International Longshoremen's Association, Local 20, AFL–CIO (Ryan-Walsh Stevedoring Company, Inc.) *and* Edward Lloyd O'Rourke and Leon J. Filidei and Philip J. O'Neal

International Longshoremen's Association, Local 20, AFL–CIO (Southern Stevedoring Company, Inc.) *and* Edward Lloyd O'Rourke

International Longshoremen's Association, Local 20, AFL–CIO (ABT Management, Inc. and Suderman Contracting Stevedores, Inc., Joint Employers) *and* Edward Lloyd O'Rourke. Cases 16–CB–4681, 16–CB–4681–6, 16–CB–4681–3, 16–CB–4780, 16–CB–4820, and 16–CB–4880

June 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On August 29, 1996, Administrative Law Judge Richard J. Linton issued the attached decision. Counsel for the General Counsel filed exceptions and a supporting brief.

The National Labor Relations 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, and conclusions, as modified, and to adopt the recommended Order as modified and set forth in full below.

We affirm the judge's findings,[1] to which no exceptions have been taken, that the Respondent Union violated Section 8(b)(1)(A) and (2) by its actions designed to suppress or retaliate against dissident members for expressing their opposition to the views of the incumbent union officials. This misconduct includes causing bodily harm to Charging Party Leon Filidei and filing internal charges against him and Charging Party Edward Lloyd O'Rourke and suspending them from attending membership meetings, and removing Charging Party Philip O'Neal's name from the crane job referral list.

The judge further found that the Respondent engaged in a yearlong retaliatory campaign of reprisals against dissident Edward O'Rourke: beginning in December 1994 by prohibiting him from posting items on the members' bulletin board and in early January 1995[2] by refusing to open a scheduled meeting, despite the presence of a quorum, in order to preclude him from his announced intention of addressing the membership and also by pressing internal union charges against him and convicting him of "inciting a riot" in connection with the aborted meeting; and continuing in late February by causing Employer Ryan-Walsh Stevedoring Company, Inc. to discharge him for pretextual reasons; and in November or December by refusing a request from Employers ABT Management, Inc. and Suderman Contracting Stevedores, Inc. for a rating on O'Rourke's ability to perform a job requiring him to throw 100-pound sacks of grain.

The General Counsel's exceptions relate to the one complaint allegation that the judge dismissed, i.e., that the Respondent discriminated against O'Rourke in violation of Section 8(b)(1)(A) by refusing his September 27, 1995 written request to have his name restored to the grain vessel referral list. We find merit in these exceptions for the reasons set forth below.

The judge found that O'Rourke registered on the grain vessel job referral list in 1990, but withdrew from it in 1992 on obtaining employment as a certified porta-packer operator. Thereafter, in 1995, when O'Rourke needed additional work because of a severe reduction in porta-packer jobs, he hand-delivered a letter to the executive board just prior to the start of their September 27 meeting requesting them to "Please reinstate my name on the grain rotation list." At the next membership meeting held a week later, the following minutes of the September 27 executive board meeting were read:

> There are two openings on grain list. Motion made that request of D. Borsellino and Chester Smith of 6–95 to be put on grain list be given.
>
> E. L. O'Rourke made request to be put back on grain list. Request denied. Vote 2 For to 10 Against.[3]
>
> No one who has quit grain list has ever been put back on. Anyone who wanted to be taken off temporary can put his name on shelf by letter & may request job back by letter to the Exec. Board.

The judge noted the parties' stipulation that as of August 1, 1995, the grain list contained only 27 names, and that Smith and Borsellino were added as numbers 28 and 29 sometime after that date. He concluded from the seven dispatch marks besides their names that their names were added to the list in unofficial status by no later than early August 1995. In response to the General Counsel's argument that there is no credited evidence showing that the Respondent had ever previously denied reinstatement to someone who submitted a written request for reinstatement after having left the grain or any other designated list, the judge observed that the burden is on the General Counsel to prove that the Respondent has allowed others who had quit to return on request and without waiting for a compilation of a new list, and that the General Counsel

[1] In affirming the judge's decision, we disavow his references to, or comparisons between, statements and actions involved in this case and those depicted in fictional works of literature or motion pictures.

[2] Except as indicated hereafter, all dates are in 1995.

[3] The judge noted that the "2" appears to have been converted into a "1."

had failed to do so. In that connection, the judge noted evidence showing that the Respondent had previously denied the oral requests for reinstatement by members Frank Diaz, John M. Brown Jr., and Wilbert A. Hill, finding it irrelevant that their requests were not in writing "because we are considering motive." Finally, in dismissing this complaint allegation, the judge relied on the Respondent's "Steadham" rule, as expounded by James H. Steadham, for whom it was named, that no one who had ever "quit" a designated list could be reinstated on request; rather such individuals were required to wait until a signup sheet for a new list was posted.[4]

We find, contrary to the judge, that the Respondent acted unlawfully in refusing to reinstate O'Rourke to the grain list at its meeting on September 27. As related in the summary of the judge's findings above, the Respondent had manifested its animus against O'Rourke for his dissident views in a series of actions against him beginning in December 1994 and extending well into 1995. That pattern of animus, together with proffered reasons for the Respondent's refusal that were, as explained below, patently false, establishes a prima facie case of discriminatory treatment;[5] and the flaws in the proffered reasons are fatal to any effort of the Respondent to establish an affirmative defense that O'Rourke would have been denied placement on the list even in the absence of his protected concerted activity.[6]

As recounted above, the minutes of the September 27 meeting indicate that the Respondent denied O'Rourke's reinstatement to the grain list on the pretense that there were only "two openings," on the list, and that those two properly went to Smith and Borsellino because they had never been on the list before and thus, unlike O'Rourke, had not "quit" the list and thereby run afoul of the so-called "Steadham rule." It is undisputed that the grain list contained only 27 names on that date,[7] and the judge's own findings refute any conclusion that only 2 more names could be added. The judge found, based on testimony of the Respondent's own witnesses, that the Respondent tried to hold the number "at 30," but that there was "flexibility" in the system, and sometimes the list was allowed to climb as high as 39.[8] The claim that there was no "opening" for O'Rourke was, therefore, plainly false.

The contention that O'Rourke was ineligible because, under the "Steadham rule," having previously resigned from the list, he would have to wait for posting of a new signup list, is put in doubt by the very terms of the September 27 minutes. They indicate that an individual *could* be put back on an existing list if he had "put his name on shelf by letter" and then requested to be put back. by "by letter to the Exec. Board." Since the rule itself was unwritten and there is no evidence that O'Rourke was ever advised at the time of his resignation about any "on shelf" option, it is hard to see how he would have been on notice about the necessity of writing a letter at the time of resignation. Furthermore, the Respondent's treatment of Smith and Borsellino indicates that it was not a stickler for adhering to supposedly established practices concerning the referral list. It deviated from them when it chose to. Thus, according to the testimony of the Respondent's recording secretary and executive board member, S. J. Rosas (apparently overlooked by the judge), the claimed practice of not adding names to the grain referral list until after a new posting applied to new names as well as to withdrawn names. Hence, the addition of Smith and Borsellino to the list was no less in conflict with the supposed practice than would be the reinstatement of O'Rourke. Further, Rosas testified that when the referral list and the standby list were "depleted," a new signup list was to be immediately posted. As noted above, however, no new signup list was posted until late February—a variance from what the Respondent's vice president Steadham testified was its usual practice of posting a new signup list just after the end of the seniority year (i.e., just after September 30).

Finally, the judge erred in concluding that evidence of the Respondent's denials of the requests of certain other employees for reinstatement onto the list before a new posting was proof that the treatment of O'Rourke reflected evenhanded application of a rule.

[4] There are three items that were at times referred to by the Respondent's witnesses as "the list." There was an initial, posted sheet on which anyone interested in being on the grain referral list could sign up (described by the judge as "the registration list"). If the number exceeded the number usually maintained on the referral list, those with lower seniority would be placed on a standby list, which could be resorted to if the referral list became "depleted" in the course of the year.

It is undisputed that the first posting of a new signup sheet after the September 27 meeting at which O'Rourke's request for reinstatement to the grain referral list was denied occurred on February 29, 1996. In early March 1996 the new grain referral list including O'Rourke's name was compiled on the basis of that posting.

[5] *Active Transportation*, 296 NLRB 431, 432 fn. 8 (1989), enfd. mem. 924 F.2d 1057 (6th Cir. 1991), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (if "proffered reason for [an adverse employment action] is false, one may infer" that real reason is unlawful, when "surrounding facts tend to support that inference"). Accord: *NLRB v. Adco Electric*, 6 F.3d 1110, 1119 (5th Cir. 1993).

[6] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[7] Although the judge found that Smith and Borsellino had been accepted for list positions "no later than early August 1995," the evidence of both the official list and the minutes of the September 27 meeting establish that the placements did not become official until September 27. There is no evidence or contention that there were names on any standby list at this point that could have filled the "openings."

[8] In fact, Steadham, the Respondent's vice president, testified, "Well, we try to keep it down to 36."

The instances on which the judge relied involved oral requests, and the one rule that was clearly enforced across the board, was that requests to be placed on the list must be in writing. Moreover some of those requests were not even made to the executive board.[9] There is thus no evidence that any employee similarly situated to O'Rourke was denied reinstatement to the grain list.

In sum, we find merit in the General Counsel's exception to the judge's dismissal of the grain list allegation. Accordingly, we find that the Respondent violated Section 8(b)(1)(A) by discriminating against O'Rourke when it denied his request to be added to fill a vacant position on the grain list on September 27, and we shall amend the Order and notice accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, International Longshoremen's Association, Local 20, AFL–CIO, Galveston, Texas, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Removing documents from its informal (available to members) bulletin board because the members posting those documents attempt to change ILA Local 20 policies and practices or express political opposition to any incumbent officer or representative of Local 20.

(b) Failing to make reasonable efforts and take reasonable steps to protect employees who are members of Local 20 from bodily harm inflicted by members or officers of Local 20 because of the employees' opposition to actions, conduct, and policies of Local 20's officers.

(c) Restraining and coercing employees by instructing Respondent's members and officers not to attend certain union meetings.

(d) Restraining and coercing employees by acting through President W. H. "B. B." Nelson in concert with members to beat, kick, and generally assault other members who seek to attend regularly scheduled union meetings.

(e) Restraining and coercing employees by refusing to call union meetings to order despite the presence of a quorum.

(f) Restraining and coercing employees by filing internal charges against them and convicting them of those charges because they attempt to change Local 20 policies and practices or express political opposition to any incumbent Local 20 officer or representative.

(g) Restraining and coercing employees by removing their names from or refusing to reinstate their names to specialized and certified work referral lists because those employees give testimony before committees investigating wrongdoing by Local 20.

(h) Restraining and coercing employees by seeking to secure their discharge and securing the discharge because those employees attempt to change Local 20 policies and practices or express political opposition to any incumbent Local 20 officer or representative.

(i) Restraining and coercing employees by refusing to recommend them for employment to employers because they attempt to change Local 20 policies and practices or express political opposition to any incumbent Local 20 officer or representative.

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

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

(a) Make available to all members and users of its hiring hall, without advance approval and without untimely removal of postings, the use of the open (informal) bulletin board at ILA Local 20's hall.

(b) Call for officers and members to come upstairs to the meeting room when dissident members so request, so that a quorum for membership meetings may be held, to the same extent ILA Local 20 does so on other occasions.

(c) Call union meetings to order whenever a quorum is present.

(d) Within 14 days from the date of this Order, declare as void and remove from its files any reference to the unlawful January 25, 1995 conviction of Leon Filidei for fighting at the January 4, 1995 union meeting, and, within 3 days thereafter notify the employee in writing that it has done so and that it will not use the conviction against him in any way.

(e) Within 14 days from the date of this Order, declare as void and remove from its files any reference to the unlawful January 25, 1995 conviction of Edward O'Rourke for inciting a riot and engaging in conduct detrimental to the Union at the January 4, 1995 union meeting, and within 3 days thereafter notify the employee in writing that it has done so and that it will not use the conviction against him in any way.

(f) Appoint and maintain employees' names on certified lists on a nondiscriminatory basis.

(g) Make Edward O'Rourke whole for any loss of earnings and other benefits suffered as a result of Respondent's causing his February 28, 1995 discharge

[9] Two of the named individuals in question, Hill and Diaz, decided not to go through with a written request to the Board: Hill, because he was "not too particular [about getting on the list]" and Diaz because he had suffered headaches every day he had previously worked in the grain dust. Testimony that a third, Brown, was told that he would have to wait because there were others on a waiting list, is in conflict with the testimony concerning Hill and Diaz insofar as it might suggest that there was an invariable rule against reinstatement before a reposting. Hill and Diaz were both given to understand they could have made application to the executive board if they wished.

from Ryan-Walsh Stevedoring Company, and Respondent's refusal to restore his name to the grain vessel referral list on September 27, 1995, in the manner set forth in the remedy section of the decision.

(h) Make Philip O'Neal whole for any loss of earnings and other benefits suffered as a result of Respondent's April 5, 1995 removal of his name from the crane referral list in the manner set forth in the remedy section of the decision.

(i) Within 14 days from the date of this Order, remove from its files any reference to the refusal to restore Edward O'Rourke's name to the grain vessel referral list, and further remove from its files, and ask the Employer, Ryan-Walsh Stevedoring Company, to remove from Ryan-Walsh's records, any reference to the February 28, 1995 discharge of Edward O'Rourke, and within 3 days thereafter notify the employee in writing that it has done so and that it will not use the discharge against him in any way.

(j) Within 14 days from the date of this Order, inform representatives of Automated Bagging Terminal that Respondent ILA Local 20 is now willing to rate Edward O'Rourke's bag throwing on an unbiased basis and, if Respondent is allowed to do so, complete a fair assessment of O'Rourke's skills, on the same basis it used in assessing all others for Automated Bagging Terminal.

(k) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all hiring hall records, dispatcher lists, job orders, referral calls, and other documents necessary to analyze and compute the amount of backpay due Charging Parties O'Rourke and O'Neal under the terms of this Order.

(l) Within 14 days after service by the Region, post at its union office in Galveston, Texas, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(m) Sign and return to the Regional Director sufficient copies of the notice for posting by the Employer, Ryan-Walsh Stevedoring Company, if willing, at all places where notices to employees are customarily posted.

[10] 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."

(n) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 promulgate rules requiring advance approval for postings on our members' bulletin board and WE WILL NOT remove postings therefrom because they are critical of our policies or officers.

WE WILL NOT instruct our members and officers not to attend union meetings to avoid a quorum be reached.

WE WILL NOT fail to make reasonable efforts and take reasonable steps to protect employees who are members of Local 20 from bodily harm inflicted by members or officers of Local 20 because of the employees' opposition to actions, conduct, and policies of Local 20's officers.

WE WILL NOT refuse to call union meetings to order when a quorum is present.

WE WILL NOT file internal charges against our members and convince them of those charges because they attempt to change Local 20 policies and practices or express political opposition to any incumbent Local 20 officer or representative.

WE WILL NOT remove the name of Philip O'Neal or any other employee from the crane list or other certified list because he gives testimony before a committee or the ILA's South Atlantic and Gulf Coast District investigating misconduct by officers of Local 20.

WE WILL NOT restrain and coerce Edward L. O'Rourke or other employees by seeking and securing his or their discharge because they attempt to change Local 20 policies and practices or express political opposition to incumbent officers of ILA Local 20.

WE WILL NOT refuse to provide factual recommendations for employment for Edward L. O'Rourke or any other employee because he or they attempt to change Local 20 policies and practices or express political opposition to incumbent officers of ILA Local 20.

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

WE WILL make available to all members and users of our hiring hall without advance approval, and with-

out untimely removal of postings, the use of the open bulletin board at our hall.

WE WILL call for officers and members to come upstairs to the meeting room when dissident members so request, so that a quorum for membership meetings may be held, to the same extent we do so on other occasions.

WE WILL call our union meetings to order whenever a quorum is present.

WE WILL, within 14 days from the date of the Board's Order declare as void and remove from our files any reference to the unlawful conviction of Leon Filidei for fighting at the January 4, 1995 union meeting, and WE WILL, within 3 days thereafter, notify the employee in writing that we have done so and that we will not use the conviction against him in any way.

WE WILL, within 14 days from the date of the Board's Order, declare as void and remove from our files any reference to the unlawful conviction of Edward O'Rourke for inciting a riot and engaging in conduct detrimental to the Union at the January 4, 1995 union meeting, and, WE WILL, within 3 days thereafter, notify the employee in writing that we have done so and that we will not use the conviction against him in any way.

WE WILL appoint and maintain employees' names on certified lists on a nondiscriminatory basis.

WE WILL make whole Edward O'Rourke for any loss of earnings and other benefits suffered as a result of our refusal to restore his name to the grain vessel referral list on September 27, 1995, or causing his February 28, 1995 discharge from Ryan-Walsh Stevedoring Company, less any net interim earnings, plus interest.

WE WILL make whole Philip O'Neal for any loss of earning and other benefits suffered as a result of our April 5, 1995 removal of his name from the crane referral list, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the NLRB's Order, remove from our files any reference to the refusal to restore Edward O'Rourke's name to the grain vessel referral list, and further remove from our files, and ask the Employer, Ryan-Walsh Stevedoring Company, to remove from Ryan-Walsh's records, any reference to the February 28, 1995 discharge of Edward O'Rourke, and WE WILL within 3 days thereafter notify the employee in writing that it has done so and that we will not use the discharge against him in any way.

WE WILL, within 14 days from the date of the Board's Order, inform representatives of Automated Bagging Terminal that we are now willing to rate Edward O'Rourke's bag throwing on an unbiased basis and, if ILA Local 20 is allowed to do so, complete a fair assessment of O'Rourke's skills, on the same basis we used in assessing all others for Automated Bagging Terminal.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 20, AFL–CIO

Tamara J. Gant, Esq. and *Nadine Littles, Esq.*, for the General Counsel.
Edward Lloyd O'Rourke, of Galveston, Texas, for himself.
Robert L. Penrice, Esq., of Texas City, Texas, and *Anthony P. Griffin, Esq.*, of Galveston, Texas, for the Respondent, ILA Local 20.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. *On the Waterfront* (Columbia Pictures, 1954), among its other Oscars, won the award as 1954's best motion picture.[1] The film (based on a screenplay by Budd Schulberg) depicted certain fictional events as a description of life on the New York waterfront. Although the situs of events here is the Galveston waterfront, some aspects of this case produce eerie flashbacks to certain scenes in *On the Waterfront.*

The General Counsel alleges here that International Longshoremen's Association Local 20, AFL–CIO or Respondent Local 20 beginning about late December 1994, committed unfair labor practices in various ways against Charging Parties Edward Lloyd O'Rourke, Leon J. Filidei, and Philip J. O'Neal. The most dramatic, and violent, incident alleged is that ILA 20's president, William H. "B. B." Nelson acted "in concert with Union members who assaulted a member [Leon J. Filidei] seeking to attend" the regular monthly membership meeting of January 4, 1995. Respondent denies all allegations of wrongdoing. Viewing the evidence as favoring the General Counsel's allegations, I find the violations occurred as alleged (with one exception, the grain list, which was not part of the incident of violence).

I presided at this 7-day trial in Houston, Texas, beginning April 17 and closing June 7, 1996. Trial was pursuant to the April 3, 1996 third consolidated complaint and notice of hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board. The complaint is based on charges filed by O'Rourke (original filed and served on February 1, 1995, in Case 16–CB–4681), Filidei, and O'Neal against International Longshoremen's Association, Local 20, AFL–CIO (Respondent, Union, or Local 20).

In the complaint, the General Counsel alleges that Respondent Local 20 violated Section 8(b)(1)(A) of the Act by various acts of restraint and coercion from about December 26, 1994, to and "since" November 3, 1995. Respondent Local 20 also violated, the complaint alleges, Section 8(b)(2) of the Act when, about February 28, 1995, Local 20, by Business Agent Billy Nelson, requested that Ryan (Walsh

[1] Marlon Brando, as longshoreman Terry Malloy, won the best actor award. Other great performances included the ones by Lee J. Cobb as the waterfront local's president, Michael J. Skelly, known to all as "Johnny Friendly," and Karl Malden as the waterfront priest, Father Barry.

Stevedoring Company, Inc. (Ryan-Walsh) discharge Charging Party O'Rourke.[2]

The General Counsel called 15 witnesses, beginning with Local 20 President W. H. Nelson under Fed. R. Evid. 611(c), followed by Longshoremen union members, plus Local 20 First Vice President James H. Steadham under Fed. R. Evid. 611(c), Charging Parties O'Rourke, Filidei, and O'Neal, and then rested. (5:1226.)[3] Representing himself, Charging Party O'Rourke called himself as a witness, and then rested. (5:1231.) Without recalling either Nelson or Steadham, Respondent Local 20 called 10 witnesses, including various longshoremen and certain officers of the Union, and then rested. (6:1451.) At the rebuttal stage, the General Counsel recalled O'Rourke and Filidei for brief testimony. Respondent presented no surrebuttal evidence.

My decision is based on the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel (who attached a proposed order and proposed notice) and O'Rourke's closing argument (O'Rourke argued orally in lieu of filing a brief, 7:1496). Respondent Local 20 expressed a desire to file a brief (7:1494), but it failed to submit one. I make the following

FINDINGS OF FACT

A. *Procedural Matters*

1. *Jencks*

Respondent's cross-examination of Charging Party O'Rourke began at 4:897 and continued to the top of 4:1010, or for some 113 pages, over nearly 3 hours (from 2:30 to 5:20 p.m. per my trial notes). I consider my notes in this respect. *Rogers Mfg. Co. v. NLRB*, 486 F.2d 644 (6th Cir. 1973); *NLRB v. Jones Lumber Co.*, 245 F.2d 388 (9th Cir. 1957), enfg. *W. B. Jones Lumber Co.*, 114 NLRB 415, 421 fn. 1 (1955); *W. R. Bean & Son*, 185 NLRB 637, 638 fn. 5 (1970).

After 85 pages (at 4:982), or after over 75 percent of the pages consumed by cross-examination (and at 4:38 p.m., or slightly over 2 hours into the examination), Respondent requested any *Jencks* statements given by the witness.[4] (Earlier, at 4:805, the General Counsel had marked and distributed copies of a February 9, 1995 pretrial affidavit of O'Rourke, and one page earlier had alluded to O'Rourke's "affidavits" that Respondent would receive (at the appropriate time) on request.) The General Counsel objected on the basis that Respondent had waived its right to obtain any additional statements because of the extensive cross-examination which had preceded the request and because Respondent appeared to be close to the end of its cross-examination of O'Rourke. (4:982.) Respondent argued that under the Board's Rule there can be no waiver, and that counsel had acted with diligence as soon as O'Rourke responded (in answer to Respondent's specific question, 4:981) that he had given other statements, although not necessarily on the current charge. (4:982–983.)

On the basis of waiver, because of the lateness of the day, and because so much cross-examination already had occurred that counsel earlier (4:969) had indicated that counsel was close to completion, I sustained the General Counsel's objection. (4:983). I reaffirm my ruling. *U.S. v. Scotti*, 47 F.3d 1237, 1249–1250 (2d Cir. 1995). Aside from the matter of waiver, a real problem which attends a late request such as occurred here is that the cross examiner, on obtaining and reading pretrial affidavits after he is well into the cross-examination, is likely to consume much time attempting (against objections) to replough ground already covered in the cross-examination. An administrative law judge may exercise a reasonable discretion in this area. In the circumstances here, that discretion was exercised reasonably.

2. Sequestration

Sequestration was invoked early in the trial. (1:47.) I made my sequestration order into an exhibit (ALJX 1; 1:57–58) in which I quoted from *Greyhound Lines*, 319 NLRB 554 (1995). On the last day of trial, Charging Party Filidei, called by the General Counsel as one of his rebuttal witnesses, testified (7:1488) that the General Counsel had disclosed to him the nature of impeaching testimony given by Filidei's longtime friend, Jose Torres, a witness called by Respondent.[5] Under *Greyhound*, the General Counsel's disclosure did not violate the sequestration order because, under the Board's express exception, "counsel for a party may inform counsel's own witness of the content of testimony, including the showing of transcripts, given by a witness for the opposing side in order to prepare for rebuttal of such testimony." *Greyhound*, 319 NLRB at 554.

B. *Overview*

Most of the problems described in this case arise from philosophical differences between ILA Local 20's president, W. H. "B. B." Nelson, and ILA Local 20 member Edward Lloyd O'Rourke, one of the Charging Parties here. The principal development which brought these differences into confrontation was a loss of work available for the longshoremen working at the port of Galveston. Conflict resulted from their differing opinions on how to solve the problem.

By October 1994 O'Rourke became convinced that the solution lay in following the route taken by the ILA locals in Houston—grant concessions to reclaim work lost to nonunion workers. Opposed to concessions, Nelson argued that the problem would be overcome by a newly installed port director at the Port of Galveston. The issue here is not which view is correct (in November 1995 Local 20's membership voted to grant certain concessions, 2:278; 4:932), but whether, as alleged, President Nelson and Local 20 resorted to unlawful means, including violence, in an effort to silence bud-

[2] All dates are for 1995 unless otherwise indicated. The pleadings establish that the Board has both statutory and discretionary jurisdiction, and that Local 20 is a statutory labor organization.

[3] References to the seven-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's, CPX for Charging Party O'Rourke's, and RX for Respondent ILA 20's.

[4] For background, see *Jencks v. U.S.*, 353 U.S. 657 1007 (1957); 18 U.S.C. § 3500; and the Board's Rule, 29 CFR. 102.118(b).

[5] Filidei may have confused which was the impeaching testimony given by Torres, but for the purpose here I assume the General Counsel disclosed to Filidei that Torres testified that Filidei, about early January 1996, had told Torres that there had been a fight at the union hall within the last day or two, that Nelson had not kicked him, and that Filidei was going to make life miserable for Nelson.

ding efforts at democratic thinking by O'Rourke and other Local 20 members who merely desired to have the issues fairly discussed at membership meetings and by postings on the membership bulletin board.

C. *Credibility Resolved*

Excluding the ILA officials (President Nelson and First Vice President Steadham) called by the General Counsel, his witnesses testified in a believable manner, and I credit each of them. O'Rourke, for example, was straightforward in his testimony, including that given during a full and searching cross-examination. Leon Filidei, too, gave specific and detailed testimony concerning the assaults which he suffered the evening of January 4, 1995, one of the assaults occurring when President Nelson repeatedly kicked him in the side and hip as Nelson's son, Business Agent Billy Nelson, pulled on one of Filidei's arms and while ILA Local 20 member Earl Nash was hitting Filidei in the face.

In contrast to the persuasive demeanor of the General Counsel's witnesses, and the convincing plausibility of their testimony, Respondent ILA Local 20's witnesses (and I include here President Nelson and First Vice President Steadham, who testified only when called by the General Counsel under Fed.R.Evid. 611(c)) testified with unfavorable demeanor and were wholly unconvincing.

President Nelson at times engaged in what, I find, was calculated whining at questions from the General Counsel, protesting on occasion that the General Counsel was "badgering" him. Nelson was not badgered. At times Nelson was argumentative and at other points evasive. As a witness, Nelson was particularly lacking in credibility. Moreover, during the course of the trial Nelson, one of Respondent's designated assistants (1:47–48, 54–55), all too often was noisily talkative at counsel table, lacked restraint, was disruptive, and appeared to be outside counsel's control. At times I cautioned Nelson to restrain himself. [The need for order should not be a novel concept for someone who, such as President Nelson, presides at union meetings. Thus, I note that ILA Local 20's constitution and bylaws, article XIX, rules of order, section 3, provide (GCX 23 at 13): "Any conversation by whispering or otherwise which is calculated to disturb a member while speaking or hinder the transaction of business shall be deemed a violation of order."] Eventually I informed Respondent's attorney that I was close to ejecting Nelson because of Nelson's disruptive conduct. (6:1401–1402.)

Jose Torres, one of Respondent's witnesses, gave testimony which apparently was calculated to impeach (1) Charging Party Filidei's testimony that President Nelson kicked him the night of the January 5, 1995 membership meeting and (2) that Filidei was even hurt at that meeting. First, Torres puts his conversation with Filidei, in which the fight was described as occurring within the last day or two, a year after the event. That would be a minor discrepancy had Torres been stating the year as a date, but he was not. Instead, Torres dated the event as some 5 or 6 months before his June 1996 testimony. (6:1384, 1386, 1389–1390.) Supposedly, Filidei reported to Torres that he had been in a fight at the union hall, adding (gratuitously) that Nelson had not kicked him. (6:1385, 1388, 1390.) Nevertheless, and without explanation, Filidei said he was going to make life "miserable" or "hard" for Nelson. (6:1385, 1387, 1390.) Although the fight supposedly had occurred within the last day or two before the conversation (6:1390), Filidei did not (6:1386) look as if he had been in any fight.

Cross-examinations by the General Counsel and Charging Party O'Rourke reveal that Torres only recently, in March before his June 1996 testimony (6:1391), had begun working on the waterfront on referrals through the Union's hiring hall; that he had just been voted on favorably as a new member of ILA Local 20 (6:1381, 1388); that he still must pass a test before becoming a member of Local 20 (6:1388); and (6:1389) that he would like to please the leadership of ILA Local 20. On rebuttal, Filidei testified that Torres came by Filidei's salvage yard some 4 to 5 days after Filidei was attacked. Filidei described the assault in some detail. At this time, Filidei was still bleeding from the nose, his eyes were still black, and he even showed his bruised side to Torres. (7:1480–1481.)

Finding Torres' account unbelievable is practically compelled. His demeanor was no better than his story, which is to say, it was unfavorable. According to both Torres (6:1382) and Filidei (7:1483, 1488), they are good friends. I need not resolve whether Torres' story was designed to be incredible (attempting to appease President Nelson while offering an account so incredible it would not be accepted and therefore not hurt Filidei).

Before passing to the allegations, I must note that the General Counsel's witnesses testified at a substantial economic risk. Incurring the animosity of President Nelson is not an action a member of ILA Local 20 would undertake lightly. And when Jesse Mejia Jr.[6] testified that he saw President Nelson kick Charging Party Filidei at the January 4, 1995 membership meeting, Nelson erupted with an outburst that showed his displeasure. I sustained the General Counsel's objection, stating that there must be no outcries from the parties. (2:364). Burly and boisterous, President W. H. "B. B." Nelson looks quite similar to Lee J. Cobb's "Johnny Friendly" in physical appearance and in some of his mannerisms.

One of the longshoremen said to Karl Malden's Father Barry in *On The Waterfront*, "One thing you got to understand, Father. On the dock we've always been D n' D." Father Barry: "D n' D? What's that?" Longshoreman: "Deaf n' dumb. No matter how much we hate the torpedoes we don't rat."[7] Persisting, Father Barry replied:[8]

> Now boys, get smart. I know you're gettin' pushed around but there's one thing we've got in this country and that's ways of fightin' back. By gettin' the facts to the public. Testifyin' for what you know is right against what you know is wrong. Now what's ratting to them is telling the truth for you. Now can't you see that? Can't you see that?

As for the reference to "D n' D," compare that to O'Rourke's testimony (3:734–735):

---

[6] At 7:1478, 1485 the spelling of Mejia's name is rendered phonetically, as "Mahaya."

[7] The film occasionally rearranges or changes some of Budd Schulberg's words.

[8] In his screenplay, *On The Waterfront* 41–42 (1980, First Samuel French Edition; final shooting script), Budd Schulberg has a slightly different wording. As noted at the beginning of both the motion picture and Schulberg's screenplay, the screenplay was inspired by a series of Pulitzer Prize-winning articles by Malcolm Johnson.

> It was just all over the waterfront because there was there is a different side to the issue there. They did not want me to express to the members what was going on; they wanted the membership to be what I consider as D and D, Deaf and Dumb.
>
> They don't want you to ask questions. They—if you do ask questions, you somehow or another, you will be—something will happen. One way or the other, you will be—

Karl Malden's Father Barry asked a group of longshoremen on the dock, "And there's nothing you can do? What about your union?" A longshoreman answers, "You know how a blackjack[9] local works, Father?" "No," Father Barry answered, "How?" Longshoreman: "You get up in a meeting; you make a motion; the lights go out; then you go out." (From the video. Schulberg, at 35, does not have Karl Malden's question, and Schulberg clips the last "g" from some words, such as "meeting.")

D. *The Violations Alleged*

1. Introduction

The alleged violations of Section 8(b)(1)(A) of the Act begin about December 26, 1994 (complaint par. 14, discriminatorily denying O'Rourke access to the bulletin board), and extend to about November 3, 1995 (complaint par. 27, President Nelson, for invidious reasons, refused to give O'Rourke a favorable recommendation for employment with employers Suderman Contracting Stevedores, Inc. and ABT Management, Inc.).

Alleged violations of Section 8(b)(2) of the Act are that, about February 28, 1995, ILA Local 20, by Business Agent Billy Nelson, requested that Ryan-Walsh fire Charging Party O'Rourke (complaint par. 24), and (par. 25) by that request, ILA Local 20 "attempted to cause and caused" Ryan-Walsh to discharge O'Rourke. Respondent denies.

2. O'Rourke denied access to bulletin board

Complaint paragraph 14 alleges that since about December 26, 1996, "Respondent has discriminatorily denied access to its bulletin board to Charging Party O'Rourke." Respondent denies.

The record reflects that the Union maintained an informal bulletin board for the use of members, and that all types of postings were common and would remain posted for weeks. However, when O'Rourke, on December 26, posted a five-page memo (GCX 47, including three pages of charts and statistics about lost work) from him to Local 20's members, President Nelson removed it after only 3 to 5 days. (3:712–717; 5:1092–1094.) Nelson's posted response of December 28 (GCX 15) remained posted for weeks. (3:720, O'Rourke.)

In his December 26 memo, O'Rourke stated that Galveston had to become competitive with other ports, and (GCX 47 at 4):

> The whole ILA is being bombarded by non-union labor. We must follow the guidance of the International and District offices. To get work back, we need to make the same concessions as the other ports or work will continue to go elsewhere. For the last three years, the ILA as a whole has started to rebound due to ILA concessions.

Advancing figures and data in his own two-page memo of December 28 (GCX 15), Nelson, unlike O'Rourke's calm tone and factual presentation, accuses O'Rourke of "carrying the ball for the Stevedores and the [ILA] District. He is nothing but a messenger boy." (GCX 15 at 2; 4:915.) On December 29 O'Rourke posted his rebuttal (GCX 16, consisting of a one-page memo and four pages of statistics), to Nelson's December 28 posting. As with O'Rourke's first posting, Nelson removed this posting after 3 to 5 days, telling O'Rourke that it had been up long enough. No posting of another member has ever been removed so quickly. (3:719–725, O'Rourke.)

Although Local 20's constitution calls for regular meetings the first Wednesday of every month (GCX 23 at 8), most of the time the required quorum of 40 (GCX 23 at 8) are not in attendance and no meeting can be conducted. On Thursday, January 26, 1995, O'Rourke hand-delivered to the Union a written request, addressed to President Nelson, reading (GCX 53):

> Since our Union does not have regular monthly meetings (thereby limiting Union members' rights to express facts and opinions) this letter is to formally request permission to post factual information and correspondence on ILA Local 20's board.

To O'Rourke's inquiry a day or two later, Nelson told O'Rourke that the Union's attorneys were reviewing his request. O'Rourke has not heard a word on the matter since that late January 1995 conversation with Nelson. (4:816–817.) However, at the membership meeting of February 8, 1995, President Nelson told members that he did not want items posted on the bulletin board without prior approval. (2:367–371, Mejia.) Although the testimony refers to February 7, that was a Tuesday, and regular meetings are held on Wednesdays.

As recently as January 1996, Nelson removed a posting by O'Rourke, remarking, in the presence of ILA member Michael Moore, that the Union's attorney had said that O'Rourke had no business posting papers on the bulletin board. Nelson commented that anything O'Rourke posted would go into the trash. (4:1032–1034, 1042.) In testifying that a second, and informal, bulletin board was not erected until recently, Moore may have been describing a new informal bulletin board. (4:1042.) In addition to several members describing the second bulletin board, Nelson freely acknowledges that the informal one has existed for at least 2 years. The first one is the one he uses for formal posting. (1:114–115). I disbelieve Nelson's assertion that he has never removed any document from the second, or informal, bulletin board. (1:117.)

Respecting President Nelson's removing O'Rourke's postings about the controversial matter of promoting a free discussion among the membership on whether ILA Local should make wage concessions, it is clear, and I find, that Nelson sought to squelch O'Rourke's efforts to promote a free discussion of this controversial issue. This constitutes an unlawful restriction on O'Rourke's Section 7 right to ad-

[9] The word is mostly unintelligible on the video, but Schulberg's screenplay (at 35) renders it "blackjack," although the sound indicates a different word on the film.

vance a position which is opposed by the Union's leadership. Moreover, I find, such motivation was President Nelson's sole purpose in removing O'Rourke's postings. Moreover, O'Rourke's postings did not disrupt union meetings or the operation of Local 20's exclusive hiring hall. Accordingly, I find that Respondent violated Section 8(b)(1)(A) of the Act, as alleged. *Laborers Local 324 (AGC of California)*, 318 NLRB 589 (1995).

3. The January 4, 1995 membership meeting

a. *Introduction*

Complaint paragraph 14 has a preamble and three subparagraphs. This complaint paragraph focuses on the regular monthly membership meeting of Wednesday, January 4, 1995. About that date, the preamble begins, "Respondent, by W. H. Nelson, violated the duty of fair representation to its members by restricting their ability to attend a scheduled Union meeting by:

(a) Instructing members and Union officers not to enter the meeting room so that a quorum would not be reached.

(b) Acting in concert with Union members who assaulted a member seeking to attend the meeting.

(c) Refusing to call the meeting to order despite the presence of a quorum.

Because the subparagraphs are closely related, I shall consider them together.

b. *Facts*

(1) Nelson declares no quorum and no meeting

For the scheduled membership meeting of January 4, 1995, O'Rourke had planned to discuss the decline of available work at the port of Galveston, and to urge the members to consider the Houston Agreement (concessions granted by ILA locals in Houston, 3:690, O'Rourke) as a solution to the problem. To promote a large attendance, O'Rourke posted a notice urging attendance, and telephoned or spoke in person to at least 40 to 50 members (including 2 members of the Union's executive board), in advance of the meeting, urging members to attend so that a quorum could be reached and the work problem and possible solution discussed. (3:733–738; 4:901, 909, 917, 926; GCX 49.)

Regular monthly membership meetings are scheduled to begin at 7:30 p.m. The credited evidence demonstrates that by the scheduled 7:30 p.m. start of the January 4 membership meeting, there were at least 50 to 60 members on the premises. About half of these, including several members of the Union's executive board, remained either at or in the parking lot or downstairs in the building. Most agree that the weather was very cool, with the temperature in about the low 40s. Frank Escamilla, Local 20's seniority and records clerk (1:27; 6:1302), and an admitted agent of Respondent, concedes that there "probably" were enough members to make a quorum had all those downstairs, including those in the parking lot, gone upstairs. (6:1321.)

O'Rourke's credited testimony establishes that, on his arrival about 7:10 p.m. (3:726), he observed President Nelson walking around with a pen and pad recording the names of members who were present. (4:768–769.) About 7:20 p.m. O'Rourke asked Nelson whether the lights and heat were going to be turned on upstairs. Nelson replied that he was not the janitor, and that when the janitor arrived he would take care of it. (4:768–769.) O'Rourke then observed that Nelson spoke to most of those present downstairs, and saw him call members Milulencak and Smiley, separately, into an adjacent office for brief conversations. As each emerged, he went to his car. Mihulencak drove off, but Smiley remained in his truck. (4:769, O'Rourke.)

Under normal practice, the lights and air or heat are turned on upstairs from 15 to 45 minutes before the scheduled start of a membership meeting. (4:770; 5:1058, 1144, 1213–1214.) At times Nelson delays the start of a meeting by as much as 25 minutes (5:1176–1178) to enable late arrivals to come upstairs. Moreover, before membership meetings the Union records a message on its telephone answering machine advising callers whether refreshments (shrimp is served) will be served. The past practice shows that the recorded message has become a code: a message of refreshments means that the leadership desires that a quorum be reached and so that a meeting can be held; a message of no refreshments means no quorum or meeting is desired by the leadership. For this meeting of January 4, the recorded message was no refreshments.

As Charging Party Leon Filidei credibly testified, usually Nelson waits until 7:40 or 7:45 p.m., for members to get upstairs, before he counts attendees to determine whether there is a quorum. (5:1176.) Indeed, at a membership meeting held one night (June 5, 1996) during the trial, Nelson did just that, not opening the meeting until 7:45 p.m., as O'Rourke credibly testified. Nelson was not late for the meeting, having opened the doors before 7:30 p.m. (6:1465–467.)

Member Cyrus Wagner entered the front door about 7:25 p.m. and walked over to the bulletin board. As Wagner was inspecting the bulletin board, Business Agent Billy Nelson approached him and said that Wagner should not go upstairs because they were not going to make up the meeting. Wagner said he intended to go up because he thought they would make the meeting. Business Agent Nelson said that if a quorum was made, then "we will come up." There were three or four members also standing there during the conversation. (Wagner recognized them, but did not know their names.) The two did not go upstairs. (2:297, 307–309, 324–327.)

A minute or two before 7:30 p.m. President Nelson unlocked the door to the upstairs meeting hall, proceeded up the stairs, and turned on the lights. O'Rourke and about 2 dozen members followed Nelson upstairs. When Nelson arrived at the podium at 7:30 p.m., he counted those present, announced that there were only 18, including himself, and, announcing that there would be no meeting because there was not a quorum, Nelson banged down his gavel and told the group to go home. Nelson agrees that he counted 18 and canceled the meeting at 7:30 p.m. Crediting Charging Party Filidei's count (5:1147, 1176–1177, 1186), I find that the total at that point was 28. Not everyone who went upstairs had arrived at that point, for there were still a few coming up the stairs. Thus, the number of the group totaled about 30 within the next minute or so after Nelson's declaration of no meeting.

O'Rourke told Nelson there were enough members on the premises to held the meeting (several officers and executive

board members had remained downstairs and in the parking lot). O'Rourke asked Nelson to go downstairs and get the executive board members. Responding with a blast of obscenities at O'Rourke, Nelson told O'Rourke that O'Rourke wanted the meeting so therefore O'Rourke could go get them. [I note that ILA Local 20's constitution and bylaws, article XIX, rules of order, section 13, provides: "Each member, when speaking, shall confine himself to the question under debate and avoid all personal and indecorous language." However, perhaps that rule applies only after a meeting has been called to order.]

Charging Party Filidei also asked Nelson to bring up the executive board so the meeting could be held [this was in terms of numbers to make a quorum, not that executive board members were a prerequisite for a meeting], and Nelson cursed him. When member Ben Scott said, "We have a problem here," Nelson, spouting an obscenity, asked where Scott had been, saying that Scott no longer worked there. O'Rourke said that was one reason Scott was present, that he wanted to work but that Nelson had given away his job to low-seniority members. O'Rourke also told Nelson that "this is not Local Nelson, it is Local 20, and it belongs to all of us, and we have the right to assemble." With an accompanying obscenity, Nelson again called O'Rourke an "asshole" and continued to curse him.[10]

At one point in the few minutes after Nelson told O'Rourke he could go get the executive board members himself, O'Rourke briefly (for less that a minute) went downstairs. Unsuccessful in his effort to persuade those there to come upstairs, O'Rourke returned to the ongoing debate with Nelson. Nelson then walked out the doorway into the entrance hall, where restrooms a water fountain and the top of the descending stairs are located, and proceeded over to the glass wall (the glassed-in wall runs the length of the meeting hall) which overlooks the parking lot. In no more than 30 seconds, Nelson returned to the meeting hall where he resumed cursing O'Rourke and the others, adding that if O'Rourke and the others did not go home he was going to call the police. As Nelson spoke, some 15 of his loyal supporters, including several officers and members of the executive board, charged up the stairs and into the meeting hall. (My description of the events upstairs is a composite of the testimony by the General Counsel's witnesses, and principally the more detailed reports given by Charging Parties O'Rourke and Filidei.)

In the opinion of Filidei, Nelson's appearance at the glassed-in wall served as a signal for Nelson's supporters to charge up the stairs into the meeting hall. (5:1148, 1182–1186.) Agreeing with Filidei, I find that Nelson's appearance at the glass wall in the entrance hall was a prearranged signal for Nelson's supporters to charge into the hall ready to enforce any orders he might give.

(2) Leon Filidei assaulted

One of the first of Nelson's supporters charging into the meeting hall was member Earl Nash. Contrary to Nash's assertion (and that of member Patrick Harris, an especially unbelievable witness) that Filidei first cursed Nash, I find, as Filidei and others testified, that Earl Nash rushed over and "sucker punched" Filidei in the left face while Filidei still was trying to persuade Nelson to call up members to make the meeting. As Earl Nash wrestled Filidei to the floor, Business Agent Billy Nelson grabbed Filidei's right arm and began dragging him across the floor, with Filidei sitting on his buttocks, while Nash had his left arm around Filidei's waist and beat him in the face with his right fist. All this time, Filidei never struck back, but merely attempted to shield his face from the blows, and that effort was largely unsuccessful after Business Agent Nelson grabbed his arm and began dragging him.

As Billy Nelson dragged Filidei, President Nelson came over and, launching a second assault, kicked Filidei in the left side and hip three or four times before (2:426, Mejia) merging into the surrounding crowd.

When member Jesse Mejia Jr. tried to intervene to stop the assault by Earl Nash, Business Agent Nelson grabbed Mejia in a bear hug and did not release him until others finally had stopped the assault by Earl Nash. Mejia and Donald Filidei, Charging Party Filidei's cousin, helped Filidei to his feet. Filidei then went to President Nelson and asked him why he had kicked him. Nelson denied kicking Filidei. Aside from Filidei himself (5:1153–1154, 1189–1190, 1204; 7:1479), the only witness who testified that he saw Nelson kick Filidei was Mejia (2:364–365, 400, 409, 421, 422, 425), who testified strongly and credibly. Others testified that they heard Filidei ask Nelson why he had kicked him. As the witnesses describe, there was a lot of confusion in the moments of the assault.

As Nelson denied kicking Filidei, David Nash, Earl Nash's son, came up from behind Filidei and, making the third assault on Filidei, hit Filidei in the back of his neck, knocking Filidei into some rows of chairs. As Filidei tried to regain his balance, David Nash (who did not testify) continued to hit and kick Filidei. After crashing through about 10 rows of chairs, Filidei collapsed on the floor. David Nash jumped on Filidei and punched Filidei five or six more times in the head and face as the battered Filidei tried to shield his face with his hands. Member Andre Beck (5:1155, 1192) pulled David Nash off Filidei. (Beck did not testify.)

President Nelson made no effort to stop David Nash's assault even though it began right in front of his eyes. I do not credit Nelson in his testimony (1:106) that he does not think that he saw David Nash hit Filidei. In fact, I find, President Nelson saw it, yet stood by and made no effort to stop it himself or to direct anyone else to stop it. Recording Secretary Jimmy Rosas also made no effort to stop David Nash's assault on Leon Filidei even though Rosas admits to being present as early as the Earl Nash assault. Supposedly, Rosas stood by Nelson to protect President Nelson. Instead, I find, Rosas and Nelson simply watched David Nash assault Leon Filidei because that assault was merely a byproduct of the prearrangement which, as I find below, President Nelson had with Earl Nash.

Charging Party Filidei was taken to the hospital where he was treated and released. Although Filidei's injuries were not life threatening, and "serious" is a relative term, no one would volunteer to accept such beatings. The injuries consisted of a bleeding and broken nose, blackened eyes, bruised ribs, bruised testicles, and unspecified "trouble with my neck." (5:1154, 1192.) At the hospital a Galveston police of-

[10] "He summoned the crowd and said to them, 'Hear and understand. It is not what enters one's mouth that defiles a person; but what comes out of the mouth is what defiles one.'" Mt. 15:10–11.

ficer took information and filed a report. (GCX 65.) Thereafter, on February 3, Filidei filed criminal assault charges against Earl Nash (GCX 67), William H. Nelson (GCX 66), and David Nash (GCX 68). The charges apparently are still pending.

c. *Analysis*

Several factors lead to the conclusion that ILA Local 20's leadership, and especially President Nelson, did not want a quorum for the meeting of January 4, 1995, because, as member Cyrus Wagner testified (2:347), Nelson and his executive board did not want a democratic discussion on the graphs and statistics which O'Rourke had gathered. Although a special called meeting was held 2 days' later to discuss contractual wages (GCX 51), that meeting was at 1 p.m. on a workday when many of those interested in the data O'Rourke had assembled were unable to be present. Thus, as a result of Nelson's "power play," as O'Rourke describes it (4:811, 931), the vote was "one-sided" (4:932) against any wage concessions. Nevertheless, at the November 1995 membership meeting, the members voted overwhelmingly in favor of (2:278; 4:932) certain wage concessions (with O'Rourke the only member voting against, because it was not the Houston Agreement, 4:919–920).

First, the recorded message of "no refreshments" was a signal by Local 20's leadership that no meeting on January 4 was desired. As member Anthony Conde credibly asserts, refreshments attract more attendees (5:1063), because (5:1071) "you can bet the membership is going to be there" to get the "shrimp poorboys."

Second, contrary to the established practice, Nelson refused to turn on the heat and the lights at least 15 minutes before the scheduled 7:30 p.m. starting time. Delaying the lights (there is no evidence the heat was ever turned on) until about 7:29 p.m. was an obvious tactic employed to reinforce the message that President Nelson, and Local 20's leadership, did not want a quorum that evening.

Third, Nelson's walking around with pen and pad and recording names plainly conveyed that Nelson was opposed even to the presence of those not his supporters. Any member with any experience at all with exclusive hiring halls (and Local 20's is an exclusive hiring hall, GCX 7 at 1) would conclude that it would not be in his best economic interest to oppose President Nelson.

Fourth, when Nelson, about 7:20 p.m., spoke to most of the members who were present in the downstairs hallway, and then separately called two members (Mihulencak and Smiley) into an adjacent office, following which Mihulencak drove away and Smiley went to his truck and did not thereafter go upstairs, Nelson clearly, I find, told each person that he did not want a quorum made that evening.

Fifth, Business Agent Billy Nelson's instruction to member Cyrus Wagner to not go upstairs because they were not going to "make up the meeting" confirms that ILA Local 20's management had decided that a quorum should not be reached. The purpose of this opposition, as I have found, was to deny Charging Party O'Rourke, and those of like mind, the opportunity to discuss and debate the merits of wage concessions under the Houston Agreement. Although Wagner disregarded Business Agent Nelson's instruction, the three or four other members who were standing there got the message and did not go upstairs.

Sixth, President Nelson's abrupt declaration at 7:30 p.m., or shortly thereafter, of no quorum, no meeting, go home, contrary to his past (and current) practice of holding the gavel to at least 7:45 p.m. to allow late arrivals time to come upstairs, is a vivid demonstration that Nelson and Local 20 were committed to silencing the democratic impulses of O'Rourke and those interested in having a debate on the merits of the Houston Agreement.

Seventh, the signal by President Nelson for his executive board members, officers, and other supporters to charge up to the meeting hall was, I find, prearranged to demonstrate to the O'Rourke faction that Nelson would brook no dissent and was prepared to use physical violence to enforce his will. The show of force was designed to crush the democratic spirit being expressed by O'Rourke and others. Moreover, the show of force was unnecessary. Nelson had told the group there was no quorum, and no meeting, and for them to go home. When Nelson walked through the doorway, instead of walking over to the glass wall to give the prearranged signal, he simply could have walked downstairs and waited there. Of course, that option was not part of his plan.

The physical assaults on Charging Party Leon Filidei by Earl Nash, then by Nelson himself, and finally by David Nash, were planned. At least, I find, the assault by Earl Nash was prearranged. The calculated object was to dissuade those who supported O'Rourke. Earl Nash testified about a personal grudge he had with Leon Filidei. (6:1396.) As the grudge involved NLRB charges Filidei assertedly had filed, it seems most probable that President Nelson was aware of the charges and the ill feeling which Earl Nash felt toward Filidei. The evening of January 4 Charging Party Filidei had arrived about 7:15 p.m. Nelson, I find, spoke with Earl Nash in the minutes before 7:30 p.m. and gave Nash advance approval for him to assault Filidei in the event Nelson signaled for his supporters to charge upstairs. That is why, I find, there was no general attack on O'Rourke and all the other attendees present. Essentially the same effect of intimidation could be generated by relying simply on the existing animosity which Earl Nash had for Filidei. When Earl Nash attacked Filidei, Nelson joined in, kicking Filidei three or four times in the left ribs and hip. (5:1153, 1190, 1204.)[11] After kicking Filidei, Nelson slipped back into the surrounding crowd. (2:426, Mejia.)

Based on the foregoing, I find that the evidence supports all three subparagraphs of the allegation. Thus, President Nelson, in order to prevent the quorum necessary to open a membership meeting, instructed members and union officers not to enter the meeting hall. (Complaint par. 14a.) Although the attendees were about 10 to 12 shy of a quorum at 7:30 p.m. when Nelson banged down the gavel and declared no quorum and no meeting, it is clear that there were well over the 10 to 12 necessary to make up a quorum had President Nelson and Business Agent Nelson not personally directed executive board members and other members of Local 20 not to attend.

Although some members may well have been opposed to any wage concessions, it is clear, and I find, that they did

[11] "I saw the dead, the great and the lowly, standing before the throne, and scrolls were opened. Then another scroll was opened, the book of life. The dead were judged according to what was written in the scrolls." Rv. 20:12.

not come to the union hall just to sit in the parking lot, or wait downstairs, rather than to go upstairs for a debate on the subject. The fact is, they were told by President Nelson and Business Agent Nelson not to go upstairs—unless President Nelson signaled for them to charge upstairs in a show of force. They complied with his instructions.

Accordingly, I find that, as alleged in complaint paragraph 14(a) and (b), Respondent ILA Local 20 violated Section 8(b)(1)(A) of the Act by failing to render the duty of fair representation to Local 20's members by restricting their ability to attend the scheduled regular membership meeting of January 4, 1995. *Teamsters Local 186 (Associated General Contractors)*, 313 NLRB 1233, 1234–1235 (1994); *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 (1991).

While the evidence establishes that ILA Local 20, by President W. H. Nelson, unlawfully prevented members of Local 20 from reaching a quorum, there in fact was never a quorum actually present in the meeting hall. President Nelson, as I have found, unlawfully prevented the membership from reaching a quorum. I, therefore, find that a quorum was constructively reached, and that Respondent ILA Local 20, by President Nelson, violated Section 8(b)(1)(A) of the Act by (constructively) refusing to call the meeting of January 4, 1995, to order despite the presence of a (constructive) quorum.

4. Internal union charges filed

a. *Facts*

Complaint paragraph 16 alleges that, about January 5, 1995, Respondent filed internal union charges against Charging Party O'Rourke for allegedly "inciting a riot" at the January 4 membership meeting. Respondent admits. Complaint paragraph 17 alleges that Respondent filed internal charges against Charging Party Filidei for allegedly "fighting" at the January 4 membership meeting. Respondent admits. Complaint paragraph 22 alleges that Respondent filed the charges because O'Rourke and Filidei "expressed views in opposition to those of the Union officers concerning the acceptance of a reduction in the Union pay scale and other related matters." Respondent denies. By filing the charges, complaint paragraph 30 alleges, Respondent violated 29 U.S.C. § 158(b)(1)(A). Respondent denies.

President Nelson filed the January charges (GCX 10) against "Earl Nash and Leon Filidei for fighting at a Union meeting on January 4, 1995 and also on E. L. Teddy O'Rourke and Ben Scott for inciting a riot and conduct detrimental to the welfare of the Organization." On January 25 all four members were found guilty as charged. O'Rourke, Filidei, and Earl Nash were assessed 1-year suspensions from attending union meetings, while Ben Scott's suspension from attendance was for 6 months. (GCX 55; 1:107–108; 4:822; 5:1157, 1199–1200.) (O'Rourke appealed his conviction, and the Appeals Committee of the District modified the ground and cut the suspension in half. The appeal is of historical interest only, for it is the action of Local 20 that is in issue.)

b. *Discussion*

The governing law is clear—a union violates Section 8(b)(1)(A) of the Act if it processes internal union charges against one of its members because that member engages in protected dissident union activity. *Laborers Local 836 (Corbet Construction)*, 307 NLRB 801 (1992) (effort to silence member who criticized manner that business agent and officers operated union and who called them dishonest). The facts here, I find, demonstrate that the Union's legal action against Charging Parties O'Rourke and Filidei was merely another step in the effort of ILA Local 20's leadership (and that principally means President Nelson) to silence their voices from urging that democracy prevail in their American union hall.

The charges against O'Rourke (and Ben Scott) of "inciting a riot" and "conduct detrimental to the welfare of the Organization" (GCX 10) describe President Nelson's conduct—not the peaceable pleas by O'Rourke that President Nelson call the others upstairs so that a membership meeting could be held. That Nelson would include Ben Scott, who did nothing more than say, "We have a problem here" (4:774), merely illustrates the depth of Nelson's animosity toward anyone who would question the absoluteness of his dictatorship at ILA Local 20.

Similarly, to charge Leon Filidei with "fighting," when all Filidei did was hold up his hands (or one free hand when he was being dragged by Business Agent Billy Nelson) in an unsuccessful effort to shield his face from the blows, demonstrates that President Nelson has adopted Humpty Dumpty's thinking:

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll, *Through The Looking Glass* 169 (1871; Bantam Classic edition 1981, Alice's Adventures in Wonderland & Through the Looking-Glass).

As if to rub salt in Filidei's injuries, President Nelson did not charge David Nash with anything. Contrary to Nelson's "I don't think I seen" David Nash hitting Filidei (1:108), I find that Nelson certainly saw David Nash attack Filidei from behind and beat him while Filidei merely tried to shield himself from the blows. As O'Rourke, Filidei had merely tried to persuade Nelson to call up officers and executive board members so that a membership meeting could be held. Because Nelson did not want the meeting of January 4, 1995, to be held, "Local Nelson" (to use O'Rourke's apt phrase) made sure there would be no quorum (as I previously found) and, as alleged, unlawfully filed and processed internal union legal charges against O'Rourke and Filidei. The motive for such internal legal action was to crush democratic thinking and democratic efforts by dissident members, and to paper over, with a cover of legality, Nelson's primary role, as I have found, in bringing about the beatings, and in personally participating at one point, and to intimidate all other members who might have given thought to joining any movement toward a democratic union. By filing these charges against O'Rourke and Filidei, and by convicting them, Respondent ILA Local 20 violated 29 U.S.C. § 158(b)(1)(A), as alleged.

As the beatings and internal legal charges show, President W. H. Nelson, conducting himself similar to Lee J. Cobb's "Johnny Friendly," and using words and terms in the fash-

ion of Lewis Carroll's Humpty Dumpty to distort events, so as to punish members who seek to have democracy in their union, is an ILA official who operates practically without restraint.

5. Philip J. O'Neal removed from crane operator referral list

a. *Facts*

Complaint paragraph 20 alleges that about March 29, 1995, Respondent, by W. H. Nelson, B. S. Ramirez, P. R. Harvey, J. Rosas, J. D. Rosas Jr., F. Escamilla, D. Gray, and B. H. Nelson, "removed the name of Charging Party O'Neal from the crane operator referral list." Respondent admits. Complaint paragraph 23 alleges that Respondent removed O'Neal's name because Charging Party O'Neal "participated in an investigation of Local 20 by the International Longshoremen's Association District Office." Respondent denies. By removing O'Neal's name, complaint paragraph 30 alleges, Respondent violated Section 8(b)(1)(A) of the Act. Respondent denies.

Beginning March 30 1995, representatives of the ILA's South Atlantic and gulf Coast District went to Galveston and conducted an internal investigation of complaints registered by members of Local 20. (4:879–882, O'Rourke; GCX 60.) Witnesses appeared before the investigating committee at the Tremont House Hotel in Galveston (1:178, Nelson; 5:1104, O'Neal). O'Rourke was one of those who testified (4:881), as was O'Neal (5:1104). In the presence of President Nelson, First Vice President Steadham, and a majority of Local 20's executive board, O'Neal reported that Local 20 had very serious problems because union officers were disregarding seniority in referrals, and that members of the executive board, and President Nelson in particular, intimidate members in three ways: physical, mental, and financial. (5:1105–1106.)

On April 5, barely a week after his testimony before the District's investigators, O'Neal was told by Executive Board Member Wilbert Hill that O'Neal's name had been removed from the crane referral list. (5:1107.) O'Neal at first waited for some official notification. Receiving none, and also receiving no further referrals to operate cranes, O'Neal, in late April 1995, appeared at a meeting of the executive board. (As the regular meetings of the executive board are held the last Wednesday of each month (1:168; 2:478; 5:1108), I find that the date of this meeting was April 26, 1995.) At that meeting both President Nelson and Vice President Steadham confirmed that O'Neal had indeed been removed from the crane referral list because he had a full-time job (40-hour weeks) at Container Terminal in Galveston.

Although O'Neal asked why he had not been notified, no understandable reason was given. (5:1107–1108.) When O'Neal asked why, if there was such a rule, it had taken them 6 years (the time he had worked full time at Container) to remove him from the crane list, no answer was given. (5:1122–1123.) Finally, when O'Neal asked how long the rule had been enforced, he received no answer. (5:11231.) Although on several occasions O'Neal has asked Recording Secretary Rosas for a copy of the alleged rule disqualifying anyone holding a 40-hour job, the Union has never furnished O'Neal a copy. (5:1123–1124.) I find that there is no such rule aside from, as I discuss later, a strained interpretation of the existing, and written, hiring hall rules.

The minutes for the called (2:478, Steadham) meeting of the Union's executive board including the following item (GCX 28 at 1):

> Bubba O'Neal met with Exec. Board to discuss crane operators list on Pier 10, and to find out why he was removed. The Board explained to O'Neal the 40 hr. a week job. Member cannot hold a designated job also, which crane operators jobs are designated. He was told his crane job would be put on shelf until he no longer has 40 hr. a week job in mechanics yard.

Even assuming that O'Neal's appearance before the Union's executive board occurred on June 13 rather than April 26, 1995, that difference in the date of his appearance would change nothing.

About 1983 O'Neal was certified to operate a crane. At that time his name was added to the designated crane referral list, and he remained on the list until his April 1995 removal. (5:1100, 1110.) In 1989, O'Neal began working full time as a mechanic at Container Terminal in Galveston, and he worked there, on 40-hour weeks, until Container transferred its operation to Houston at the end of May 1995, at which time he was laid off. (5:1100, 1111–1113, 1127.) During his time at Container, O'Neal could work nights and weekends as a crane operator from the referral list. Such referrals averaged about two to three crane jobs a month during his time at Container before his April 1995 removal from the crane referral list. (5:1102, 1127.)

ILA Local 20's hiring hall rules (GCX 7) contain certain restrictions pertaining to designated jobs. (President Nelson acknowledges that the crane list is a designated job. 1:159.) For example, any person holding a designated job may not "refuse" to go when called for his designated job. (GCX 7 at 22.) In theory, a designated job likely would clash at some point with a full-time (40-hour week) job. Indeed, at trial President Nelson applied just that strict interpretation to the restriction. (1:159.)

The problem with Nelson's trial interpretation (aside from his unfavorable witness demeanor) is that it conflicts with the credited evidence of past practice. Thus, as O'Neal testified, no conflicts developed as to him for two reasons. One, when Local 20 referred crane operators to Container Terminal, Container could, and did, specify that one or more of four specialized crane operators be referred. Second, the Local calls by alphabetical order, and if O'Neal was ever called during his regular job at Container, he could simply waive the call, and Local 20 would call the next name on the list. (5:1113.) Another restriction is that designated persons who "miss five consecutive jobs" will be removed from the list. (GCX 7 at 23.) The term "miss" implies acceptance but failure to show. In any event, there is no evidence that O'Neal ever missed five consecutive crane jobs.

According to Nelson, at least four other members (including Eddie Savage) were involuntarily removed from a designated job list between 1990 and 1994. (1:164–167, 231.) However, Savage testified that, in about 1993, he voluntarily removed his name from the porta-packer list, a designated job, and placed it "on the shelf." President Nelson told him that he could be reinstated to the list on request. (5:1087.) (Nelson testified that the "on the shelf" procedure permits a person to have his name, on request, "automatically" restored to his designated job list. (1:233.) Respecting the other

three, Nelson appears to admit that they voluntarily removed their names on request. (1:232.) That is, as I am about to describe respecting O'Neal, the three were asked. Unlike O'Neal, they voluntarily complied. Their names were not involuntarily removed.

Appearing before the executive board about 1993 respecting a request he had, O'Neal was asked by President Nelson whether O'Neal would relinquish his place on the crane referral list. O'Neal does not know whether President Nelson's reason for asking was that less work was available, but, in any event, O'Neal declined, stating that he liked operating a crane and he needed to maintain his crane operating skills by at least some work in event he lost his full-time job and had to return to the crane list. O'Neal was not pressed further. (5:1102–1104, 1114, 1121.) Thus, I do not credit Nelson's flimsy excuse for O'Neal's 6 years' of working full-time at Container while also being referred two or three times a month from the crane list as merely a situation of O'Neal's doing so "until he got caught." (1:160–161.)

Some 2 weeks before his testifying in this case, O'Neal was referred to a crane job. That is the first crane referral he has received since President Nelson told him, at the April 1995 meeting of the executive board, that he had been removed from the crane list. O'Neal thinks that perhaps the referral means that his name has been restored to the crane list. (5:1112, 1127.) There is no evidence, however, that the Union has in fact restored O'Neal's name to the crane list.

b. *Discussion*

No provision in Respondent's written hiring hall rules pertaining to designated jobs (GCX 7 at 21–24) disqualifies a longshoreman from remaining on a designated job list while he also holds a full-time job. In fact, the rules expressly provide, "His designated job will remain his as long as he respects and follows these rules of Local 20." (GCX 7 at 21.)

In view of Local 20's past practice, and President Nelson's 1993 request of O'Neal, which O'Neal declined, it is clear, and I find, that Respondent simply ignored past practice and applied a strict, and theoretical, interpretation to the printed language quoted earlier, in order to justify removing O'Neal's name from the crane list on, I find, April 5, 1995. Respondent's motivation for this action was to punish Charging Party O'Neal for so strongly criticizing President Nelson and the leadership of ILA Local 20 when O'Neal testified before the ILA District's investigators in the presence of President Nelson and other officers of ILA Local 20. Accordingly, in so retaliating against Charging Party O'Neal, Respondent violated 29 U.S.C. § 158(b)(1)(A), as alleged. As the General Counsel's suggested order correctly specifies, the remedial order for the violation found as to Section 8(b)(1)(A) will provide that O'Neal be made whole for any loss of earnings, and other benefits, with interest, resulting from the removal of his name from the crane list.

Because Respondent's April 5, 1995 removal would deprive O'Neal of referrals to crane jobs, the retaliatory action also would violate 29 U.S.C. § 158(b)(2). *Plumbers Local 138 (Bechtel Corp.)*, modified in some unpublished respect, 17 F.3d 393 (9th Cir. 1994); *Longshoremen ILA Local 1423 (Savannah Maritime)*, 306 NLRB 942 (1992). However, the complaint makes no such allegation, and Respondent was not put on notice that such a finding was a possibility. Moreover, the General Counsel (properly) confined her motion to conform to apply only to minor matters such as variations in dates, and not as to substantive matters. I granted that motion. (5:1222–1224.) I therefore shall find no violation of Section 8(b)(2) of the Act.

6. Refusal to restore O'Rourke's name to grain list

a. *Allegations*

Complaint paragraph 21 alleges that since about September 27, 1995, Respondent, by President Nelson and nine other officers, executive board members, and also Business Agent Billy Nelson "refused the request of Charging Party O'Rourke to have his name restored to the grain rotation list for referral to grain vessel work." Respondent admits. Complaint paragraph 22 alleges that Respondent so refused because O'Rourke "expressed views in opposition to those of the Union officers concerning the acceptance of a reduction in the Union pay scale and other related matters." Respondent denies. By such refusal, complaint 30 alleges, Respondent violated Section 8(b)(1)(A) of the Act. Respondent denies.

b. *Hiring hall law; Judge Black's final merger order*

The union operating a hiring hall owes referral applicants a duty of fair representation and is obligated to operate the hiring hall in a manner free from any arbitrary or invidious considerations. *Electrical Workers IBEW Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109, 124 (1995) (SFEC). The Board does not require that hiring hall rules and procedures be either written or posted. Id. However, as written in *Plumbers Local 519 (Sam Bloom Plumbing)*, 306 NLRB 810, 813 (1992):

> The Board has held that any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function. *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983).
>
> In *Operating Engineers* the Board also held that the failure to give timely notice of a *significant* change in referral procedures was arbitrary and in breach of the union's duty to represent job applicants fairly by keeping them informed about matters critical to their employment status. Accordingly, the Board found that the respondent union further violated Section 8(b)(1)(A) by changing the 5-day referral rule [to a 6-day rule] without giving timely notice to all job applicants. Id.

Although hiring hall rules need not be written or posted, if they are, the written or posted rules may well be found to be the "established" rules. Thus, any significant change (adversely affecting employment) would have to conform to the requirements of *Operating Engineers Local 406* as cited in *Sam Bloom Plumbing*. (Respecting any question of ade-

quate notice, the Board, at footnote 1 of *Sam Bloom*, distinguishes situations where registrants can act on notice from situations where avoiding consequences of changes was solely in the hands of others).

The topic of written hiring hall rules calls up the background here respecting the Final Merger Order (GCX 63) issued by United States District Judge Norman W. Black on March 22, 1983, in *EEOC v. International Longshoremen's Assn.*, Civil Action 69-B-3 (S.D.Tex. 1983). As Judge Black's order recites, in January 1969 the Equal Employment Opportunity Commission (EEOC) sued the International Longshoremen's Association (ILA), the ILA's South Atlantic and Gulf Coast District (District), and all ILA locals in the ports of Texas, alleging that the maintenance of racially segregated locals constituted unlawful racial discrimination in employment. After two trips to the Fifth Circuit Court of Appeals, and two unsuccessful efforts to persuade the Supreme Court to grant certiorari, the case was ripe for Judge Black's final merger order (FMO) affecting the 29 ILA locals in 10 Texas ports. (GCX 63 at 1.) Galveston was 1 of the 10 Texas ports.

Pursuant to an August 26, 1982 interim injunction, as Judge Black's FMO points out, a merger committee was formed in each port. The merger committees were to meet at least weekly to resolve all merger issues, including hiring hall procedures. (FMO at 2–3.) "A detailed, written report on these subjects was submitted to the District on November 1, 1982, including any areas of disagreement and the alternate solutions proposed." (FMO at 3.) "On December 6, 1982, the District filed with the Court a recommended plan of merger on a port-by-basis." (FMO at 3.) Judge Black received objections and courterproposals until a March 11, 1983 hearing. Id. As might be expected, the "most hotly disputed merger issue has been the merger of seniority lists." (FMO at 4.) Judge Black resolved that issue in the court's FMO. In general provisions applicable to all ports, Judge Black permanently enjoined the ILA from chartering, maintaining, or authorizing racially segregated locals in any port in Texas. Second, the FMO ordered the ILA to dissolve the charters of the affected locals on or before April 1, 1983, and to issue a new charter with a new local number for each new set of locals. For Galveston, four locals, Locals 307, 329, 851, and 1576 were listed. (FMO at 6.) Third, all the locals were permanently enjoined as well, including under either the old numbers or under whatever new numbers they would receive. Fourth, "Commencing April 1, 1983, each of the above-named sets of locals in each port shall operate and conduct all business out of a single hiring hall as a single local." (FMO at 7.)

Because Galveston's merger committee failed to agree on a method for merging the four seniority rosters, Judge Black accepted the District's recommended plan as the fairest approach. (FMO at 20.) In outlining that plan, Judge Black wrote that the "written hiring hall procedures" shall be reformed, and (FMO at 21):

> A copy of this redrafted hiring hall procedure will be filed with the Court by the District no later than March 28, 1983, along with the District's recommendation for approval.

After approving a new constitution and bylaws, Judge Black dismissed objections filed by individual locals to bylaw provisions allowing retirees to vote and regarding the amount of pay for officers of the new local. "The Court believes that these are internal organizational matters best decided by the Merger Committee, not a federal court. They do not directly bear upon the purpose of the merger. Therefore, the court will not second-guess the Merger Committee on those questions." (FMO at 22.)

In light of the foregoing quotations from the FMO, it is clear that, when ILA Local 20 began operation (as the new Galveston local) on April 1, 1983, it began with a court(ordered and approved set of written hiring hall procedures. Effective January 11, 1985, Local 20 adopted an updated set of "Hiring Hall Procedures and Rules Governing ILA #20." (GCX 7 at 1.) That book of procedures and rules was "revised and updated by the officers and members of the Executive Board of I.L.A. Local #20 on May 26, 1993." (GCX 7 at 30.) So far as the record shows, the May 1993 revision was the last published revision of the written set of procedures and rules which, apparently, for several years has existed in the form of published booklets.

Because of the court-ordered nature of Local 20's hiring hall rules, and with the rules initially having been published in writing as ordered by the Court, and with two subsequent revisions also being published in writing, with the second revision occurring at the late date of May 1993, it seems entirely reasonable to find, as I do, that the published booklet of "Hiring Hall Procedures" (May 1993) is the set of "established hiring hall procedures" contemplated by the Board's rule as reiterated in *Ford, Bacon & Davis Construction*, supra, 262 NLRB at 51, and *Sam Bloom Plumbing*, supra, 306 NLRB at 813. Accordingly, any departure from such published procedures which results in a denial of employment to an applicant is unlawful, "unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function."

c. *Facts*

Because grain work is dusty and dirty, with an hourly pay rate of $12 rather than the $16 an hour and more for other work, the jobs are frequently hard to fill. A stable work force is needed. Thus, the Union established the grain list about 1990. (2:459, 471; 4:882.) An earlier grain list apparently existed in the early 1980s but was discontinued. (1:148, Nelson.)

For the 1990 list, interested longshoremen signed a registration list. (2:459.) Charging Party O'Rourke signed. (4:882.) The Union has tried to hold the number on names accepted for the list at 30 (1:152, Nelson), although there is some flexibility because Vice President Steadham mentions (2:459, 468; 3:554) numbers as high as 39. As President Nelson (1:149–154) and others testified, selections for the list have been by strict seniority from those who signed up. Although a place on the grain list, with its dusty work and low pay, normally is not sought after when the good work is available, during slack times those with higher seniority will register.

In 1992, O'Rourke became a certified porta-packer operator. (4:882.) Operators have to be certified by the West Gulf Maritime Association. (2:499; 3:560.) Because a porta-packer

operator is a designated job (GCX 7 at 21), O'Rourke considered that there would be a conflict between his designated (40-hour week) job and calls to grain jobs. He, therefore, in 1992, asked to be removed from the grain list. (4:882, 942–943.) His request was granted; he intended to put his grain list job "on the shelf" (4:945), and (4:946) he had no intention of returning to the grain list unless a work shortage developed. There is no evidence that the Union had ever advised its members of an "on the shelf" procedure or that the failure to use that (magic) phrase would be interpreted as a request to quit a designated list altogether and not as a request for "on the shelf" status. The latter apparently reserves one's status on a designated list while the person holds a regular, 40-hour week, job. If the regular job ever ends, the person may, in writing, notify the executive board of that fact and that he desires to return to his designated list—that is, to convert from on-the-shelf status to active status on his designated list. (1:233, Nelson; 2:493–494, Steadham.)

As with many of the best plans of mice and men, in May 1995 two big companies left the pier 10 operation where O'Rourke had been operating the porta-packer. (4:943.) With porta-packer work now reduced to a very few hours a week, O'Rourke needed the additional work available on referrals from the grain list. (4:943–944.) By his one-sentence letter (GCX 62) dated September 27, 1995, which he hand-delivered that same evening to Seniority and Records Clerk Francisco Escamilla Jr. (4:883, 1016–1017, 1022) shortly before a meeting of the executive board (2:463; 4:883), O'Rourke asked the executive board: "Please reinstate my name on the grain rotation list." O'Rourke did not ask whether he could attend, and he left. (4:883–884.) At the next membership meeting (O'Rourke could not recall when the next membership meeting was held), O'Rourke heard Recording Secretary S. Jimmy Rosas read the minutes of the executive board's September 27 meeting. O'Rourke learned that, although his request had been denied, the executive board had granted the requests of Donald Borsellino and Chester Smith. (4:885.) Borsellino and Smith, O'Rourke testified (4:885–886), are two casuals who have no seniority but are drinking friends with President Nelson and Vice President Steadham.

The executive board's minutes (handprinted by Rosas) for this matter read (GCX 29, emphasis added below):

> There are two openings on grain list. Motion made that request of D. Borsellino and Chester Smith of 6–95 to be put on grain list be given. Motion 2nd & carried. [Steadham testified that their requests were in writing, 2:472, 501.]
>
> E.L. O'Rourke made request to be put back on grain list. Request denied. Vote 2 For to 10 Against. [The "2" is a strikeover, and it possibly was a "2" converted into a "1."]
>
> No one who has quit grain list has ever been put back on. Anyone who wanted to be taken off temporary can put his name *on shelf* by letter & may request job back by letter to the Exec. Board.

The parties stipulated that, as of August 1, 1995, the grain list (GCX 30) contained only 27 names (2:482; 3:553), and that the other 2 names on the list, "C. Smith" at place 28 and "D. Borsellino" at place 29, were placed there at some point after August 1. As with a similar list for the porta-packer operators (3:571–572), marks by their two names presumably indicate the times that each person was dispatched. Smith and Borsellino each has seven dispatch marks—as many as most of the other names on the list (of which only a handful have the top number of eight dispatches). I find that, at the least, the names of Smith and Borsellino were added to the list in unofficial status by no later than early August 1995.

Consistent with the foregoing minutes, President Nelson (1:156) and Vice President Steadham (2:493–494, 498) testified that anyone who quits the grain list, or any designated job list, cannot be reinstated on request, and that no one who has quit has ever been so reinstated. Instead, the person must wait until a new list is announced or posted and apply in writing or by signing. After his September 27 request was denied, and a new list later announced, O'Rourke went into the business agent's office and signed the new posting. (4:886.) Because he was the most senior person, with seniority number 115 for 1995–1996 (GCX 6 at 4; GCX 17), he topped the new list, and was reinstated on March 1. (4:886, 1023; GCX 17.)

Although the Union's fiscal year begins October 1 (2:462, 489), as does the seniority year (GCX 7 at 15), seniority hours are calculated to include all qualifying hours through the last pay period ending in September, so as to correspond with the pension, benefit, and welfare plan which the Union has with the maritime association (2:462–463, GCX 7 at 20). That ending date usually occurs, Steadham testified (2:490, 492), around September 22 or 23. In observing that O'Rourke's written request (hand-delivered on September 27) did not arrive until September 27 (2:498), Steadham implies that O'Rourke's request came too late to be considered as arriving during the seniority year ending in September 1995. Contrary to that implication, Steadham testified that most lists, apparently including the one which ultimately led to O'Rourke's March 1, 1996 reinstatement to the grain list, are posted at the end of a fiscal year when the number of qualifying hours can be determined. (2:495–496.) President Nelson even seems to suggest that O'Rourke's request came too late because the two others (Smith and Borsellino) were already working. (1:157.)

Nelson's implication that the other two had been working is confirmed, as already noted, by the dispatch marks beside their names on the grain list. (GCX 30 at 4.) Further confirmation that the two had been working came from D. R. Harvey, a member of the executive board since about 1993 or 1994. (6:1410.) Harvey testified that casuals Borsellino and Smith had been working the grain jobs because none of the "seniority people" would accept the work. (6:1422–1423.) Although apparently denying that the casuals would receive preference over workers with seniority standing, Harvey concedes the "possibility" that casuals nevertheless could be appointed to the grain list. (6:1420.) This greatly irritates Charging Party O'Rourke who strongly advocates that seniority standing should control. Thus, O'Rourke is "still aggravated" that the Union "would take someone that has never been on a ship before and give him my job." (4:947.) And, "I was not allowed to be put back on that list, and they put casual laborers ahead of me on that list *after* my request to be reinstated." (4:948.) (Emphasis added.)

Although the 1996 grain list posting is dated February 29 (GCX 17), with O'Rourke's name at the top of the list,

Steadham testified that notices have to be posted and everything "checked." Steadham apparently means that it must be determined whether any of those applying or signing remained at regular, 40 (hour jobs. (2:496–497.)

Vice President Steadham testified that the Union has denied the (oral) requests of at least three members, in addition to O'Rourke, to have their names restored to the grain list: Frank Diaz, John M. Brown Jr., and Wilbert A. Hill. (2:465–469.) Steadham acknowledges that a request to be returned to the list must be in writing, or the person may sign a list which the Union has posted or made available. (2:466.) Each of the three named by Steadham—Diaz (4:760), Brown (5:1240), and Hill (6:1328–1330)—admits that his request was oral. Even so, the basis of the Union's denial was not that the request was not written, but that the three voluntarily removed themselves and would have to wait for a new list.

Steadham asserts that the purpose of the rule requiring those who quit the grain list (as distinguished from those who ask for their names to be place "on the shelf" when they take a regular 40-hour week job) is to avoid a revolving door registration by those with seniority. That is, if members could come and go at will, then when work was slow, high seniority members simply could submit a one-line note asking to be reinstated. If a short time later a good-paying (but short-term) job opened up, the same high seniority members could resign from the list, complete the good work, then return to the grain list. That would prevent the Union from maintaining a stable work force for the grain list. (2:464–465, 493, 498.) "You have got to have some rules and regulations." (2:499, Steadham.)

Return now to Judge Black's order and ILA Local 20's "established" hiring hall rules—the revision of May 1993 (GCX 7). As the General Counsel observes (Br. at 21), the hiring hall rules (GCX 7 at 21–24) make no distinction between "on the shelf" and "quit" departures. The published rules contain no reference to any "on the shelf" procedure, nor do they address the matter of whether someone who has quit the grain list, or any designated job, may return at will or must wait until a new list is posted. Thus, nothing at all appears in the May 1993 published rules about the "rule" cited by Steadham, Nelson, and some of Respondent's other witnesses—the "Steadham rule" as I shall label it for shorthand reference.

Various witnesses expressed some confusion about the specifics of the "Steadham rule." One witness appeared to think that, even had he wanted reinstatement to the grain list, he was not eligible, because he earlier had quit the list. (4:763–767, Diaz.) Another was unsure what length of time would be required to classify a job as regular, permanent, or "guaranteed" so that the "Steadham rule" would apply. (2:448, Zapata.) O'Rourke apparently did not know that he should have spoken the proper incantation of "on the shelf." O'Rourke also testified that he has been unsuccessful in his efforts even to see a copy of the "Steadham rule." (4:946.)

The "Steadham rule" does not appear to exist in writing. Steadham testified that the source of the rule is "somewhere in the minutes" of the meetings of the executive board when the grain list was created in about 1990. (2:470.) The membership "ratified it" (2:471, Steadham), although it is unclear whether Steadham is claiming the members ratified creation of the grain list, the "Steadham rule," or both. Respondent did not identify or offer any such "source" minutes into evidence. The executive board's minutes of September 27, 1995 (GCX 29), do not qualify because (a) they are contemporary and (2) self-serving and made under circumstances strongly indicating bias and unreliability. There is a reference to being placed "on the shelf automatically" in the minutes of the August 4, 1992 meeting of the executive board. (GCX 24.) J. D. Rosas, apparently the recording secretary at the time (2:269), reports there that a motion was made that any gang foreman who accepts a 40-hour week job shall have his gang "placed on the shelf automatically until such time [as he requests back]." The minutes do not state whether the motion was seconded and approved or whether it failed. As already noted, the Union's 1993 revision of the published hiring hall rules contain nothing about parking (temporarily or long term), a grain list position "on the shelf," or anything about one who quits a designated list being required to wait until the next posted list before he may have his name restored to the designated list.

The General Counsel's disparity evidence pertains to Business Agent Billy Nelson. Business Agent Nelson is 1 of 18 names on the list (GCX 31) of certified porta-packer operators. The operators are certified by the West Gulf Maritime Association. (2:499; 3:560.) Certification is a separate matter from a designated job list such as the grain list. (2:500.) During late 1995, 2 of the 18 names were removed, one because he had not worked the required 400 hours during the seniority year to maintain seniority standing, and the other when he retired. (3:560, 566–568.) A third was temporarily removed because of injury. (3:567, 572.) Billy Nelson's name is shown at number 11A. (3:560.) Vice President Steadham testified that the number on the list remains rather stable, with additions usually made only at retirements or when someone loses his seniority standing. (3:563.)

At some point before June 13, 1995, Business Agent Billy Nelson (Nelson apparently was an assistant business agent at the time) submitted a written request to President Nelson to be put "on the shelf" or some personal reason. (3:564, Steadham.) Later, and as reflected in the minutes (GCX 28 at 2), at the executive board's meeting of June 13, 1995, Billy Nelson submitted a letter requesting to have his name reinstated to the list of porta-packer operators. (2:502–503; 3:563.) The minutes reflect that a motion was made to restore his name to the list, that the motion was seconded, and that it carried. (GCX 28 at 2; 2:503.) A notation appearing to the right of Billy Nelson's name on the porta-packer list appears to be "on," or it could be "off," or something else. It is followed by the date of "7/24" and President Nelson's initials. Vice President Steadham believes that the notation means that Billy Nelson's name was, again, temporarily removed from the list, this time because, as Steadham recalls, Nelson was elected business agent about that time. (3:561.) The General Counsel suggests the notation means Billy Nelson was reinstated to the list on July 24, 1995. (Br. at 21–22.) As the motion to restore Billy Nelson's name passed at the June 13 meeting, restoration presumably was immediate. Thus, Steadham's explanation appears the more plausible.

The General Counsel argues disparity because there is no evidence that Billy Nelson was holding a regular 40-hour week job (the prerequisite for voluntarily obtaining "on the shelf" status; 2:464, Steadham) when his name was placed "on the shelf," and his request to return was granted the same evening it was presented. As to Billy Nelson's status

before going "on the shelf," Steadham testified that Nelson was working some days as an assistant business agent and did not have a 40-hour week job elsewhere. (2:503.) As to the approval of the restoration request at the same meeting as made, the General Counsel has failed to show anything unusual in that.

The main point in dispute appears to be Steadham's claim that Judge Black's 1983 FMO approved a provision allowing union officers to put their designated jobs "on the shelf" and request them back as they deem necessary. (2:504; 3:563.) The General Counsel argues that the FMO contains no such approval. Respondent's attorney represented that the provision for protecting union officials actually is in the Merger Committee Report which Judge Black approved and adopted, and that Respondent could furnish a copy of that report later. (2:505.) No copy of the report was ever furnished for the record.

Judge Black's FMO approves various matters proposed by the Galveston Merger Committee and recommended by the District. Local 20's constitution and bylaws are one example. (FMO at 22.) The same is true respecting "the elected officers and their amount of pay." (Id.) There are others. And as previously noted, the hiring hall procedure, apart from the seniority matter, apparently was approved. (FMO at 21.) If the report of the merger committee in fact addressed the matter of protection of job status held by union officers, either as part of the hiring hall procedure or as part of the "internal organizational matters best decided by the Merger Committee," then Judge Black's FMO did approve the protection (assuming that Judge Black, as he presumably did, subsequently approved a redrafted hiring hall procedure to be filed, with the District's recommendation, no later than March 28, 1993). Because the representation by Respondent's attorney is not affirmative evidence, our record does not establish whether the report of Galveston's merger committee addressed this matter.

Assume for a moment that it did, and that, under Judge Black's FMO, Local 20 officials are permitted to move freely back and forth from a designated job list. Would that be a permitted or prohibited superseniority status? Would collateral estoppel apply? Superseniority as to hiring halls is discussed in Hardin, 1 *The Developing Labor Law* 273–274 (3d ed. 1992, BNA). Because these issues were neither litigated nor briefed, I shall not address them further.

d. *Discussion*

The General Counsel argues that ILA Local 20's denial of Charging Party O'Rourke's September 27, 1995 written request to be placed on the grain list was unlawfully discriminatory. To start with, I find that the "Steadham rule" is outside the established hiring hall rules. However, I find no violation in the Union's maintenance of a "Steadham rule" because the only violation alleged is based on the theory of discriminatory intent. Legality of the "Steadham rule," as a valid hiring hall rule, was not alleged and was not litigated by implied consent.

As the General Counsel argues, the grain list had but 27 names on September 27. The names of Smith and Borsellino apparently were added as unofficial extras on the same list. The minutes of the executive board state that there were only two vacancies. (GCX 29.) Steadham sought to assert that the status of a third person, Vada Mitchell, was in question. (3:554–555.) But even counting Mitchell (as the list, possibly incorrectly, does), the primary portion of the list (before the names of Smith and Borsellino are reached) clearly concludes with numbers 24, 25, 26, and 27 (the last name being that of A. Rosas). Then, to the obvious question of why was O'Rourke not restored when (now counting Smith and Borsellino as 28 and 29) the list contained fewer than 30 names, Steadham testified (3:558): "I didn't not put him on there. His request came to the executive board." Recall, too, that the number of 30, so far as the record shows, is not established in any document. Moreover, as Vice President Steadham testified, the permitted number is flexible, not rigid, with the accepted number having previously reached as high as 39. Finally, the General Counsel argues that there is no credited evidence showing that Respondent has ever previously denied reinstatement to someone who had voluntarily left the grain list, or any designated list, and who thereafter had submitted a written request for reinstatement.

However, the burden is not on ILA Local 20 to show examples of actions consistent with its treatment of O'Rourke's September 27, 1995 request, but on the General Counsel to show disparity. In fact, the evidence, as earlier noted, does show that the Union denied the oral request of three members because they had quit the list. That they did not submit written requests is irrelevant because we are considering motive. As for disparity, the case of Billy Nelson, apparently an assistant business agent before July 1995, fails to qualify. This is so because ILA Local 20's understanding may well be correct that Judge Black's FMO approved a provision in the report of Galveston's merger committee protecting union officers' feedom to leave and return to designated job lists. If the merger committee's report does so provide, which at least seems possible, then Judge Black's order apparently approved that protection. In short, the evidence suggests that Respondent has a plausible basis for its position.

Respecting the "Steadham rule" itself ("quits" are barred until the next list is posted), the General Counsel failed to establish that union officials had no good-faith belief that such a rule exists. Granted, the Union never produced the rule, as a document bearing a date preceding the controversy here. Oral references to the rule were made, however, before September 27, 1995. Moreover, there is some logic to the rule of not permitting those with high seniority to switch off and back to a designated job list at will, as union officials are so permitted. Perhaps the "Steadham rule" does promote stability in the available work force. The members may prefer "seniority prevails, regardless." That is a dispute the members can debate.

Finally, Respondent's witnesses, especially Vice President Steadham, testified that no one who has quit a designated list has ever been allowed to be reinstated on request, but always has had to wait until a new list was posted. The General Counsel failed to show disparity on this critical point by establishing that, contrary to such evidence, the Respondent indeed has not barred those who quit from returning on request and without waiting for a new list. That is, the General Counsel failed to show that O'Rourke was treated differently, and adversely, from treatment accorded others.

Finding that the General Counsel has failed to show the alleged unlawful motivation respecting the September 27, 1995 rejection of Charging Party O'Rourke's request of that date for reinstatement to the grain list, I shall dismiss com-

plaint paragraph 21. *Plumbers Local 38 (Bechtel Corp.)*, 306 NLRB 511, 512 (1992).

7. Charging Party O'Rourke's February 28, 1995 discharge

a. *Allegations*

About February 28, 1995, complaint paragraph 24 alleges, "Respondent, by Billy Nelson, requested that Ryan-Walsh Stevedoring Company, Inc. discharge Charging Party O'Rourke." Respondent denies. By that request, complaint paragraph 25 alleges, Respondent "attempted to cause and caused the Employer to discharge Charging Party O'Rourke." Respondent denies. ILA Local 20 engaged in that conduct, complaint paragraph 29 alleges, because O'Rourke "expressed views in opposition to those of Respondent's officers and because he filed the instant unfair labor practice charges." Respondent denies. Finally, the complaint alleges (par. 31, denied) that the conduct described violates Section 8(b)(2) of the Act by causing the employer to discriminate against O'Rourke in violation of Section 8(a)(3). Moreover, the conduct, including that in paragraph 29, also violates Section 8(b)(1)(A) of the Act, by restraining and coercing employees in the exercise of their Section 7 rights, complaint paragraph 30 alleges. Respondent denies.

b. *Facts*

The witness list is short concerning the incident here. Charging Party O'Rourke testified, but Business Agent Billy Nelson did not. Allen Bullock, Ryan-Walsh's general superintendent for the Stevedoring Company's Galveston operations during the time of the incident in issue (3:650), also testified as a witness called by the General Counsel. President Nelson gave brief testimony bearing on the issue. Certain documents, including some correspondence, are in evidence. In these documents, the participants outline their version of events and motivation of others. O'Rourke filed a grievance over his discharge, and the four-page report (GCX 41) of the Spot Grievance Committee (SGC), dated April 3, 1995, is in evidence. (The SGC actually met twice, the first time on March 27. It then recessed and permitted the parties to submit statements.) I use the second, and concluding, date of April 3. The SGC was composed of representatives of Ryan-Walsh as the employer and the Union. The purpose generally stated in the offer of the trial documents was to show the course of correspondence relating to O'Rourke's grievance. For that limited purpose, I received the exhibits (all GCXs). Thus, I do not consider the hearsay statements as independent proof of what the statements assert, unless a statement constitutes an admission by a party. I generally consider all the assertions made as simply the positions the persons expressed in the posting of the correspondence, for whatever relevance that may have. The SGC's report (SGCR) was offered and received for the nature of the conclusion reached. (3:665–666.)

On Tuesday, February 28, 1995, Charging Party O'Rourke was working as a porta-packer operator at Pier 10. His gang foreman was Francisco "Frank" Vargas. The walking foreman was B. H. "Billy" Nelson. The complaint alleges, and Respondent admits, that at all material times Billy Nelson was a "Business Agent" and an agent of Respondent "within the meaning of Section 2(13) of the Act." When Billy Nelson wrote his March 2, 1995 version of events, a two-page memo to the Union's executive board, copies to the presidents of the International and the District (GCX 58), he signed over, "B. H. Nelson, Business Agent." The Union's constitution and bylaws (GCX 23) provides (at 2, art. V, sec. 1) for the election of officers, including "two Business Agents."

It is important that we understand the "chain of command" which exists at Galveston, or which existed at the time of these events. As a member of the crew of Gang Foreman Frank Vargas (3:661; 4:954), O'Rourke was at the bottom of the chain of command. His immediate superior was the gang foreman whose superior, in turn, was the walking foreman. Finally, the walking foreman reports to the employer's superintendent. (3:653, 670, Bullock.)

O'Rourke was working for Ryan-Walsh on Pier 14 as a porta-packer operator on February 28, 1995. (4:826.) The porta-packer is a huge machine (140,000 pounds to 200,000 pounds, 3:654; 4:836) which, functioning in the reverse of a forklift, loads, or unloads heavy containers (up to 85,000 pounds, 3:654) by lowering a basket device over a 20-foot to 40-foot container and then lifting the container for loading or unloading and stacking. Thus, the porta-packer is a toploader with a maximum speed of 10 to 15 miles per hour when, as here, it is used with the third gear removed. (3:654–655; 4:826–827.)

On this day, February 28, O'Rourke had received radioed instructions from the Ryan-Walsh yard clerk that an unnumbered container soon would be arriving at Pier 14, but that O'Rourke was not to move it because the yard's porta-packer operator (represented by a different ILA local) would load it on a road truck. (4:830–831.) Within a few minutes, the unnumbered container arrived, and O'Rourke let it sit. About that point there was a lull in the work. (4:829, 837, 958.) O'Rourke backed his porta-packer to within about 20 feet or so of where R. Ellis (his first name apparently is Roosevelt, 4:967; GCX 41 at 4), the other porta-packer operator working that day with O'Rourke was situated. Shortly after they began a conversation, Walking Foreman Billy Nelson drove up with O. J. Greco, the other gang foreman working the ship that day. (4:829, 831.) Billy Nelson jumped out and began screaming at O'Rourke to get the (unnumbered) container. Although O'Rourke attempted to explain why he was not unloading and stacking the container, Nelson would not listen to him and continued screaming at O'Rourke, telling him to get the container. At that point other, marked, containers arrived, and O'Rourke, accelerating the porta-packer, drove over and began stacking them in the normal course of his work. (4:831, 833, 835, 837, 950, 955, 957.)

As O'Rourke began unloading the numbered containers, he radioed Superintendent Allen Bullock and reported that there was a problem and that Bullock needed to come to the pier. (3:654–655; 4:836.) Bullock arrived in his truck very soon thereafter. Billy Nelson and Frank Vargas (Nelson apparently had gone to get Vargas) pulled up a moment later. (3:655; 4:837.) At the ensuing group discussion, Bullock asked what the problem was. Billy Nelson said that O'Rourke had refused to take his orders, and had tried to run over Nelson with the porta-packer, and that Nelson was going to fire O'Rourke. O'Rourke told Bullock about the yard clerk's instruction, that the yard operator was to load the unmarked container. (4:838.) The "discussion" also included some ar-

guing between Nelson and O'Rourke with Nelson saying that O'Rourke was not working and had tried to run over him, an allegation which O'Rourke denied. (3:657, Bullock.) Operator Ellis came over and said that O'Rourke had done nothing wrong. Nelson told Ellis to get back to work or he too would be fired. Ellis complied. (3:657–658; 4:838–839.)

Walking Foreman Nelson then told Gang Foreman Vargas to order a replacement for O'Rourke. Vargas was reluctant, saying he did not want to send O'Rourke home. Nevertheless, Vargas complied. Thus, Bullock testified (3:659), "The walking foreman instructed the gang foreman, and the gang foreman ultimately did replace" O'Rourke.

At one point before the termination, Bullock, Nelson, and Vargas stepped to the side away from O'Rourke. (4:839, O'Rourke.) That apparently was the occasion, as Bullock describes (3:661–664), when Bullock told Nelson that he should be sure his action was because of events that day on Pier 14 and nothing else. (Bullock was concerned that Nelson's action was prompted by events off the job.) Nelson assured Bullock that his decision was because O'Rourke was not working, and because O'Rourke had tried to run over him with the porta-packer. (3:661–664, Bullock.) O'Rourke recalls that it was Bullock who released him, telling O'Rourke that Nelson was determined to fire O'Rourke. (4:839.) Bullock suggests that it was Vargas (3:660–661), and Vargas, in an internal union charge (GCX 20) which he filed against O'Rourke, records that he released O'Rourke. Although I find that both conversations occurred (Bullock's statement to O'Rourke, as well as the fact that it was Vargas who delivered the actual release message to O'Rourke), it is clear, and I find, that the driving force behind the discharge of O'Rourke was Billy Nelson.

Return now to the chain of command. O'Rourke concedes that he did not comply with Walking Foreman Nelson's order. (4:950.) O'Rourke testified that he is obligated to follow the orders of his gang foreman, and that is why Nelson went to get Gang Foreman Vargas. (4:949.) Had O'Rourke followed Nelson's order on this occasion, O'Rourke believes that, at the very least, it would have delayed the proper disposition of the unmarked container, and he asserts that there could have been a work stoppage. (4:951, 953, 1011, 1024.) Believing that Billy Nelson was out of line, O'Rourke made a judgment to follow his responsibility to see that the job gets done, to unload the numbered containers, rather than to obey Billy Nelson's order to stack the unnumbered container. (4:955, 1024.)

Asserting that the applicable collective-bargaining agreement (RX 1, not offered in evidence) authorized his view that he could insist on an order directly from his gang foreman, O'Rourke quoted from page 77 of the Deep Sea and Coastwide Longshore agreement (4:960, 1013, 1018–1019) as follows (4:960, 963, emphasis added below):

> There shall be only one gang foreman to each working whip; gang foremen to be leadermen of their gangs, *and to have the duty of assigning all men in the gang subject to supervision and direction of the stevedore.*

Thus, O'Rourke understands that provision to mean that the duty of giving orders to the gang, and the person who solely has that duty and authority under the, collective-bargaining agreement, is the gang foreman. The "stevedore" in this case, O'Rourke testified, was Ryan-Walsh. "They employ the walking foreman. The walking foreman is hired through the union hall, but the walking foreman actually is a part of management." (4:1013.) Actually, O'Rourke testified, in this instance the "stevedore" would include both the walking foreman, Billy Nelson, and the superintendent, Allen Bullock. (4:1013.)

Following his discharge, O'Rourke sent a letter (GCXs 19, 56), dated March 1, 1995, to President "B. B." Nelson protesting that his discharge was unjust. O'Rourke also argued that Bill Nelson's dual role as both walking foreman and as a business agent, an officer of ILA Local 20, was a conflict of interest which violated the Union's constitution and the National Labor Relations Act. In his final two paragraphs O'Rourke wrote (GCX 56):

> Several Union members have complained about this violation in the past. Since Mr. Billy Nelson is using his position of authority to harass me, I have no alternative but to mail a complaint letter to Ryan and Walsh [which he did on March 28, GCX 21] and to file a complaint with the NLRB [O'Rourke filed his original charge of retaliation on March 2 in 16–CB–4681–6 complaining of his discharge by Billy Nelson].
>
> In closing, I would like to state that Billy Nelson's actions demonstrate the importance of not allowing a Union official to work in the capacity of a supervisor for a company that deals with the Union. I feel strongly that Mr. Nelson continues to harass me because of my previous complaints to the NLRB as well as my continued support of freedom of speech, the right to assemble, and the right to work without fear of assault or reprisals for differences in opinion.

O'Rourke received no response. (4:855.) The letter shows only a copy to the District, but O'Rourke testified that he also raised these issues with Ryan-Walsh. (4:855, 1011–1012.) O'Rourke is referring to his March 28 letter (GCX 21) which he wrote to the Spot Grievance Committee (SGC). O'Rourke filed a grievance over his discharge, and a SGC took evidence on March 27 and April 3, 1995, and issued its report (SGCR, GCX 41) finding in O'Rourke's favor on the basis that there was insufficient evidence to show that O'Rourke had refused to work as directed or had otherwise violated the contract. (GCX 41 at 4.) Superintendent Bullock testified that Ryan-Walsh therefore paid O'Rourke for the afternoon which he missed. (3:664.) As Bullock explained at trial, although the walking foreman has authority to discharge a member of a gang, he must follow the proper chain of command by telling the gang foreman to order a replacement. (3:651, 674.) If the gang foreman agrees, then, President Nelson testified (1:255), the man is fired. If the gang foreman refuses, the walking foreman must fire the whole gang if he wants to get rid of the one person. Most stevedores, President Nelson testified, want to avoid that event. (1:256.)

O'Rourke protested at trial, and in his March 28 letter to the SGC (GCX 21), that the Union's representation of him before the SGC on March 27 was biased and unfair. (4:867, 873, 964, 967, 1015–1016.) I need not explore that matter.

Aside from the pressure implied to Gang Foreman Vargas from Billy Nelson's dual position as both management and a business agent of the Union, Nelson followed the correct procedure for O'Rourke's discharge. (3:658–659, 673.) How-

ever, it is clear that Billy Nelson did not do so when he undertook, in a grossly abrasive and insulting manner, to direct a member (O'Rourke) of Gang Foreman Vargas' crew to "get" (unload and stack) a container.

Largely because neither Billy Nelson nor Frank Vargas testified, the record is mostly silent concerning their location and movements just prior to this incident. Superintendent Bullock testified that a walking foreman spends a majority of his time on the ship, but may go on the dock or wherever he is needed. (3:681.) Bullock testified that Vargas was on the ship at Pier 10 at the time of the Nelson/O'Rourke incident. (3:676.)

Under normal circumstances, O'Rourke testified, there is no problem when a walking foreman undertakes to tell a gang member to do this or that, or perhaps to show a worker a better method to accomplish a task. (4:954–956.) But there is a chain of command and, if a problem develops, such as a man not doing his job, that is when the walking foreman goes to the gang foreman to get the problem corrected. (4:956.) Rather than following the tradition of cooperation and common sense, Billy Nelson "got off the truck and started screaming at me. There was no dialogue. It wasn't, 'Hey, Ted, why aren't you getting that container?'" (4:957.) And, "It was just blurting out, you know, get that and hollering and screaming. And there was no questions asked like in a normal tone of voice that would say that you could say to him and resolve it that way." (4:957.)

O'Rourke asserts that Billy Nelson's abusive conduct was motivated by a desire to keep O'Rourke from talking with any of the other dockworkers. (4:957–958.) He contends that Billy Nelson pulled up in his truck and got out for the sole purpose of harassing him. (4:951.) O'Rourke attributes his discharge to retaliation by Billy Nelson for NLRB charges O'Rourke had filed (O'Rourke's original charge in this case was filed February 1, 1995) and for the beliefs he had expressed on union matters. (4:933–934.) In this connection, O'Rourke notes that in all his years on the waterfront [since about 1976 (3:683)], he has never seen a walking foreman in the container yard. (4:840.) Nor has he ever seen a walking foreman come down to a pier to handle what the walking foreman perceived to be a work delay or other problem. Instead, the walking foreman tells the gang foreman who then speaks to the worker. (4:862–863, 954–956). Even so, had Billy Nelson simply spoken to O'Rourke in a rational manner, O'Rourke testified, there would have been no problem. (4:957.)

Following O'Rourke's impassioned two-page letter (GCX 21) of March 28 to the SGC, and shortly after the SGC's April 3 conclusion in its SGCR (GCX 41) of insufficient evidence to support the basis for O'Rourke's February 28 discharge, both Ryan-Walsh and ILA Local 20 ended the practice of permitting a person to be employed as a walking foreman (a position representing management) while he also held an officer position in the Union. (2:267, Nelson; 3:666–667, Bullock; 4:951, 1011–1012, O'Rourke.)

c. *Discussion*

The incident of February 28 developed not because Billy Nelson bypassed the chain of command. By tradition, walking foremen on occasion bypass the contractual chain of command. However, they do it in a rational manner, one which shows common decency and respect. Here, the credited evidence shows that Billy Nelson displayed the very opposite of common decency when he screamed at O'Rourke as someone might yell at a cur dog turning over a garbage can. Exhibiting unbounded rage, Nelson ignored O'Rourke's attempts to tell him that the unnumbered container was not supposed to be moved. In a normal dialogue, as the one posed by O'Rourke at trial, with a walking foreman asking why O'Rourke was not moving the container, the walking foreman, on learning why, may have responded in different ways. The point is that the dialogue would have been in a normal tone of voice. The record strongly indicates that something other than the work situation prompted Billy Nelson's verbal abuse of O'Rourke on February 28. The evidence is persuasive that O'Rourke's assessment is the correct one—enraged by the sight of O'Rourke talking to another longshoreman, Billy Nelson retaliated against O'Rourke because of O'Rourke's NLRB original charge in Case 16–CB–4681 and because of the dissident union activities engaged in by O'Rourke. I so find.

On brief, the General Counsel does not address the matter of knowledge or the fact that Billy Nelson made no reference to O'Rourke's unfair labor practice charge in this case. As an elected officer of the Union, Billy Nelson is charged with knowledge of the unfair labor practice charge. Moreover, Billy Nelson is the son of President Nelson, and the record demonstrates that they coordinate activities and support the other. It is reasonable to find, as I do, that Billy Nelson was well aware of O'Rourke's NLRB charge and O'Rourke's dissident activities generally. Although the original charge, apparently by oversight, actually named the International Longshoremen's Association without adding Local 20 to the name, the charge named "B. B. Nelson" as the representative to contact and gave Local 20's Galveston address. The service letter from NLRB Region 16 was addressed to Nelson at that address, and President Nelson thereafter met with the Region's assigned investigator. (1:122–145.)

Respecting motivation, again the evidence is that Billy Nelson said nothing about any NLRB charge and nothing about any dissident activities by O'Rourke. The circumstantial evidence, however, is strong. First, at the very least, it was highly unusual for a walking foreman to come to the container yard, four blocks from the ship, for any reason. Second, in O'Rourke's some 18 or 19 years' experience on the waterfront, he had never seen a walking foreman come off a ship to a pier to address what he perceived to be a problem. Third, Billy Nelson bypassed the contractual chain of command in an enraged, irrational, and insulting manner. Fourth, the circumstances are persuasive that what triggered Billy Nelson's insulting conduct was the fact that O'Rourke was talking with another longshoreman, and that Billy Nelson simply used O'Rourke's admitted hands off the unnumbered container as a pretext for harassing O'Rourke because of O'Rourke's NLRB charge and because of his dissident activities. I so find.

Does it matter that, on that February 28, Billy Nelson was working as a walking foreman (a representative of management) for Ryan-Walsh and not ostensibly acting in the other position he also occupied at the time, that of a business agent for ILA Local 20? (For some strange reason, on brief the General Counsel does not address this critical legal issue.) In *Vanguard Tours*, 300 NLRB 250 (1990), the Board, although certainly implying that a finding of dual-agency status may

be appropriate in the proper circumstances, found that the circumstances in that case would cause employees to conclude that the dual-status persons were speaking and acting only in their capacities as supervisors. Accordingly, the Board reversed 8(b)(1)(A) findings while adopting 8(a)(1) findings. Here, I find, the circumstances lead to the finding that employees reasonably would conclude, as did O'Rourke, that Billy Nelson was motivated to verbally abuse and then discharge O'Rourke because of O'Rourke's NLRB charge and his dissident union activities. I so find.

Moreover, consistent with the well-established principle that where a wrongdoer has left the situation ambiguous, it is not the burden of the victim to clarify the ambiguity, it would seem that where two wrongdoers (here, Ryan-Walsh and ILA Local 20) jointly have created an employment situation condemned by the Board 40 years ago in *Nassau & Suffolk Contractors Assn.*, 118 NLRB 174 (1957), as quoted in *Vanguard Tours*, id., it should not be the burden of victim employees, or of the General Counsel, to have to demonstrate whether the dual agent was acting for one principal rather than the other principal. In any event, as I have found, the evidence shows that Billy Nelson was motivated by considerations incident to his status as a business agent of ILA Local 20 when he accosted O'Rourke on February 28, 1995, and, minutes later, caused him to be discharged.

Accordingly, I find that, as alleged by the General Counsel, Respondent violated Section 8(b)(1)(A) and (2) of the Act when, on February 28, 1995, Billy Nelson requested that Ryan-Walsh discharge Charging Party O'Rourke, and by thereby causing Ryan-Walsh to discharge O'Rourke that date.

8. Refusal to provide O'Rourke a favorable recommendation

a. *Allegations*

Since about November 3, 1995, complaint paragraph 27 alleges, President W. H. Nelson "participated in the application of a discriminatory selection process for training, referring and hiring employees for the automated bagging facility by refusing to provide for Charging Party O'Rourke a favorable recommendation for employment with Employer Suderman and Employer ABT, Joint Employers." By such conduct, paragraph 28 alleges, "Respondent has failed to represent Charging Party O'Rourke for reasons that are unfair, arbitrary, invidious and has breached the fiduciary duty it owes to the employees it represents." Finally, complaint paragraph 30 alleges that such conduct violates Section 8(b)(1)(A) of the Act. Respondent denies all.

b. *Facts*

ABT is a reference to ABT Management, Inc. President Nelson testified that a few months before this trial opened, or about early 1996, an automated bagging terminal opened at the port in Galveston. (1:117–118.) ABT apparently was selected to provide the terminal management, and Paul Allen was designated as ABT's manager for the automated bagging terminal. To ensure that workers referred through ILA Local 20 were qualified to perform the work, workers were tested on their abilities in operating a tow motor and in "throwing sacks." They also had to pass a drug test. (1:118.) In preparation for opening the terminal, Allen, in about November or December 1995, met with the presidents of the ILA locals in his office relative to the testing.

Reference to sack, or bag, throwing requires some explanation. Whereas grain loaded onto ships from grain elevators is as bulk (or loose), the reference to sacks or bags means that grain is enclosed in sacks or bags. (2:441, Zapata.) The sacks or bags weigh about 100 pounds. (1:119, Nelson; 4:891, 995, O'Rourke.) Picking up and tossing 100-pound bags obviously requires strength and endurance, and doubtlessly some skill and experience. O'Rourke has done such work since 1972, and as recently as March 26, 1996, when he did so for over 9 hours. (4:891, 993–994.) Understandably, O'Rourke would prefer the easier work, particularly since he is now 41. (4:995–996.) Although O'Rourke is not a tall and large man, he appears to be about 5 feet 10 and a strong 200 pounds and capable of handling heavy work.

When President Nelson met with Allen in November-December 1995, they conversed alone, because Allen met individually with the presidents of the locals. (1:120, 122.) As Allen did not testify, and O'Rourke was not present at the conversation, the General Counsel's evidence about the Allen/Nelson conversation is based on Nelson's plus a March 7, 1996 pretrial statement (GCX 5) which Nelson gave during the investigation of the charges. When Nelson's trial testimony deviated on some key points from the pretrial version, the General Counsel offered relevant portions of the statement in evidence for the purpose of "impeachment." (1:127.) After objections and discussion, I received the pages offered, plus the balance of the statement to show context. (1:142.) At no point, however, did the General Counsel ever modify her offer from one of impeachment to an offer generally—that is, as substantive evidence based on admissions of a party opponent. Accordingly, I do not consider the signed pretrial statement as substantive evidence. That leaves the General Counsel in the position of needing admission in Nelson's trial testimony. That is, I cannot make substantive findings based on a document offered and received only for the purpose of impeachment.

The General Counsel contends that Allen said he wanted Nelson to rate each worker's bag-throwing ability at either a plus 5 or a minus 5, that Nelson rated all but O'Rourke, and that he refused to rate O'Rourke because of the problems they have had. Nelson admits he told Allen, when Allen asked whether the employees had thrown sacks in the past, that he would not rate O'Rourke because, regardless of the score he gave, O'Rourke would sue him. (1:119–121.) (Had he addressed the issue, Nelson claims, he would have told Allen that O'Rourke had not thrown sacks in quite some time and that he was not in the shape to throw sacks. (1:121).)

What evidence there is concerning O'Rourke's sack-throwing work is rather skimpy concerning the months leading up to December 1995. O'Rourke suggests that he may not have had occasion, or opportunity, to throw sacks during those months because there have been very few sack jobs on the waterfront during that time. (4:994–995.) Nevertheless, O'Rourke is just as qualified as any of the other longshoremen in throwing sacks. (4:992.)

c. *Discussion*

As the General Counsel stated at trial, there is no allegation that President Nelson's conduct deprived O'Rourke of a

job at ABT. Therefore, the General Counsel seeks only a cease-and-desist order and not backpay. (4:997–1000.) Although O'Rourke testified that he apparently had incurred Allen's animosity for some event not described in the evidence (4:995, 1002–1003), that topic is irrelevant in view of the limited nature of the allegation and the remedial order sought.

O'Rourke's opinion is that President Nelson refused to rate him because of O'Rourke's dissident union activities. (4:997, 1005–1006, 1020.) Factually, there is no work-related problem that he has had that would pertain to a rating process on his sack-throwing ability. (4:1020.) In fact, he threw the test sacks with no problem, and all but O'Rourke received the same passing score even if they simply dragged the sacks. (4:993.) President Nelson admits that he did not give Allen a rating because of a concern that O'Rourke would file charges against ("sue") the Union. Nelson also admits that the only reason he did not rate some others is that he did not know them. Finding that the only reason President Nelson did not give ABT's Paul Allen a rating on O'Rourke was because of Charging Party O'Rourke's dissident union activities, I find by such refusal the Union, as alleged, violated Section 8(b)(1)(A) of the Act.

CONCLUSION OF LAW

Based on the record, I find that the Board has statutory and discretionary jurisdiction; that ILA Local 20 is a statutory labor organization; that Respondent ILA Local 20 has violated Section 8(b)(1)(A) and (2) of the Act; that the unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act; and that the evidence fails to establish that Respondent, as alleged in complaint paragraph 21, unlawfully refused the September 27, 1995 request of Charging Party O'Rourke to have his name restored to the grain rotation list.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As Respondent unlawfully caused Ryan-Walsh to discharge Charging Party O'Rourke on February 28, 1995, ILA 20 must make him whole, with interest. Although it appears that O'Rourke received payment following the spot grievance proceeding, that is a matter to be determined at the compliance state. Even though no 8(b)(2) finding is made (none was alleged or litigated) respecting Charging Party O'Neal's removal from the crane operator referral list, I nevertheless include a make whole provision in order to remedy the violation. The Respondent having discriminatorily caused the discharge of Charging Party O'Rourke, and discriminatorily removed O'Neal's name from the crane referral list, it must make them whole for any loss of earnings and other benefits. Nonwage benefits and entitlements, including what should have been accrued hours and seniority, must be restored. As to both O'Neal and O'Rourke, backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See *Grassetto USA Construction*, 313 NLRB 674 (1994).

[Recommended Order omitted from publication.]