United Association of Plumbers and Pipefitters, Local 619, AFL–CIO (Bechtel Power Corporation) *and* David C. Massey. Case 15–CB–2395

3 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 2 February 1982 Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent herewith.

The General Counsel has excepted to the judge's finding that the Respondent operated its hiring hall in accordance with objective criteria from 13 October 1980 to 6 January 1981. We find merit to the General Counsel's exceptions, and for the reasons below we find that the Respondent's operation of the hiring hall violated Section 8(b)(1)(A).

The judge found that the Respondent served as the exclusive source of referrals for several construction projects within its jurisdiction, including a nuclear power plant being constructed by Bechtel Power Corporation. The Respondent was contractually required to maintain three out-of-work lists and to refer applicants on a first-in, first-out basis. The "A" list included area residents who had passed a competency examination; the "B" list included nonarea residents, known as travelers,[2] who had passed a competency examination; and the "C" list included area residents who had not passed a competency examination.[3] The Respondent was to make referrals from the "B" list after the "A" list had been exhausted, and from the "C" list after the "B" list had been exhausted. The judge found that in spite of the contractual requirement, the Respondent's business agent, Newell, made referrals without maintaining the "B" list from December 1978 until January 1981.[4]

Under all of the circumstances, we agree with the General Counsel that Respondent's operation of the hiring hall was unlawful. Although Newell was asked several times to define the factors which he considered in making referrals, his testimony does not establish that he used any objective criteria. Thus, Newell conceded that he used "discretion" and stated that he would refer an applicant "if he needs something bad enough and his family needs feeding and everything." Where, as here, there is no evidence that objective criteria have been utilized, the Board has found that a union's reliance on an applicant's financial need is a factor which supports a finding that a hiring hall has been unlawfully operated.[5]

Newell further testified that before making a referral he did not consider an applicant's classification or whether the applicant had ever sought work at the hiring hall on a prior occasion. Indeed, Newell conceded that prior to 15 January 1981 "if people was at the hall and I had jobs for them, they got them." Newell also indicated in this context that "[i]f I've got work for them, I send them out." The foregoing testimony suggests that Newell simply referred those applicants who happened to be present in the hiring hall at the time he received job requests. The Board has relied on similar evidence to find that a union's operation of a hiring hall was unlawful. In *Kaiser Engineers*,[6] the union did not maintain a contractually required out-of-work list and relied instead on other methods which frequently resulted in the referral of applicants who happened to be present when a work request was received. In that case, the union's business manager testified, inter alia, that if there happened to be any travelers in the hiring hall at the time of a work request, he would utilize them to fill the order. In a statement virtually identical to Newell's, the business manager also testified that "[I]f we have someone in the hall that morning [and a work request comes in] . . . we refer them." The Board found that there were "no obvious standards applied" and that the business manager used his "unfettered discretion" in making referrals.

[1] The General Consel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge found that "travelers" received 75 percent of the Respondent's referrals.

[3] The General Counsel does not allege that the contractual requirement is unlawful on its face.

[4] Although the judge also found that the Respondent did not maintain an "A" list, the record contains a copy of the "A" list which was maintained from August 1980 until March 1981. There is no evidence as to whether a "C" list was maintained.

[5] *Laborers Local 394 (Building Contractors Assn. of New Jersey)*, 247 NLRB 97, 102–03 (1980). The Board noted that a union's reliance on financial need does not demonstrate per se that a hiring hall has been unlawfully operated. 247 NLRB at 103.

[6] *Plumbers Local 392 (Kaiser Engineers)*, 252 NLRB 417 (1980), enf. denied 712 F.2d 225 (6th Cir. 1983).

Similarly, in *Polis Wallcovering Co.*, 262 NLRB 1336 (1982), the Board found that a union failed to maintain a contractually required out-of-work list, and that after giving preference to recently laid-off applicants, the union's business manager simply referred those who were present in the hall at the time job requests were received.[7] The business manager also relied on his subjective experience regarding the qualifications of applicants whom he knew, thereby creating the possibility that qualified nonmembers might be arbitrarily disadvantaged. In these circumstances, the Board found that the Union violated Section 8(b)(1)(A) by failing to rely on objective criteria.

Consistent with the above cases, we find that Newell operated the hiring hall without reference to objective criteria. Newell departed from the requirements of the contract, applied no discernible standards, and conceded that he used his discretion, relied on an applicant's financial need, and referred applicants who happened to be present at the time job requests were received. Accordingly, we find that from 13 October 1980 until 6 January 1981 the Respondent's operation of the hiring hall violated Section 8(b)(1)(A).[8]

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(6) and (7) of the Act.
2. Bechtel Power Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. By operating its hiring hall without reference to objective criteria, the Respondent violated Section 8(b)(1)(A) of the Act.
4. The Respondent has not otherwise violated Section 8(b)(1)(A) and (2) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(b)(1)(A) of the Act, we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board hereby orders that the Respondent, United Association of Plumbers and Pipefitters, Local 619, AFL-CIO, Vicksburg, Mississippi, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Operating an exclusive hiring hall by making referrals without reference to objective criteria.

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

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

(a) Operate its hiring hall by making referrals in accordance with objective criteria.

(b) Post at its hiring hall and office in Vicksburg, Mississippi, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by an authorized representative, shall be posted by the 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 the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] 262 NLRB at 1338–39.

[8] We agree with the judge that the the Respondent did not operate its hiring hall in a discriminatory fashion. Therefore, as we did in *Polis Wallcovering Co.*, supra at 1339, we do not find that the Respondent's operation of the hiring hall violated Sec. 8(b)(2).

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

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT operate our exclusive hiring hall by making referrals without reference to objective criteria.

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

WE WILL operate our hiring hall by making referrals in accordance with objective criteria.

UNITED ASSOCIATION OF PLUMBERS AND PIPEFITTERS, LOCAL 619, AFL-CIO

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge: Upon a charge filed by David C. Massey on December 11, 1980, a complaint issued on January 16, 1981. The complaint alleges that United Association of Plumbers and Pipefitters, Local 619 (the Respondent), from October 13, 1980, to January 6, 1981, operated its exclusive hiring hall in contravention of contractual requirements and without the use of objective criteria in making referrals, and refused to register and refer David Massey for employment with Bechtel Power Corporation (Bechtel) in violation of Section 8(b)(1)(A) and (2) of the Act. Hearing was held in Vicksburg, Mississippi, on September 24, 1981, and briefs were received from the Respondent and the General Counsel.

Upon the entire record including the testimony of the witnesses and my observation of their demeanor I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Bechtel Power Corporation is a Nevada corporation engaged in industrial engineering and construction work at various locations throughout the United States, including a location at Port Gibson, Mississippi. Bechtel during the past year purchased and received at its Port Gibson location goods and materials valued in excess $50,000 directly from points outside the State of Mississippi. I find Bechtel to be an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE LABOR ORGANIZATION

United Association of Plumbers and Pipefitters, Local 619, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Pertinent Facts*

At all times material to this proceeding, the Respondent was the exclusive source of referral for several construction projects located within the Local's territory. Foremost among these jobs was the Grand Gulf Nuclear Reactor project of Bechtel. Operating as the exclusive source of referral for this project, the Respondent was contractually bound to follow detailed procedures relating to registration and referral of applicants.

From December 21, 1978, to the present, David G. Newell (Newell) was the Respondent's business manager and as such was responsible for referring applicants for employment as requested by contractors.

In the operation of its referral system, the Respondent was contractually required to maintain three out-of-work lists. Applicants were to be registered and referred from the appropriate list on a first-in-first-out basis. The eligibility for list placement for an applicant is determined by residence and a competency examination. Referrals must first be made from the "A" list made up of area residents who have passed a competency examination. Once the "A" list is exhausted, resort is made to the "B" list, composed of nonarea residents who have passed a competency examination. Both the "A" and "B" lists must be exhausted before referring from the "C" list made up of area residents who have not passed the competency examination.

The applicants registered on the "B" list are termed "travelers" in the craft.

David C. Massey (Massey), the Charging Party, is a member of Local Union No. 397 of the United Association of Plumbers and Pipefitters, located in Bartlesville, Oklahoma, and lists his residence as Jackson County, Mississippi. Massey is in the category termed "travelers" and entitled to registration and referral from the "B" list. Massey first arrived in the geographic jurisdiction of the Respondent sometime in August 1977. He called the business manager in the office at that time seeking work and was referred to the Bechtel project. He was subquently laid off by Bechtel on April 5, 1978, for unsatisfactory work performance. Massey was again referred to the Bechtel job in November 1978 and was terminated on the same day as a result of failing the Bechtel preemployment welding test. Local 619 again referred Massey to Bechtel on April 14, 1979, as a pipefitter/welder. He was in turn laid off by Bechtel on October 10, 1980. Between the date of his layoff and January 7, 1981, Massey requested to be referred to the Bechtel project without success.

Prior to January 1981, Massey had consistently been referred by the Respondent for jobs as a welder, as opposed to a pipefitter. The evidence reflects, and I find, that during the October 1980–January 1981 period there were no welder jobs available to which a person properly belonging on the "B" out-of-work list could have been referred. There were six jobs available during this period for pipefitters to which "travelers" were referred. Massey asserts, and Newell denies, that he requested work as a pipefitter as well as a welder during the fall of 1980. A resolution of this contradictory testimony is made at a later point in this decision.

From the time he became business manager of the Respondent in 1978 until January 1981, Newell did not utilize an out-of-work list for referrals. In January 1981, shortly after the charge was filed in this proceeding and obviously as a result of its filing, the Respondent established an "A" and "B" out-of-work list. Massey has contended that he had requested the right to sign an out-of-work list as early as October 1981 and that his request was refused by Newell. Newell denies that any such request was ever made. A resolution of this contradictory testimony is also made at a later point in this decision. Massey entered his signature for the first time on the "B" list on February 17, 1981, classifying himself as a welder.

On January 7, 1981, Massey had been referred to a job where he worked only half a day. On this occasion he was referred as a pipefitter on being asked by Newell if he would take a job as a pipefitter. Newell was informed by the job steward that Massey left after 4 hours of work

and failed to return. He was terminated by this company for absenteeism. On January 19, 1981, Massey was referred to a job in Greenville, Mississippi, where he worked for a week. He returned to the Local about February 9, 1981, stating that he had received a reduction in force. Newell was informed by the job superintendent on that job that Massey had asked for a reduction in force.

Thereafter, having registered on the "B" out-of-work list on February 17, 1981, Massey was referred to the Bechtel Grand Gulf jobsite as a welder. He was classified by Bechtel as a pipefitter/welder, but failed the company's welding test.

After the February 17 referral, Massey reentered his name on the out-of-work list on February 19, 1981, again as a welder. He was thereafter referred to the Bechtel jobsite as a pipefitter because of a mutual understanding reached between himself and Newell that Massey could not pass the welding test.

B. *Analysis and Conclusions*

Based on the foregoing facts, the General Counsel contends that during the period between October 1980 and January 1981 the Respondent violated the Act by failing to maintain out-of-work lists as required by its contract with, inter alia, Bechtel, by refusing to allow Massey to register on a out-of-work list, by failing or refusing to refer Massey to employment with Bechtel or any other contractor, by discriminating against Massey because of his status as a "traveler," and by operating its exclusive hiring hall in an arbitrary manner without regard to written requirements for its operation. The Respondent urges that it has not committed a violation because between Newell's assumption of the role of business agent until the fall of 1980 work was so plentiful in the Local's jurisdiction that an out-of-work list was wholly unnecessary. During the time frame immediately at issue, the Respondent urges that no member of the Local or "traveler" in the area was discriminated against by its failure to maintain out-of-work lists and that it has breached no duty imposed by the Act for the operation of its hiring hall. Under the facts in this case, I agree with the Respondent.

Exclusive hiring halls are not per se violations of the Act. However, hiring halls must be operated in a nondiscriminatory manner utilizing objective criteria for referrals. It is a violation of the Act if qualified persons seeking referral are treated unfairly or in a discriminatory way. David Massey is the only person utilizing the Respondent's hiring hall alleging discrimination in its referral system. There is no evidence that any other member or traveler failed to receive a referral from the Respondent's hiring hall during any relevant time period because the Respondent did not maintain out-of-work lists or because of any other reason relating to its mode of operation. Because I find that no discrimination resulted from the Respondent's failure to maintain an out-of-work list prior to January 1981, and because the Respondent has, since that date, established and properly maintained out-of-work lists, I can find no purpose that would be served by finding the Respondent in violation of Section 8(b)(1) of the Act in this regard.

Looking then to the question of whether the Charging Party was discriminated against individually, one must decide whether Massey sought work as a pipefitter rather than as a welder during the fall of 1980. During the fall, at least six "travelers" were referred to jobs as pipefitters by the Local. There were no welders jobs available that could have been given properly to a "traveler" during this period of time even if out-of-work lists had been maintained by the Respondent. As noted above, Massey contends that in October 1980 he requested to sign the Respondent's out-of-work list and his request was refused. Newell denies that this request was made. Because the Respondent had not maintained any out-of-work list during Newell's tenure as business manager, a period in which Massey was referred to jobs on a number of occasions, it does not seem probable to me that Massey would have made such a request in October. Additionally, when out-of-work lists were established by the Respondent in January 1981, Massey did not request the right to sign the "B" list until the middle of February of that year.

For three reasons, I credit Newell's denial that such a request was made. In any event, had proper out-of-work lists been maintained by the Respondent in the fall of 1980, and had Massey signed the "*B*" list, he could not have been referred to a job unless he was willing to accept one as a pipefitter.

Massey testified that, during October and part of November, he repeatedly visited the hiring hall seeking work. Massey also contends that, on one occasion during the period, he informed Newell that he would take work as a fitter as well as a welder. Massey supports this contention with a diary that he maintained during the fall of 1980, detailing his visits to the hiring hall. At one point in the diary, there is interlineated in different ink from that used in the rest of the diary a notation that he asked for work either as a fitter or a welder. Massey could not, however, remember when this conversation took place and did not note to the Board agent at the time of giving his affidavit that he had made such a request. The existence of the diary and the interlineation were evidently made known to the counsel for the General Counsel for the first time at the hearing.

On the other hand, all of Massey's referrals prior to the fall of 1980 were as a welder. After out-of-work lists were established in January 1981, in February Massey registered himself as a welder. The General Counsel points to one referral in January 1981, when Massey was referred to a job as a fitter rather than as a welder. This referral came after Massey's charge had been filed with the Board and Newell testified that he asked Massey on this occasion whether he would take work as a fitter. As noted earlier, Massey remained on this job for only one-half day. Based on the objective evidence of Massey's work history and demonstrated preference to be a welder both before and after the fall of 1980, I credit Newell's memory that he was not requested by Massey in the fall to be referred out as a fitter. Therefore, as only fitters were referred out during the relevant time frame, I cannot find that the Local has discriminated against Massey.

On a closely related point, the General Counsel alleges that the Local refused to refer Massey for employment because the Charging Party was not a member of the Respondent. There is no other motive for alleged discrimination against Massey to be found in this record. The evidence reflects that, during the period of Newell's employment as business agent of the Respondent, approximately 75 percent of the referrals made were of travelers as opposed to Local members. Moreover, during the fall of 1980, travelers were referred to jobs as fitters. I find that the record clearly refutes the allegation that Newell has shown discriminatory favoritism toward Local job seekers over travelers. Again, the record fails to disclose any reason why Newell would have wanted to discriminate against Massey.

Lastly, it is contended that the Respondent has violated the Act because Newell failed to refer persons from the Local utilizing objective criteria, asserting that referrals were made solely on the basis of Newell's discretion. Although one passage of Newell's testimony is ambiguous on this point, based on the evidence as a whole I cannot find that Newell actually discriminated against any member or traveler by the manner in which he made referrals. Prior to the fall of 1980 when work was abundant, virtually everyone who wanted work apparently received a referral on very short notice. When business became slack in the fall, the record reflects that Newell referred workers to jobs in substantially the same manner that they would have been referred had out-of-work lists been maintained. For example, area members were first referred for work, as they would have been had an "A" list been maintained. During the fall, travelers were referred out only as fitters as there were not sufficient welding positions available to exhaust the supply of qualified area members seeking such positions. In conclusion, I find that the Respondent has operated its hiring hall utilizing objective consideration and has not made referrals on an arbitrary basis to the prejudice of the Charging Party or any other person seeking referrals from the Respondent's hiring hall. Accordingly, I conclude that the Respondent did not violate Section 8(b)(1)(A) or (2) of the Act by the manner in which it has operated its exclusive hiring hall. Inasmuch as the complaint alleges no other violation of the Act by the Respondent, and as the Respondent is now maintaining out-of-work lists, my order will provide for dismissal of the complaint.

On the foregoing findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

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

2. Bechtel Power Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondent did not engage in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act by the manner in which it has operated its exclusive hiring hall.

[Recommended Order for dismissal omitted from publication.]