International Union of Operating Engineers, Local 18, AFL-CIO *and* William F. Murphy. Case 8-CB-1896

June 29, 1973

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND PENELLO

On February 28, 1973, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board was 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 brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.

We agree with the Administrative Law Judge's ultimate conclusion that Respondent violated Section 8(b)(1) and 8(b)(2) of the Act. However, we do so for somewhat different reasons. The Administrative Law Judge's decision rests on the rationale that a violation of Section 8(b)(2) occurs whenever a union interferes with an employee's employment status for reasons other than the failure to pay dues and initiation fees or other forms of service fees uniformly required for the use of a hiring hall. This *per se* approach derives from a misconception of the law and is clearly at odds with Board precedent.[2]

When a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer–or, if you please, adopt a presumption that–the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power.[3] But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.

Thus the Supreme Court has sanctioned union control over access to employment through hiring hall agreements,[4] even though recognizing that "the very existence of a hiring hall encourages union membership." And this Board has found legitimate a union's action in causing the layoff of an employee who insisted on working without receiving a subsistence allowance called for by the collective-bargaining agreement.[5] In such cases, the union's actions, while incidentally encouraging union membership, were nevertheless essential to its effective representation of employees.

And in *Philadelphia Typographical Union No. 2 (Triangle Publications),* 189 NLRB 829, we dismissed a complaint when the union's interference with a member's employment was necessary to deter felonious and egregious conduct which could seriously threaten the union's very financial survival–the offending employee there having embezzled a very substantial amount of union funds.

Respondent in this case sought, and was denied by a ruling of the Administrative Law Judge, an opportunity to establish that its purpose in denying Murphy his normal seniority on the referral list was not unlawful by proving that he had engaged in offensive conduct at the hiring hall and had also engaged in conduct disruptive of an internal union election. We must therefore decide whether the rejection of this testimony and the failure of the Administrative Law Judge to consider such evidence was prejudicial to Respondent. In so deciding, we must determine whether such proof would have been sufficient to overcome the inference–or rebut the presumption–that Respondent's interference with this employee's employment operated unlawfully to discourage union membership. Under applicable precedent, that, in turn, requires us to make a judgment as to whether the Union's actions here were necessary to the effective performance of its function in representing employees.

That question must be answered in the negative. While it might well be convenient for the Union, in enforcing its own internal rules of conduct, to have available an employment-related sanction, it can hardly be said that such severe sanctions are necessary to that end. Internal union discipline–fines, sus-

[1] Respondent's request for oral argument is hereby denied. In our view, the record, exceptions, and brief adequately present the positions of the parties.

The General Counsel filed an exception to the Administrative Law Judge's inadvertent failure to provide for backpay in his recommended Order. This issue is now moot because the Administrative Law Judge issued a correction to his recommended Order which provides for backpay as requested by the General Counsel.

[2] See, for example, *Millwrights' Local Union 1102, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Planet Corporation),* 144 NLRB 798; *Houston Typographical Union No. 87 (Houston Chronicle Publishing Company),* 145 NLRB 1657.

[3] *Radio Officers' Union [A. H. Bull Steamship Co.]* v. *N L R B*, 347 U.S. 17 (1954).

[4] *Local 357, Teamsters [Los Angeles-Seattle Motor Express]* v. *N L R B*, 365 U.S. 667 (1961).

[5] *Planet Corporation,* fn 2, *supra*

pension, expulsion from membership, and the like—ought surely to be adequate for this purpose. Thus, while the evidence proffered here might indeed show that the Union had no *intent* to encourage union membership by interfering with Murphy's employment, yet the display of union power exhibited by an exercise of control over employment opportunity solely for reasons relating to the conduct of an employee as a union member would necessarily have that *effect.* Since the Union's discrimination against Murphy was, at best, related to his obligations as a union member such action by the Union comes within the proscription action of Section 8(b)(2).

Upon this rationale, rather than the one adopted by the Administrative Law Judge, we find that Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act, as alleged by the complaint.

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 as modified below and hereby orders that Respondent, International Union of Operating Engineers, Local 18, AFL–CIO, Cleveland, Ohio, its officers, agents, and representatives, shall take the action set forth in the said recommended Order as modified herein.

Add as paragraph 2(b) the following and reletter subsequent paragraphs accordingly:

"(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon a charge filed on June 2, 1972,[1] by William F. Murphy, an individual, against International Union of Operating Engineers, Local 18, AFL–CIO (hereinafter called Respondent Union), a complaint and notice of hearing was issued by the Regional Director for Region 8 on July 14, 1972. The complaint alleged, *inter alia,* that the Respondent Union was a party to a collective-bargaining agreement with the Ohio Contractors Association and the Associated General Contractors of America, Inc., and pursuant to the terms of the collective-bargaining agreement maintained an exclusive referral system by which it referred individuals to prospective employers. The complaint further alleged that on or about May 8, the Respondent suspended Murphy from membership in the Union and removed his name from the exclusive referral list. Further, the Respondent Union required him to prepare a new registration card and register as a new applicant for employment for reasons other than nonpayment of dues. It is alleged that by this conduct the Respondent Union engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and 8(b)(2) of the Act. The Respondent Union filed an answer in which it admitted several of the allegations of the complaint, denied others, and specifically denied committing any unfair labor practices.

This case was tried before me in Cleveland, Ohio, on September 20, 1972. All parties are represented by counsel and afforded an opportunity to be heard and to introduce relevant evidence bearing on the issues herein. Briefs were submitted by all counsel and were fully considered in arriving at my decision in this matter.

Upon the entire record herein, including my evaluation of the testimony of the witnesses based upon my observation of their demeanor, and upon consideration of the relevant evidence, I make the following:

FINDINGS OF FACT

I JURISDICTIONAL FINDINGS

The complaint alleges, and the answer admits, that the Respondent Union is a local union affiliated with the International Union of Operating Engineers, AFL–CIO, and maintains its principal office in Cleveland, Ohio. It is further alleged that the Respondent Union has a collective-bargaining agreement with various employers in the State of Ohio and Kentucky, who are in turn members of the Ohio Contractors Association and the Associated General Contractors of America, Inc. The employer-members of the associations annually receive materials in excess of $50,000 at their places of business in the State of Ohio, which are shipped directly from suppliers located outside the State. Further the Respondent Union collects dues within the State of Ohio in excess of $200,000 annually, a portion of which is remitted to the International Union in Washington, D.C.

On the basis of the above, I find that the employer-members of the associations, individually and collectively, are employers as defined in Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local 18, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Murphy was a member of the Union and his registration card for referral purposes was dated November 23, 1971.

[1] Unless otherwise indicated, all dates herein refer to 1972.

Because of his qualifications and work experience, Murphy was a member of group A on the referral list.[2]

During the course of a delegates' election held by the Union on February 12, Murphy engaged in conduct which resulted in his being brought up on charges before the union membership. As a result of the hearing on the charges, the members voted to suspend Murphy from membership in the Union for a period of 2 years and fined him $500.[3] Murphy paid the fine and appealed the action of the local to the International Union.

The office dispatcher at union headquarters removed Murphy's card from its place of priority in the referral stack after he was suspended. This was the customary practice followed by the Union whenever a member was under suspension. Most of the suspensions prior to that of Murphy, however, were for nonpayment of dues.

The referral system as operated by the Respondent Union separates applicants into priority groups based on experience, length of employment in the trade, and length of residence in the area.[4] Once an individual has registered, his card is placed in the priority group for which he is eligible, based on the date of his registration. When a request is received from an employer, the dispatcher starts with the top card in group A to determine who is available with the experience and skill required by the employer. If the first group is exhausted without an individual being available for referral, the dispatcher is required to go to the next priority group until all of the groups are exhausted.[5]

The Union also follows the practice of returning an individual's card to its original place in rotation, if the individual has not worked more than 12 days in a 90-day period.[6] Thus during each 90-day period, if an individual has not exceeded the limit of employment, his card is placed back in its original order of priority instead of being placed at the bottom of the list in his group.

B. *Murphy's Efforts to Register After His Suspension*

After he was suspended, Murphy went to the union hall on May 22 to attempt to reregister his referral card. He was accompanied by Norman Hess, a fellow union member. The office where the applicants registered for the referral list had a glass partition separating the waiting area from the office area. This petition did not extend all the way to the ceiling. The applicants went to a window in order to talk to the clerk. The window contained iron bars and apparently had a ledge beneath it. There was also a door adjacent to the window by which the office personnel could enter the office area. The door contained opaque glass louvers so that it was not possible to see inside the office from the waiting area.

Murphy spoke to Mrs. Hacker, the dispatcher for the Respondent Union. He tendered the $5 nonmember registration fee and asked to have his card reregistered. He was told by Hacker that she could not accept the fee unless he filled out a new card. This card would have carried the date of his registration. Murphy insisted that he wanted to reregister his old card, and Hacker refused to allow him to do so. Hacker stated that she was acting under orders of the union officials. Murphy testified that he returned to the union office on May 23 and 26, June 1 and 27, and July 24. On each occasion Murphy tendered the $5 nonmember registration fee, and on each occasion this fee was refused. Murphy was told that he could not register until he executed a new card, which would be placed at the bottom of his priority group. Murphy continued to demand that his original card be placed back in the stack in its rightful order of priority.

Hacker testified regarding Murphy's efforts to reregister his card. Hacker acknowledged that she was under instructions from the union officials to require a new card from Murphy. This card, under the practice followed by the Respondent Union, would then be put at the bottom of the priority group. Hacker stated that she attempted to explain this to Murphy on each occasion, but he refused to accept the explanation. According to Hacker, Murphy would come to the union office and stand on a chair looking over the petition. He would shout and yell obscenities at the people working in the office area. She also stated that on occasions, Murphy would lie on the floor on his stomach looking through the louvers and would yell at the office personnel.

Hacker further testified that on August 14, pursuant to instructions from the president of the Union, she returned Murphy's card back to its proper order of rotation under the date that it was executed in November 1971. Hacker made the observation that had Murphy's card remained in the stack following his suspension, he still would not have been eligible for referral to employment. She stated that there were many other cards on the list which had a higher priority than Murphy's card. She could not state with certainty, however, that Murphy would not have been referred a job. After his card was returned to its proper position of priority on August 14, Murphy was referred to jobs in his proper order of rotation.

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[2] Under the terms of the collective-bargaining agreement, applicants were classified in priority groups based on years of experience and residence in the area. Group A is defined as follows.

> Article III, § 19. Group A All applicants who have worked as Operating Engineers at least 120 days per year during each of the last 4 years and have been employed for at least twelve (12) months during that four-year period on work as defined in Article I of this Agreement within the State of Ohio and who have lived in the State of Ohio or in any county contiguous thereto for at least one (1) year prior to application.

[3] The evidence indicates that Murphy was apparently angry over the outcome of the election and he took several of the ballots in order to prevent them from being counted. In addition to being brought up on internal charges by the Union, Murphy was charged with petty theft, i e, of the ballots, in a criminal prosecution. At the time of the trial herein, the criminal matter had not been resolved

[4] The referral system is operated for members and nonmembers alike The cost of the service for members is included in their monthly dues Nonmembers are charged a $5 fee which makes them eligible to receive the referral service for a 30-day period. At the expiration of 30 days nonmembers are required to pay an additional $5 fee to keep their cards in order of priority in the particular referral group. Members are also required to reregister every 30 days in order to indicate their availability for employment They can accomplish this by appearing at the union office in person, or on the basis of a telephone call to the office dispatcher

[5] The contract porvides for five priority groups, with a separate grouping for apprentices

[6] The testimony indicates that during 1972, because of the serious unemployment situation, the requirement of working less than 12 days was extended to 20 days within a 90-day period

Concluding Findings

The Respondent Union argues that it was justified in moving Murphy's card from the referral stack because of his suspension. Therefore, it had a right to require Murphy to reregister as a nonmember and execute a new card. It is also argued that Murphy's conduct, including the theft of the ballots and his offensive actions at the union office, were such that the Respondent Union had a right to deny him the use of the referral service. In support of this latter argument, the Respondent Union cites *Local 1838, International Longshoremen's Association, AFL–CIO,* 179 NLRB 425. In *Local 1838,* the Board found that a union could lawfully refuse to refer members of sister locals as winchmen because they had refused to report to assigned jobs in contravention of a no-strike clause in the union collective-bargaining agreement. Thus, reasons the Respondent Union in this case, it had a right to withhold all privileges from Murphy because of his offensive and reprehensible conduct.

This argument, in my judgment, misconceives the issues presented by this case. Murphy was suspended and fined by the Union for his actions regarding the ballots during the delegates' election. He paid the fine and was appealing both the fine and the suspension to higher internal union authority. His conduct, both during the delegates' election and at the union office when seeking to reregister, were not the reasons for withholding of the referral privileges from him. Hacker testified that she was under instructions to remove Murphy's card and to require a new registration card because he was a suspended member.

Notwithstanding the Respondent Union's claim that it could withhold or, as the facts here show, reduce Murphy's referral priority because of his bizarre conduct, the law is clear that the only ground on which Murphy's referral status could be changed is the nonpayment of membership dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the local. *The Radio Officers Union of the Commercial Telegraphers Union, A.F.L. [Bull Steamship Co.]* v. *N.L.R.B.,* 347 U.S. 17, 41 (1954); *United Brotherhood of Carpenters and Joiners of America, Local 1913, AFL–CIO,* 189 NLRB 521. This is not a situation where the Union is seeking to protect the integrity of its contractual obligations with others, as in *Local 1838, Longshoremen, supra.* Rather, it involves dealing with a disruptive individual who has caused the Union grave concern. In such a situation the Respondent Union must rely on its normal internal sanctions which do not affect his employment or referral status.

Accordingly, I find that the Respondent Union reduced Murphy's referral priority, and thereby lessened his chances for employment, for reasons unconnected with any failure to tender or pay periodic dues or initiation fees required as a condition of acquiring or maintaining membership in the Union. More specifically in Murphy's case, the reduction in priority status was for reasons other than the failure to tender the nonmembers fee required to make use of the exclusive referral systerm maintained by the Respondent Union. I conclude, therefore, that the foregoing conduct violated Section 8(b)(1)(A) and 8(b)(2) of the Act. *United Brotherhood of Carpenters and Joiners of America, Local 1913, supra; Waitresses' Union No. 276, Hotel & Restaurant Employees and Bartenders International Union, AFL–CIO,* 186 NLRB 484.

Conclusions of Law

1. International Union of Operating Engineers, Local 18, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
2. Ohio Contractors Association and Associated General Contractors of America, Inc., are employers as defined in Section 2(2) of the Act and are engaged in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.
3. By refusing, for reasons other than nonpayment of dues, initiation fees and/or registration fees to allow William F. Murphy, a suspended member, to reregister his referral card and continue his place of priority on the referral list, the Respondent Union engaged in a discriminatory hiring hall practice in violation of Section 8(b)(1)(A) and 8(b)(2) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend the issuance of an order that it cease and desist therefrom and that it take certain affirmative action necessary to effectuate the policies of the Act. Inasmuch as the record evidence indicates that Murphy's card was restored to its rightful place of priority on August 14, 1972, I shall order the Respondent Union to make him whole for any loss of earnings he may have suffered by not being referred to jobs in proper rotation for the period beginning May 17, 1972 and ending August 14, 1972.

Accordingly, upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, pursuant to Section 10(c) of the Act, I make the following recommended:

ORDER [7]

The Respondent, International Union of Operating Engineers, Local 18, AFL–CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

[7] In the event no exceptions are filed to this Order as provided by Sec. 102 46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Order herein, shall as provided in Sec. 10(c) of the Act and in Sec 102 48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for purposes herein

(a) Refusing to reregister William F. Murphy, or any other person, in his rightful order or priority on the referral list for reasons unconnected with his failure to tender and pay periodic dues, registration fees, and initiation fees uniformly required as a condition of acquiring or maintaining membership in the Union, or as a condition required for using the Respondent's exclusive hiring hall system.

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

2. Take the following affirmative action which I find will effectuate the policies of the Act.

(a) Notify William F. Murphy that it has no objection to his reregistering of his name in the rightful order of priority on the referral list maintained at the union hall.

(b) Post at its business and meeting hall, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 8, after being duly signed by authorized representatives of the Respondent Union, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notice to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Mail or deliver to the Regional Director for Region 8, signed copies of said notice for posting by Ohio Contractors Association, provided that employer association is willing, at its place of business within the Union's jurisdiction.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of receipt of this Order, what steps the Respondent Union has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of the complaint setting forth violations not specifically found herein be dismissed.

[8] In the event this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

The National Labor Relations Board having found, after a trial before a duly designated Administrative Law Judge, that we violated Federal law by refusing to allow William F. Murphy, a suspended member, to reregister his name on the job referral list in its rightful order of priority for reasons unconnected with his failure to tender or pay periodic dues, registration fees, and/or initiation fees, we hereby notify our members that:

WE WILL NOT refuse to reregister William F. Murphy, or any other person, in his rightful order of priority on the referral list for discriminatory reasons.

WE WILL NOT in any like or related manner interfere with the Section 7 rights guaranteed employees under the National Labor Relations Act, as amended.

WE WILL make William F. Murphy whole for any loss of earnings he may have suffered as a result of our unlawful conduct in preventing him from reregistering his name in its place of priority on the job referral list maintained by us.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, AFL–CIO
(Labor Organization)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1695 Federal Office Building, 1240 E. 9th Street, Cleveland, Ohio 44199, Telephone 216–522–3715.