Polis Wallcovering Co., Economy Decorators Inc. of New Jersey, Ponzio & Sons, Inc., S. W. Kooperman, Inc., Charles Shaid of New Jersey, Claremont Painting and Decorating Co., Inc. and Willard Painting and Sandblasting *and* Edward W. Pygatt and Jennings V. Love

Local Union No. 277, International Brotherhood of Painters and Allied Trades *and* Edward W. Pygatt and Jennings V. Love. Cases 4-CA-11875 and 4-CB-4170

July 27, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On December 28, 1981, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, Respondent Union and Charging Party Love filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and a supporting brief. Respondent Union filed answering briefs in opposition to Charging Party Love's exceptions and to the General Counsel's cross-exceptions, and Respondent Claremont filed a brief in opposition to the General Counsel's cross-exceptions.

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, cross-exceptions, and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

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, Local Union No. 277, International Brotherhood of Painters and Allied Trades, Atlantic City, New Jersey, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.[2]

IT IS FURTHER ORDERED that the complaint in Case 4-CA-11875 be, and it hereby is, dismissed.

[1] We hereby deny Charging Party Love's motion to reopen the record. The Charging Party seeks to present certain evidence pertaining to his employment history prior to Respondent Local 277's failure to refer him for employment. The Charging Party asserts that the foregoing evidence was not presented at the hearing "through inadvertence" and because counsel deemed it unnecessary to do so at the time of the hearing. Accordingly, it is evident that the Charging Party alleges neither extraordinary circumstances nor any other matter satisfying the requirements of Sec. 102.48(d) which might warrant reopening of the record.

[2] In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by me in Atlantic City, New Jersey, on October 21 and 22, 1981, upon an initial unfair labor practice charge filed in Case 4-CB-4170 on December 22, 1980, and a complaint which issued on February 13, 1981, alleging that Respondent Union maintained a hiring practice of affording preference in job referrals to its members over nonmembers, and that it failed and refused to refer Edward Pygatt and Jennings Love for employment with Respondent Employers,[1] for reasons other than failure to tender periodic dues and initiation fees, and thereby violated Section 8(b)(2) and Section 8(b)(1)(A) of the Act.

In Case 4-CA-11975, an initial charge was filed on February 19, 1981, and a complaint issued on April 30, 1981, alleging that the Respondent Employers, together with Respondent Union, have maintained a practice or arrangement whereby members of the Union are accorded employment preference over nonmembers, and that Respondent Employers further violated Section 8(a)(3) and (1) of the Act by their failure to employ Edward Pygatt and Jennings Love, the Charging Parties herein.

The various Respondents filed answers in which they denied that any unfair labor practices were committed. After close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Parties, Respondent Union, Respondent Kooperman, and Respondent Claremont. A statement was filed on behalf of Respondent Shaid.

Upon the entire record in this proceeding, including direct observation of the witnesses while testifying and their demeanor, and upon consideration of the post-hearing briefs, it is hereby found as follows:

FINDINGS OF FACT

I. JURISDICTION

Respondent Polis Wallcovering, Inc., is a Pennsylvania corporation engaged in the installation of wallcoverings, with a principal place of business located in Philadelphia, Pennsylvania. During the calendar year preceding the instant hearing, Respondent Polis Wallcovering in the course of said operations purchased and received goods

[1] Pursuant to withdrawal request on behalf of the Charging Parties and on motion of the General Counsel, two employers originally named as Respondents, "Paul C. Morganweck & Sons" and "Edward Ravelli," were deleted at the hearing from the class of Employers charged with unfair labor practices in this proceeding.

valued in excess of $50,000, shipped directly from points located outside the Commonwealth of Pennsylvania.

Respondent Economy Decorators, Inc. of New Jersey (EDI) is a New Jersey corporation engaged in paperhanging from its place of business in Cherry Hill, New Jersey. During the calendar year preceding the instant hearing, EDI, in the course of said operations, provided services valued in excess of $50,000 directly to customers located outside the State of New Jersey.

Respondent Charles Shaid of New Jersey is a New Jersey corporation engaged in painting and allied services from its office located in Margate, New Jersey. In the course of said operations, Charles Shaid, during the calendar year preceding the hearing, performed services valued in excess of $50,000 for customers located directly outside the State of New Jersey.

Respondent S. W. Kooperman, Inc., is a New Jersey corporation and a painting contractor with an office in Atlantic City, New Jersey. In the course of its operations, S. W. Kooperman, Inc., performed services valued in excess of $50,000 for customers located directly outside the State of New Jersey.

Respondent Ponzio & Sons, Inc., is a New Jersey corporation with a place of business located in Atlantic City, New Jersey, from which it is engaged in general contracting. During the calendar year preceding the hearing, Ponzio & Sons, Inc., in the course of said operations, purchased and received goods valued in excess of $50,000 from points directly outside the State of New Jersey.

Respondent Claremont Painting and Decorating Co., Inc., is a New Jersey corporation engaged in painting and allied trades from its place of business located in Atlantic City, New Jersey. During the calendar year preceding the hearing, Respondent Claremont in the course of said operations performed services valued in excess of $50,000 for customers located outside the State of New Jersey.

Respondent Willard Painting and Sandblasting is a New Jersey corporation engaged in sandblasting and painting from its place of business located in Somers Point, New Jersey. During the calendar year preceding the instant hearing, Willard Painting and Sandblasting performed services valued in excess of $50,000 for the Government of the United States.

The complaints allege, and based on the foregoing it is found, that Respondents Polis Wallcovering Co., Economy Decorators, Inc. of New Jersey, Ponzio & Sons, Inc., S. W. Kooperman, Inc., Charles Shaid of New Jersey, Claremont Painting and Decorating Co., Inc., and Willard Painting and Sandblasting are, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaints allege, and it is found, that Local Union No. 277, International Brotherhood of Painters and Allied Trades, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In this proceeding the General Counsel levels an attack upon an important source of *skilled* painters and paperhangers in Atlantic City, New Jersey, first alleging that Local 277's hiring hall was maintained in a fashion extending illegal preference to members over nonmembers, and second that a paperhanger, Edward Pygatt, and a painter apprentice, Jennings Love, were denied employment referrals for unlawful reasons. In consequence, Local 277 is charged with violations of Section 8(b)(2) and (1)(A), and certain named employers who utilized the hiring hall within the 10(b) period are charged in a separate complaint with violations of Section 8(a)(3) and (1) of the Act.

The unfair labor practice allegations focus upon a period which corresponds with the development of the casino gambling industry in Atlantic City, New Jersey. The construction, remodeling, and restoration of hotels for that purpose created heavy demand for skilled painters and paperhangers. This revitalization of the decorating industry began in 1977 when Local 277 had 25 members. However, thereafter, as contractors entering the Atlantic City market looked upon Local 277 as the preferred source of skilled decorating mechanics, its membership base was soon to expand to some 175. This growth was accompanied by a less than mechanistic approach to job referrals.

Central to the inquiry is Local 277's collective-bargaining agreement with employer-members of the National Painting and Decorating Contractors of America.[2] That, in effect at times material herein, included an article IV, which set forth as follows:

Hiring

4.1—In the employment of workmen for all work covered by this agreement, the following provision shall govern:

(a) The union shall establish and maintain an open and nondiscriminatory employment list for the employment of workmen of this particular trade, including journeymen painters and indentured apprentices previously employed by employers in the multi-employer unit included in this agreement and nonmember workers who may make applications for a place on this list.

(b) Whenever desiring to employ workmen, the employer shall call upon the union or its agent, for any such workman as they may from time-to-time need, and the Union or its agent shall immediately furnish the employers the required number of qualified and competent workmen needed by the employer.

(c) The union or its agent will furnish each such required competent workman entered on said list to the employer by use of a written referral, which

[2] There is neither evidence nor claim herein that any of Respondent Employers were members of that association. Their liability has been litigated on an individual, rather than multiemployer, basis.

shall be mailed by the union to the workmen dispatched and will furnish such workmen from the union open listing in the manner and order following:

1. The specifically named workmen to have recently been laid off or terminated by an employer now desiring to reemploy the same workmen, provided they are available for employment.

2. Workmen who have been employed by an employer within the unit covered by this agreement during the previous 10 years.

3. Workmen whose names are entered on the list above referred to and who are available for employment.

(d) Reasonable advance notice (but not less than 24 hours) will be given by the employer to the Union or its agent upon ordering such workmen, and in the event that within (48) hours after such notice, the union or its agent shall not furnish such workmen, the employer may procure workmen from any other source or sources.

If the workmen are so employed, the employer shall, within 24 hours report to the union or its agent such workmen by name, and social security account number.

(e) The Employer shall have entire freedom of selectivity and hiring and may reject any person referred to it by the union.

(f) A notice incorporating the above enumerated terms and conditions relating to the hiring system shall be conspicuously posted at the union's office and principle [sic] place of business.

(g) No provision of this agreement shall be based upon or anyway affected by the union membership, bylaws, regulations, constitutional provisions or any other aspect or obligation of any union membership, policies or requirement.[3]

B. *The Alleged Discrimination*

1. The alleged unlawful preference

The General Counsel does not contend that the above contractual hiring arrangement was unlawful on its face. Instead, it is claimed that said arrangement, as administered by the Union, ignored objective criteria or standards and extended an unlawful preference upon members as against nonmembers.[4]

James T. Brennan, the business manager of Local 277, was the sole custodian of authority with respect to referrals under the hiring arrangement. Brennan's testimony as to the operation of the hiring hall is critical to the General Counsel's assertion in this regard. It indicates that *no* comprehensive out-of-work list is maintained signifying the time at which applicants, who are either members or nonmembers, register as available for work. According to Brennan, order of registry is irrelevant to referral. Furthermore, there is no document signifying preference as between members.[5] As for nonmembers, card racks are maintained and segregated into two categories. Thus, nonmembers who actually have been referred to jobs by Respondent Union are segregated from those nonmembers who have not been referred. Beyond that, the only information maintained by the Union pertinent to administration of the hiring hall is a list of recently laid-off members and nonmembers which is maintained to accommodate the right of employers to recall their prior employees.[6] However, inclusion on that list conveys no further priority.

From the foregoing, it is apparent that the only document routinely maintained by the Union to implement the hiring hall is that related to the listing of those recently laid off. Otherwise there is no "open and nondiscriminatory employment list" as called for by the contract. Nor is there any listing from which the second contractual preference category might be ascertained; namely, those employed by employers within the unit covered by the agreement during the past 10 years.[7] Finally, documentation does not exist from which one could determine, as of a given date, the identity of applicants who had sought, or been accorded, jobs, or who were available for employment.

As has been indicated employees are selected for referral without regard for order of registry or recorded priority. Instead, Brennan acts on his own judgment in effecting the choice. According to Brennan, the first preference is accorded to those specifically recalled, whose names appear on the recent out-of-work list. Beyond that, the first workmen referred are those who are present in the hall at the time a job request comes in. However, where those in attendance exceed the job offers, Brennan alone decides between the job applicants,

[3] See G.C. Exh. 2, pp. 7-9.

[4] Among its defenses, the Union contends that the specific allegation in the complaint relevant here was too vague and uncertain as to be maintainable without violating due process rights. However, early in the hearing, at the conclusion of the opening statement by counsel for Respondent Union, in colloquy with me, it was made clear that the "preference issue" was viable, and that no impropriety derived from the General Counsel's failure to accompany said allegation with the names of individuals victimized by any such discrimination. The litigation commenced with what I perceived to be full understanding on the part of the Union that the general allegations of discriminatory preference raised issues separate and distinct from those pertaining to Charging Parties Pygatt and Love. Furthermore, opportunity was at that time extended to request a continuance if the Union were misled or failed to understand the allegations in the complaint. No such request was made and the issue under consideration here was fully litigated. The procedural questions raised by the Union are deemed lacking in merit.

[5] A general membership list exists, but it does not appear that this list has any functional utility with respect to the hiring hall. Brennan indicated that he was aware of the identity of all members of the Local.

[6] See G.C. Exh. 24. The General Counsel argues that discretion exercised by Brennan in removing names from the above list contributes to the allegation of discrimination herein. The document in question, according to uncontradicted and entirely probable evidence, is maintained exclusively for the purpose of fulfilling the Union's obligation to refer available workmen recalled by employees as per the hiring hall contract. Brennan's testimony that this list confers no other preference was believed. Further, there is no evidence that Brennan had ever denied an employer's request for recall of an employee, whether or not that particular employee had been removed from said list. On the basis of the entire record, that possibility is considered entirely unlikely. Accordingly, the challenge to the discretion exercised by Brennan with respect to G.C. Exh. 24 is viewed as immaterial to the issue of unlawful preference. At best, the argument is cumulative.

[7] Although, considering the small size of the Local in 1977, Brennan presumably was aware of all within this category, applicants seeking proof of such preference could not be accommodated.

exercising complete and unfettered authority in this respect. To implement the contractual requirement that the Union furnish "competent" help, Brennan chooses between men without reference to agreed-upon or published criteria. Although Brennan testified to the effect that he will refer the best qualified man for the particular job, it is clear that the basis for that determination is purely personal and made without aid of objective factors. Measurable criteria are not utilized, no test is administered, nor does the Union compile documentation on a regular basis evidencing an employer's satisfaction or dissatisfaction with the performance by a particular workman referred by the Union. Brennan, in view of the above, conceded to the obvious; namely, that he would prefer men whose qualifications were known over those whose qualifications were unknown. Thus, were such a situation to arise the nonmember might be prejudiced, because the abilities of the member would be known by Brennan. In addition, Brennan, when asked to explain how he would make the selection if all present at the hall were equally competent, offered as follows:

> It's a judgment call. The number one thing that would enter my mind: Has this particular person ever been employed by that particular employer before? If so, that's the first one who would go. Has he worked on a building where that particular contractor was, but maybe he was employed by another contractor, but on the same building, sometimes there are two or three contractors who go to the same building. He would be familiar with that operation, that particular contractor's operation, the ways of their shop, their foreman, or whatever. Many other things. It's a judgment call. It's the only way it will ever work.

Despite potential for abuse Respondent did in fact refer nonmembers along with union members. However, the above description of the hiring hall policy strongly supports the possibility that circumstances might arise in which qualified nonmembers might be arbitrarily disadvantaged. Because Brennan would rely upon his subjective experience and opinion rather than objective standards, criteria, or examinations in assessing qualifications, by his own admission, the familiar traits of members would lead to a discriminatory preference should a situation arise where a nonmember is passed over who in fact possessed greater competence.

The General Counsel asserts that: "It is well established that the operation of an exclusive hiring hall without any objective criteria or standard for the referral of employees violates Section 8(b)(1)(A) and (2) of the Act. See *Local 394, Laborers' International Union of North America, AFL-CIO (Building Contractors Association of New Jersey)*, 247 NLRB 97, fn. 2 (1980). See also *Journeymen Pipefitters Local No. 392 (Kaiser Engineers, Inc.)*, 252 NLRB 417, 421-422 (1980); *Local Union No. 174, Teamsters, etc. (Totem Beverages, Inc.)*, 226 NLRB 690, 699-700 (1976). There can be no quarrel that this represents an accurate articulation of Board policy. However, the precedent does not suggest that the Board, absent a showing of actual discrimination, has ventured beyond the conventional corrective relief in remedying such a deficiency. Thus, in prior cases the Board has confined itself to removing the potential for abuse and to enjoining labor organizations from making referrals without reference to objective criteria and standards. No backpay has been awarded to any unidentified job applicants nor has liability been imposed upon employers. Here, the General Counsel seeks both.

In quest of such a remedy, the General Counsel cannot point to a single instance of discrimination. Unquestionably the manner in which referrals were administered offered the opportunity to accord preference on the basis of unlawful considerations. Nonetheless the concession made by Brennan related merely to an unproven eventuality in which union members would be competing for a job against nonmembers who possessed equal or superior qualification. There is no evidence that such a situation ever arose or that any qualified job applicant was ever prejudiced by reason of arbitrary, union-related, or other consideration, barred by the Act. As I construe the evidence in this regard, Brennan was simply describing his policy and how he would react in described circumstances of a purely hypothetical nature. Such a disposition, proclivity, or inclination to effect discrimination under an exclusive hiring hall would tend to restrain and coerce employees in violation of Section 8(b)(1)(A), but falls short of establishing that Local 277 has caused or attempted to cause a single discriminatory act.[8] "The unfair labor practice is . . . to encourage or discourage membership by means of discrimination . . . . Thus, this section does not outlaw all encouragement or discouragement of membership in a labor organization; only such as is accomplished by discrimination is prohibited."[9] Accordingly, I find that Respondent violated Section 8(b)(1)(A) by operating a hiring hall without reference to objective criteria or standards and by manifesting an intention to make referrals under conditions which might accord arbitrary preference to members over nonmembers.[10] However, I do not find that Respondent Union has caused or attempted to cause any employer to discriminate in this respect so as to violate Section 8(b)(2). For identical reasons I shall dismiss the 8(a)(3) allegations pertaining to the general hiring hall practice.

2. Specific discrimination

a. *Jennings V. Love*

Love, since 1978 when he became a member of Local 277, had been enrolled in an apprenticeship for the painting craft which was sponsored jointly by Local 277 and contractors in the area. During his apprenticeship, Love was referred to various contractors, including Respondents Ponzio, Shaid, Kooperman, and Claremont.

---

[8] *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Los Angeles-Seattle Motor Express]* v. *N.L.R.B.*, 365 U.S. 667, 671 (1961).

[9] *The Radio Officers Union of the Commercial Telegraphers Union A.F.L. [A. H. Bull Steamship Company]* v. *N.L.R.B.*, 347 U.S. 17, 42-43 (1954).

[10] There is no evidence that Brennan, or any other representative of Local 277, implemented any such policy at any time before, during, or after the 10(b) cutoff date herein.

On June 27, 1980, internal union disciplinary charges were filed against Love by Brennan, founded upon assertions that Love had violated membership obligations in the following respects:

> (1) Violation of the Oath of Membership, to wit: Brother Love on the night of June 3, 1980, during the general membership meeting did make malicious statements about me.
>
> (2) Violation of Section 245(4) of the Constitution of the Brotherhood, to wit: Brother Love was disloyal to the Brotherhood in his actions by going to The Press and attempting to run a classified ad stating the Painters Local 277 is discriminatory.
>
> (3) Violation of Section 245(5) to wit: he is repeatedly late, absent and when on the job he is consistently missing from his assigned work place.
>
> (4) Violation of Section 245(9) to wit: Brother Love visited job sites in the week following the membership meeting and harassed men at work in an attempt to get members of Local 277 to sign statements to be used against our Local.
>
> (5) Violation of Section 245(10) to wit: Brother Love did libel, slander and abuse me in my capacity as Business Manager of Local 277 during his travels around the job sites.
>
> (6) Violation of Section 245(11) to wit: Brother Love in front of the membership present at the aforementioned meeting did abuse me.
>
> (7) Violation of Section 245(13) to wit: Brother Love in all of the above charges and through his general demeanor and activities has brought the Painters Union into disrepute and has caused a shadow to be cast upon our good name.

On July 24, 1980, a Local 277 trial board found Love guilty of certain of the above charges. He was fined $2,450. In the meantime on July 5, 1980, William L. Kinzer, Local 277's financial secretary, filed additional charges against Love, as follows:

> (1) Violation of the Oath of Membership, to wit: Brother Love on the night of June 27th, 1980 did make malicious statements inferring upon my integrity as Financial Secretary.
>
> (2) Violation of Section 245(4) to wit: Brother Love was disloyal to the Brotherhood by assuming that the Financial Affairs of Local 277 are not in order and should be subject to the scrutiny of the F.B.I.
>
> (3) Violation of Section 245(5) to wit: Brother Love's conduct is unbecoming a member of this Brotherhood.
>
> (4) Violation of Section 245(10) to wit: Brother Love did libel and slander me in my status as Financial Secretary by stating that if the books were not in order, he would get the F.B.I. after me.
>
> (5) Violation of Section 245(13) to wit: Brother Love through his general demeanor and activities has brought the Painters Union into disrepute and has cast a shadow upon our good name.
>
> (6) Violation of Section 245(16) to wit: his acts and conduct shall be considered inconsistent with the duties obligations, and fealty of a member of this Brotherhood.

On August 5, Love was found guilty of the charges, and fined an additional $1,200.[11]

It is conceded that Local 277 has refused to refer Love since August 1980. Nonetheless, Respondent Union denies that Love's internal difficulties with Local 277 contributed to the denial of employment opportunities to Love via the hiring hall. Instead it is contended that Love's disqualification from the apprenticeship program rendered him ineligible for referral.

Love's employment history was far from favorable. Undisputed evidence establishes that Love was terminated for cause by Shaid in April 1979, by Kooperman in August 1979, and by both Claremont and Ponzio in November 1979. After a second referral to Kooperman, Love was again discharged by the latter in April 1980.

The last referral extended by Local 277 to Love was on July 28, 1980, a few days after the second set of charges was filed against him by Union Financial Secretary Kinzer. Pursuant thereto, Love was rehired by Shaid, a subcontractor on a job at Harrah's Club. Undisputed evidence shows that on August 15, 1980, Love was discovered asleep on the floor in his work area by the general contractor's superintendent. The matter was reported to Shaid and Love was discharged immediately.

At the time of this discharge Love had not fulfilled the apprenticeship. At a meeting of the joint apprenticeship committee on September 18, 1980, Love was removed from the apprenticeship program in consequence of (1) his unsatisfactory performance on past jobs and (2) his poor attendance with respect to the classroom phase of the apprenticeship program. Love conceded that in a conversation with Brennan in September he was told that he "was no longer a part of the . . . apprentice school."

I credit the testimony of Brennan that Local 277 is only authorized to refer qualified mechanics and apprentices. No challenge to the legitimacy of the action of the joint apprenticeship committee is registered, and from all appearances the removal of Love from the apprenticeship on the basis of his past employment record, a recent discharge for flagrant misconduct, and his failure to meet the apprenticeship's classroom attendance requirements seemed entirely reasonable. As I am convinced that this action removed Love from the classifications legitimately encompassed within the hiring arrangement, I find that Local 277 would not have referred Love even if he had not engaged in conduct found offensive by union officials and which formed the predicate for internal union discipline. Accordingly, I find that Respondent Local 277 did not violate Section 8(b)(1)(A) and (2) of the Act in refusing to refer him and I shall dismiss the allegations

[11] It was the Union's policy that membership dues would not be accepted until all outstanding disciplinary fines were paid. Love understood this to be the case. Apparently, Love had no intention of paying the fines, and because of the aforesaid policy ceased paying dues in August 1980.

that Respondent Employers violated Section 8(a)(3) and (1) of the Act in this respect on a derivative basis.[12]

b. *Edward W. Pygatt*

Prior to his involvement with Local 277, Pygatt had been a paperhanger for some 30 years. In April 1977, he became a member of Local 277. Until June 25, 1980, Pygatt was referred by Local 277 within his craft to various jobs, but he apparently failed to earn a favored status among certain of his employers. His referrals terminated following internal disciplinary charges filed against him by Brennan on June 27, 1980. The charges alleged as follows:

> (1) Violation of the Oath of Membership, to wit: Brother Pygatt did knowingly wrong me by making false and erroneous damaging statements to The Press, such statements being published Thursday, June 26, 1980.
>
> (2) Violation of Section 245(4) of the Constitution of the Brotherhood, to wit: disloyalty to the Brotherhood by faulting our procedures in The Press.
>
> (3) Violation of Section 245(5) Brother Pygatt's conduct certainly is not becoming a union member.
>
> (4) Violation of Section 245(10) Brother Pygatt did in the above mentioned issue of The Press, libel, slander and abuse me in my capacity of Business Manager of Painter Local 277.
>
> (5) Violation of Section 245(13) to wit: Brother Pygatt did engage in activities that have in fact brought the Brotherhood into disrepute and caused a shadow to be cast on our good name.

On July 24, Pygatt was found guilty by a union trial board and fined $3,200. On August 26, 1980, further charges were filed against Pygatt by Terry Mulholland, Respondent's recording secretary, as follows:

> (1) Violation of Oath of Membership, to wit: Brother Pygatt did knowingly wrong the Brotherhood by his statements and actions.
>
> (2) Violation of Section 245(4) of the Constitution of the Brotherhood, to wit: disloyalty to the Brotherhood by picketing our Union Hall on August 16th, 1980.
>
> (3) Violation of Section 245(5) Brother Pygatt's conduct is certainly not becoming a Union Member.
>
> (4) Violation of Section 245(12) Brother Pygatt was picketing our Union Hall in his overalls which is against our Local Work Rules.
>
> (5) Violation of Section 245(13) to wit: Brother Pygatt did engage in activities that have in fact brought The Brotherhood into disrepute and caused a shadow to be cast on our good name.

On September 26, 1980, Pygatt was found guilty on charges and fined an additional $1,000. Pygatt declined to pay the fines and, pursuant to union policy whereby dues could not be accepted until the payment of outstanding fines, Pygatt's tender of dues was rejected. Accordingly, Pygatt was subsequently expelled from Local 277 for nonpayment of dues.

Respondent has admittedly refused to refer Pygatt since June 25, 1980. Since that date, however, it admittedly has referred paperhangers for employment to various decorating contractors. Respondent Union defends on grounds that it was contractually obligated to refer "competent" employees, and that referral of Pygatt would violate that requirement as he had proven unsatisfactory to "every" contractor in the area to which he had been referred.

Pygatt for a period of 10 years owned and operated an insurance firm which required his attention from time to time during the period in which he was gainfully employed as a paperhanger on referral from Local 277. His difficulties with Respondents EDI, Polis, and Ponzio might well have been in consequence of the demands of this outside business. Thus, uncontradicted evidence establishes that EDI employed Pygatt on a job at Resorts International in 1977, but terminated him on August 22, 1977, because of his poor attendance, lateness, and lack of productivity. After intervention of Brennan on behalf of Pygatt, EDI rehired him on November 8, 1977. After his reinstatement, Pygatt's lateness and absenteeism persisted, and in January 1978 he again was terminated following a dispute with an EDI job foreman. Apparently in 1979, after rehire and further termination, Pygatt instituted an action before a local "affirmative action group" alleging that EDI had discriminated against him. EDI's defense, founded on Pygatt's work inadequacies, was sustained in that proceeding. In relation to said proceeding, Jerry Rebock, EDI's vice president, informed Local 277 by letter dated March 26, 1979, as follows:

> Based on my experiences with workmen, I feel that Mr. Pygatt is a below-average employee. His work habits are poor and his ability to get along with his fellow co-workers is not good. In his case, I feel that we went overboard to try and keep this man in our employ.

Rebock also testified that the Union was informed that EDI did not desire to have Pygatt referred again.

After his termination from EDI, Pygatt was referred to Ponzio and Sons, a paperhanging, painting, and decorating contractor. Pygatt was hired on April 16, 1980, and was terminated on April 23, 1980, after having worked approximately 1 week. Joseph C. Fenton, Jr., testified that Pygatt was terminated by him on the latter

[12] *International Union of Operating Engineers, Local 18, AFL-CIO (Ohio Contractors Association)*, 204 NLRB 681 (1973); *Local 873, International Brotherhood of Electrical Workers, AFL-CIO (Kokomo-Marion Division, etc.)*, 250 NLRB 928 (1980). The motivation described in the complaint as unlawful is the refusal to refer "for reasons other than the . . . employee's failure to tender periodic dues and the initiation fees uniformly required as a condition of requiring or retaining membership in Respondent." There can be no question but that Respondent acted against Love for reasons other than nonpayment of dues. However, in the context of challenged discrimination under a hiring hall, this is not an appropriate expression of unlawful motivation. Denial of referral under a legitimate, objective standard, such as seniority, would fall within the complaint's broad classification of motive. Simply stated, there are circumstances in which referral might legitimately be denied under an exclusive hiring hall for reasons other than the nonpayment of dues or initiation fees.

date because of "frequent no-shows, poor attitude, and . . . inability to work without constant supervision."[13] According to Fenton, Pygatt's earnings during that week were less than half of what they would have been had he not taken so much time off. According to Fenton, it was his belief[14] that the Union subsequently attempted to refer Pygatt to Ponzio, but that he informed the Union that if someone else were available Fenton would prefer that individual.[15]

After Ponzio, Pygatt was referred by Local 277 in April 1980 for employment with Polis. Joseph Kleiman, president of Polis, testified that on June 25, 1980, when he was under a rush to complete his work at the Brighton Hotel and Casino, Pygatt quit him at a time when sufficient manpower was unavailable to complete the job. According to Kleiman, he pleaded with Pygatt to stay, but Pygatt simply told him that "he had something to do on his own." Kleiman testified that he informed the Union that he did not wish to rehire Pygatt because "if anybody quits me when I need them most, I have no need for him." Though his capacity for recollection was not the clearest, Kleiman went on to testify credibly and without contradiction that, in August 1980 and again in January 1981, Pygatt approached him directly seeking reemployment. Kleiman refused Pygatt on both occasions. According to the former, out of fear that Pygatt would file a complaint, he wrote the Union on August 12, 1980, following Pygatt's first rehire request, which letter recited as follows:[16]

> This letter is to inform you that I have no desire to employ Mr. Edward Pygatt on any of my jobs. He was absent from the job several times without informing a foreman. Also he quit when we needed him most.

After Pygatt quit Polis, he appears to have first attempted to register with Local 277 on July 31, 1980, when he telephoned Brennan advising that he "was ready to go back to work." Brennan responded by indicating, "well, we only have one job going, that's a Polis job and he doesn't want you to work for him. . . . In fact, I got a letter here to prove it."[17] Pygatt asked to see the letter, a request that Brennan denied. Brennan also told Pygatt that he had been sent to every wallcovering contractor in the territory, none of whom would take Pygatt back, while indicating that he had an obligation to his membership to comply with the contract and send only competent workmen.

According to Brennan, Local 277's refusal thereafter to refer Pygatt was because he had proven himself to be incompetent. As the justification goes, under the contract Local 277 was obligated to refer only competent workmen, and to refer a proven incompetent could result in liability pursuant to the holding of a New Jersey Federal court.[18] I did not believe Brennan and find that his stated ground for interference with the employment opportunities of Pygatt were pretextual.

It is noted in this connection that Brennan admittedly had no quarrel with Pygatt's workmanship. In the words of Brennan, "the quality of his work was good, what he did was good." Specific evidence merely reveals that Pygatt's work deficiencies related to attendance problems developed in the course of employment with three contractors.

Brennan conceded, however, that in either 1978 or early 1979 Pygatt was referred to Tri-Deck, a Maryland-based firm that worked on Caesar's Boardwalk Regency, a job completed in late 1978 or early 1979. He also conceded that, at the Boardwalk Holiday Inn, Pygatt was referred to another contractor, "Interiors by Anthony," in 1979. There is no indication that either Tri-Deck or Interiors by Anthony had any problem with Pygatt's performance.

Finally, Brennan's own testimony indicates that concern for liability of his Local took second place to his hostility against Pygatt. Brennan admitted that Pygatt was not to be accorded a preference over nonmembers, who had never been referred by Local 277 and whose competence or lack thereof was unknown. When asked to explain, Brennan responded as follows:

> He [Pygatt] had been proven, by contractors to be incompetent. You're asking me point blank would I refer him out above someone who had never been sent, no, I would not . . . I would have sent someone who we have not tried yet, who had not been proven incompetent. He had been proven by every contractor that he worked for to be incompetent.

In the total circumstances, it is concluded that Brennan terminated, effectively, Pygatt's access to the hiring hall upon the same considerations which resulted in the imposition of union discipline, fines, and ultimate expulsion of Pygatt from union membership.[19] In these cir-

[13] Pygatt's termination coincided with the completion of the particular job.

[14] Pygatt testified that in March 1980 he told Brennan that he had no desire to be referred to Ponzio in the future because he did not like working conditions of that firm. Based thereon, the General Counsel agreed that no violation could be found as against Ponzio derived from the treatment of Pygatt under the hiring hall.

[15] By letter written over a year later and dated June 19, 1981, Fenton informed the Union that, on April 23, Pygatt was terminated by reason of "poor attitude," "frequent lateness and no-shows," and inability to work without supervision. The letter was written at the urging of the Union, assertedly in response to Fenton's indication that it would prefer others to Pygatt. The letter stated that Ponzio would decline to employ Pygatt "unless absolutely necessary and only for the absolute minimum period of time that his services would be required."

[16] Brennan testified that, in early August 1980, Polis, in connection with a new job at Harrah's Club, called requesting manpower. According to Brennan, Kleiman was asked if he would take Eddie Pygatt. Kleiman responded by indicating that he had told Brennan not to send Pygatt back to him. At that point Brennan requested that Kleiman write him a letter to that effect.

[17] Based on the credited testimony of Brennan, Pygatt's version differs only in the sense that Brennan allegedly accused him of quitting Polis twice. Brennan claimed that he also referred to the other contractors that were dissatisfied with Pygatt.

[18] *Nivins* v. *Sievers Hauling Co.*, 424 F.Supp. 82 (D.C. N.J. 1976).

[19] Respondent Union contends that the General Counsel failed to prove that there were any jobs to which Pygatt could be referred during the period since June 1979. The record discloses, however, that Local 277 referred paperhangers to numerous contractors during the period in which it declined to refer Pygatt. Respondent apparently contends that this evidence is insufficient to establish that jobs were available to which Pygatt could be referred. However, in *Utility and Industrial Construction*

Continued

cumstances, the denial of referral, being so motivated, violated Section 8(b)(1)(A) and (2) of the Act.[20]

In Case 4-CA-11875, the General Counsel contends that Respondents Claremont, EDI, and Polis are "vicariously" responsible for Local 277's unlawful treatment of Pygatt and, accordingly, each should be deemed to have violated Section 8(a)(3) and (1) of the Act. See, e.g., *Morrison-Knudsen Co., Inc., et al.*, 123 NLRB 12, 24 (1959), enfd. 275 F.2d 914 (2d Cir. 1960); *Lummus Company*, 142 NLRB 517, 520 (1963), enforcement denied in material part 339 F.2d 728, 731, 735-738 (D.C. Cir. 1964). The above-named contractors are not party to any agreement with Local 277. Each is a nonresident contractor which apparently utilizes the latter's hiring hall as a matter of convenience while abiding by the terms of Local 277's agreement on a voluntary basis. In any event, the General Counsel concedes that, as a matter of law, liability is not to be imposed upon any of said contractors if "they can prove that they would not have employed Pygatt even if he had been referred by Respondent."[21]

The above allegations shall be dismissed insofar as they apply to Claremont. Credible evidence fails to establish that that firm had ever employed Pygatt or that it utilizes Local 277's hiring hall as a source of referral for those within the paperhanger classification.[22] Thus, Claremont is situated identically to Shaid and Kooperman, as to whom the appropriateness of dismissal is conceded.

EDI employed Pygatt on a number of occasions between June 24, 1977, and January 19, 1979. As heretofore set forth, multiple terminations of Pygatt ultimately led EDI to express the view that it no longer desired referral of Pygatt. No challenge is laid to the misconduct that furnished the foundation underlying that view, and in the face of Pygatt's adverse work record, I am persuaded that EDI would have rejected Pygatt,[23] as was its right, even if the Union had referred him under nondiscriminatory conditions. Accordingly, the 8(a)(3) and (1) allegations with respect to EDI shall be dismissed.

For like reasons, the 8(a)(3) and (1) allegations shall be dismissed as against Polis. On the basis of previously discussed testimony of Kleiman, I am satisfied that Polis, having refused to hire Pygatt on two prior occasions, would have rejected Pygatt a third time if referred.

CONCLUSIONS OF LAW

1. Respondents Polis Wallcovering Co., Economy Decorators Inc. of New Jersey, Ponzio & Sons, Inc., S. W. Kooperman, Inc., Charles Shaid of New Jersey, Claremont Painting and Decorating Co., Inc., and Willard Painting and Decorating Co., Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Local Union No. 277, International Brotherhood of Painters and Allied Trades, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Local 277 violated Section 8(b)(1)(A) by maintaining an exclusive hiring hall whereby employment referrals are made without reference to objective standards or criteria so as to enhance the possibility that members will receive a preference over nonmembers.

4. Respondent Local 277 did not violate Section 8(b)(1)(A) and (2) of the Act by refusing to refer Jennings Love for employment following his legitimate removal from any classification subject to referral under Local 277's hiring hall.

5. Respondent Local 277 violated Section 8(b)(2) and 8(b)(1)(A) of the Act by refusing to refer Edward Pygatt for employment because he engaged in conduct viewed by union officials as disloyal.

6. Respondents Polis Wallcovering Co., Economy Decorators Inc. of New Jersey, Ponzio & Sons, Inc., S. W. Kooperman, Charles Shaid of New Jersey, Claremont Painting and Decorating Co., Inc., and Willard Painting and Sandblasting did not violate Section 8(a)(3) and (1) with respect to the employment of Edward W. Pygatt or Jennings V. Love.

7. The unfair labor practices found in paragraph 5 above have an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Local 277 has engaged in certain unfair labor practices within the meaning of the Act, it shall be ordered to cease and desist therefrom. Certain affirmative action shall also be recommended designed to effectuate the policies of the Act.

It having been found that Respondent Local 277 denied referral to Edward W. Pygatt in violation of Section 8(b)(2) and (1)(A) of the Act, it shall be recommended that he be made whole for any loss of earnings suffered as a result of the discrimination against him by payment of a sum equal to that which he normally would

Company, 214 NLRB 1053 (1974), the Board acknowledged that specific proof to this effect was not indispensable in circumstances where a labor organization has declared unlawfully that an employee will not be referred under its exclusive hiring hall. In so holding, the Board stated as follows:

> We have consistently held that to establish a violation, it is unnecessary to show that jobs were available at the time of the request for referral. The stated reason for the Union's refusal to register and refer was nonmembership. Hence, we find that by refusing . . . to register and refer [the employee] the Respondent Union violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

[20] *International Union of Operating Engineers, Local 406 (New Orleans Chapter, Associated General Contractors of America, Inc.)*, 189 NLRB 225 (1971); *Laborers' Local Union 1440 (Southern Wisconsin Contractors Association)*, 233 NLRB 1366 (1977).

[21] On this basis, the General Counsel concedes that no liability inures in the case of Respondents Shaid and Kooperman, neither of which employed paperhangers, and Respondent Willard, which did not seek referral of paperhangers during the critical period involved in this proceeding.

[22] In this respect, I prefer the testimony of Thomas Passerello, Claremont's paint supervisor, over (1) testimony of Pygatt elicited by prejudicially leading questions and (2) what I consider to be an erroneous implication in that of Brennan. Brennan was asked by the General Counsel to name all contractors to whom he did not refer paperhangers. Claremont was omitted by Brennan. However, Passerello observed that two "painters" employed by Claremont and referred by Local 277 possessed paperhanging skills. Brennan's omission of Claremont may have been induced by this ambiguity. Passerello was considered to be the more reliable witness.

[23] The EDI letter of March 26, 1979, was sent well in advance of the filing of the unfair labor practice charges giving rise to this proceeding.

have earned as wages from the date of discrimination against him until such time as Respondent Union properly refers him for employment, less net interim earnings during such period. Backpay is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[24]

It shall be recommended that Respondent be ordered to maintain and operate its exclusive job referral system in a nondiscriminatory fashion based upon published, objective criteria or standards and that recordkeeping be initiated which will reflect priorities called for by the collective-bargaining agreement as well as all available job opportunities and referrals. Said records must be intelligible and adequate to fully disclose the basis upon which referral is made, and sufficiently accessible to enable applicants to ascertain that their hiring rights are protected and that referrals are made in a fair and impartial manner.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[25]

The Respondent, Local 277, International Brotherhood of Painters and Allied Trades, Atlantic City, New Jersey, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause discrimination against Edward W. Pygatt, by refusing to refer him to work available under its exclusive referral procedure, or by otherwise causing discrimination against him for reasons proscribed by the Act.

(b) Maintaining an exclusive hiring hall whereby referrals are made without reference to published objective criteria or standards, thereby enabling arbitrary preference to members over nonmembers.

(c) In any like or related manner restraining or coercing applicants for referrals in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Maintain and operate its exclusive job referral system in a nondiscriminatory manner based upon published, objective criteria or standards, and maintain, under conditions accessible to all applicants, legible books and records enabling determination on a comprehensive basis of preferences and referrals as set forth in the section of this Decision entitled "The Remedy."

(b) Make whole Edward W. Pygatt for any loss of earnings he may have suffered as a result of the discrimination against him by payment of a sum of money equal to that which he normally would have earned as wages from the date of the discrimination against him until such time as he is referred to employment in a nondiscriminatory manner, with interest to be computed in the manner set forth in the section hereof entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all hiring hall records, dispatch lists, referral cards, and other documents necessary to analyze and compute the amounts of backpay due under the terms of this Order.

(d) Post at its office and hiring hall in Atlantic City, New Jersey, copies of the attached notice marked "Appendix."[26] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by an authorized representative of Respondent Union, 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 or applicants for referral are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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

[25] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided 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 all purposes.

[26] 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."

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 in which all sides had the opportunity to present their evidence, it has been found that we violated the law by committing unfair labor practices. Accordingly, we post this notice and we shall keep the promises we make in this notice:

WE WILL NOT maintain our exclusive hiring hall pursuant to policies or practices whereby referrals are made on any basis other than published objective standards or criteria.

WE WILL NOT maintain our exclusive hiring hall under conditions which enable arbitrary preference to members over nonmembers.

WE WILL NOT cause or attempt to cause employers to discriminate against Edward W. Pygatt or any other applicant for employment for reasons prescribed by the National Labor Relations Act.

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

WE WILL make whole Edward W. Pygatt for any loss of earnings he may have suffered by reason of the discrimination we caused against him, with interest.

WE WILL revise our policy and practices to assure that our exclusive job referral system func-

tions on a nondiscriminatory basis by adopting, publishing, and adhering to objective criteria or standards so as to assure to job applicants that referral is conferred in a fair and impartial manner, and without reference to union membership.

LOCAL UNION NO. 277, INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES