Highway and Local Motor Freight Employees, Local Union No. 667, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Spector Freight System, Inc.) *and* Clyde Hudson. Case 6-CB-1480

March 11, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On September 27, 1979, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. Respondent filed exceptions and a supporting brief, and also filed a response to the General Counsel's brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent operated a lawful, exclusive referral hall. He found, however, that Respondent violated Section 8(b)(1)(A) and (2) of the Act by requiring, as a condition of registration and referral for employment from its exclusive hiring hall, the payment of a referral fee in excess of costs attributable to the services rendered. Accordingly, he ordered Respondent to reimburse registrants for those sums which were found to be unrelated to the expenses of operating the hall. The General Counsel has excepted to the Administrative Law Judge's conclusion that Respondent operated a lawful exclusive referral hall, claiming that Respondent provided no referral service for which it could charge a fee, and has asked the Board to declare the referral hall unlawful and to order Respondent to refund each registrant employee the entire amount of the referral fee paid. We find merit in the General Counsel's exception, as we find that, under the circumstances of this case, Respondent did not operate a bona fide referral hall.

The record reveals, as set forth in greater detail in the Administrative Law Judge's Decision, that since the early 1970's the collective-bargaining agreement between Respondent and Memphis area trucking companies contained language providing for the operation of an exclusive referral hall.[1] However, prior to 1978, Respondent did not enforce this portion of the agreement, and most of the casual employees hired by signatory employers were hired directly by those employers, without recourse to the referral service.

On January 8, 1978,[2] Johnny Raney took office as president of Respondent. Upon assuming office, Raney determined that Respondent should enforce the referral hall provisions of the agreement, because, in his view, "[w]e felt like under the contract that these people were getting benefits from the contract. It takes money to negotiate a contract, it takes time and effort for making some of the money for these people and we didn't feel like we could stay in business if we didn't get something out of it."

In July, Raney called a meeting of all signatory employers, at which he announced that Respondent would henceforth enforce the contract provision relating to the operation of an exclusive hiring

[1] Art. 41, sec. 6, of the National Master Freight Agreement provides as follows:

1. Local Unions shall be the sole and exclusive source of referrals of applicants for employment, except as herein provided.

2. The Employer shall notify the appropriate Local Union of his need for employees (casual, temporary, or regular) at least twenty-four (24) hours in advance of the job. This notice shall not be required when the need of the Employer is to replace an absent regular employee or in an emergency. In requesting referrals, the Employer shall specify to the Local Union the number of employees required, the location of the job, the nature and type of work to be performed and such other information as is deemed essential in order to enable the Local Union to make proper referral of applicants.

3. The Employer shall not recruit or hire applicants not referred by the Local Union. However, if the Local Union is unable to refer applicants for employment to the Employer within twenty-four (24) hours from the time of receiving the Employer's request, Saturdays, Sundays, and holidays excepted, or within two (2) hours if replacing an absent employee the Employer shall be free to secure applicants without using the referral procedure, but such applicants, if hired, shall have the status of "temporary employee." The Employer shall notify the Local Union 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.

4. The Local Union shall maintain a register of applicants for employment established on the basis of the time of registration.

5. The Local Union shall refer applicants to the Employer in order of time and date of their registration, provided the Local Union shall not refer an applicant previously discharged or disqualified by the Employer requesting a referral.

6. When a request is made by the Employer for employees, the applicant next entitled to a referral shall be notified by the Local Union at the Hiring Hall or by telephone. If an applicant refuses a referral or cannot be readily reached in the foregoing manner, his name shall be removed from the register to re-register for additional employment.

7. Registration and selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall in no way be affected by Union membership bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of Union membership policies or requirements. The parties hereto agree that a copy of this Agreement shall be posted at the Union Hall and the terminal of the Employer.

8. When hiring hall is closed, vacancy caused by absenteeism may be filled with casuals without referrals.

[2] Unless otherwise noted, all dates hereinafter are in 1978.

hall. The monthly referral fee for casual employees was set at $15.[3] Raney announced that employers could continue to use the casual employees employed at that time, and requested that employers instruct those employees to report to the referral hall to pay the referral fee and obtain monthly referral cards.

Respondent assigned a clerical employee, Debra Wade, to handle referral duties at the referral hall. Wade maintained two sets of referral records. For those casual employees who worked part-time for a specific employer on a regular basis, Respondent maintained individual cards bearing the name of the employee and the employer. As the employee paid the referral fee, Wade filed the completed card in a file box divided by employer. For applicants not regularly employed by a specific employer, Respondent maintained a "miscellaneous list" limited to 50 names. Applicants were informed that it was a list of part-time employees to be utilized for all terminals. Respondent advised the "miscellaneous" employees that although they did not have to pay the referral fee to work, they did have to pay the fee to get on the list and to remain on it.

Once a casual employee on the first list paid his monthly referral fee, Respondent provided no additional referral services on his behalf. Employers directly contacted those employees, as needed, for part-time casual work. If an employer was unable to obtain sufficient casual manpower from its regular casual employee complement, the employer could contact the referral hall for additional casual employees; however, the record indicates that employers infrequently sought casual employees by contacting the referral hall, and relatively few referrals were made from the miscellaneous list. Occasionally, in response to the requests of persons seeking casual employment, Respondent would suggest various employers in the area who, they believed, might need additional casual manpower.[4] Respondent maintained no other records with regard to operation of the referral hall.

In September, Respondent raised its monthly membership dues by $2 and consequently raised its monthly referral fee to $17 per month. Respondent presented no evidence that the expenses of administering the referral hall had increased so as to justify an increase in the referral fee, but rather continued to set the fee at $1 below the monthly dues paid by union members. In December 1978 or January 1979, Wade prepared the miscellaneous list as usual. However, contrary to past practice, she sent the list *directly* to each signatory employer. From the time Respondent mailed the miscellaneous list to signatory employers, the referral hall received no further calls for referrals, as employers made their contacts directly with those on the list. On February 22, 1979, Hudson filed the original charge in this proceeding. In March 1979, Respondent terminated operation of its referral hall.

Upon these facts, the Administrative Law Judge found that the referral system set forth in the collective-bargaining agreement was an exclusive hiring arrangement which was not *per se* unlawful and that those who paid the referral fee received the same services from the referral system that such systems customarily provide. The Administrative Law Judge also found that the referral fees were not imposed in a discriminatory manner, nor was the system operated in any manner which contravened the Act. He found, however, that the referral fee charged by Respondent was excessive in two respects: (1) the expenses upon which the fee was ostensibly based[5] included $4.15 of each monthly fee remitted as per capita taxes to various International Brotherhood of Teamsters governing bodies, as required by the Teamsters International constitution,[6] which payments were not properly attributable to the costs of providing referral services; and (2) Respondent raised the referral fee by $2 per month, coincident with an increase in union dues, without providing any evidence of increased expenses in operating the referral hall to justify the increased fee. Accordingly, the Administrative Law Judge ordered Respondent to reimburse those casual employees who paid the referral fee on or after August 22, 1978,[7] for these overcharges.

We conclude, contrary to the Administrative Law Judge, that Respondent did not operate a

[3] Respondent set the monthly referral fee at $1 less than the amount of monthly dues paid by union members, which at the time the referral system was established was $16. In setting the referral fee in this manner, Respondent relied on the Board's decision in *Local 825, International Union of Operating Engineers, AFL-CIO (H. John Homan Company)*, 137 NLRB 1043 (1962), in which the Board approved a hiring hall fee pegged at $1 below the union's monthly dues. Union members were not required to pay a referral fee.

[4] For example, the Charging Party, Clyde Hudson, sought part-time employment off the miscellaneous list after his regular employer, Spector Freight System, Inc., refused to employ him. The record contains uncontroverted evidence that Hudson paid his referral fee to Respondent, but was never called by Respondent for referrals. In an effort to find employment, Hudson went to the union hall and met with Maurice Smith, a business agent and vice president of Respondent. Smith gave Hudson the names of four or five other employers in the area, and suggested that he go around to those trucklines to see if they had any work. Hudson did not obtain employment throught this method.

[5] Raney testified that he did not know what expenses were used to justify the amount of the fee, but in a letter to the General Counsel from J. V. Pellicciotti, secretary-treasurer of Local 667, Respondent indicated the items which were considered to comprised the administrative expenses of the referral hall.

[6] The per capita taxes consisted of: $3.15 remitted to the International Union, 75 cents to the Southern Conference, and 25 cents to Joint Council No. 87.

[7] The Administrative Law Judge held that he was precluded by Sec. 10(b) of the Act from requiring reimbursement of fees paid more than 6 months prior to the filing the original charge in this matter.

bona fide referral system for which casual employees should have been required to pay any referral fees. Such arrangements are characterized by an agreement between the parties for the employer to notify the union as jobs become available in the relevant classifications, and for the union to send the employer sufficient manpower for the employer to fulfill his employment requirements.[8]

In the instant case, the agreement between the parties provided for a conventional exclusive referral hall, with employers notifying Respondent of its need for casual employees and Respondent referring applicants to the employer in order of the time and date of their registration, without regard to their membership in the union.[9] In practice, however, Respondent did not conduct even the semblance of a bona fide hiring hall. Those employees who were regularly employed by a specific employer were not contacted by Respondent when their employer had vacancies; rather, the employer contacted the desired employees directly. Yet they were still required to pay the referral fee. Those applicants who did not desire to work for a single employer were placed on the "miscellaneous list," and were theoretically referred upon employers' requests; however, Respondent provided no evidence that any employees were in fact referred in this manner. In fact, Respondent failed to keep any written records pertaining to the operation of the referral hall, except a list of those who paid the fee.[10]

Moreover, in January 1979, Respondent prepared a written roster of those on the "miscellaneous list" and sent it to each signatory employer. Thereafter, every casual employee hired by signatory employers between January and March 1979, as well as all casual employees hired between July and December 1978 who expressed to Respondent a desire to work on an "as needed" basis for a specific employer, was contacted by the employer directly, rather than through the referral system, even though Respondent required those employees to pay a referral fee.

We conclude, therefore, that Respondent's purpose, as expressed by its president, was to "get something out of" the negotiating efforts made on behalf of casual employees.[11] While Respondent did "get something out of" its establishment of the referral hall—referral fees—it rendered no services in return. Thus we agree with the General Counsel's contention that no fee is reasonable because Respondent operated no referral hall and performed no service warranting any fee. Where, as here, Respondent charges and collects a referral fee from employees "who did not gain employment through the referral system of, or through any efforts extended by, Respondent"[12] we cannot consider *any* payments made thereby to be lawful under the Act. Accordingly, we hereby order that Respondent reimburse each applicant or employee, who has made referral fee payments pursuant to this system within the 10(b) period,[13] the full amount of their payment.

CONCLUSIONS OF LAW

1. Spector Freight System, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Highway and Local Motor Freight Employees, Local Union No. 667, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By requiring employees, as a condition of registration and referral for employment with Spector Freight System, Inc., and other signatory employers of the collective-bargaining agreement between those employers and Respondent, to pay a referral fee where Respondent has failed to provide any referral services, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

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[8] *In Mountain Pacific Chapter of the Associated General Contractors, Inc., et al.*, 119 NLRB 883 (1957), remanded 270 F.2d 425 (9th Cir. 1959), modified 127 NLRB 1393 (1960), enfd. as further modified 306 F.2d 34 (9th Cir. 1962), we stated:

> It was to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers that the union hiring hall as an institution came into being. It has operated as a crossroads where the pool of employees converges in search of employment and the various employers' needs meet that confluence of job applicants.[119 NLRB at 896, fn. 8.]

See also *N.L.R.B. v. National Maritime Union of America (CIO) [The Texas Company]*, 175 F.2d 686, 689-690 (2d Cir. 1949), cert. denied 338 U.S. 954 (1950).

[9] See fn. 1, *supra*.

[10] The record lacks any evidence that Respondent kept records of when applicants on the miscellaneous list paid their referral fees, when employers contacted the hall for referrals, which applicants were referred to which employers, and whether an applicant so referred was hired by the requesting employer. The lack of such documentation by Respondent lends support to the conclusion that Respondent did not operate an exclusive referral hall as that term is normally understood. See *Local 394, Laborers' International Union of North America, AFL-CIO (Building Contractors' Association of New Jersey)*, 247 NLRB No. 5 (1980).

[11] It is worth noting, in this regard, that Respondent admitted setting the referral fee at a dollar less than union dues without regard to, and without attempting to estimate, the costs of operating the hiring hall. See fn. 3, *supra*. Likewise, when Respondent raised union dues from $16 to $18 it automatically raised the referral fee by the same $2 amount.

[12] *Detroit Mailers Union No. 40, International Typographical Union, AFL-CIO (Detroit Newspaper Publishers Association)*, 192 NLRB 951, 952 (1971).

[13] Sec. 10(b) of the Act limits Respondent's liability to a period beginning 6 months from the filing and service of the original charge. See *Union Taxi Corporation*, 130 NLRB 814 (1961); *American Advertising Distributors*, 129 NLRB 640 (1960). As the Charging Party filed the initial charge in this matter on February 22, 1979, the 10(b) period runs from August 22, 1978.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to ordering that Respondent cease and desist from the unfair labor practice found herein and that it post the customary notice to members and employees, we shall further order that Respondent refund all referral fees paid pursuant to the referral system on or after August 22, 1978, with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation.*[14]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Highway and Local Motor Freight Employees, Local Union No. 667, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Requiring, as a condition of registration referral for employment, the payment of a referral fee where Respondent has provided no referral service.

(b) 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 designed to effectuate the policies of the Act:

(a) Reimburse registrant employees for any amount paid for referral pursuant to this referral system, on or after August 22, 1978. Such reimbursement shall be computed in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by an official representative, of Respondent shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Furnish to the Regional Director for Region 26 sufficient signed copies of the attached notice for posting, the employers signatory to its collective-bargaining agreement noted herein willing, in conspicuous places, including all places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for Region 26, after being duly signed by Respondent as indicated, shall be forthwith returned to the Regional Director for disposition by him.

(d) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

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

After a hearing at which all sides had an opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice. We intend to carry out the Order of the Board.

WE WILL NOT require, as a condition of registration and referral for employment from our referral hall, the payment of a referral fee in excess of the costs attributable to employment services rendered.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of rights guaranteed under Section 7 of the National Labor Relations Act.

Since it was decided that we violated the Act by requiring the payment of a referral fee where we provided no referral services, WE WILL reimburse any registrant employee for amounts paid for referral fees pursuant to this referral system on or after August 22, 1978, plus interest.

HIGHWAY AND LOCAL MOTOR FREIGHT EMPLOYEES, LOCAL UNION NO. 667, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

[14] 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[15] In the event that 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."

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge: This case was heard before me at Memphis, Tennessee, on July 2 and 3, 1979, pursuant to charges and amended charges filed on February 22 and March 15, 1979, and complaint issued on March 22, 1979. The complaint alleges violations of Section 8(b)(1)(A) and (2); and recites in relevant part:

8.

(a) Certain employer parties to the collective bargaining agreement described above in paragraph 7, including the Employer herein, have, since August 1978, hired casual employees directly rather than obtaining the employees through the Union's referral system.

(b) Since on or about August 22, 1978, the Union has required employees hired, as described above in paragraph 8(a), to pay a monthly referral fee.

9.

(a) The Union maintains a list of all casual employees who seek employment by certain of the employer parties to the collective bargaining agreement described above in paragraph 7.

(b) Since on or about August 22, 1978, the Union has charged the casual employees on the list described above in paragraph 9(a) a monthly referral fee as a condition of referral or continued referral.

* * * * *

12.

The referral fee referred to above in paragraphs 8(b) and 9(b) is excessive in that it is not reasonably related to the cost of providing the referral service.

Respondent moves to dismiss paragraph 12 because it is not specifically alleged, as 8(b) and 9(b) are, in paragraphs 13 or 14 of the complaint as violative of the Act. Paragraph 12, on its face, supplements and explains allegations in paragraphs 8(b) and 9(b). The General Counsel made it clear at the hearing that the imposition of an excessive and unreasonable fee is the theory of the complaint, and this issue was fully litigated by both parties. Moreover, paragraph 12 is an allegation necessary to the pleading of a cause of action in this proceeding.[1] Accordingly, the motion to dismiss is denied.

Respondent denies the commission of unfair labor practices.

After careful consideration of the entire record, the demeanor of the witnesses testifying before me, and the parties' post-trial briefs, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Spector Freight System, Inc., herein called the Employer, is a corporation doing business in the State of Tennessee with an office and place of business located in Memphis, Tennessee, where it is engaged in the hauling of freight. During the 12 months preceding the issuance of the complaint, the Employer received in excess of $50,000 for the transportation of goods which originated outside the State of Tennessee, or which were designated for delivery to points located outside the State of Tennessee. During the same period of time, the Employer purchased and received at its Memphis, Tennessee, location, goods valued in excess of $50,000 directly from points located outside the State of Tennessee. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Highway and Local Motor Freight Employees, Local Union No. 667, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,[2] herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE REFERRAL SYSTEM

A. *Fact Findings*

The Respondent, the Employer, and various other Memphis area trucking companies are parties to a National Master Freight Agreement covering over-the-road and local cartage employees which provides, in pertinent part, for a referral hall, as follows:

ARTICLE 41

Section 6.

* * * * *

1. Local Unions shall be the sole and exclusive source of referrals of applicants for employment, except as herein provided.

2. The Employer shall notify the appropriate Local Union of his need for employees (casual, temporary, or regular) at least twenty-four (24) hours in advance of the job. This notice shall not be required when the need of the Employer is to replace an absent regular employee or in an emergency. In requesting referrals, the Employer shall specify to the Local Union the number of employees required, the location of the job, the nature and type of work to be performed and such other information as is deemed essential in order to enable the Local Union to make proper referral of applicants.

3. The Employer shall not recruit or hire applicants not referred by the Local Union. However, if the Local Union is unable to refer applicants for employment to the Employer within twenty-four (24) hours from the time of receiving the Employ-

[1] *Boston Cement Masons and Asphalt Layers Union No. 534, etc. (Duron Maguire Eastern Corp.)*, 568 (1975), reaffirmed 235 NLRB 826 (1978).

[2] The name of the Respondent appears as amended at the hearing.

er's request, Saturdays, Sundays, and holidays excepted, or within two (2) hours if replacing an absent employee the Employer shall be free to secure applicants without using the referral procedure, but such applicants, if hired, shall have the status of "temporary employee." The Employer shall notify the Local Union 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.

4. The Local Union shall maintain a register of applicants for employment established on the basis of the time of registration.

5. The Local Union shall refer applicants to the Employer in order of time and date of their registration, provided the Local Union shall not refer an applicant previously discharged or disqualified by the Employer requesting a referral.

6. When a request is made by the Employer for employees, the applicant next entitled to a referral shall be notified by the Local Union at the Hiring Hall or by telephone. If an applicant refuses a referral or cannot be readily reached in the foregoing manner, his name shall be removed from the register to re-register for additional employment.

7. Registration and selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall in no way be affected by Union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of Union membership policies or requirements. The parties hereto agree that a copy of this Agreement shall be posted at the Union Hall and the terminal of the Employer.

8. When hiring hall is closed, vacancy caused by absenteeism may be filled with casuals without referrals.

There is no contention that the contract is illegal or discriminatory within the meaning of the Act.

The Respondent had not operated such a referral hall or enforced this contractual provision for several years prior to 1978, and most of the casual employees hired by the contracting employers in the Respondent's area were hired directly by the employers, primarily by recalling casuals previously employed, without recourse to any union facility or referral.[3] Prior to July 1978, casuals paid no referral fee to the Respondent.

Johnny Raney took office as president of the Respondent on January 8, 1978. According to Raney, he decided to enforce the referral hall provisions of the contract because, "We felt like under the contract that these people were getting benefits from the contract. It takes money to negotiate a contract, it is time and effort for making some of the money for these people and we didn't feel like we could stay in business if we didn't get something out of it."

The referral hall was operated by the Union from July 1978 to March 1979. Sometime before its July start, the Respondent sought legal advice and, after some discussion, set the monthly referral fee at $15. Regular union dues were $16, and union members were not required to pay a referral fee.[4] I credit the testimony of J. V. Pellicotti, Respondent's secretary and treasurer, that the Respondent had no idea of what the costs of the referral hall would be when it set the $15 figure,[5] and that, as he aptly put it, "It was more of a shot in the dark." I find, as Raney testified, that the referral fee was set at a dollar less than union dues on the basis of legal authority[6] to the effect that a fee which was a dollar less than dues was lawful.

Raney called a meeting with employers[7] party to the contract in July 1978, and told them that the Respondent was going to enforce the contractual hiring procedures. He advised that the Union was going to refer through its hall, and that employers could keep using the casuals they had used in the past but he preferred that these casuals belong to the referral hall. He requested and received lists of casuals working as of July 1978. Raney further advised that monthly referral cards would be issued to employees who paid the fee at the hall. He asked the employers to announce the new policy to employees, and later told the Respondent's job stewards that article 41, section 6, of the contract was to be enforced. He states that he "probably" told the stewards to so inform the employees. The record reflects that Raney was evasive at times, and his demeanor was not convincing. I conclude that he did instruct the stewards to so inform employees.

Respondent's vice president, Maurice Smith, credibly averred that the Respondent asked employers to inform the casuals working for them that they should go to the hall and get a referral card. Smith also conceded that the Respondent investigated occasional reports that certain casuals were not "a member of the referral."

Within a week or so after meeting with Raney, Whicker posted a notice to employees at McLean Trucking that article 41, section 6, would be enforced. Whether or not other employers did the same is not in evidence.

The Respondent assigned clerical employee Debra Wade, an impressive and credible witness, to handle referral duties at the union hall. She worked full time, with some minor deviations, on referral until about the first of January 1979, after which she devoted from 40 to 50 percent of her worktime to other office work. Wade maintained two sets of referral records. One, pertaining

[3] It appears from the testimony of Donald Whicker, terminal manager for McLean Trucking, that about 50 percent of the casuals working for that company prior to July 1978 had been referred at one time or another by individual union agents. According to Union President Raney, however, employers had been hiring casuals off the street and only occasionally called the hall for men.

[4] The referral fee was increased to $17 and union dues to $18 in October 1978.

[5] Raney concedes that the fee was an estimate and no mathematical computations were made.

[6] Respondent's counsel, in opening argument, referred to such a precedent and, in his brief, cited *Local 825, International Union of Operating Engineers, AFL-CIO (H. John Homan Company)*, 137 NLRB 1043 (1962), as authority for the reasonableness of a fee $1 less than dues. I conclude this case is the precedent on which the Respondent relied in setting the fee.

[7] Whicker estimates 40 people were present.

to employees who were working part-time for a specific employer on a regular basis, consisted of individual filing cards bearing the name of the employee and the employer. To get on this record an employee would appear at the hall and tell her which company had told him that he could go to work. The card was then completed, the employee paid the $15 fee, and Ward would issue a referral card and a receipt. At the beginning of her referral duties, Wade used lists of working employees furnished by their employers,[8] and employees on these lists would come to the hall and secure their referrals. I am persuaded that they, in accordance with the procedure described by Wade, paid the fee at that time.[9]

Wade also maintained a miscellaneous list limited to 50 names for applicants not regularly employed by a specific employer. Wade told those who wished to get on this list that it was a list of part-time employees to be utilized for all terminals. She advised them of the amount of the fee, that they did not have to pay it to work, but they did have to pay it in order to get on the list. She also told employees who wished to get on either list that they would have to pay the fee each month in order to remain on the list. I do not credit Raney's assertion that he told Wade to place employees' names on the list whether they paid or not.[10]

Secretary-Treasurer Pelliccotti seemed to be an honest witness, but his testimony that the Respondent posted a sign at the referral hall window, to the effect the fee was voluntary, suffers in probative weight by virtue of the Respondent's failure to produce that sign, which is patently the best evidence of its contents. Pelliccotti's claim is further eroded by Clyde Hudson's credible testimony that he saw no such sign on the window. Accordingly, I shall accord no weight to Pelliccotti's testimony about the alleged sign.

Clyde Hudson, the sole employee witness, gave uncontroverted testimony that the terminal manager for Spector Freight System, Inc., where Hudson had previously worked as a casual employee, told him in July 1978 that he could no longer work for Spector until he got a referral card. Hudson went to the union hall, paid the $15 fee for August,[11] had a file card filled out by Wade for Spector, and received a referral card. He thereafter worked 16 hours for Spector during the week ending August 20, and 14 the week ending September 3. Hudson never asked to be placed on any list other than the Spector card, and, after he was no longer working for the Spector, Smith gave him names of other employees to approach for work as sent to by Smith. That Hudson was not hired is irrelevant.

I am persuaded that Hudson was confused when he testified that Smith told him he had to pay $15 to get on the list, and that it was Wade who told him that. I credit his testimony that he was not informed that he did not have to pay the fee to work.

B. *Conclusions*

Article 41, section 6, of the collective-bargaining agreement sets forth, with replete detail, an exclusive hiring arrangement which is not *per se* unlawful or alleged to be unlawful under the Act.

The record evidence establishes that the Respondent told employers that this contract provision would be enforced, told them and its job stewards to so notify employees, procured lists of currently employed casuals from their employers, utilized these lists to check off employed casuals registering and paying a referral fee at the union hall, and required all registrants to pay the fee to get on a referral list. Accordingly, I conclude that casual employees were required by the provisions of article 41, section 6, and the system set up to implement those provisions, to pay the fee as a condition of using the Respondent's referral services.[12] When referred they had the status of applicants and could be rejected as employees by the Employer.[13] "It is well established that a reasonable [referral] fee may be imposed upon applicants for referral as long as such fees are imposed in a nondiscriminatory manner." *Boston Cement Masons, supra.* There is no allegation nor any evidentiary showing that the fees were imposed in a discriminatory manner, or that the referral system was operated in any manner in contravention of the Act.

The only issue in this case is whether or not the fee imposed was unreasonable in amount. There can be no real question at this late date, after many years of Board Decisions on the topic, of the settled proposition that such fees must be reasonably related to the value of services rendered, and any payment required beyond this as a condition of referral violates Section 8(b)(1)(A) and (2)

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[8] I conclude these were the lists requested and received by Raney earlier.

[9] Union members who got on this miscellaneous list were not required to pay the fee because they paid regular dues.

[10] In addition to my general observation that Raney did not impress me as a frank and forthright witness, his evasiveness and testimonial inconsistency on this subject were obvious:

> Q. From Ms. Wade's testimony—Well I will put it like this. The actual operation, at least to say, of the miscellaneous list up to fifty names; if the employee did not pay a fee, he did not get his name on that list, did he?
>
> A. Why don't you ask Ms. Wade?
>
> Q. If the employee did not continue to pay a fee, his name did not stay on that list?
>
> A. If he didn't come back over there, well, we had no reason to put his name back.
>
> Q. But, your instructions to Ms. Wade, though, was that employees names were not to be kept off the list, whether they paid the referral fee or not.
>
> MR. PAUL: That is not what he said. He said it was not a condition of employment.
>
> JUDGE WOLFE: Well, did you give any such instruction to Ms. Wade?
>
> THE WITNESS: What did you ask me, again?
>
> MR. FORD: Did you instruct Ms. Wade that employees could be placed on a referral list whether they paid the fee or not?
>
> THE WITNESS: Certainly.
>
> Q. (By Mr. Ford) You did?
>
> A. Yes.

[11] He also paid a referral fee in September 1978. I do not credit his claim that he paid in July, because it is contrary to the Respondent's record.

[12] Raney's letter to Whicker, and perhaps other employees, of February 26, 1979, assuring that the Union had no intent to exclude people who did not pay the referral fee from employment, was after the charge was filed in the instant case and requires no different conclusion.

[13] The collective-bargaining agreement specifically provides, at art. 3, sec. (c), that the employer shall not be required to hire those referred by the Union.

of the Act.[14] No additional discrimination need be shown.

The General Counsel makes no effort to determine what a reasonable fee might be, taking the position that no fee is reasonable because the Respondent operated no referral hall and performed no service warranting any fee. The General Counsel does not suggest what services they should have received but didn't.

It seems to me that registrants received the same services from the referral system that are customarily provided. In the case of the miscellaneous list, from which a relatively few employees secured employment, the applicant's name was entered thereon and employees were referred out in order of their standing on the list. That many were not reached for referral, or chose not to pay the monthly fee to remain on the list, does not alter the fact that those paying the fee chose to take advantage of the system, with full knowledge there was no guarantee of employment,[15] and received the services applicable to their situation. This is what referral halls are all about. You come in, get on the list, and maybe get reached for job referral. Union costs incident to both the registration and the referral are plainly attributable to the operation of the service.

The General Counsel argues that no service was given to those casuals who were working when the referral system commenced in July 1978, and that all they did was pay fees for nothing. The Respondent's grant of permission to employers to continue to employ the casuals they already had, with the proviso that these employees should belong to the referral hall, was reasonable in the circumstances. The employees were permitted to continue to work without interruption and disruption of the employers' day-to-day operations was avoided. I do not believe the General Counsel would require dismissal of all incumbents and then rehire only after going through the referral system. This would be an unreasonable exaltation of form over substance.

In any event, Section 10(b) of the Act prohibits any finding that the fees paid prior to August 22, 1978, were unlawfully unreasonable. I conclude, from Wade's credible testimony that applicants had to pay by the 10th of the month to get on the list, that the only fees that are subject to attack by the complaint are those for September 1978 and the months thereafter.

An examination of the employers' weekly casual reports compiled by the General Counsel clearly shows that even regularly returned casuals' employment was of an intermittent nature, frequently punctuated by gaps of several weeks' duration. I do not see that it makes any difference whether an employee came to the hall seeking work, paid the fee, was registered and referred to some employer where he might be hired, or whether he had been assured work, contingent on lawful referral,[16] before he went down to pay the fee and get on the list. The Respondent was, in both cases, furnishing employment service pursuant to a lawful contractual provision which had not been waived by the Respondent.

Commencing in January 1979, the Respondent sent copies of the miscellaneous list to employers, who thereafter made the employment contacts directly with those on the list. I do not consider this convenience to be a material deviation from hiring practice. The applicants still had to pay the fee to the Union to get on the list.

I agree with the Respondent that the mere fact that the referral fee was roughly equivalent to monthly dues does not establish in and of itself that the fee was unreasonable. On the other hand, neither does it establish that the fee was reasonable.

Secretary-Treasurer Pelliccotti furnished the General Counsel, and the General Counsel placed in evidence, a written list of expenses, set forth below, that Respondent considered attributable to operation of the referral system from July through December 1978:

Salary for Deborah Wade at $499.45 per week for 26 weeks:	$12,985.70
10% of the rent at $125.00 per month for 6 months	750.00
10% of office administrative expenses for 6 months	4,030.90
Printing	70.09
5% of other salaries	10,482.42
Utilities for 6 months $2,352.70 - 10%	235.27
Basic telephone bill for 6 months $3,444.48 - 10%	344.44
Per capita tax 17/ paid for 6 months	8,278.20
Total Expenses	$37,177.02

[14] *Coal Producers' Association of Illinois*, 165 NLRB 337, 338 (1967); *International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators of the United States and Canada, AFL-CIO, Local 640 (Associated Independent Theatre Company, Inc.)*, 185 NLRB 552, 558-559 (1970); *J. J. Hagerty, Inc.*, 153 NLRB 1375 (1965); *Local 825, International Union of Operating Engineers, supra; Boston Cement Masons, supra.*

[15] Which Wade told applicants when they came in to get on a referral list.

[16] It was not unlawful for the Union to require the employers to utilize the referral system to secure the employment of specified employees. *Local 1341, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, etc. (Lanham Brothers, General Contractors)*, 161 NLRB 344 (1966).

[17] The fees were $3.15 per month for the International Union, 75 cents for the Southern Conference, and 25 cents for Joint Council No. 87. The International constitution requires the payment of per capita taxes on referral fees.

Additionally, Respondent's records show the following:

Month	Number of employees paying fee		Gross Monthly Fees Received
July 1978	446		$ 6,750.00
August	488		7,425.00
September	504		7,628.00
October 18/	513		8,765.00
November	395		6,764.00
December	282		4,845.00
		Subtotal	$42,177.00
January 1979	230		$ 3,979.00
February	213		3,621.00
March 19/	140		2,380.00
		Total collected	$52,157.00

Returning to the Respondent's list of expenses, a computation of Wade's earnings from a compilation of Respondent's records shows her earnings during the period encompassed by the list were $8.59 per hour for 40 hours per week, totaling $343.60 a week. Pelliccotti credibly testified that pension plan costs attributable to the employment of Wade were $41 per week for one plan plus 21.7 percent of her salary for the other. I compute the latter at $74.57 per week. The addition of these pension costs to her salary produces a weekly cost of $459.17. When health and welfare, workmen's compensation, unemployment insurance, and social security costs, none of which are specifically set forth in the record, are added on, Pelliccotti's total figure of $499.45 per week does not appear unreasonable. Pelliccotti's allocation of a percentage of the rent, administrative expenses, printing, utilities, and local phone calls is unrebutted and does not appear exorbitant. In view of Assistant Business Agent Newton's credible testimony that he spent 50 percent of his time tending to referral business, the fact that his salary is $612 a week, and the evidence that other agents also devoted some time to the referral system, Pelliccotti's estimate of 5 percent of salaries attributable to referral business seems reasonable.

Accepting Pelliccotti's figures for these items, as I do, I am persuaded that the charge for per capita taxes is not properly attributable to the costs of providing referral service.[20] That the Respondent's constitution may require this payment does not transform it into an allowable cost for referral services.

Inasmuch as the only reasonably complete data available to me for purposes of computing a reasonable fee is that for the months of July through December 1978, and inasmuch as the fee payment only continued an additional 3 months, I shall treat this 6-month period as reasonably representative for calculation purposes.

Subtracting the per capita taxes from the total figure leaves a remainder of $28,898.82 reasonably attributable to hiring hall costs for 6 months. Dividing this remainder by 2628, the total number of fees paid during that period, results in an allowable fee of $10.996, rounded off to $11.00. Thus, in a circuitous way, we arrive at the already evident conclusion that employees were overcharged to the extent of the per capita taxes.[21]

I find that the monthly fee charged through September 1978 was unrelated to the operation of the referral service, and therefore unlawfully exacted, in the amount of the per capita taxes, $4.15 per month. There is no justification, other than the increase in members' dues, for the $2-per-month increase in the fee effective October 1978. I therefore find that the fee was excessive in the amount of $6.15 per month from October 1978 through December 1978.

Ms. Wade's duties in connection with the referral service diminished to approximately 60 percent of her time about January 1, 1979. It thus appears that $300, less a few cents, of her weekly wage was attributable to the service in January, February, and March 1979. Recognizing that the costs per referral will inevitably fluctuate with the number of referrals, certain basic office costs will remain relatively static, the amount of time spent on referrals by other union agents is probably not subject to precise calculation,[22] the commonsense argument that the Respondent cannot reasonably be expected to recalculate its referral fee every month, and that a premise figure is probably unattainable, I am inclined to believe that costs will balance out over a period of time, as will the variations in Ms. Wade's hours devoted to referrals. My review of the Respondent's figures reveals no inclination by the Respondent to inflate its costs, impermissible though the fee increase and per capita taxes may be. The 6-month period from July through December is a reasonably representative period, and it follows that referral costs during that period are also reasonably repre-

[18] The fee for October and months following was $17, as opposed to $15 in prior months.

[19] Respondent's records show a refund of $17 for March 1979.

[20] *J. J. Hagerty, Inc., supra* at 1376.

[21] In reaching this conclusion I am not unmindful that some few union members, who did not pay fees, may have utilized the referral service, but it is plain the system was set up to secure service fees from nonmember casuals. The system was really erected for nonmembers to pay for services rendered, and I am convinced that expenses incurred were attributable to nonmember services with but *de minimis* exception.

[22] Pelliccotti's allocation of other salaries strikes me as quite conservative.

sentative.[23] Accordingly, I find the fee was excessive by $6.15 per month from January through March 1979.

Upon the foregoing findings of fact and conclusions drawn therefrom, and upon the entire record, I make the following:

CONCLUSIONS OF LAW

1. Spector Freight System, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By requiring, as a condition of registration and referral for employment from its exclusive referral hall, the payment of a referral fee in excess of cost attributable to the services rendered, the Respondent violated Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to a recommended Order that the Respondent cease and desist from the unfair labor practice found herein and post the customary notice to its members and employees, I shall further order that the Respondent refund $4.15 of each monthly referral fee paid thereafter, with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[24]

[Recommended Order omitted from publication.]

[23] Increases in costs due to inflation are speculative on this record, and I do not consider them. The per capita taxes would not be an allowable amount in any month.

[24] See, generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).