring Hall Rules

In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court held that a union breaches its duty of fair representation by conduct toward a member of the collective-bargaining unit that is "arbitrary, discriminatory, or in bad faith." 386 U.S. at 190.[11] Guided by subsequent Supreme Court decisions construing the duty of fair representation,[12] the Board has held that the three-pronged *Vaca v. Sipes* standard applies to all union activity, including the operation of a hiring hall. *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999), enf. denied sub nom. *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2000).[13] When a union purposely departs from the rules governing the operation of its hiring hall, it dramatically displays its power to affect employees' livelihood. Such a deliberate departure constitutes arbitrary, discriminatory, or bad-faith conduct in violation of the duty of fair representation, and violates Section 8(b)(1)(A) and (2), unless the union can demonstrate that the departure was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function. *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB at 550, enfd. sub nom. *Jacoby v. NLRB*, 325 F.3d 301 (D.C. Cir. 2003); *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983). As set forth above, on numerous occasions throughout the relevant period, Local 48 knowingly and deliberately departed from the procedures governing its hiring hall. There is no contention that any of these departures were pursuant to a valid union-security clause. Accordingly, Local 48 violated Section 8(b)(1)(A) as alleged unless it rebutted the presumptive unlawfulness of its conduct by demonstrating, as an affirmative defense, that the departures were necessary to the effective performance of its representative function.

The judge found that Local 48 met its burden in this regard with respect to departures in furtherance of its salting program. Citing *Ashley, Hickham-Uhr Co.*, 210 NLRB 32 (1974), the judge equated the "necessary to the effective performance" defense with a showing that deviations from hiring hall rules are not "arbitrary, invidious, or irrelevant to legitimate union interests." Finding that a goal of Local 48's salting program was to capture work for the Union, the judge then relied on *Sheet Metal Workers Local 27 (Sheet Metal Contractors' Assn.)*, 316 NLRB 419 (1995), which she characterized as holding that "a union may deviate from established hiring hall rules to achieve its goal of providing employment opportunities otherwise unavailable to its hiring hall registrants when such a goal is recognized by the union." Finally, the judge reasoned by analogy from *Food & Commercial Workers Locals 951, 7, & 1036 (Meijer, Inc.)*, 329 NLRB 730 (1999).[14] In *Meijer*, the Board held that union organizing expenses are chargeable to *Beck*[15] objectors. The *Meijer* Board based its holding on evidence that represented employees benefit from their union's organization of additional workers. By analogy to *Meijer*, and applying the *Ashley* standard set forth above, the judge found that deviations from the hiring hall rules in furtherance of Local 48's salting program "served the legitimate Union interest of organizing unorganized employees" and were neither "arbitrary" nor "invidious." Based on this finding, the judge concluded that those deviations were "necessary to the effective performance

[11] The third amended consolidated complaint alleges violations of Sec. 8(b)(1)(A), which makes it an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of their Section 7 rights. The complaint does not, in so many words, allege that Local 48 breached its duty of fair representation. However, under *Miranda Fuel*, 140 NLRB 181, 185 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963), a breach of the duty of fair representation constitutes an 8(b)(1)(A) violation; and the judge and parties take it for granted that Local 48's duty of fair representation is at issue here. Moreover, in hiring hall cases, the Board applies the same standards regardless of whether a breach of the duty of fair representation is expressly alleged. *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549, 553 (2001).

[12] *Steelworkers v. Rawson*, 495 U.S. 362 (1990); *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65 (1991).

[13] In *Jacoby*, supra, the D.C. Circuit disagreed with the Board's application of a unitary duty-of-fair-representation standard to all union activity, holding that unions owe a heightened duty in the operation of a hiring hall. The Ninth Circuit has agreed with the D.C. Circuit in this regard. *Lucas v. NLRB*, 333 F.3d 927, 934–935 (9th Cir. 2003). We discuss this issue more fully in sec. II,B, which deals with Local 48's mistaken departures from its hiring hall rules. We need not decide here which standard should apply because, for the reasons explained below, Local 48's deliberate departures from its hiring hall rules were unlawful under either a unitary or a heightened duty standard.

[14] Enfd. en banc 307 F.3d 760 (9th Cir. 2002), cert. denied 537 U.S. 1024 (2002).

[15] *Communication Workers of America v. Beck*, 487 U.S. 735 (1988).

of the Union's representative function." We disagree with both the judge's analysis and her ultimate conclusion.

First, contrary to the judge, *Ashley, Hickham-Uhr*, supra, does not explain the "necessary to the effective performance" defense. *Ashley* concerned a dispatch preference for a union steward. Steward dispatch preferences are not presumptively unlawful. *Teamsters Local 959 (Ocean Technology, Inc.)*, 239 NLRB 1387, 1389 (1979); *Plumbers Local 520 (Aycock Inc.)*, 282 NLRB 1228 fn. 2 (1987). Thus, in such cases, the union has no burden to present a "necessary to the effective performance" defense. Rather, the General Counsel must show that the union's preferential dispatch of a steward was "'arbitrary, invidious, or irrelevant to [its] legitimate . . . interest,'" and therefore "belied any motivation to assure effective administration of the contract." *Ocean Technology*, supra (quoting *Ashley, Hickham-Uhr*, supra). In sum, *Ashley* articulates the General Counsel's burden in steward preference cases, not Local 48's burden in this case of showing that its deliberate out-of-order dispatches were necessary to the effective performance of its representative function.

Moreover, *Sheet Metal Workers Local 27*, supra, upon which the judge relied, is distinguishable. In that case, union president Stapleton learned that the general contractor for a county jail project intended to subcontract the sheet metal work to an out-of-state contractor. Stapleton asked county politician Larrison to intercede with the general contractor. Larrison did so, and the sheet metal subcontract was awarded to an in-state union contractor. Larrison then asked Stapleton whether the subcontract would result in employment for residents of the county. Thereafter, Stapleton limited dispatches for the jail renovation project to county residents. In doing so, Stapleton invoked "Resolution 78," an addendum to the collective-bargaining agreement that authorized the union to take whatever steps necessary in order to capture work for its members. 316 NLRB at 422. In finding the union's conduct necessary to the effective performance of its representative function, the Board emphasized the union's reliance on Resolution 78, which was found to be "a collectively bargained exception to the hiring hall practice of referring employees in the order of their listing on the out-of-work list." Id. at 423. Here, by contrast, there is no collectively bargained "work capture" exception to the first in, first out rule. Accordingly, *Sheet Metal Workers* is inapposite.

The judge's reliance on *Meijer*, supra, which our dissenting colleague shares, is similarly misplaced.[16] This case and *Meijer* are fundamentally unlike. *Meijer* is a "union-security" case. As noted above, "union security" is one of the ways in which a union can justify a departure from hiring hall rules. However, as also noted above, that is not the asserted basis for the departure here. Further, at issue in *Meijer* was a marginally higher dues burden on employed *Beck* objectors; at issue here is access to employment altogether. *Meijer* holds that because all unit members benefit from organizational efforts, *Beck* objectors have to pay their share of the costs of those efforts. From this holding, it does not follow that because all unit members benefit from salting efforts, salts may be rewarded with dispatches to which others are entitled under the rules of the hiring hall. If the analogy to *Meijer* were sound, it should be lawful to withhold referrals from hiring hall registrants who decline to engage in or otherwise support picketing, since all unit members presumably benefit from the economic pressure picketing exerts on employers. Nevertheless, the Board has found to the contrary. See *Service Employees Local 9 (American Maintenance)*, 303 NLRB 735 (1991)[17] (violation found where applicant denied dispatch for refusing to picket); *Carpenters Local 316 (Bay Counties Contractors)*, 291 NLRB 504 (1988)[18] (violation found where applicants rolled to bottom of OWL for failing to show up at a picket site for a hiring-hall roll call).

Finally, Supreme Court precedent supports a finding contrary to the judge's. The Court has observed that the Act was "designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954). Thus, "the policy of the Act is to insulate employees' jobs from their organizational rights." Id. This policy is plainly undermined by a dispatching regime that steers work to employees who engage in union organizing, to the disadvantage of those who do not. In essence, the Union has extended an employment preference to those who engage in union activity elsewhere and has concomitantly disadvantaged those who refrain from engaging in such activity. Even if it were shown that organizational efforts in other units would redound to the economic benefit of those who use the hiring hall involved here, that would not privilege the

[16] The Chairman and Member Schaumber did not participate in *Meijer*, and they express no views as to the merits of that decision.

[17] Enfd. mem. as modified 996 F.2d 1226 (9th Cir. 1993) (substituting narrow for broad cease-and-desist order).

[18] Enfd. mem. 942 F.2d 792 (9th Cir. 1991).

employment discrimination. For such discrimination is not necessary to the effective performance of the Union's representative function.

For all of the foregoing reasons, we find that Local 48's knowing, deliberate preferential dispatching treatment of salts and peppers was not necessary to the effective performance of its representative function, and therefore violated Section 8(b)(1)(A). Additionally, as recounted in section I,C above and detailed in section 1 of the evidentiary appendix below, Local 48 deliberately deviated from its hiring hall rules in favor of a number of applicants who did not serve as salts or peppers. The judge did not address the legality of these dispatches. However, Local 48 does not contend that any of them were necessary to the effective performance of its representative function. We find that they were not, and therefore, that Local 48's deliberate preferential dispatching treatment of applicants who did not serve as salts or peppers also violated Section 8(b)(1)(A).

Our dissenting colleague defends Local 48's methods of favoring salts and peppers in dispatching—namely, by dispatching salts and peppers not registered on the OWL, and by giving salts and peppers credit for their time with nonsignatory contractors for purposes of satisfying the signatory 1 out of 4 rule. Our colleague approves these practices as compensating salts and peppers for the personal sacrifices entailed by their organizational work. Like our colleague, one can respect the sacrifices these individuals made, but we disagree that it was necessary to reward them with job referrals to which others were rightfully entitled. Local 48 could have found other ways to compensate salts and peppers for their organizing work, the most obvious being monetary payment.

Our colleague would find no violation for three other categories of deliberate dispatching irregularities: returning "stripped" employees to their former employer (category 2), redispatching discharged employees back to the employer that had just fired them instead of pursuing a grievance (category 4), and dispatching individuals requested by name (category 6). In his view, category 2 and 4 practices should be held lawful because they smoothed the waters between the Union and signatory contractors in accord with general language contained in a section of the parties' collective-bargaining agreement entitled "Basic Principles." This section refers to the value of "harmonious relations," "continuous peace," and "adjusting any differences by rational common sense methods." Notwithstanding these general aspirational statements, however, our colleague does not dispute that category 2 and 4 conduct was at odds with more specific contract provisions regulating the operation of the hiring hall; and it is a settled canon of contract interpretation that the specific governs over the general. See, e.g., *Newspaper & Mail Deliverers (Macromedia Publishing)*, 281 NLRB 588, 591 fn. 15 (1986), enfd. mem. 804 F.2d 1248 (3d Cir. 1986). Our colleague also says that the policy of industrial peace favors his position on category 2 and 4 conduct. On the contrary, his position would undermine industrial peace by subordinating specific contractual provisions to abstract ideals. Industrial peace under a collective-bargaining agreement is best maintained where parties may confidently assume that its rules will be enforced as written, not trumped by vague generalities.

Turning to category 6, the name-request dispatches, we disagree with our dissenting colleague's allocation of the burden of proof as to the dispatch of Paul Demos. Our colleague would place the burden on the General Counsel to negate Business Manager Bruce's naked assertion that Demos was a "special skills" dispatch. To meet that burden, the General Counsel would have had to prove that somebody other than Demos had the needed skill and was listed higher on the OWL—even though no OWL was printed on the date of Demos' dispatch, making this a burden the General Counsel could not possibly have met. Contrary to our colleague, we find that the General Counsel sustained his burden of proof by showing that a contractor asked for Demos by name to fill a nonforeman position, and Demos was dispatched to that contractor. Nothing more was necessary to raise an inference that Local 48 had deliberately departed from the hiring hall rules. Bruce's claim that this was a "special skills" dispatch was an affirmative defense, as to which Local 48 bore the burden of proof, which it failed to sustain.

Our colleague also says that we are "flyspecking" in finding violations for Wilhite's and Kerner's dispatches. On the contrary, we are simply applying the hiring hall rules as set forth in the labor contract. Under those rules, only foreman positions may be filled by name request. If that rule leads to harsh results, the remedy lies with the parties to negotiate different rules.

B. Mistaken Departures from the Hiring Hall Rules

In *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999) *(Contra Costa I)*, the Board held that mere negligence in the operation of an exclusive hiring hall does not breach a union's duty of fair representation. Applying *Contra Costa I*, the judge held that Local 48's mistaken departures from the hiring hall rules did not breach its duty of fair representation. After the judge issued her decision in this case, *Contra Costa I* amassed a significant subsequent history. To clarify the basis of our decision, we will briefly review that history here.

The Board held in *Contra Costa I* that alleged breaches of the duty of fair representation must be analyzed in all cases—including hiring hall cases—under the test announced by the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171 (1967). Under that test, a union breaches its duty of fair representation by conduct toward a member of the collective-bargaining unit that is "arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. In so holding, the Board concluded that *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989), does not impose a heightened duty of fair dealing on unions in the operation of a hiring hall. Applying the *Vaca v. Sipes* standard, the *Contra Costa I* Board found that a single, inadvertent dispatching mistake did not constitute a breach of the duty of fair representation. The Board stressed, however, that its holding was a narrow one:

> We do not suggest that *gross* negligence in the operation of a hiring hall, of the type indicating disregard for established procedures, would not breach the duty of fair representation. Such conduct would likely be found to be "arbitrary," and possibly in bad faith, and thus within the proscription of *Vaca v. Sipes* and *O'Neill* [*Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65 (1991)].

Contra Costa I, 329 NLRB at 691.

On a petition for review of *Contra Costa I*, the Court of Appeals for the D.C. Circuit reversed. *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2000). Contrary to the Board, the court found that both the Supreme Court's decision in *Breininger* and its own earlier decisions[19] do impose on unions a heightened duty of fair representation in the hiring hall context.[20] The court remanded the case to the Board for application of this "heightened duty" standard.

Applying on remand the "heightened duty" standard as the law of the case, the Board reaffirmed "that inadvertent mistakes in the operation of an exclusive hiring hall arising from mere negligence do not violate the union's duty of fair representation." *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549, 550 (2001) *(Contra Costa II)*. "However heightened the duty, we do not believe it reaches so high," the Board stated. Id. at 552. The Board reiterated, however, that *gross* negligence demonstrating deliberate or reckless indifference to employees' interests would breach the duty of fair representation. Id. at 552 fn. 9.

On a second petition for review, the D.C. Circuit agreed with the Board that "[o]ne act of simple negligence does not come close to violating the 'heightened duty' standard." *Jacoby v. NLRB*, 325 F.3d 301, 309 (D.C. Cir. 2003). Further explaining that standard, the court wrote:

> Under a heightened duty standard, . . . a union might violate the DFR in instances of gross negligence or in circumstances in which its hiring hall business practices are so reckless as to cause foreseeable adverse affects [sic] on the employment status of those persons whom the union is expected to represent fairly. The heightened duty of fair dealing requires a union to operate a hiring hall using "objective criteria" and "consistent standards." It does not, however, hold a union strictly liable for inadvertent mistakes when it is otherwise operating its hiring hall pursuant to the prescribed criteria and standards. [Id.]

Coming back now to the instant case, as stated above, the judge found under *Contra Costa I* that Local 48's mistaken departures from the hiring hall rules did not breach its duty of fair representation. In so finding, the judge assumed that Local 48 had mistakenly deviated from those rules approximately 200 times during the relevant period. In the judge's view, 200 mistakes over a little less than 2 years in a busy hiring hall did not rise to the level of gross negligence.

We agree with the judge that the dispositive question under *Contra Costa I* is whether Local 48's mistakes constituted gross negligence. We disagree, however, with her manner of applying this standard, as well as with her ultimate legal conclusion. As the Board stated in *Contra Costa I*, gross negligence in the operation of a hiring hall is conduct indicating disregard for established procedures. In determining whether dispatching errors indicate such disregard, numbers alone do not necessarily tell the whole story. The kind of mistakes committed, and the ease with which they might have been avoided, also must be taken into consideration. Here, the collective-bargaining agreement set forth specific eligibility rules for registering on book 1, but Local 48 simply did not enforce them, despite the fact that records containing book 1 eligibility data—the MMIs—were readily available in the union office. Moreover, these records were not gathering dust in some archive. On the contrary, they were regularly consulted and updated to document members' employment history. Under these circumstances, book 1 eligibility could have been routinely checked. And it should have been: with jobs at stake, it was entirely predictable that some would test the system. In addition, throughout the entire relevant period, Local 48

[19] *Plumbers Local 32 v. NLRB*, 50 F.3d 29 (D.C. Cir. 1995); *Boilermakers Local 374 v. NLRB*, 852 F.2d 1353 (D.C. Cir. 1988).

[20] In agreement with the D.C. Circuit, the Ninth Circuit also holds unions to a heightened duty of fair dealing in administering a hiring hall. *Lucas v. NLRB*, 333 F.3d 927, 934–935 (9th Cir. 2003).

applied a nonexistent short-call rule. The collective-bargaining agreement plainly specified a 40-hour short-call period, but the Union applied a 30-day period instead. This mistake could have been avoided simply by reading the contract.

These mistakes go beyond simple inadvertence. They indicate reckless disregard for established procedures and employees' interests, and thus constitute gross negligence under *Contra Costa I* or *II*. Accordingly, we conclude that Local 48's mistaken departures from its hiring hall rules violated Section 8(b)(1)(A). We would reach the same conclusion under the "heightened duty" standard applied by the Ninth and D.C. Circuits. That is, the numerous departures from the objective criteria and consistent standards that are established by the rules show a reckless disregard for such criteria and standards, and that disregard has had employment consequences. Thus, because the result here is the same under either standard, we need not pass on which standard should apply.

C. Compliance Issues

In her decision, the judge stated that she did not allow evidence to be introduced concerning the Union's dispatching practices after December 31, 1994.[21] However, the judge did not find the Union's conduct after that date to be beyond the scope of the complaint, which alleged unlawful dispatches continuing "at least" through December 31, 1994. On the contrary, she ruled that additional instances of deviation from the hiring hall rules may be litigated, if necessary, at compliance. There are no exceptions to that ruling. Nevertheless, under our authority to address remedial issues even in the absence of exceptions,[22] we wish to clarify the permissible scope of compliance-stage litigation in this case.

The Board's general rule is that where discrimination against a defined and easily identified class is established, the identification of individuals detrimentally affected thereby is properly left to compliance. See, e.g., *Electrical Workers Local 724 (Albany Electrical Contractors Assn.)*, 327 NLRB 730 (1999); *Teamsters Local 328 (Blount Bros.)*, 283 NLRB 779 (1987). That rule is not quite directly applicable here. The individuals detrimentally affected by Local 48's unlawful dispatching practices do not comprise a defined and easily identified class. However, Local 48's unlawful conduct *benefited* certain defined and easily identified classes; and the individuals in those classes must be identified in order to ascertain, for backpay purposes, the identity of all those who suffered loss of employment as a result of Local 48's unlawful conduct. We have already identified some benefited individuals above; others are identified below in the evidentiary appendix. However, we do not purport to have exhaustively identified everyone who benefited from Local 48's unlawful conduct during the relevant period; and it goes without saying that no such individuals have been identified with respect to unlawful dispatches postdating the relevant period, if any. Thus, at compliance, additional instances of unlawful dispatching, both during and after the relevant period, may be established, limited to the following defined classes:

- Persons who received preferential dispatches as salts or peppers.
- Persons who received dispatches in "Tigard Electric"–type situations—i.e., those in which Local 48 returned so-called "stripped" employees off the books to a newly organized contractor.
- Persons who received off-the-books dispatches as a reward for joining the Union.
- Persons who, following discharge, were promptly redispatched to the discharging employer to resolve a dispute over the discharge.
- Persons who preserved their OWL positions despite missing a compulsory biannual resign.
- Persons who were dispatched in response to a name request under circumstances where the hiring hall rules do not so permit.
- Persons permitted to register on book 1 at a time when they were not eligible to do so.
- Persons who improperly retained OWL positions rather than rolling to the bottom of the book due to Local 48's failure to apply the contractual short-call rule.

In addition, as found above, a number of individuals received out-of-order dispatches that do not fall into any of the above categories. These individuals are identified below in section 1 of the evidentiary appendix. Because these dispatches do not comprise a defined and easily identified class, no additional instances of such uncategorizable dispatching violations may be litigated at compliance.

EVIDENTIARY APPENDIX

This appendix summarizes the record evidence upon which we have based our findings concerning three groups of individuals: (1) applicants who received deliberate out-of-order dispatches, where the evidence does

[21] In actuality, no evidence was introduced concerning any dispatches postdating May 16, 1994. At that time, demand for electricians out of the hiring hall was beginning to outstrip supply, so Local 48 "rolled the books" and went to a lottery system. The record does not indicate when Local 48 resumed use of the OWL.

[22] See, e.g., *Indian Hills Care Center*, 321 NLRB 144 fn. 3 (1996).

not suffice to place them in a defined and easily identified class; (2) applicants who were permitted to register on book 1 during the relevant period despite being ineligible to do so; (3) applicants who, during the relevant period, worked jobs in excess of the 40-hour short-call limit without rolling to the bottom of their book.

1. "Uncategorizable" out-of-order dispatches

Patrick McDonald: MMI shows McDonald starting at Team Electric on December 7, 1993. No hiring hall record documents any referral for this job. The inference arises that this was an off-the-books dispatch.

Joseph Lauritzon: MMI shows Lauritzon starting at Excalibur on May 19, 1993. No hiring hall record documents any referral for this job. The inference arises that this was an off-the-books dispatch.

Terry Lindberg: Union agent Mel Conner admitted that Lindberg was dispatched out of order.

Wesley Sherrer: Conner testified that somebody named Wesley—"I don't remember his last name"—was one of about 10 people who were dispatched "under abnormal circumstances." Nobody else named Wesley was alleged to have been improperly dispatched during the relevant period.

Richard Sandefur: Sandefur's name is handwritten in between numbers 333 and 334 on book 1 of the October 16, 1992 OWL. He appears at number 333 on book 1 of the October 20 OWL, with a sign-in date of October 7. However, the DSR for October 7 does not show Sandefur signing in that day. Because the October 7 sign-in date appears to have been invented, we infer a deliberate dispatching irregularity. Sandefur was subsequently dispatched on October 23, and again on December 1, 1992, from a book 1 position commensurate with an October 7 sign-in.

Howard Stratton: Dues withholding authorization and introduction slip show Stratton starting a job at Oregon Electric on October 6, 1992. Typically, the dispatch date is either the same as or 1 day before the job-start date. Stratton's name does not appear on the DDR for either October 6 or 5. On occasion, a few days might elapse between a dispatch and the start of a job. Stratton's name does not appear on the DDRs for October 2 or 1, either. (The hiring hall was closed for the weekend on October 3 and 4.) Absent any DDR documenting this dispatch, the inference arises that Stratton's job starting October 6 was pursuant to an off-the-books referral.

William Filz: The DDR for October 13, 1992, shows that Filz received a dispatch on that date. Filz was not listed on the October 13 OWL; he does not appear on the October 13 DSR as having signed in that day; and several book 1 registrants present in the hall that day were not referred for employment. The inference arises that he was given a deliberate off-the-books dispatch.

Ron McClenahan: The DDR for January 22, 1993, shows McClenahan dispatched to Team Electric for a job starting January 18. McClenahan's MMI confirms that he started work with Team on January 18. Obviously, McClenahan could not have been dispatched on January 22 to a job starting 4 days earlier. Moreover, McClenahan was not present in the hall on January 18: he was listed at number 478 on book 1 of the January 18 OWL, but he did not initial that OWL. McClenahan's MMI also shows him starting a job with Adams Electric on January 25, but there is no corresponding DDR entry documenting this dispatch. Thus, we infer that McClenahan received back-to-back off-the-books dispatches.

Samuel Johnson: Johnson was dispatched on June 21, 1993. He was not listed on the June 21 OWL, but the DSR for that date shows Johnson signing in as a new applicant. If nobody else takes priority, a new applicant may properly be dispatched the same day he signs in. However, that was not the case here: many book 1 registrants present in the hall on June 21 did not receive dispatches that day.

S. Casey O'Connor: The DSR for May 3, 1994, shows that O'Connor signed in as a new applicant on that date, and the May 3 DDR shows he was dispatched that same day. As with Samuel Johnson, above, OWL registrants present in the hall on May 3, including several on book 1, received no dispatch that day.

Ed Campbell: Campbell was listed at number 26 on book 2 of the November 3, 1992 OWL, but there is no evidence that he was present in the hall that day, as he did not initial the November 3 OWL. Nevertheless, Campbell received a dispatch on November 3.

Stephen Mulligan: Mulligan, a traveler from St. Paul, Minnesota, was listed on book 2 at number 121 on the November 4, 1992 OWL; but, like Ed Campbell, he did not initial the November 4 OWL to indicate presence in the hall that day. Nevertheless, Mulligan received a dispatch on November 4.

Stan Monti: The DSR and DDR for December 8, 1992, show that Monti signed in on that date and was dispatched that same day. No OWL was generated on December 8, making it impossible to demonstrate conclusively that previously registered applicants were left undispatched that day. However, from examining the OWLs for the day before and the day after December 8, a persuasive inference can be drawn that Monti's dispatch was irregular. On both December 7 and 9, the supply of applicants present in the hall well exceeded employer demand. On December 7, 20 applicants initialed book 1, and there were only 6 dispatches. On December 9, 15

applicants initialed book 1, and there were only 4 dispatches. Moreover, six individuals who initialed both the December 7 and 9 OWLs were left in the hall both days. It goes against common sense to think that these individuals were not also seeking work on December 8—yet Monti signed in that day and was dispatched.

Howell Marsh: Marsh showed up at the hiring hall in the fall of 1992, driving a pickup truck with a camper on the back, and representing himself to be a traveler out of Houston. In fact, Marsh had been dropped from the Houston IBEW local for nonpayment of dues. After permitting Marsh to camp in its parking lot for some time, Local 48 asked Tigard Electric to create a job for Marsh so he could make some money, rent a place to live, and move out of the parking lot. Marsh signed in as a new applicant on the March 4, 1993 DSR and was dispatched that same day. Book 1 registrants present in the hall on March 4 were left undispatched.

Marsh's MMI shows that his Tigard job ended April 30, 1993. Marsh signed in at the hiring hall on April 30 and was given a dues withholding authorization and an introduction slip for a job at Sutherland starting May 3, 1993. This dispatch was not documented on the DDR.

Marsh's job with Sutherland ended on July 23, 1993. Upon signing in, Marsh registered on book 1 and was dispatched on July 26. Marsh was not eligible for book 1: having come from Houston in the fall of 1992, Marsh could not have met either the residency requirement or the requirement of having worked 1 year out of the last 4 within Local 48's geographical jurisdiction. Local 48 must have been aware of Marsh's ineligibility for book 1 in July 1993, when just a few months earlier it had arranged Marsh's first employment within the Union's geographical jurisdiction. Under the circumstances, the record shows that Local 48 knowingly gave Marsh three irregular dispatches during the relevant period.

2. Book 1–ineligible applicants permitted to register on book 1

Richard Sandefur: As stated above, Sandefur's name is handwritten in between numbers 333 and 334 on the October 16, 1992 OWL, and typed in at number 333 of book 1 on the October 20 OWL. However, Sandefur was not entitled to be on book 1 at this time because, as his MMI shows, his first employment with a signatory employer began on January 6, 1992. Thus, Sandefur did not satisfy the signatory 1 out of 4 rule for registering on book 1. Sandefur was dispatched off book 1 on October 23 and again on December 1, 1992.

Loy Lonberg: Lonberg was dispatched off book 1 on October 30, 1992, and again on January 28, 1993. However, Lonberg's MMI shows that he did not pass the journeyman inside wireman's exam until February 2, 1994. Thus, Lonberg's dispatches from book 1 were improper.

David Enwards: Enwards shows up on book 1 of the March 1, 1993 OWL, and he was dispatched off book 1 on June 18, 1993. However, Enwards was ineligible for book 1 at the time because he did not pass the journeyman inside wireman's exam until November 2, 1994.

Curtis Nappe: Nappe was dispatched off book 1 on June 10, 1993. Nappe's MMI shows, however, that he was not eligible for book 1 because he had not worked 1 year out of the previous 4 for signatory employers.

Alan Brown: Brown did not pass the journeyman inside wireman's exam until November 3, 1993, and he was dispatched off book 1 twice prior to that date, on June 17 and August 30, 1993.

Greg Nordin: Nordin did not pass the journeyman inside wireman's exam until August 4, 1993, and he was dispatched off book 1 four times prior to that date: on December 10, 1992, January 27 and 29, 1993, and May 28, 1993.

John Marosi: Marosi took the journeyman inside wireman's exam on November 3, 1993, and failed it. Nevertheless, he was repeatedly dispatched off book 1 both before and after November 3—on December 2, 1992, May 26 and July 12, 1993, and March 28, 1994.

Douglas Person: Person did not pass the journeyman inside wireman's exam until August 4, 1993, but before that date he was dispatched off book 1 three times: for a job starting May 13, 1993 (documented after the fact on the May 14 DDR), and on June 15 and 21, 1993.

Robert Lynch: Lynch signed in on April 25, 1994, and was dispatched that same day. There were no book 1 applicants left undispatched that day, but there were several book 2 applicants present in the hall who were not dispatched. If Lynch were eligible for book 1, his April 25 sign in would have entitled him to a dispatch ahead of any previously registered book 2 applicants. However, Lynch's MMI indicates that he was not eligible for book 1 until 1998. Thus, Lynch was improperly dispatched ahead of those book 2 applicants.

Paul Rosenberg: Rosenberg signed in as a new applicant on May 9, 1994, and was dispatched off book 1 on May 10. He was not eligible for book 1 at the time because he had not worked 1 year out of the previous 4 in Local 48's geographical jurisdiction.

Mike Evans: Evans signed in as a traveler on May 9, 1994, and was dispatched off book 1 the following day. Evans was not eligible for book 1 at the time because he did not reside within Local 48's geographical jurisdiction, and he did not pass the journeyman inside wireman's exam until August 3, 1994.

Michael Douglass: Douglass passed the journeyman inside wireman's exam on June 2, 1993, but he was dispatched off book 1 before that date on February 25, 1993.

Lamar Delaney: Delaney passed the journeyman inside wireman's exam on May 5, 1993, but before that date he was dispatched off book 1 five times—on October 26, 1992, and February 8, March 8, April 8, and April 12, 1993.

Craig Leyburn: Leyburn passed the journeyman inside wireman's exam on August 3, 1994. Before that date, he was dispatched off book 1 twice, on April 2 and May 12, 1993.

Douglas Kobilan: On May 10, 1993, Kobilan received a foreman dispatch. Contractors may request foremen by name, but Local 48 Business Manager Bruce testified that only book 1 registrants are eligible for foreman dispatches. Kobilan was registered on book 1 at number 331 on the May 10 OWL, but improperly so: he was a traveler and not entitled to be on book 1. Confirming that fact, his MMI shows he was not approved for book 1 until February 1998.

Dale Polzin: As explained in the text of the decision, Polzin was one of several applicants knowingly permitted to retain book 1 registration despite having missed a biannual re-sign. In addition to this knowing departure from the hiring hall rules, Polzin also benefited from Local 48's inattention to book 1 eligibility criteria. Polzin appears on book 1 of the April 23, 1993 OWL. However, he did not pass the journeyman inside wireman's exam until May 5, 1993; and even then, his MMI indicates that he had not yet satisfied the signatory 1 out of 4 requirement. Polzin was dispatched from book 1 on June 28, 1993—after he had passed the exam, but from a book 1 position predating exam passage.

James Lawrence III: Lawrence signed in on book 1 on November 8, 1993. Bruce admitted that as of November 8, Lawrence had not worked 1 year out of the past 4 within Local 48's geographical jurisdiction. Lawrence was dispatched off book 1 on May 16, 1994.

Gary McKibben: McKibben was listed as number 278 on book 1 of the April 29, 1994 OWL. Bruce admitted there was no evidence McKibben had worked 1 year out of the previous 4 in Local 48's geographical jurisdiction. He was dispatched from book 1 on May 16, 1994.

Steven Dietrich: Dietrich signed in on book 1 on April 2, 1993, but he did not pass the journeyman inside wireman's exam until May 5, 1993. Dietrich was dispatched on August 9, 1993 from book 1 number 405, a position commensurate with his April 2, 1993 sign in. Dietrich's first termination date following passage of the exam was May 21, 1993. With a May 21 sign-in date, he would have been listed on book 1 at or near number 445.

Mitch Wright: Wright's MMI indicates that his initial employment date out of Local 48's hall was July 23, 1993. It also shows that he passed the journeyman inside wireman's exam on August 4, 1993, but that, consistent with his very recent initial employment date, he had not met "the one year employment requirement" for registering on book 1. The September 7, 1993 OWL lists Wright on book 1, approximately a month and a half after his first employment within Local 48's geographical jurisdiction.

Paul Starr: Starr received preferential dispatching treatment as a salt, and he was also one of the "stripped" employees sent back to Tigard Electric off the books. In addition, when Starr signed in on March 21, 1994, after the end of his Tigard employment, he was listed on book 1 despite the fact that he did not pass the journeyman inside wireman's exam until August 3, 1994.

3. Applicants who exceeded the 40-hour short-call limit without rolling to the bottom of their book

Jorge Algeciras: Algeciras took a dispatch to a job starting November 23, 1992, and signed in from that job on January 11, 1993. Upon signing in, Algeciras was listed on book 1 of the January 12 OWL at number 341, with a sign-in date of October 9, 1992. He was subsequently dispatched twice: on March 29, 1993, from book 1 number 114, and on April 13, 1993, from the same position. Bruce defended Algeciras's OWL position under the 30-day short-call "rule."[23] However, the short-call limit was 40 hours, not 30 days. Since the purported short call lasted longer than 40 hours, Algeciras's position on the March 29 and April 13, 1993 OWLs should have been commensurate with a sign-in date of January 11, 1993. (Even under the 40-hour short-call rule, Algeciras would have properly retained his position after the March 29, 1993 dispatch because his MMI shows that job lasted zero days—i.e., Algeciras was dispatched on March 29 but not hired.) Because of the intervening February 1993 biannual re-sign and the attendant modification of sign-in dates recorded on the OWL, it is impossible to determine what Algeciras's proper position should have been on March 29 and April 13, 1993, solely from examining the OWLs for those days. However, by tracking the OWL positions of Algeciras's cohort—other applicants who also signed in on January 11, 1993—it

[23] Obviously, more than 30 calendar days elapsed between November 23, 1992, and January 11, 1993, Algeciras's dispatch and sign-in dates, respectively. However, Local 48 counted only working days in applying the 30-day "rule."

appears that instead of number 114, Algeciras should have been in the neighborhood of number 267 or 268.

Brian Neary: Neary was listed as number 520 on book 1 of the January 18, 1993 OWL, with a sign-in date of January 11. He was dispatched from number 5 on book 1 of the February 18, 1993 OWL, which position was commensurate with an April 30, 1992 sign-in date. Local 48 contends that Neary must have shown that he had not worked more than 30 days since April 30, 1992. Again, however, the short-call period was 40 hours, not 30 days. Applying the 40-hour rule and examining Neary's MMI, it appears that his sign-in date should have been November 3, 1992. That would have placed him somewhere between numbers 400 and 405 on the January 18, 1993 OWL—higher than number 520, but nowhere near number 5.

Paul Demos: Demos was dispatched from number 32 on book 1 of the May 24, 1993 OWL. Under the 40-hour short-call rule, Demos' position on the May 24 OWL should have been commensurate with a sign-in date of April 13, 1993, the date he signed in from a job that began March 2 and ended April 13, 1993. That would have dropped Demos from number 32 to number 412 on book 1 of the May 24, 1993 OWL.

Joseph Irby: Counsel for the General Counsel admits that Irby's position on the September 3 and 7, 1993 OWLs is proper. However, Irby maintained that position and was dispatched from it twice: on December 6, 1993, and March 31, 1994. Prior to the December 6, 1993 dispatch, Irby worked from November 4 to 19, 1993—more than 40 hours. Prior to the March 31, 1994 dispatch, Irby worked from December 7 to 29, 1993—again, more than 40 hours. Under the 40-hour short-call rule, Irby should not have maintained his prior position on the OWL.

George Rutherford: Rutherford was dispatched on June 15, 1993, from number 16 on book 1 of the OWL. That position was far too high, given that Rutherford's previous job ran from April 19 to June 3, 1993, clearly more than 40 hours. Had Rutherford's position on the June 15 OWL been commensurate with a June 3 sign-in, he would have dropped from number 16 to between numbers 455 and 456 on book 1.

Walter Uhrich: Uhrich worked from May 5 to June 25, 1993—obviously not a short call—and yet maintained a position on the OWL commensurate with a sign-in date of March 2, 1993. He was dispatched from an improperly high OWL position on June 30, 1993. A June 25 sign-in date would have put Uhrich almost at the bottom of the June 30 OWL.

Brian Treacy: Treacy worked from August 23 to November 17, 1993, and next from November 30, 1993, to January 12, 1994. He was subsequently dispatched on April 12, 1994, from a book 1 position commensurate with a sign-in date of November 17, 1993. In other words, the intervening employment—November 30, 1993, to January 12, 1994—was improperly treated as a short call. Treacy's sign-in date should have been the date he signed in after his January 12, 1994 termination, which was January 18. A January 18 sign-in date would have dropped Treacy farther down the OWL.

Patrick McCorkle: McCorkle was listed at number 271 on book 1 of the January 6, 1994 OWL, with a sign-in date of September 30, 1993. McCorkle did indeed sign in on September 30 following a job that ended on September 28. Subsequently, however, he worked from November 5 to December 23, 1993, well in excess of 40 hours. Thus, McCorkle should have rolled to the bottom of the list when he signed in from that job. Instead, he retained a position commensurate with a September 30, 1993 sign in. He was subsequently dispatched on April 8, 1994.

Ralph Robbins: Robbins's MMI shows that he was dispatched to a job that lasted from May 20 to June 30, 1993. Under the 40-hour short-call rule, Robbins should have rolled to the bottom of the list when he signed in from that job. Instead, on July 22, 1993, Robbins was dispatched from an OWL position commensurate with a sign-in date of February 16, 1993. The DSR for February 16 does not show Robbins having signed in that day, so Robbins is numbered among those applicants Local 48 knowingly permitted to retain their OWL position despite having missed a biannual re-sign. In addition, the record shows that Robbins then improperly retained the February 16 position because of Local 48's gross negligence with respect to the short-call rule.

Alex Melnick: Melnick worked from June 14 to July 30, 1993, signed in on July 30, and was dispatched on August 11, 1993, from a book 1 position commensurate with a February 17, 1993 sign-in date. This set of facts involves two improprieties. First, Melnick's name does not appear on the February 17 DSR. Thus, Melnick, like Robbins, is included among those applicants Local 48 knowingly permitted to retain their OWL position despite having missed a biannual re-sign. Second, the job that began June 14 and ended July 30, 1993, obviously lasted longer than 40 hours. Thus, Melnick should have rolled to the bottom of the list when he signed in from that job.

Samuel Brock: At the hearing, counsel for the General Counsel dropped his allegations with respect to Brock. However, counsel's decision in this regard was based on his misconception—under which everyone labored during the hearing—that the short-call limit during the relevant period was 30 days. In his exceptions brief, counsel

for the General Counsel insists, correctly, that the short-call limit was 40 hours, not 30 days. Since the record plainly shows the impropriety of Brock's dispatch under the 40-hour rule, we will assume that the General Counsel does not intend to abandon his allegations concerning Brock.

Brock was dispatched on June 21, 1993, for a job that ended on July 30, 1993. Since that job lasted longer than 40 hours, Brock should have rolled to the bottom of the list when he next signed in. Instead, he was restored to a position commensurate with his last biannual re-sign on February 12, 1993, and was dispatched from that position on August 9, 1993.

Ronald Remy: Remy appears on the October 11, 1993 OWL with a sign-in date of August 16, 1993. In the interim, he worked from August 20 to October 6, 1993, more than 40 hours. Thus, Remy should not have retained an OWL position commensurate with an August 16, 1993 sign-in date.

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Electrical Workers, Local 48, AFL–CIO, Portland, Oregon, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Deliberately departing from the rules governing the operation of its hiring hall in the following ways: (i) giving preferential dispatching treatment to salts—i.e., union members who take jobs with nonunion employers to engage in union organizing—and "peppers"—i.e., newly organized employees of nonunion employers who remain with those employers to engage in union organizing; (ii) returning, off the books, to their newly organized former employer, employees who had been "stripped"—i.e., persuaded to leave that employer and join the Union—during a union organizing campaign; (iii) giving off-the-books dispatches to individuals as a reward for joining Local 48; (iv) sending discharged employees back to the discharging employer off the books; (v) permitting registrants to retain positions on the out-of-work list despite having missed a compulsory biannual re-sign; (vi) dispatching registrants requested by name under circumstances where the collective-bargaining agreement does not permit a name-request dispatch; (vii) otherwise deliberately departing from the rules governing the operation of its hiring hall where such a departure is neither pursuant to a valid union-security clause nor necessary to the effective performance of its representative function.

(b) Permitting book 1–ineligible registrants to register on book 1.

(c) Restoring registrants to their prior position on the out-of-work list despite intervening employment in excess of the contractual short-call limit.

(d) Refusing to allow registrants the opportunity to inspect and/or copy its records relating to the operation of the hiring hall.

(e) Utilizing a journeyman inside wireman's examination that in major part tests knowledge of the Union's bylaws and constitution, the contents of its collective-bargaining agreement with the Oregon-Columbia Chapter of the National Electrical Contractors Association, and labor history, rather than knowledge of the electrical trade, and utilizing such an examination as the basis for denying book 1 status to William Perry.

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

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

(a) Make available the requested records relating to the operation of the hiring hall.

(b) Within 14 days from the date of this Order, administer to William Perry, upon request, a nondiscriminatory journeyman inside wireman's examination.

(c) Make whole all individuals who suffered loss of employment because of the violations found herein for all earnings and other benefits lost as a result of those violations. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) 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 payroll records, social security payment records, timecards, personnel records and reports, out-of-work lists, daily sign-in reports, daily dispatch reports, member master inquires, introduction slips, dues withholding authorizations, and all other records, including an electronic copy of such records if stored in electronic form, necessary to identify those who suffered loss of employment because of the violations found herein and/or to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its union office and hiring hall in Portland, Oregon, copies of the attached notice marked "Appendix."[24] Copies

[24] 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."

of the notice, on forms provided by the Regional Director for Region 19, 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 or applicants for referral 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.

(f) 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.

MEMBER WALSH, dissenting in part.

I disagree with my colleagues in several respects. First, I would not find a violation for Local 48's dispatching practices in furtherance of its organizational efforts. One such practice challenged by the General Counsel was perfectly appropriate under the rules of the hiring hall: salts were permitted to remain on the out-of-work list (OWL) during their salting employments with nonunion contractors. Under hall rules, an applicant loses his place on the OWL when he is *dispatched* to a job that exceeds the short-call limit. Dispatches are to union contractors. A salt working for a nonunion contractor has not been dispatched. Nothing in the parties' collective-bargaining agreement requires registrants to remain unemployed while working their way up the OWL. Thus, permitting salts to stay on the OWL while working for nonunion employers was not contrary to the rules.[1]

My colleagues find a violation for a related practice that represented a justifiable departure from the hiring hall rules. Salts and peppers were credited for their time with nonsignatory contractors for purposes of satisfying the "signatory 1 out of 4" rule—i.e., the requirement, for registering on book 1, of having worked 1 year out of the previous 4 with signatory employers. This practice should not be faulted. Those who volunteered to serve as salts and peppers could have met the signatory 1 out of 4 rule by declining organizational work, securing dispatches, and amassing time with signatory contractors. Instead, they subordinated self-interest to collective goals, thus necessarily foregoing opportunities to satisfy the signatory 1 out of 4 rule. Crediting their salting and "peppering" employments toward the signatory 1 out of 4 requirement compensated them for their personal sacrifice and prevented them from being unfairly penalized for their organizing work.

The majority also finds a violation for a third dispatching practice in furtherance of Local 48's salting program: salts and peppers sometimes received dispatches without having registered on the OWL. This limited departure from the hiring hall rules is justifiable as well. It bears repeating that members serving as salts and peppers gave up more lucrative employment opportunities with union contractors to engage in organizational efforts. In some instances, when peppers lost their nonunion jobs due to their organizing activities, they were promptly dispatched to a union contractor working at the same jobsite as the nonunion employer in order to encourage the latter's employees to persevere in union activity. Doing so both compensated the peppers for their losses and maintained the momentum of the organizing campaign.

Turning to the legal issue, the judge correctly held that Local 48's dispatching treatment of salts and peppers was lawful. As the Board has recognized, "Congress envisioned broad economic benefits to society flowing from the organization of employees for the purposes [of] collective bargaining." *Food & Commercial Workers Locals 951, 7, & 1036 (Meijer, Inc.)*, 329 NLRB 730, 734 (1999).[2] More specifically, when previously unorganized employees become unionized, the union typically secures higher wages for employees it already represents in the same competitive market. Id. Thus, the work a union does to extend the benefits of organization is inseparable from its duty to effectively represent current unit employees. Since organizing is a vital part of the union's representative function, and since salting is a vital part of union organizing, the Union's rather modest uses of dispatching in furtherance of its organizational efforts here were necessary to the effective performance of its representative function.

In finding a violation for the Union's "salt and pepper" dispatches, my colleagues rely in part on cases in which unions withheld dispatches to punish a refusal to engage in union activity.[3] This case is unlike those cases. Local 48 did not use dispatching to punish anybody. Rather, as explained above, it sought to prevent salts and peppers from being disadvantaged in dispatching because of their union work. My colleagues also rely on broad language from *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954). Notwithstanding that language, however, the

[1] The majority does not pass on the legality of this particular practice.

[2] Enfd. en banc 307 F.3d 760 (9th Cir. 2002), cert. denied 537 U.S. 1024 (2002).

[3] *Service Employees Local 9 (American Maintenance)*, 303 NLRB 735 (1991), enfd. mem. as modified 996 F.2d 1226 (9th Cir. 1993); *Carpenters Local 316 (Bay Counties Contractors)*, 291 NLRB 504 (1988), enfd. mem. 942 F.2d 792 (9th Cir. 1991).

Board has long held that departures from hiring hall procedures do not violate the Act where they are necessary to the effective performance of the union's representative function. *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983); *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549, 550 (2001), enfd. 325 F.3d 301 (D.C. Cir. 2003). Thus, *Radio Officers* does not preclude finding Local 48's "salt and pepper" dispatches lawful under the "necessary to the effective performance" test.

I also would find no violation for returning "stripped" employees to their former employer, or for redispatching discharged employees in lieu of pursuing a grievance. In the course of its organizing campaign at Tigard Electric, Local 48 succeeded in convincing almost all of its employees of the advantages of joining the Union. Since union rules typically bar members from working for nonunion employers, these newly organized workers left Tigard. According to Local 48 Business Manager Gerald Bruce, at the time Tigard recognized the Union, only four employees remained out of a former workforce of 175. After recognizing the Union, Tigard asked for several of its former employees back again. Local 48 accommodated that request. Under the circumstances, this should be viewed as a gesture of goodwill following a tough campaign, meant to get the new contractual relationship off on the right foot. Such a gesture, in my view, easily satisfies the "necessary to the effective performance of the Union's representative function" test.

Similarly, the way the Union handled the three discharges promoted good relations with a signatory contractor. Northwest Electric had fired three employees. Bruce investigated, determined that the discharges were retaliatory, and filed a grievance. A few days later, Northwest put in a call for three employees. Bruce dispatched the three that had just been discharged, Northwest accepted them, Bruce dropped the grievance, and that settled the matter. As in the Tigard episode, the Union acted reasonably here to maintain cordial relations with a contractual partner.

Indeed, in both situations, the Union's conduct was in accord with a foundational provision of the parties' collective-bargaining agreement entitled "Basic Principles." This provision affirms the importance of "harmonious relations" and "mutuality of confidence" between the contracting parties, and states that "[a]ll will benefit by continuous peace and by *adjusting any differences by rational common sense methods*" (emphasis added). My colleagues err in failing to give effect to this provision. After all, the "overriding policy" of the Act is "industrial peace." *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 38 (1987). The Act should not be applied so as to preclude commonsense measures consistent with both this overriding policy and the contract's "Basic Principles," such as those undertaken by the Union here. There is a difference between observing the rules and being rule bound.

The majority faults my reliance on the contract's "Basic Principles," citing the interpretive canon that specific contract provisions govern over more general provisions. It is also well settled, however, that a contract must be interpreted "as a whole and in light of the law relating to it when made." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956). That is what I have done here. The majority also defends the harshness of its findings by saying that the remedy lies with the parties to change the dispatch rules. However, the "Basic Principles" already provide the needed flexibility. My colleagues simply decline to give effect to that part of the contract.

I would also find no violation for the referrals of Paul Demos, Dean Wilhite, and Patrick Kerner. As to Demos, the majority finds that the General Counsel sustained his burden of proving a violation by showing that Demos was dispatched after Heil Electric asked for him by name. However, according to Bruce, who was dispatching on the day in question, Demos was a "special skills" dispatch. A "special skills" dispatch goes to the highest-listed OWL registrant present in the hall who possesses the needed skill. If Demos was that individual, his dispatch to Heil was proper as a "special skills" dispatch notwithstanding the name request. Thus, to prove that Demos was improperly dispatched, the General Counsel had to rebut Bruce's testimony by showing that Demos was *not* the highest-listed registrant with the needed skill. The General Counsel did not meet that burden. The fact that no OWL was generated on the day Demos was dispatched does not alter the legal consequence of the General Counsel's failure to make the necessary showing. Therefore, no violation may be found.

As for the jobs Wilhite and Kerner took, Bruce testified that nobody else wanted them. The job Wilhite accepted was 86 miles from Portland. Wilhite took it because he happened to live out that way. Kerner's dispatch was for a residential job. According to Bruce, nobody else would take a residential call. Local 48 did not formally offer these referrals in the hiring hall, but dispatchers should not be forced to engage in pointless formalities when they know it would be an exercise in futility. In fact, the only reason these instances have been brought to the Board's attention here is that a searchlight has been aimed at all of Local 48's dispatches. The General Counsel was right to aim that light, but the Board should not respond by flyspecking mere technicalities.

As to the rest of the violations found, I join my colleagues.

APPENDIX

NOTICE TO EMPLOYEES AND 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 deliberately depart from the rules governing the operation of the hiring hall in the following ways: (i) giving preferential dispatching treatment to salts—i.e., union members who take jobs with nonunion employers to engage in union organizing—and "peppers"—i.e., newly organized employees of nonunion employers who remain with those employers to engage in union organizing; (ii) returning, off the books, to their newly organized former employer, employees who had been "stripped"—i.e., persuaded to leave that employer and join the Union—during a union organizing campaign; (iii) giving off-the-books dispatches to individuals as a reward for joining Local 48; (iv) sending discharged employees back to the discharging employer off the books; (v) permitting registrants to retain positions on the out-of-work list despite having missed a compulsory biannual re-sign; (vi) dispatching registrants requested by name under circumstances where the collective-bargaining agreement does not permit a name-request dispatch; (vii) otherwise deliberately departing from the rules governing the operation of the hiring hall where such a departure is neither pursuant to a valid union-security clause nor necessary to the effective performance of our representative function.

WE WILL NOT permit book 1–ineligible registrants to register on book 1.

WE WILL NOT restore registrants to their prior position on the out-of-work list despite intervening employment in excess of the contractual short-call limit.

WE WILL NOT refuse to allow registrants the opportunity to inspect and/or copy our records relating to the operation of the hiring hall.

WE WILL NOT utilize a journeyman inside wireman's examination that in major part tests knowledge of our bylaws and constitution, the contents of our collective-bargaining agreement with the Oregon-Columbia Chapter of the National Electrical Contractors Association, and labor history, rather than knowledge of the electrical trade, and WE WILL NOT utilize such an examination as the basis for denying book 1 status to William Perry.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights set forth above.

WE WILL make available the requested records relating to the operation of the hiring hall.

WE WILL, within 14 days from the date of the Board's Order, administer to William Perry, upon request, a nondiscriminatory journeyman inside wireman's examination.

WE WILL make whole, with interest, all individuals who suffered loss of employment because of our unlawful conduct for all earnings and other benefits lost as a result of that conduct.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 48, AFL–CIO

Patrick F. Dunham, Esq., for the General Counsel.

Paul C. Hays, Esq. (Ping Tow-Woram, Esq., with him on brief) *(Carney, Buckley & Hays),* of Portland, Oregon, for Respondent International Brotherhood of Electricians, Local 48, AFL–CIO.

George Fisher, Esq., of Portland, Oregon, for the Charging Parties.

DECISION
STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. These cases were tried in Portland, Oregon, on various dates in 1998 and 1999. At issue is whether International Brotherhood of Electrical Workers, Local 48, AFL–CIO (the Union) violated Section 8(b)(1)(A).[1] On May 8, 1998, the Regional Director for

[1] The charge and amended charge in Case 36–CB–1798-1 was filed by Paul Footlick on April 22 and May 7, 1993, respectively. The charge is Case 36–CB–1798-2 was filed by Dennis Coey on April 22, 1993. The charge in Case 36–CB–1798-3 was filed by Patrick Mulcahy on April 22, 1993. The charge in Case 36–CB–1798–4 was filed by Richard S. Smith on April 22, 1993. The charge and amended charge in Case 36–CB–1798–5 were filed by Brad Twigger on April 22 and May 10, 1993, respectively. The charge in Case 36–CB–1798-6 was filed by Terry Taylor on April 22, 1993. The charge and amended charge in Case 36–CB–1947 were filed by Footlick on October 12 and November 13, 1994. The charge in Case 36–CB–1840–1 was filed by Footlick on January 10, 1994. The charge in Case 36–CB–1859 was filed by Twigger on March 24, 1994. The charge in Case 36–CB–1853 was filed by William Perry on March 1, 1994.

Region 20 of the National Labor Relations Board (the Board) issued a third consolidated amended complaint and notice of hearing against the Union. The Union filed a timely answer to the complaint denying any violation of the Act.[2]

The parties were afforded full opportunity to appear, to introduce relevant evidence,[3] to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record,[4] including my observation of the demeanor of the witnesses,[5] and after considering the briefs filed by counsel for the General Counsel, counsel for the Union, and many of the Charging Parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Oregon-Columbia Chapter of the National Electrical Contractors Association (Oregon-Columbia NECA), with offices and a place of business in Portland, Oregon, is a multiemployer association of electrical contractors performing work in the State of Oregon and in southwest Washington State. Friberg Electric Company, Christensen Electric Company, Allphase Electric, and Cherry City Electric (the Employers), with offices and places of business in Portland, Oregon, are among its members. Each Employer has duly authorized Oregon-Columbia NECA to represent it in collective-bargaining negotiations with the Union. Each Employer annually has gross sales of goods and services in excess of $500,000 and purchases goods and materials in excess of $50,000. These goods and materials are shipped to their State of Oregon projects directly from outside the State of Oregon and to their State of Washington projects directly from outside the State of Washington. Each Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Oregon-Columbia NECA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[6] The Union admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

1. Facts

The Union and Oregon-Columbia NECA have been parties to a series of collective-bargaining agreements covering journeymen and apprentice electricians working for employer members of Oregon-Columbia NECA, including Employers Friberg, Christensen, Allphase, and Cherry City. Pursuant to these agreements, the Union operates an exclusive referral system[7] (the hiring hall) for journeymen and apprentice electricians from its offices in Portland, Oregon. The complaint alleges four discrete areas of arbitrary and discriminatory conduct engaged in by the Union. These categories are:

- that the Union operated its exclusive hiring hall in contravention of the hiring hall rules since at least October 22, 1992, and continuing at least through December 31, 1994;
- that the Union refused registrants the opportunity to inspect and/or copy its records relating to operation of the hiring hall;
- that on occasions in 1993 and 1994, the Union unlawfully removed hiring hall registrants Twigger and/or Footlick from the Group I out-of-work list and refused to permit them to register and to dispatch them; and
- that on at least three occasions between November 3, 1993, and February 2, 1994, the Union unlawfully refused to allow Perry to sign the Group I out-of-work list by administering an arbitrary journeyman wireman's examination to him.

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[2] Following litigation of all allegations in the third amended consolidated complaint, the cases were severed. Fourteen of the underlying charges, all involving alleged discrimination in employment, were severed as "Employer" cases (see *Friberg Electric Co.*, JD(SF)–19–00); 10 of the charges, all involving alleged restraint and coercion by the Union, were severed as "Union" cases and are discussed in this decision; and 4 charges were severed as "Pension/Attorneys Fee" cases (see *Oregon-Columbia NECA*, JD(SF)–21–00).

[3] Several of the Charging Parties submitted posthearing motions to supplement the record. These motions are denied as there was ample opportunity during the 28-day hearing to submit all relevant evidence and there is no showing that the evidence is newly discovered or previously unavailable.

[4] Counsel for the General Counsel's unopposed motion to correct the transcript is granted.

[5] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[6] Respondent Oregon-Columbia NECA denied employer status within the meaning of the Act because it does not employ any electricians. However, it admitted that the Employers authorized it to represent them jointly in collective-bargaining negotiations with the Union. Under these circumstances, it is appropriate to assert jurisdiction over the association on that basis. See, e.g., *Laundry Owners Assn. of Greater Cincinnati*, 123 NLRB 543, 544 (1959) (association is engaged in commerce based upon association's members direct outflow and gross volume of business), relying on *Siemons Mailing Service*, 122 NLRB 81, 84 (1958) (all members of multiemployer associations who participate in or are bound by multiemployer bargaining negotiations treated as single employers for jurisdictional purposes); *Insulation Contractors of Southern California*, 110 NLRB 638, 639 (1954) (by manifesting a desire to be bound in their labor relations by joint rather than individual action, the association and its members have constituted themselves a single employer within the meaning of the Act).

[7] The Union and General Counsel agree that the Union operates an exclusive hiring hall. In related litigation, Employers Friberg, Christensen, Allphase, and Cherry City, as well as Oregon-Columbia NECA denied that the Union operates an exclusive hiring hall asserting that because employers may hire off the street if the Union does not provide referrals within 48 hours, exclusivity is defeated. I find contrary to the Employers' and Oregon-Columbia NECA's assertion, that the hiring hall operated by the Union is an exclusive hiring hall. See, e.g., *Iron Workers Local 111 (Steel Builders)*, 274 NLRB 742, 746 (1985), enfd. in relevant part 792 F.2d 241 (D.C. Cir. 1986), and cases cited therein.

2. Law

Although a labor organization owes a duty of fair representation to individuals which it represents, it is permitted a wide range of discretion in the performance of its duties.[8] A labor organization breaches this duty when any of its actions are arbitrary, discriminatory, or in bad faith.[9] Generally, mere negligence does not constitute a breach of the duty of fair representation.[10] In the operation of an exclusive hiring hall, "mere negligence" does not violate the duty of fair representation even if an applicant loses an employment opportunity as a result of the union's mistake.[11] However, gross negligence in the operation of a hiring hall may constitute a violation of the union's duty of fair representation:

> We do not suggest that *gross* negligence in the operation of a hiring hall, of the type indicating disregard for established procedures, would not breach the duty of fair representation. Such conduct would likely be found to be "arbitrary," and possibly in bad faith, and thus within the proscription of *Vaca v. Sipes* [386 U.S. 171 (1967)] and *[Air Line Pilots Assn. v.] O'Neill* [499 U.S. 65 (1991)]. We hold only that honest, inadvertent mistakes, such as the Union's in this case, do not, without more, constitute a breach of the duty. [12]

Finally, if "mistakes" are routinely made or if "mistakes" typically disfavor nonmembers, dissidents, or some other identifiable group, such "mistakes" may be arbitrary, discriminatory or bad-faith conduct breaching the duty of fair representation.[13] Absent the defense of negligence, union actions which deviate from hiring hall rules may be lawful if the action was taken pursuant to a valid union-security clause or was necessary to the effective performance of the union's representative function.[14]

B. Dispatches Allegedly Failing to Conform to Hiring Hall Rules

1. Factual background

Edward Barnes was business manager of the Union from 1992 until late July 1995. During that same period of time, Gerald D. Bruce, business representative, was the chief dispatcher in the hiring hall. As dispatcher, Bruce sent employees to employers pursuant to employer requests for electricians, utilizing the hiring hall rules. In late July 1995, Bruce succeeded Barnes as business manager.

The hiring hall rules provide in relevant part:

5.02.01	The Union shall be the sole and exclusive source of referral of applicants for employment.
5.04.01	The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or nonmembership in the Union and such selection and referral shall not be affected in any way by rules, regulations, bylaws, constitutional provisions or any other aspect or obligation of Union membership policies or requirements. All such selections and referrals shall be in accord with the following procedure.
5.05.01	The Union shall maintain a register of applicants for employment established on the basis of the Groups listed below. Each applicant for employment shall be registered in the highest priority Group for which he qualifies.

JOURNEYMAN WIREMAN:

GROUP I. All applicants for employment who have four or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market, have passed a journeyman's examination given by a duly constituted Inside Construction Local Union of the I.B.E.W. or have been certified as a Journeyman Wireman by an Inside Joint Apprenticeship and Training Committee, and who have been employed for a period of at least one year in the last four years under a collective bargaining agreement between the parties to this Agreement [or in later contracts, "in the geographical jurisdiction of IBEW Local 48."]

GROUP II. All applicants for employment who have four or more years experience in the trade and who have passed a Journeyman Wireman's examination give by a duly constituted Inside Construction Local Union of the I.B.E.W. or have been certified as a Journeyman by any Inside Joint Apprenticeship and Training Committee.

GROUP III. All applicants for employment who have two or more years experience in the trade, are residents of the geographical area . . . . and have been employed for at least six months in the last three years under a collective bargaining agreement between the parties to this Agreement [or in post June 17, 1993 contracts, "in the geographical jurisdiction of IBEW Local 48."]

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[8] *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

[9] *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), as applied in *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991).

[10] *Letter Carriers Branch 6070 (Postal Service)*, 316 NLRB 235, 236 (1995).

[11] *Steamfitters Local 342 (Contra Costa Electric)*, 329 NLRB 688 (999), overruling *Iron Workers Local 118 (California Erectors)*, 309 NLRB 808, 809 (1992), and returning to the rule of law extant from 1963 with the holding in *Operating Engineers Local 18 (Ohio Pipe Line Construction Co.)*, 144 NLRB 1365 (1963), until 1982 when the Board held for the first time that any departure from established hiring hall rules denying employment to an applicant violated the duty of fair representation. *Operating Engineers Local 406 (Ford, Bacon & Davis Construction Co.)*, 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983).

[12] *Contra Costa Electric*, supra, 329 NLRB at 811. This case was litigated prior to the decision *Contra Costa Electric*. That is, the case was litigated under a theory of "strict" liability in operation of an exclusive hiring hall. Therefore, each instance of deviation from the hiring hall rules was thoroughly litigated. Counsel for the General Counsel sought to litigate the issue of contravention of the hiring hall rules up to the present date. However, I would not allow evidence after December 31, 1994. Any additional instances of deviation from the hiring hall rules may be litigated in the compliance phase of this proceeding, if necessary.

[13] *Contra Costa Electric*, supra, 329 NLRB at 811 fn. 24.

[14] See *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, supra, 262 NLRB at 51.

. . . .

5.06.01 If the registration list is exhausted and the Local Union is unable to refer applicants for employment to the Employer within 48 hours from the time of receiving the Employer's request, Saturdays, Sundays and holidays excepted, the Employer shall be free to secure applicants without using the Referral Procedure but, such applicants, if hired, shall have the status of "temporary employees."

5.07.01 The Employer shall notify the Business Manager promptly of the names and Social Security numbers of such "temporary employees" and shall replace such "temporary employees" as soon as registered applicants for employment are available under the Referral Procedure.

Individuals who have signed the group I out-of-work list and are present in the hall at the time of dispatch have the highest dispatch priority and are given the opportunity to be dispatched before individuals in other groups. Occasionally, however, individuals are legitimately dispatched out of order, for instance, when an employer requests an individual with specific skills or requests an individual by name.

The Union maintains a salting program which interfaces with the hiring hall in several aspects. Pursuant to the salting program, the Union allows its members to work for nonunion electrical contractors. Such members are known as "salts." One purpose of salting is to attempt to persuade employees of the nonunion contractors to join the Union. Any nonunion electricians thus recruited are known as "peppers."

2. Alleged contravention of hiring hall rules

Eleven separate categories of "irregularities" in operation of the hiring hall were delineated in paragraph 11(a) of the complaint as follows:

1) Dispatching persons not registered on the out-of-work list

2) Dispatching persons who worked as "salts" for the Union at non-Union companies ahead of other qualified journeymen who had a higher position on the out-of-work list.

3) Providing dispatches to persons not present in the hiring hall at 3 p.m. or whatever time was set by the Union for dispatching when other qualified journeymen who were present in the hiring hall at that time were available.

4) Leaving numbers blank on the out-of-work list, in order to insert registrants with less priority thereon.

5) Placing converted apprentices on the journeyman out-of-work list as of the date they signed the apprentice list rather than the date they became journeymen.

6) Dispatching newly organized persons ("peppers") ahead of qualified journeymen registered on the out-of-work list.

7) Allowing "salts" and "peppers" credit for the time worked for non-union companies toward their Group I status.

8) Giving "salts" and "peppers" credit for the time worked for non-union companies toward their Group I status.

9) Failing to put available jobs on the recorder and then dispatching persons not on the out-of-work list and/or lower on the out-of-work list than other available journeymen.

10) Dispatching persons not meeting Group I requirements ahead of journeymen registered on the Group I out-of-work list.

11) Inserting persons on the out-of-work list out of order and ahead of other registrants.

These allegations are grouped in logical categories and discussed below.

3. Dispatching persons not registered on the out-of-work list; Dispatching persons who worked as "salts" for the Union at non-Union companies ahead of other qualified journeymen who had a higher position on the out-of-work list; Dispatching newly organized persons ("peppers") ahead of qualified journeymen registered on the out-of-work list; Giving "salts" and "peppers" credit for the time worked for non-union companies toward their Group I status

a. Facts

The parties agree that salts and peppers did not register on the out-of-work list and were nevertheless sometimes given preference in referrals. This occurred approximately 15 times between October 22, 1992, and December 31, 1994. The parties agree that salts and peppers were sometimes given credit for the time they worked for non-Union companies for purposes of registering on the group I out-of-work list. No negligence was involved. Rather, the Union purposefully determined to return salts and peppers, perceived to have lost employment due to their organizing activity, to the same construction site, if possible at a location adjoining the location from which the salts or peppers had been discharged or had otherwise left employment. To achieve this result, the Union admits that it dispatched the salts and peppers (who had not registered) ahead of registrants on the out-of-work list and gave salts and peppers credit for the time they worked for nonunion companies for purposes of future registration on the group I out-of-work list. The issue, accordingly, is whether departure from its established rules was necessary to the effective performance of the Union's representative function.

b. Contentions

Counsel for the General Counsel argues that the favoritism accorded salts and peppers pursuant to the Union's policy to suspend certain hiring hall rules is unlawful because this encourages union membership or unlawfully coerces employees to engage in the union activity of becoming members and seeking to work as salts and peppers. Counsel for the General Counsel distinguishes cases which hold that referral preferences for stewards are lawful,[15] arguing that those cases are based

[15] See cases cited by counsel for the General Counsel: *Plumbers Local 520 (Allis-Chalmers Corp.),* 282 NLRB 1228 (1987); *Teamsters Local 959 (Ocean Technology),* 239 NLRB 1387 (1979).

upon the Union's need for an ongoing site representative to administer the contract.

Counsel for the Union asserts that the salt and pepper referrals were necessary to the performance of the Union's representative function. A goal of the salting program was to capture work for the Union. The ability to send salts and peppers immediately to projects adjoining nonunion projects which they were attempting to organize after they departed the nonunion company served the purpose of the Union as a whole. Counsel argues that the Union did not act arbitrarily or discriminatorily or in bad faith. Rather, these 15 deviations from the hiring hall rules were for the common good of its members and hiring hall referents.[16] Similarly, when nonunion contractors signed agreements with the Union, employees who had been stripped from the contractor earlier, received first priority in returning to the contractor in order to ensure continuity of the work force. Counsel asserts that this is a legitimate reason for deviation from the rules. Finally, counsel notes that these incidents are so isolated that they should not constitute a violation.[17]

c. Analysis

The defense, that deviation from established rules was necessary to effective performance of a union's representative function, has long been recognized.[18] It has been explained as follows:

> Not every encouragement of union membership is unlawful, and the mere acquiescence of an employer in a demand of a union is not unlawful encouragement *per se* . . . . Thus, when the circumstances do not involve an objective of furthering, requiring, or conditioning employment on union membership as such, the illegality, if any, must be found in those actions by a union that impinge upon the employment relationship which are arbitrary, invidious, or irrelevant to legitimate union interests.[19]

Application of this principle has resulted in findings that independent of rules allowing such referrals, stewards may be sent to jobsites in order to police the collective-bargaining contract. In *Painters District Council No. 2 (The Paintsmiths),*[20] the collective-bargaining agreement provided that the union could appoint job stewards. Upon learning that an employer had secured a new job and no steward had immediately been designated, the union business agent sent his brother from the union hall to act as steward.[21] No violation was found even though the union acted without authority of a rule allowing such a dispatch. The Board noted that the union's action served a legitimate purpose in ensuring an independent steward who would enforce trade rules and police the contract without fear of losing a regular job.[22] Of course, these "steward preference" cases recognize the Union's need to represent its organized employees by placing a steward on the worksite to protect the organized employees' contractual and statutory rights. In the instant case, the Union's assertion of necessity to deviate emanates from its desire to organize nonunion employees.

However, recognizing the distinction between necessity of protecting organized employees and the goal of organizing nonunion employees, as in our case, further guidance is provided in *Sheet Metal Workers Local 27 (Sheet Metal Contractors' Assn.),*[23] relied upon by the Union. In that case, rather than referring employees from the top of the out-of-work list, the union referred only employees on the out-of-work list who were residents of a specific county in order to satisfy a contractor's requirement that a percentage of the work force reside in that county. The union defended its action by reference to a resolution which permitted it to "take whatever steps necessary" in order to "capture" work for its members to ensure full employment. By invoking the resolution, the union was able to obtain work for its hiring hall registrants. The Board found that this deviation from hiring hall rules was necessary to the effective performance of the union's representative function. Accordingly, it is recognized that a union may deviate from established hiring hall rules to achieve its goal of providing employment opportunities otherwise unavailable to its hiring hall registrants when such a goal is recognized by the union.

The Union has fully endorsed the COMET or salting program as a method of organizing the unorganized. The record reflects that, as implemented by this Union, the salting program eschewed the filing of unfair labor practice charges when a salt or pepper was discharged or laid off arguably for his union organizing involvement. Rather, the Union immediately referred the salt or pepper back to the site to show its strength. It must be concluded that by engaging in these actions, the Union was encouraging union membership, a goal sanctioned by the Union, in part, pursuant to its COMET program. However, the

[16] Counsel cites, *Sheet Metal Workers Local 27 (Sheet Metal Contractors' Assn. of Central & South New Jersey),* 316 NLRB 419 (1995) (resolution allowing union to do whatever is necessary to capture work was legitimate reason for deviation from hiring hall rules); *Hays v. NECA,* 781 F.2d 1321 (9th Cir. 1985) (referral preference for those within a 40-mile radius was legitimate exercise of union's discretion and did not violate duty of fair representation).

[17] Counsel cites *Master Stevedores Assn. of Texas (Houston Maritime Assn.),* 156 NLRB 1032, 1036 (1966) (violations not sufficient in number to support allegation that union hall dispatching hundreds of longshoremen daily engaged in practice of discriminatory preference to members at shapeup).

[18] See, e.g., *Plasterers Local 299,* 257 NLRB 1386, 1394–1395 (1981), and *Longshoremen ILA Local 440 (Port Arthur Stevedores),* 214 NLRB 1068, 1070–1071 (1974), both pre-*Operating Engineers Local 406* cases; and *Operating Engineers Local 450 (Houston Chapter, AGC),* 267 NLRB 775, 795 (1983), and *Plumbers Local 519 (Sam Bloom Plumbing),* 306 NLRB 810, 813 (1992), enfd. 15 F.3d 1160 (D.C. Cir. 1994), both post-*Operating Engineers Local 406* cases.

[19] *Ashley, Hickham-UHR Co.,* 210 NLRB 32, 33 (1974).

[20] 239 NLRB 1378 (1979), enfd. in relevant part 620 F.2d 1326 (8th Cir. 1980), on remand 253 NLRB 164 (1980).

[21] There is no evidence regarding the dispatched steward's placement on any out-of-work list.

[22] See also *Teamsters Local 959 (Ocean Technology),* 239 NLRB 1387, 1388–1389 (1979) (steward preference clause which allowed union discretion to send a steward to job in place of employee who would otherwise have been entitled to the referral is valid), overruling *Painters Local 798 (Gypsum Drywall Contractors),* 212 NLRB 615, 617 (1974), enfd. 538 F.2d 312 (2d Cir. 1976) (steward's provision creates member preference in referral).

[23] 316 NLRB 419, 422–423 (1995).

fact that the Union's salting efforts encouraged union membership, in and of itself, does not constitute the end of the analysis. If relevant to legitimate union interests and if not arbitrary or invidious, the action may nevertheless be lawful.[24]

Although resolving a different issue, the rationale in *Food & Commercial Locals 951, 7 and 1035 (Meijer, Inc.),*[25] is instructive. The Board held therein that under the *California Saw*[26] standard, a union's organizing expenses within the same competitive market as an organized employer are chargeable to the organized employer's objecting bargaining unit employees. This holding is based in part upon the acknowledged relationship between organizing and collective bargaining readily "apparent from the language of the Act. . . . Congress envisioned broad economic benefits to society flowing from the organization of employees for the purposes of collective bargaining."[27] The Board also noted evidence that represented employees' wage rates increase or decrease as a function of the percentage of employees who are unionized in the geographic area increases or decreases.[28] Based upon this evidence, the Board concluded that, "represented employees, whether or not they are members of the union that represents them, benefit, through the results of collective bargaining, from that union's organization of other employees. . . . "[29]

By analogy to *Meijer,* and based upon the same policy rationale and economic conclusions, I find that deviations from the exclusive hiring hall referral rules in furtherance of the Union's salting program served the legitimate union interest of organizing unorganized employees.[30] Moreover, there is no evidence that the Union's actions were arbitrary or invidious. It is agreed that the Charging Parties herein did not lose employment opportunities due to the Union's deviation from its exclusive hiring hall rules in favor of salts and peppers. Accordingly, I conclude that the Union's deviation on 15 occasions from its established exclusive hiring hall rules in order to refer salts or peppers to work without regard to their relative placement or lack of placement on the out-of-work list was necessary to the effective performance of the Union's representative function. Similarly, I conclude that allowing credit to salts and peppers for time worked for nonunion contractors was necessary to the effective performance of the Union's representative function.

4. Providing dispatches to persons not present in the hiring hall at 3 p.m. or whatever time was set by the Union for dispatching when other qualified journeymen who were present in the hiring hall at that time were available and failing to put available jobs on the recorder and then dispatching persons not on the out-of-work list and/or lower on the out-of-work list than other available journeymen

a. Facts

Late on Friday, April 8, 1994, Frito Lay fired a nonunion contractor and awarded the work to Tice Electric. Organizer Mel Connors was contacted by Tice at home on Friday evening with a request for dispatches for the weekend. Connors went to the hiring hall, retrieved the out-of-work list, and started telephoning registrants. He started at the top and called registrants until he found some individuals to report to Tice by 11 p.m. or midnight that night. Connors also requested that Chezem, who remained at work for the nonunion contractor on Friday night and into Saturday morning, April 8 and 9, 1994, leave the job. Chezem left the job early Saturday, April 9, 1994. On Monday, April 11, 1994, before dispatching hours, Connors gave Chezem a dispatch to Tice. Connors made these dispatches on an emergency basis in order to staff the job for Tice before normal hiring hall hours. Connors conceded that this was an emergency situation and he handled it on an emergency basis.

Posted dispatch procedures effective March 1, 1994, provided that "Available jobs will be announced on the hotline between 5:30PM through 8:30AM . . . ." There is no evidence whether the Tice jobs were announced on the hotline.

b. Contentions

Counsel for the General Counsel relies on the above example of deviation from the hiring hall rules to prove the allegations. Counsel contends that it is not necessary to list every instance of such conduct. Counsel asserts that having proven that the Union engaged in this one instance of prohibited conduct, a remedy is appropriate and any other violations can be remedied in compliance. Counsel for the Union discusses the above facts

[24] In *Teamsters Local 357 (Los Angeles-Seattle Motor Express) v. NLRB,* 365 U.S. 667, 675 (1961), the Court stated:

> It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well. But . . . the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination."

[25] 329 NLRB 730, 733 (1999).

[26] *California Saw & Knife Works,* 320 NLRB 224, 239 (1995), supplemented 321 NLRB 731 (1996), enfd. sub nom. *Machinists v. NLRB,* 133 F.3d 1012 (7th Cir. 1998), cert. denied 525 U.S. 813 (1998), relying on *Lehnert v. Ferris Faculty Assn.,* 500 U.S. 507, 524 (1991) (chargeability of expenses outside objector's bargaining unit is determined by whether they are germane to the union's role in collective bargaining, contract administration, and grievance adjustment, regardless of whether the activities were performed for the direct benefit of the objector's bargaining unit as long as the expense is for services which may ultimately inure to the benefit of the members of the local by virtue of their membership in the parent organization).

[27] *Meijer,* supra, 329 NLRB at 734.

[28] Id., 329 NLRB 735.

[29] Id., 329 NLRB 737.

[30] Cf. *Teamsters Local 174 (Totem Beverages),* 226 NLRB 690, 699–700 (1976) (where exclusive hiring hall maintained no objective criteria or written standards of any kind and employees were referred at the whim of the union, referral of employee because of his organizational role inherently encouraged union activities and was, thus, discriminatory).

in connection with deviations from hiring hall rules incident to its salting program.

c. Analysis

In agreement with the Union, I find that Chezem's situation was handled outside the normal hiring hall rules due to his status as a salt. As to other referrals to Tice over the weekend of April 8, 1994, I note that there is no evidence whether the job was announced on the hotline. It is undisputed that the job order was received after 5:30 p.m. and had to be filled on an emergency basis. Because this was an isolated incident based upon an emergency situation, I find no violation. To the extent possible, Connors followed the order of the out-of-work list in attempting to staff the Tice job. Such emergency excuses putting the job on the hotline and waiting to dispatch until the following Monday when normal hiring hall hours resumed. In my view, this constitutes action taken to effectively perform the Union's representative function.

5. Leaving numbers blank on the out-of-work list in order to insert registrants with less priority thereon; inserting persons on the out-of-work list but out of order and ahead of other registrants

Counsel for the General Counsel contends that the Union left numbers blank on the out-of-work list in order to "slot people in." There is no evidence that this, in fact, occurred. Rather, the evidence reflects that when the Union converted from a manual to a computerized system, blanks were left on the computer-generated list in order to correct any mistakes made through the computer program.[31] Accordingly, this allegation is dismissed.

6. Placing converted apprentices on the group I out-of-work list as of the date they signed the apprentice list rather than the date they became journeymen.

a. Facts

Rule 5.05.01 states, inter alia, that a registrant may be placed on the group I out-of-work list only when "certified as a journeyman wireman." Nevertheless, the Union uniformly registered apprentices who became journeymen through the inside joint apprenticeship and training program on the out-of-work list as of the date the registrant last became unemployed as an apprentice.[32] Admittedly, the date of certification was different that the date of last becoming unemployed. In December 1993, the Union published a letter of understanding between itself and NECA which reflected the longstanding practice of permitting unemployed graduate apprentices to sign the group I out-of-work list and be considered as group I journeymen prior to completion of their apprenticeship status. This employment notice, posted in the hiring hall, states, "The policy of the local union regarding apprentices who graduate to journeyman level while unemployed shall be to place these individuals within the Book I group, giving them full credit for their time unemployed while an apprentice previous to graduation."

b. Contentions

Counsel for the General Counsel contends that the Union's policy prior to December 1993 violated rule 5.05.01. Counsel asserts that this action by the Union was taken purposefully rather than negligently.

The Union contends that it properly allowed apprentices to register on the out-of-work list prior to their eligibility for group I status. This is so, the Union argues, because it had a long-standing, well-known practice of allowing apprentices to sign on the group I out-of-work list prior to meeting all the official criteria. Counsel notes that the apprentices were accorded this treatment because they had essentially qualified for group I except for receiving notice of their completion of the state licensure examination.

c. Analysis

Until December 1993, the apprenticeship policy was not in writing. However, the Union uniformly treated apprentices enrolled in the joint apprenticeship and training program as unemployed for purposes of eligibility on the group I out-of-work list as of the date they were last unemployed as an apprentice. Accordingly, after these apprentices completed the state-administered examination but before they were notified that they had received their state license, if they became or were unemployed prior to receiving their state license but after taking the exam, it was that date of unemployment which was utilized for purposes of eligibility for referral from the group I out-of-work list. Technically, as pointed out by counsel for the General Counsel, the apprentices were not eligible for group I until they received their state licenses. Admittedly, there was a delay between taking the exam and receiving notification from the state of passing. However, I find that whether the Union maintained a written rule or merely acted pursuant to an oral understanding, the practice was lawful in the absence of evidence that it was designed for an invidious or discriminatory purpose. Absent such evidence, I find the uniform practice of according apprentices an unemployment date prior to their receipt of state licensure a lawful practice. This is not a case of failure to maintain objective criteria or written rules for referral from an exclusive hiring hall.[33] Rather, it is a case of acting pursuant to an unwritten rule.[34]

[31] There is evidence that occasionally names were written in on the out-of-work list. However, there is no evidence why this was done and there is no evidence that the names written in were out of order.

[32] Bruce credibly testified that this has been the practice of the Union for as long as he could remember. He testified that only one apprentice, to his knowledge, had been out of work at the time his graduation from the joint apprenticeship and training program was imminent.

[33] *Teamsters Local 174, (Totem Beverages)*, supra, 226 NLRB at 699–700 (by operating its exclusive hiring hall without any objective criteria or standards and in a discriminatory manner, the union violated the Act).

[34] See, e.g., *Iron Workers Local 10 (Guy F. Atkinson Co.)*, 196 NLRB 712 (1986), enf. 83 LRRM 2409 (8th Cir. 1973) (referral system created as a matter of practice or oral agreement lawful even though not reduced to writing).

7. Dispatching persons not meeting group I requirements ahead of journeymen registered on the group I out-of-work list

a. Facts

Counsel for the General Counsel presented evidence of about 200 instances when the Union apparently failed to follow its own rules for registration on the group I out-of-work list during the period October 22, 1992, to May 16, 1994. During this period of time, the Union made about 10,000 dispatches. Approximately 2100 or 2200 to 3500 or 4000 individuals utilized the hiring hall during this same time. In addition, during this time period, the Union converted its dispatching procedure from a manual system to a computerized system. The computerized system initially incorporated members of the Union. Travelers were added to the computerization at a later time.

The evidence reflects, for example, that some registrants were allowed to sign the group I list even though there was no documentation that the registrant had passed a journeyman wireman's examination. In addition, the General Counsel produced evidence that some registrants were allowed to maintain their group I priority although they had worked more than 30 days since their last "re-signing" and, thus, should have been removed from the list. Further, some registrants' names were inserted on the out-of-work list ahead of other registrants and dispatched according to their point of insertion although the record sometimes failed to reflect the reason for insertion of the registrants' names at the particular points on the out-of-work list. Finally, some registrants were allowed to remain on the group I list even though the evidence failed to establish that the registrant had worked one of the prior 4 years in the industry.

On about 10 occasions, the union records did not reflect that particular registrants on the group I out-of-work list had passed the journeyman inside wireman's examination. The Union agreed that these registrants should not have been allowed to sign the group I out-of-work list if, indeed, they had not passed the journeyman inside wireman's examination. The Union could offer no explanation for how these registrants slipped through the rules. The Union conducted periodic audits to determine compliance with the group I requirements. However, the Union agreed that in these instances the registrants had not been caught. No specific group was targeted for special treatment. The registrants who were improperly present on the group I list without evidence of having passed the journeyman inside wireman's examination consisted of both travelers and members.

With regard to virtually all of the evidence regarding failure to remove registrants from the out-of-work list after 30 days of work, the evidence reveals that very few deviations from the rule actually occurred. The Union instituted a computerized program to monitor the 30-day rule. This program counted 42-calendar days and assumed that anyone who had worked that long had probably worked for 30-working days. However, the program did not account for holidays or sick days. On numerous occasions, the Union was able to rebut the General Counsel's assertion of failure to follow the 30-day rule. Business Manager Bruce testified credibly that certain insertions of names on the group I out-of-work list were consistent with correcting a mistake of omitting the registrant's name on a prior list. Accordingly, he surmised in many instances (although he did not have a specific recollection of each instance) that the registrant had been dropped from the list due to improper application of the 30-day rule or improper application of the "re-sign" rule[35] and the registrant brought the mistake to the attention of the dispatcher who rectified the mistake by inserting the registrant's name at the appropriate spot on the out-of-work list. On some occasions, Bruce specifically recalled that this had been the case.

Finally, the Union produced evidence that many of the apparent deviations from the hiring hall rules were actually contemplated within the framework of the hiring hall. For instance, some of the registrants were actually requested by name and thus dispatched out of order; some of the registrants had special skills which were required and, thus, were dispatched out of order; and some of the registrants were sent to noninside wiremen's jobs and thus not pursuant to the hiring hall rules.

It is not disputed that deviations from the hiring hall rules were random. That is, travelers, nonmembers and dissidents were advantaged as often as members. The record, on the whole, indicates that the deviations from hiring hall rules were simply that—deviations or mistakes which had no motivation to advantage or disadvantage any group.

b. Contentions

Counsel for the General Counsel contends that so many inadvertent errors were made that this amounts to gross negligence while counsel for the Union, although conceding that some mistakes were made, insists that mistakes were made in an honest, good-faith attempt to comply with all hiring hall rules. Counsel for the Union notes that the Union installed a new computer system for handling referrals. This system dropped some individuals from the group I out-of-work list before they had worked 30 days. However, no evidence indicates that discriminatory or unlawful reasons were behind these mistakes. Once the Union became aware of these errors, the employees were appropriately reinserted on the out-of-work list and dispatched. Counsel for the Union also asserts that many of the mistakes, such as verification of eligibility and application of the "re-sign" requirement, involved honest human error.[36] Finally, counsel for the Union argues that statistical and numerical evidence of errors, advantaging both members and nonmembers, is insufficient to establish breach of the duty of fair representation.[37]

[35] Basically, this rule required that registrants who wanted to retain their place on the out-of-work list were required to resign the list in February and August.

[36] Counsel relies upon *Plumbers Local 38 (D.I. Chadbourne)*, 159 NLRB 370 (1966), enfd. 388 F.2d 679 (9th Cir. 1968) (where operation of hiring hall admittedly left much to be desired, nevertheless no violation because no relationship to union activity); *Stage Employees IATSE Local 592 (Saratoga Performing Arts)*, 266 NLRB 703 (1983) (union did not operate exclusive hiring hall in arbitrary faction although operation was sloppy and unbusinesslike).

[37] Counsel cites *Iron Workers Local 483 (Building Contractors Assn.)*, 285 NLRB 123 (1987), enfd. in relevant part 864 F.2d 1113 (3d Cir. 1989) (unexplained bypasses of nonmembers from among thou-

c. Analysis

In exercising its duty of fair representation, a labor organization must, "serve the interests of all members without hostility or discrimination toward any. . . . exercise its discretion with complete good faith and honesty, and . . . avoid arbitrary conduct."[38] However, mere forgetfulness or inadvertent error in the operation of an exclusive hiring hall does not violate the duty of fair representation.[39]

Given that the law does not guarantee the quality of representation and given that a degree of human error or negligence may be expected in any human endeavor, the issue is whether the referral mistakes admittedly made by the Union rise to the level of gross negligence in violation of the duty of fair representation. I find that all of the mistakes were made in good faith. Many were due to the press of business at the hiring hall. Many were due to implementation of the computer system. However, there is no evidence that any specific group of employees was prejudiced by the mistakes. Given the great volume of business in the hiring hall and the relatively few numbers of "mistakes,[40] I am unable to find that "gross" negligence has occurred.

C. Refusal to Allow Registrants the Opportunity to Inspect and/or Copy Hiring Hall Records

1. Facts

In mid-March 1993, Footlick and others requested access to hiring hall records on behalf of their dissident union organization, Electricians for a Democratic Union (EDU), in order to ascertain the order of dispatch and how the hall was being operated. Bruce took the records away when Footlick began writing notes from the records. At an appeals committee meeting in April 1993, a box of hiring hall records was produced while Footlick and others were presenting an appeal. There is no evidence that Footlick and other EDU members examined the box of records at the appeals hearing. There is no evidence regarding what, if any, restrictions were placed on access to the box of hiring hall records nor is there any evidence regarding the dates of coverage of those records. On January 19, 1994, Footlick was allowed to examine several months of dispatch records. However, when Footlick attempted to write notes regarding the records, the books were withdrawn and Footlick was asked to leave.

2. Contentions

Counsel for the General Counsel notes that when a union undertakes the operation of an exclusive hiring hall, the union must allow hiring hall registrants an opportunity to inspect and copy the records in order to determine that the hall is being operated in conformity with the rules and the law. Counsel asserts, based on the undisputed facts herein, that the Union clearly acted arbitrarily and discriminatorily in denying access to the records. Counsel asserts that the Union's "defense," that some of the documents were produced in April 1993, is unavailing because any records produced at the appeals hearing were not made available at a time when the Charging Parties could avail themselves of the opportunity to inspect and copy. Further, counsel asserts that subsequent attempts to inspect and take notes were met with a stone wall.

Counsel for the Union asserts that the Charging Parties' request for access to hiring hall records was spurious and based on untenable grounds. This is so, counsel asserts, because the sole basis for the Charging Parties' concern about hiring hall procedures was the fact that a computerized referral system left systematic blanks on the out-of-work list in order to leave room to correct mistakes. Because the only evidence regarding the blanks in the list is a legitimate reason for the blanks, counsel asserts that the request was unreasonable. Counsel additionally raises privacy concerns for registrants' social security numbers. Finally, counsel notes that the Union made certain records available during an appeals committee meeting and the Charging Parties did not avail themselves of the opportunity to inspect these materials.

3. Analysis

"Inherent in a union's duty of fair representation is an obligation to deal fairly with an employee's request for information as to his relative position on the out-of-work register for purposes of job referral through an exclusive hiring hall."[41] When a labor organization refuses to provide access to hiring hall records in response to a request for such records in order to determine whether referral rights are being protected, the labor organization violates Section 8(b)(1)(A).[42]

The Union has failed to advance any legitimate reason for withholding the requested information from the Charging Parties. Initially, it must be concluded that the request for information was reasonably based. If, indeed, the request to review hiring hall records was based upon the blank spaces left in the out-of-work list when the list became a computer-generated list, it does not matter whether the Charging Parties' belief or concern about the system was accurate. Rather, it is enough to establish a right to hiring hall information if the applicant just

sands of referrals over an 18-month period unlikely to have been result of deliberate discrimination).

[38] *Vaca v. Sipes*, 386 U.S. 171, 177 (1966), citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964).

[39] *Steamfitters Local 342 (Contra Costa Electric)*, supra, 329 NLRB 688, 690 (1999), citing *Operating Engineers Local 18 (Ohio Pipe Line)*, 144 NLRB 1365 (1963); *Plumbers Local 40*, 242 NLRB 1157, 1163 (1979), enfd. mem. 642 F.2d 456 (9th Cir. 1981). In both of the cited cases, the union had made mistakes in operation of their hiring halls but no showing of hostile, invidious, irrelevant or unfair considerations was shown and no violation of the duty of fair representation was found.

[40] Even if all of the General Counsel's allegations of deviation from the rules had been proven—and they were not because the Union rebutted many of the allegations—there were about 200 instances in over 10,000 dispatches. Thus, even if the Union made as many deviations as alleged, only 2 percent of the dispatches involved misapplication of the rules.

[41] *Operating Engineers Local 324 (Michigan Chapter AGC)*, 226 NLRB 587 (1976).

[42] See, e.g., *Boilermakers Local 197 (Northeastern State Boilermaker Employers)*, 318 NLRB 205 (1995); *Carpenters Local 35 (Construction Employers Assn.)*, 317 NLRB 18, 21–23 (1995).

wants to see the information.[43] Moreover, as to any concerns for privacy of registrants, the fact that the Charging Parties were allowed to view the social security numbers of registrants but not to make notes belies the concern for registrants' privacy. Finally, I do not find failure to examine the box of materials made available at the April 1993 appeals hearing fatal to the allegation herein. The Charging Parties were at the appeals hearing to resolve an issue and their failure to undertake examination of the box of materials during that meeting cannot be held against them. Moreover, on a subsequent attempt to examine and take notes, the Union withdrew the materials from the Charging Parties. Accordingly, I find that the Union violated Section 8(b)(1)(A) by failing to allow the Charging Parties to inspect and/or take notes of its records relating to operation of the hiring hall.

D. Unlawful Refusal to Allow Perry to Sign the Group I Out-of-Work List by Administering an Arbitrary Journeyman Wireman's Examination to Him

1. Facts

Perry began working in the jurisdiction of the Union in the early 1990s. He had been a journeyman inside wireman for about 20 years at that time. Initially, the Union allowed Perry to register on the group I out-of-work list. In October 1993, Perry was notified that he needed to complete a journeyman inside wireman's examination. Perry sat unsuccessfully for the examination on three occasions and thereafter, pursuant to valid rules, was denied group I status. Counsel for the General Counsel alleges that the content of the examination unlawfully encouraged membership in the Union. The examination required applicants to know details about the elected union leadership, the bylaws of the Union, the constitution and operation of the IBEW, and the local Union and its collective-bargaining agreement with Oregon-Columbia NECA.

For instance, the examination administered in 1994 contained 10 questions regarding the electrical code (apparently worth 4 points each), 6 questions about the collective-bargaining agreement (apparently worth 4 points each), 5 questions about the Union's bylaws (apparently worth 2 points each), 2 questions about IBEW history (apparently worth 2 points each), and 2 questions about the IBEW constitution (apparently worth 2 points each). An examination administered in 1993 contained 15 questions about the bylaws, 10 questions about the collective-bargaining agreement, 10 questions about the IBEW constitution, 8 questions about IBEW history, and 25 questions about the electrical code.

2. Contentions

Counsel for the General Counsel acknowledges the Union's right to require examination prior to referral in the group I out-of-work list. It is the content of the examination, characterized in the complaint as requiring "in major part" knowledge of union bylaws and constitution, labor history and the contents of a collective-bargaining agreement, which counsel asserts is unlawful. Counsel for the General Counsel acknowledges that Perry was not the only person required to take the examination and also acknowledges that this argument presents an issue of first impression.[44] He argues, however, that it is axiomatic that a labor organization may not use its control over the referral process to foster, encourage, discourage, or require union membership.[45]

Counsel for the Union asserts that there is no evidence that the examination was unfair or discriminatory. Counsel also notes that at least in 1994, Perry did not pass the examination largely due to incorrect answers regarding the electrical code section of the test.

3. Analysis

It has long been permissible for a labor organization to administer regular examinations to persons selected on a nondiscriminatory basis in order to certify "journeyman" status, that is, the status of a qualified independent worker, for purposes of referral priority.[46] However, a labor organization may not use the device of journeyman examination to promote discriminatory practices.[47]

The purpose of the examination of applicants for inclusion on the group I out-of-work list is to ensure referral of qualified applicants to employers. I conclude that inclusion of questions about the Union's collective-bargaining agreement, bylaws, and constitution, and history do not serve the purpose of ensuring referral of qualified applicants. Inclusion of such questions can only serve union institutional purposes. Moreover, I find that inclusion of such questions unlawfully restrains or coerces employees who wish to refrain from the right to join a union. inclusion of such questions is invidious in the potential to deny referral access.[48] Accordingly, I conclude that Perry was unlaw-

[43] *Operating Engineers Local 513 (Various Employers)*, 308 NLRB 1300, 1303 (1992).

[44] In fact, counsel for the General Counsel specifically denied that this allegation was related in any way to Perry's dissident union activity.

[45] Counsel relies generally on *Scofield v. NLRB*, 394 U.S. 423 (1969) (union may reasonably enforce a properly adopted rule which impairs no statutory policy and serves a legitimate union interest); *Electrical Workers Local 1579*, 316 NLRB 710 (1995) (union unreasonably enforced rule against traveler for working for a nonunion employer but not against its own members); *Teamsters Local 579 (Janesville Auto Transport Co.)*, 310 NLRB 975 (1993), enfd. in relevant part 145 LRRM 2200 (7th Cir. 1993) (penalizing union members who publicly expressed opposition to union's choice of health providers does not serve legitimate union interest and impairs policy of labor laws); and *Carpenters Local 720 (UMC of Louisiana)*, 287 NLRB 545, 546–547 (1987) (rule forbidding members from turning down union job referrals in order to continue nonunion employment serves legitimate union interest).

[46] See, e.g., *Nassau-Suffolk Chapter of the NECA*, 215 NLRB 894 (1974), vacated in relevant part as moot and remanded 565 F.2d 76 (D.C. Cir. 1977), on remand 231 NLRB 1021 (1977), enfd. in part 586 F.2d 959 (2d Cir. 1978); *Electrical Workers, Local 99 (Crawford Electric Construction Co.)*, 214 NLRB 723, 725 (1974).

[47] See, e.g., *Plumbers Local 633 (B & W Construction Co.)*, 249 NLRB 67, 70 (1980), enfd. 668 F.2d 921 (6th Cir. 1982).

[48] It is irrelevant whether Perry failed the exam based in large part upon the electrical code questions or the internal union questions. Moreover, I credit Perry's denial that the 1994 exam admitted in evidence reflects his answers. Perry credibly testified that although his score was the same as the score on the exam admitted in evidence, that particular exam did not contain his handwriting.

fully excluded from group I status due to the contents of the examination.[49]

E. Removal of Registrants Twigger and Footlick from the Group I Out-of-Work List and Refusal to Permit them to Register and to Dispatch them

1. Facts

Charging Parties Footlick, Twigger, Coey, Mulcahy, Jacobs, DeBien, Taylor, Perry, and McVay as well as other electricians who used the Union's hiring hall, formed EDU in 1993 because they disliked the hiring hall preferential dispatches to salts, peppers, new hands, and apprentices. EDU held its first open meeting in March 1994. In addition to seeking access to the hiring hall records, EDU filed internal union charges and appeals. Shortly after this dissident activity became known to the Union, an agreement between the Union and Oregon-Columbia NECA was published requiring that anyone who unsuccessfully filed NLRB or other charges would be responsible for paying costs incurred by the Union and Oregon-Columbia NECA.[50] Evidence introduced by counsel for the General Counsel clearly indicates both knowledge of EDU activities and animus for these activities as of March 1994.

In May 1993, about a year before the Union learned of EDU activity, internal union charges were brought by Bruce against Footlick alleging that Footlick did not reside within the geographic area constituting the normal construction labor market and was, accordingly, ineligible to sign the group I out-of-work list. During the pendency of this charge, Footlick was removed from the group I out-of-work list. Bruce based his internal union charge against Footlick on the fact that Footlick lived in a travel trailer without a permanent foundation and Footlick kept his vehicles registered in another county. Footlick successfully proved his residency and Bruce lost the internal union charge against Footlick.[51]

Later, in October 1994, dispatcher Keith Edwards refused to allow Footlick to sign the group I book because of a dispute over Footlick's residency. After a meeting with the appeals board, Footlick was allowed to sign the group I out-of-work list again. Footlick's removal from the group I out-of-work list from October 22 to November 7, 1994, is alleged as violative of Section 8(b)(1)(A).

Similarly, between September 23 and November 19, 1993, and between February 25 to April 8, 1994, Twigger's name was removed from the group I out-of-work list. Bruce testified that Twigger's name was removed pursuant to a group I eligibility audit performed by the Union. However, Bruce could not recall the names of any other persons who were affected by the audit but believed about 17 individuals were affected.

2. Contentions

Counsel for the General Counsel contends that Twigger and Footlick's protected EDU activities motivated the Union's actions to remove them from the group I out-of-work list. Counsel notes the knowledge, animus, and timing of their removals. Counsel notes that Bruce's treatment of Footlick stands in harsh contrast to Bruce's treatment of Howell Marsh, an unregistered electrician from Texas. Bruce called Tigard Electric on behalf of Marsh and immediately found employment for him. When Marsh's work with Tigard ended, Bruce allowed Marsh to sign the group I out-of-work list even though Marsh was admittedly not eligible to sign that list because he had not satisfied the residency requirement. Counsel additionally, points to the pretextual nature of the audit, in that there is no evidence that anyone other than Twigger was affected by the audit.

Counsel for the Union concedes that there is evidence that Barnes and Footlick did not get along. However, counsel asserts that personal animosity falls far short of animus for dissident union activities which the Union had no knowledge of at the time of Footlick's removal from the group I out-of-work list.[52]

Counsel for the Union notes that Twigger was removed in September 1993 pursuant to a normal audit and once he provided evidence that he satisfied the group I requirements, he was reinstated to the group I out-of-work list. Counsel asserts that Twigger's removal in February 1994 was an inadvertent clerical error.[53] Counsel asserts that the Union's actions were not motivated by animus for Twigger's dissident activities, in part, because there is no evidence of knowledge of EDU activities until March 1994.

Finally, counsel contends that Twigger's and Footlick's claims are barred by res judicata. Counsel asserts that an action

[49] The complaint specifically alleges that Perry was removed from the group I out-of-work list during the summer of 1993 in violation of Sec. 8(b)(1)(A). The complaint further alleges that between November 3, 1993, and February 2, 1994, on three occasions, Perry took the examination and failed to pass. I do not find that Perry's removal from the group I out-of-work list was unlawful under the circumstances of this case. The Union has shown by a preponderance of the evidence that it lawfully conducted audits to ensure the integrity of the group I qualifications. However, refusal to allow Perry the opportunity to take a lawful journeyman examination was violative. Any issues regarding Perry's ability to physically perform the duties of a journeyman inside wireman are left to the compliance phase of these proceedings.

[50] This agreement between the Union and Oregon-Columbia NECA was never enforced and was later rescinded. The legality of publication of the "loser pays" requirement is dealt with in my decision in "*Oregon-Columbia Chapter of National Electrical Contractors Association*, JD(SF)–21–00."

[51] This removal from the group I out-of-work list is not alleged as violative of the Act.

[52] Counsel relies upon *Plasterers Local 299(Wyoming Contractors Assn.)*, 257 NLRB 1386, 1395 (1981) (although union impaired registrant job referral prospects, union's actions were in good faith, based on rational considerations, and linked to its need to effectively represent its constituency as a whole); *Plumbers Local 375*, 228 NLRB 1191 (1977) (expulsion of individual from apprenticeship program and failure to dispatch him not based on personal or intra-union political considerations not violative).

[53] Counsel relies upon *Operating Engineers Local 18 (Ohio Pipe Line Construction Co.)*, 144 NLRB 1365 (1963) (mere forgetfulness or inadvertent error in failing to re-register member did not constitute discriminatory conduct); *Operating Engineers Local 450 (Houston Chapter AGC)*, 267 NLRB 775, 799–800 (1983) (retention of members on the out-of-work list contrary to hiring hall rules did not constitute unfair labor practice because they were due to oversight or mistake and did not cause detriment to others).

in Federal court between the same parties found no evidence of animus or discriminatory behavior on the part of the Union.

3. Analysis

Turning to the procedural issue first, on December 20, 1994, Twigger and others filed suit against the Union and employers Christenson and Friberg in the United States District Court for the District of Oregon (Civil No. 94-1544-JE) claiming, in part, breach of the duty of fair representation and collusion between the Union and the employers in issuance of not-for-rehire letters allegedly in retaliation for Twigger's and others' dissident union activities.[54] The substance of the alleged breach of duty of fair representation claim included not only the alleged collusion between the employers and the Union but also the manner in which grievances regarding the not-for-rehire letters were handled by the Union. Removal of Twigger's and Footlick's names from the out-of-work list was not litigated. However, in entering an order of partial summary judgment in favor of the Union and the employers, the magistrate noted there was some evidence that the Union, "generally disfavored the EDU. . . ." (Opinion and Order of November 20, 1997, at 26). Given this statement, I am unable to conclude that the court found no evidence of animus. However, the magistrate concluded that the evidence was insufficient to prove that the Union, "investigated and prosecuted their grievances in a manner that was arbitrary, capricious, or in bad faith." (Opinion and Order of November 20, 1997, at 28).

The doctrine of res judicata does not bar litigation of Twigger and Footlick's claims herein nor does the doctrine of collateral estoppel compel a finding of no animus or discriminatory behavior. Assuming arguendo that the doctrine of res judicata is applicable to proceedings before the Board, the fact that the Union and the Charging Parties have engaged in Federal court litigation of the duty of fair representation involving alleged collusion in issuance of not-for-rehire letters and processing of grievances due to issuance of those letters does not preclude the government from litigating the issue of Twigger and Footlick's removal from the out-of-work list.[55] Moreover, I decline to apply the doctrine of collateral estoppel to the court's statement regarding general disfavor of EDU by the Union or to the court's holding regarding processing of the grievances. Neither of the holdings is directly applicable herein. Finally, the Government was not a party to the Federal court proceeding and the finding of the court is currently on appeal.

Turning to the merits of removal of Twigger's and Footlick's names from the group I out-of-work lists, I note that all three of the removals in question occurred prior to the Union's knowledge of EDU or of Twigger and Footlick's involvement in EDU. Accordingly, absent knowledge of the dissident union activities of these individuals, it is impossible to conclude the EDU activities were the basis for their removals. Nevertheless, counsel for the General Counsel argues that personal animosity on behalf of the Union toward Twigger and Footlick motivated their removals. Of course, disfavored treatment due to personal animosity is arbitrary action in violation of the duty of fair representation. However, I am unable to discern evidence in the record which warrants a finding that personal animosity existed in 1993 and early 1994 toward

Twigger and Footlick.[56] According, I conclude that there is insufficient evidence upon which to find that their removals from the group I out-of-work list were arbitrary or discriminatory.

CONCLUSIONS OF LAW

1. By refusing to allow hiring hall registrants the opportunity to inspect and/or copy its records relating to the operation of the hiring hall, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

2. By utilizing a journeyman wireman examination given on three occasions to hiring hall registrant Perry which dealt in major part with knowledge of the Union's bylaws and constitution, labor history and the contents of its collective-bargaining agreement, rather than knowledge of the electrical trade, and utilizing this examination as the basis for denying Perry group I status, the Union violated Section 8(b)(1)(A).

REMEDY

Having found that the Union has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Union unlawfully refused to allow hiring hall registrants the opportunity to inspect and/or copy its records, the Union must make available the requested information. Having found that the Union unlawfully utilized an arbitrary journeyman wireman's examination to deny Perry group I status, the Union must make Perry whole for his money losses and loss of contributions to the funds established by the relevant collective-bargaining agreements, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[54] The issuance of these not-for-rehire letters was litigated before me as unfair labor practices in the related Employer cases. Those cases were severed for purposes of decision. See "Friberg Electric Company, et al., Cases 36–CA–7261, et al., JD(SF)–19–00").

[55] *Precision Industries*, 320 NLRB 661, 663 (1996), enfd. 118 F.3d 585 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998).

[56] I note that in the federal court litigation, the magistrate specifically referred to evidence of personal animosity between Twigger and Barnes and between Footlick and Barnes. The Federal court litigation documents were admitted as union exhibits solely for the purpose of the argument regarding issue preclusion. Counsel for the General Counsel strenuously objected to admission of these documents as irrelevant. Under these circumstances, it would be improper to take note of the evidence referred to by the court regarding personal animosity. This evidence was not litigated before me and cannot now be considered.