Iron Workers Local Union 377, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO *and* Ronald W. Bryant. Cases 20–CB–8663, 20–CB–8846, and 20–CB–8991

August 26, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On December 21, 1993, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent 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,[1] and conclusions[2] and to adopt the recommended Order as modified.

Background

In this proceeding, the judge determined, inter alia, that the Respondent Union violated its duty of fair representation by failing to honor employee Ronald W. Bryant's request that it file a grievance against employer Alamillo Steel Corporation. The substance of Bryant's would-be grievance was that Alamillo improperly refused to accept him as a referral for employment through the Respondent's hiring hall for a job that was available on June 3, 1991. We agree with the judge's conclusion, for the reasons stated by him, that by failing to pursue the grievance, the Respondent violated Section 8(b)(1)(A) of the Act.

With regard to the appropriate remedy for this violation, the judge agreed with the counsel for the General Counsel's request to apply the provisional make-whole remedial formula as set forth in *Rubber Workers Local 250 (Mack-Wayne Closures) (Mack-Wayne II)*, 290 NLRB 817 (1988). Consistent with that formula, the judge ordered the Respondent to take certain, successive steps. First, he ordered that the Respondent request Alamillo to: (1) rescind a letter that it had sent to the Respondent which stated that Bryant was barred from employment with Alamillo, and (2) make Bryant whole for wages and other benefits he lost as a result of his not being referred to an Alamillo job on June 3, 1991, because of the previously described letter. If Alamillo refuses either of these requests, the Respondent must promptly attempt to initiate and pursue in good faith a grievance against Alamillo seeking the make-whole relief outlined above. This requires the Respondent to take the grievance through the arbitration stage and to pay the reasonable costs of an attorney of Bryant's choosing to represent him throughout such proceedings. Finally, if it is not possible for the Respondent to pursue Bryant's grievance and, therefore, the issue cannot be resolved on the merits, then the Respondent itself must make Bryant whole for any loss of pay and benefits he suffered as a result of his not being employed at Alamillo on June 3, 1991.[3]

Prior to imposing such liability on the Respondent, the *Mack-Wayne II* approach requires a finding of a "nexus between the unfair labor practice and the make-whole remedy."[4] That is, a causal link must be shown to exist between the unlawful act (in this case, the Respondent's failure to proceed with Bryant's grievance) and the injury suffered by the charging party (the wages and benefits Bryant lost by not having worked on the June 3, 1991 job). This process is intended to demonstrate the merits of the underlying grievance insofar as it seeks to establish some basis for assuming that absent the union's unfair representation, the grievant may have prevailed, and therefore that the grievant suffered damage from the unfair representation, for which he or she should be made whole.[5] Predicating the evidentiary requisites on the same policy which guided *Mack-Wayne I*, i.e., that the party which violated the Act should bear the greater burden, *Mack-Wayne II* states that this nexus may be established by the General Counsel's initially showing merely that the grievance was not "clearly frivolous," thus leaving to the respondent to counter with proof that the grievance affirmatively lacked merit.

Relying on two clauses in the parties' collective-bargaining agreement that provide alternative bases for

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

[2] In the absence of exceptions, we adopt, pro forma, the judge's dismissal of the 8(b)(1)(A) allegations concerning the Respondent's failure to provide Charging Party Bryant with information he had requested concerning his dispatch history and the Respondent's letter to Bryant threatening to deny him dispatches if he failed to pay his supplemental dues; and his dismissal of the 8(b)(2) allegations dealing with the failure to dispatch Bryant to Alamillo Reinforcing Steel Corporation. In affirming the judge's decision, we do not adopt his discussion, at fn. 7, of the implications of *John Deklewa & Sons*, 282 NLRB 1375 (1987), relating to the continued appropriateness of multiemployer bargaining units.

[3] The Board in *Mack-Wayne II* ordered this last "provisional" step to ensure that the aggrieved party is afforded compensation for his injury and that the ultimate responsibility for remedying the employee's injury falls on a "wrongdoer," i.e., the Union which unlawfully failed to pursue the grievance in the first place. See *Mack-Wayne II*, 290 NLRB at 817. Thus, it is only when there is some bar to resolving the previously unpursued grievance through prescribed procedural channels that the "provisional" aspects of *Mack-Wayne* apply and that a respondent union must provide the make-whole compensation.

[4] 290 NLRB at 818. It is this issue that prompted the Board to reconsider its first *Mack-Wayne* decision, reported at 279 NLRB 1074 (1986), referred to as *Mack-Wayne I.*

[5] Id. at. 818–819.

Bryant's position,[6] the judge determined that the General Counsel met his threshold burden of demonstrating that Bryant's grievance would have had some chance of prevailing. Having found that Bryant's claim was "out of the realm of the clearly frivolous," the judge then determined that the Respondent had offered no evidence that Bryant's grievance lacks merit. Noting further that the *Mack-Wayne* formula permits a respondent to elect whether to litigate the merits of the grievance during the trial of the unfair labor practice or during posthearing compliance proceedings, the judge concluded that by failing to litigate the merits of Bryant's grievance at the trial, the Respondent had implicitly elected to present its case during compliance. Accordingly, he declined to reopen the record to permit the Respondent to affirm this election and ordered the Respondent to take the remedial steps outlined above, leaving to compliance the Respondent's efforts to establish that Bryant's grievance lacked merit.

The Respondent has excepted, inter alia, to the application of the *Mack-Wayne* formula, asserting that the judge erred in finding that the General Counsel had established that Bryant's grievance was not "clearly frivolous," as well as by finding that it had implicitly elected to litigate the merits of that grievance during compliance. The Respondent also contends that the remedy ordered is improper because it is "punitive rather than restorative."

Analysis

It is settled that under the essentially remedial scheme of the Act, affirmative relief that the Board orders under Section 10(c) must be "remedial, not punitive."[7] After evaluating the practical implications of the *Mack-Wayne* formula and reviewing its reception in the courts, we now conclude that the formula does not allocate evidentiary burdens appropriately among the parties and therefore runs the risk of imposing essentially punitive liability on the union and granting a windfall to the grievant/discriminatee. Accordingly, as explained in section A, below, we have decided to bring our remedies in this particular area of the duty of fair representation into greater harmony with the standards followed by courts adjudicating hybrid duty of fair representation/Section 301 breach of contract actions by requiring the General Counsel to establish the meritoriousness of the grievance before we will assess backpay liability against the Union. As explained in section B, we have also decided to follow the Supreme Court in limiting the Union's liability in such circumstances to the portion of the employee's damages caused by the Union's mishandling of the grievance. Finally, as explained in section C, we have found it advisable to modify the procedure by which it is determined whether the merits of the grievance should be litigated in the initial stage of the unfair labor practice proceeding or at the compliance stage.

A. The Allocation of Burdens

The *Mack-Wayne* remedial formula rests fundamentally on two propositions: first, that uncertainties should be resolved against the wrongdoing union; and second, that the legally significant event which impels the remedy is the respondent-union's unlawful failure to pursue the grievance—in and of itself—rather than the ultimate meritoriousness of the grievance.[8] Whatever the surface appeal of that analysis, we agree with the Respondent that the resulting allocation of burdens, insofar as it compels the award of a make-whole remedy on a simple showing of a union's unlawful handling of the grievance, ultimately conflicts with the essentially remedial character of the Act. Under the current standard, the General Counsel need show only that the affected employee's grievance was "not clearly frivolous" in order to satisfy his evidentiary burden, while the union must counter with proof that the grievance actually lacked merit. Only by proving that pursuit of the grievance would have been essentially futile may the union escape liability for injury assumed to have been suffered by the employee because of the union's mishandling of the grievance. As a consequence, a mere showing that an employee's position in his dispute with an employer was not "clearly frivolous" could well result in a union's being required to indemnify an employee for a grievance which had only a remote chance of success. This would place the employee not where he would have been absent the union's unlawful conduct, but in a position superior to that which he would have occupied had the grievance been properly processed. Such a windfall award is contrary to the Act's intent.[9]

We believe that the Act's remedial purpose would be better effectuated by requiring the General Counsel to carry a heavier burden as to the merits of the unlawfully handled grievance before backpay liability may be assessed against the union. Under the approach we adopt today, once the General Counsel has established that a union has unlawfully breached its duty of fair representation by failing properly to process an employee's grievance, then we will provide an appropriate cease-and-desist order and an order directing the Union to process

[6] The judge cited two different clauses of the collective-bargaining agreement which offer support for Bryant's grievance: the first is sec. 5(I)(7), restricting employers' in-advance rejections of employee referrals and the second is sec. 5(N), the Equal Employment Opportunity clause.

[7] *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961).

[8] Because this remedial formula is based on the approach laid out in *Mack-Wayne I* and thereafter refined in *Mack-Wayne II*, the reasoning and analysis of both of those decisions is at issue in this proceeding

[9] The reference to the Supreme Court's admonishment in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), in the *Mack-Wayne I* dissent is particularly on-point and worth repeating here, to wit: that "it remains a cardinal, albeit frequently unarticulated assumption that a backpay remedy must be sufficiently tailored to expunge only the actual and not merely speculative consequences of the unfair labor practices." *Sure-Tan*, supra at 900.

the grievance in accordance with its duty. Before we will require a union to compensate an employee for losses alleged to have been suffered by the employee as a consequence of the union's mishandling of the grievance, however, the General Counsel must also show that the grievance was one presenting a claim on which the grievant would have prevailed if the grievance had been properly processed by the union.

In determining whether the General Counsel has met that burden, we will take into account the standard that an arbitrator would have applied had the grievance been submitted to arbitration pursuant to the contractual grievance-arbitration procedure. If, for example, evidence shows that the burden of establishing the propriety of the employer's action vis-a-vis the grievant would have been on the employer in the arbitration proceeding, the General Counsel will be required to show that under that standard, the arbitrator would have found in favor of the grievant.[10] (In other words, in such a case, the General Counsel would have to show, based on evidence adduced at the hearing, that an arbitrator would have found that the employer failed to establish justification for its action under the contractual standard.) If, on the other hand, the burden would have been on the union to show that the employer's action was in breach of the agreement, we will require the General Counsel to establish that the grievant would have prevailed under that standard.

The approach we adopt today is consistent with our remedial goal of restoring the injured employee, so far as possible, to the position that he would have been in had his grievance been properly handled by the union. This is in keeping with the statutory "requirement that a proposed remedy be tailored to the unfair labor practice it is intended to redress."[11] The reallocation of the parties' respective burdens also responds to concerns expressed by various courts of appeals which have considered—and uniformly rejected—remedial formulas like that in *Mack-Wayne*.

The *Mack-Wayne II* decision was itself an attempt to respond to the decision of the Ninth Circuit Court of Appeals in *San Francisco Pressmen v. NLRB*, 794 F.2d 420 (1986). In that case, the court denied enforcement of a provisional backpay remedy against a union for failure to pursue arbitration of a discharge grievance because the General Counsel had not been required to establish the merits of the grievance before the Board imposed liability on the union.[12] While acknowledging the Board's discretion in fashioning backpay remedies, the Ninth Circuit reasoned that it was nevertheless an incorrect application of the Act to impose backpay liability on a union for failing to pursue a grievance, absent a finding that the grievance was founded on an actual contract violation by the employer. The court found persuasive decisions rendered by the Seventh and Second Circuit Courts of Appeals, which had considered and rejected the Board's position,[13] and noted that the Board itself had once required that a grievance be found meritorious before backpay liability could be imposed.[14] The court agreed with the reasoning expressed by those tribunals that the Board's power to remedy violations of the Act, though broad, does not extend to imposing what amounts to punitive and speculative damages for a violation of the Act. The court concluded that a union's breach of its duty to process a grievance alone is an insufficient foundation on which to support an order of financial recovery, which speaks to the merits.

While the decisions of the Ninth, Seventh, and Second Circuits predated *Mack-Wayne II*, a more recent, post-*Mack-Wayne II* court decision again rejected the Board's formula. In *Mail Handlers Local 305 v. NLRB*, 929 F.2d 125 (1991), the Fourth Circuit Court of Appeals held that the burden of proving the merits of an unresolved grievance properly rests with the General Counsel and that a finding that the grievant "would have won on the merits" if the grievance "was properly pursued" is required before a backpay order against a union may be supported. Thus, the *Mack-Wayne* approach has been rejected by every circuit which has considered the issue.

The allocation of burdens which we adopt today is in accordance with the sound guidance of those circuit courts, and with the reasoned dissents in *Mack-Wayne I* and *Mack-Wayne II*. It is also consistent with the approach followed by the Federal courts in hybrid duty of fair representation/Section 301 breach of contract actions, in which the burden is on the plaintiff to establish that his grievance is meritorious in order to obtain backpay from a union for failing to represent him fairly. See *Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-571 (1976).[15] We conclude that it represents a more appro-

[10] Whether the General Counsel successfully makes such a showing is, of course, to be determined under the normal preponderance-of-the-evidence standard.

[11] *Sure-Tan*, supra at 900

[12] In that case the union had taken a grievance alleging the wrongful termination of two employees through the initial steps but had declined to pursue arbitration.

[13] *Steelworkers v. NLRB*, 692 F.2d 1052 (7th Cir. 1982), and *NLRB v. Electrical Workers UE Local 485,* 454 F.2d 17 (2d Cir. 1972).

[14] *Bottle Blowers Local 106*, 240 NLRB 324 (1979).

[15] We recognize that the role of the Board in deciding a case alleging a violation of Sec. 8(b)(1)(A) based on a union's alleged failure properly to process an employee's grievance is not precisely parallel to that of a court in a hybrid duty of fair representation/Sec. 301 suit. Thus, unlike the court, which has jurisdiction to decide both the breach of duty claim against the union and the breach of contract claim against the employer, the Board has no general jurisdiction to decide breach of contract issues. Thus, unless the employer's alleged breach of contract is also alleged to be an unfair labor practice, the Board ordinarily will be presented only with the duty of fair representation claim against the union, and will confront the contract issue only indirectly in assessing the merits of the grievance for purposes of determining an appropriate remedy for the union's unlawful conduct. However, notwithstanding this difference there is a substantial overlap between the issues presented in the court action and those presented in the Board action which

priate exercise of our statutory remedial authority than our previous approach.

B. Allocation of Damages

In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court held that in a suit where it is proven that a union breached its duty of fair representation by failing properly to process a meritorious grievance against the employer for breach of the collective-bargaining agreement, the union may not be required to pay damages attributable solely to the employer's breach of contract. "Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employees' damages," the Court stated.

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. [Id. at 197–198.]

The principle that each party causing damage to an employee should be held responsible only for the damage caused by *its* misconduct was reaffirmed by the Court in *Bowen v. Postal Service*, 459 U.S. 212 (1983). There, the Court held that where an employer has discharged an employee in breach of the collective-bargaining agreement and the employee's union has failed properly to process a grievance on behalf of the employee, both the employer and the union have caused the injury suffered by the employee and must bear responsibility for their respective contributions to the damage:

> It is true that the employer discharged the employee wrongfully and remains liable for the employee's backpay. The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunction resulting in an increase in the employee's damages. Even though both the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the damages. [Id. at 223; citation and footnote omitted.]

This principle was underscored again in *Del Costello*, in which the Court stated: "We held in *Vaca*, and reaffirmed this term in *Bowen*, that the union may be held liable only for `increases if any in [the employee's] damages caused by the union's refusal to process the grievance." (Citations omitted.) 462 U.S. at 168.

counsels for the adoption of uniform decisional rules. See *Del Costello v. Teamsters*, 462 U.S. 151, 170 (1983).

We believe that the *Vaca* principle of limiting the union's liability to the increase in damages caused by its misconduct should also be applied in unfair labor practice cases where the union's mishandling of the employee's grievance is alleged to violate Section 8(b)(1)(A). As noted earlier, the issues presented to a court in a hybrid duty of fair representation/Section 301 breach of contract suit substantially overlap with the issues presented to the Board in a case alleging that the union's conduct with regard to the grievance violated Section 8(b)(1)(A). Thus, our application of the *Vaca* apportionment principle to this class of cases contributes to the uniformity of Federal labor law. It is also consistent with the statutory requirement that our orders be remedial, rather than punitive, and tailored to the unfair labor practices they are intended to address. See *Sure-Tan*, supra at 900.[16]

Our colleagues, Member Hurtgen and Member Brame, in their dissent contend that it is inequitable to apply the *Vaca* apportionment principle to unfair labor practice proceedings because the employee ordinarily will not be able to name the employer as a respondent in the unfair labor practice proceeding and thus will not be able to recover the portion of his damages attributable to the employer's breach, while both the employer and the union may be named as a defendant in hybrid Section 301

[16] Unlike the Chairman, we believe it inadvisable to attempt to specify at this point any particular method of calculating the amount of the Charging Party's damages for which the Respondent Union should be held responsible, should the General Counsel establish entitlement to a make-whole remedy. The *Bowen* Court found it unnecessary to decide whether the lower court's instructions to the jury on that point were proper (459 U.S. at 230 fn. 19), and as the 10th Circuit has pointed out, even those jury instructions did not require any particular method of apportionment. *Aguinaga v. Commercial Workers*, 993 F.2d 1463, 1475 (10th Cir. 1993). Rather the instructions left the matter to the jury's discretion, while expressly permitting the jury to assess backpay against the union for the period between the date on which an arbitration hypothetically would have occurred had the union acted in accordance with its duty of fair representation and the date on which the jury verdict was rendered. Id. at 1476, citing *Bowen*, 459 U.S. at 215. In *Aguinaga,* the trial court had employed a "proportionate fault" method that took into account a hypothetical arbitration date but also considered other factors. The 10th Circuit found this a proper method "under the circumstances" of that case. Id. at 1477. In short, the appropriate method may depend on the type of contract violation, the type of breach by the union, and the nature of the damages suffered by the employee. It is therefore appropriate to follow the general standard applicable to gross backpay formulas initially devised by the General Counsel: such a formula is acceptable if it is "reasonable under the circumstances" (*Churchill's Supermarkets*, 301 NLRB 722, 724 (1991)) or "not unreasonable or arbitrary" (*Laborers Local 38 (Hancock-Northwest)*, 268 NLRB 167, 168–169 (1983), enfd. 748 F.2d 1001 (5th Cir. 1984), and cases there cited).

If the General Counsel ultimately sustains his burden in this case of establishing that Bryant would have prevailed on his grievance if it had been properly pursued, then the General Counsel can propose a formula for determining the damages attributable to the Respondent Union's breach of its duty of fair representation. If the formula is disputed by the Respondent, presumably a record will be made on which the appropriateness of the formula can be determined. In our view, it is premature to specify a particular formula now.

actions. We do not regard this as an inequity, but rather as a simple function of the statutory scheme created by Congress. Under that scheme, Congress chose to give general jurisdiction over claims alleging breach of a collective-bargaining agreement to the Federal courts, rather than to the Board. As a consequence, an employee who wishes to recover damages resulting from a breach of contract by his employer can do so only through a Section 301 action in Federal court and not—unless the breach of contract is also an unfair labor practice—through a Board proceeding. We do not regard it as unfair to require an employee who seeks damages caused by his employer's breach of contract to proceed against the employer in what Congress has said is the appropriate forum for resolution of such claims. We do, however, regard it as unfair to require the union to reimburse the employee for losses caused by the employer's wrongful conduct simply because the employee has chosen a forum in which his claim against the employer cannot be decided.[17]

C. Procedural Rules for Litigating the Merits of Unlawfully Handled Grievances

As the Board stated in *Mack-Wayne II*, the primary purpose of the Board's Order in a case where the union has breached its duty of fair representation with regard to the processing of an employee's grievance is to "hold the union to the terms of the collective-bargaining agreement that it negotiated with the employer and to permit the employee to have his or her grievance resolved on its merits pursuant to the negotiated grievance procedure." 290 NLRB at 818. The need for a make-whole remedy against the union arises only if the preferred outcome—resolution of the grievance through the contractual procedure—cannot be obtained. However, if the General Counsel, in order to obtain a make-whole remedy, is required to establish the merits of the grievance at the unfair labor practice hearing, the employee's ability to obtain a subsequent resolution of the grievance through the contractual procedure will either be foreclosed or seriously complicated.[18]

The Board resolved this problem in *Mack-Wayne II* by adopting a procedure which allows the union the option of choosing whether to litigate the merits of the grievance at the unfair labor practice hearing, or to postpone litigation of that issue to a subsequent compliance proceeding so that it may first attempt to resolve the grievance pursuant to the negotiated procedure. Id. On reconsideration, we have decided that because of the strong reasons counseling against having the parties litigate the merits of the grievance in the Board proceeding when there is a possibility it may yet be resolved through contractual channels, the merits of the grievance should not ordinarily be litigated in the initial unfair labor practice hearing. Rather, the presumption will be that the merits of the grievance will not be litigated and decided, if at all, until the compliance stage of the proceeding, after the union has had an opportunity to attempt to resolve the grievance through the contractual procedure.

It may be that in some circumstances it would be appropriate to resolve all the issues in the initial unfair labor practice proceeding.[19] However, we no longer will allow this choice to be made at the sole election of the union. Instead, we will require the agreement of the General Counsel and the charging party or parties, and the approval of the judge. We will, moreover, require that this be handled by the judge as a preliminary pretrial matter, so as to provide all parties adequate notice of the

[17] Our dissenting colleagues cite as support for their position the statement in *Bowen* that if an aggrieved employee "does not collect the damages apportioned against the Union, [the Employer] remains secondarily liable for the full loss of backpay" (459 U.S. at 223 fn. 12). We believe it is important to understand the context of that statement. In reversing the court below, the *Bowen* Court was rejecting only the proposition that a union could not be held liable for *any* lost backpay at all. Its limited holding was that a union could and should be held liable for the "increase in the damages" caused by "its wrongful conduct" (even if that increase is part of the backpay). Id. at 224. The Court was mindful that damage awards must remain consistent with the "interests recognized in *Electrical Workers v. Foust*, 442 U.S. 42 (1979)." 459 U.S. at 227. In *Foust*, in the course of justifying its holding that unions should not be liable for punitive damages for a breach of the duty of fair representation, the Court referred to a need to avoid "compromising the collective interests of union members in protecting limited funds." 442 U.S. at 50. The *Bowen* Court held that requiring "the union to pay *its share* of the damages" was consistent with the concerns expressed in *Foust*. 459 U.S. at 227 fn. 16 (emphasis added). Finally, it is reasonable for an employer to remain at least secondarily liable for the entire amount of backpay, since it is the employer's initial action against the employee that initiates the loss, or, as the Court in *Vaca* noted, it is the employer's breach of contract that "trigger[s] the controversy." 386 U.S. at 197. Of course, as the Court noted (id. at 197 fn. 18), it would be proper to hold the union jointly liable for all the backpay if it was responsible for the employer's breach, but that was not the case in *Vaca*, nor is it here.

[18] If the Board were to find in the unfair labor practice proceeding that the grievant would not have prevailed had the grievance been processed under the contractual grievance procedure, the union could not logically be ordered nevertheless to process the grievance. The effect of the Board's decision would therefore be to foreclose resolution of the grievance through the contractual procedure. If, on the other hand, the merits of the grievance were litigated and the Board concluded that the grievance was meritorious—i.e., that the grievant would have prevailed had the grievance been properly processed—it would seem anomalous to provide as a remedy an order requiring the union to seek a de novo determination of the merits of the grievance through the contractual procedure. Once the merits of the grievance have been litigated at the unfair labor practice stage, an order requiring the union to process the grievance would also put the union—which will presumably have sought to show at the unfair labor practice stage that the grievance lacked merit—in the position of having to argue the opposite in the grievance proceeding.

[19] This would include circumstances where it is clear that the union will be unable to obtain a resolution of the grievance through the contractual grievance-arbitration procedure, or where the evidence that will be introduced in connection with the duty of fair representation issue also relates directly to the merits of the grievance. It would also include circumstances where the union has made a proffer of evidence to show that the grievance is so clearly lacking in merit that an order requiring the union to attempt to process the grievance would not be appropriate.

issues that will be litigated at each stage of the proceeding.

Under the modified procedure which we adopt today, we will not provide a remedy requiring the union to make the grievant whole for losses allegedly suffered as a consequence of a union's mishandling of a grievance unless the General Counsel (1) affirmatively pleads for this remedy in the complaint and (2) shows not only that the union breached its duty of fair representation by mishandling the grievance but also that the grievant would have prevailed in the grievance-arbitration procedure had the union not breached its duty. If the General Counsel pleads for this remedy he will not normally be required to establish the merits of the grievance in the unfair labor practice proceeding. Rather, once the General Counsel has established that the union acted unlawfully in breach of its duty of fair representation, we will normally issue an order directing the respondent union to take such affirmative steps as may be necessary, under the facts of the particular case, to pursue properly the grievance in a manner consistent with the union's duty of fair representation. If the grievance is resolved through the contractual machinery, no further proceedings will be required. However, if the union is unable to secure a resolution of the grievance through the contractual machinery (because of time bars or other constraints rendering the process ineffectual), it will then be necessary for the Board, for the purpose of deciding whether make-whole relief is appropriate, to determine whether the grievant would have prevailed on a properly processed grievance. At that point, in the compliance stage, the burden will be on the General Counsel to establish that the grievance was meritorious.[20]

We believe that removing the litigation of the merits of the grievance from the initial unfair labor practice proceeding will ordinarily be the preferable procedure, since it avoids creating the hazards, which we have noted above, to proper processing of the grievance through the normal contractual channels. It also lessons the burden of trial preparation for all parties and expedites the resolution of the basic underlying issue, which is whether the respondent union violated the Act by handling the grievance in bad faith or in an arbitrary or discriminatory manner.

As we have noted, however, there may be circumstances in which it would be appropriate to resolve all the issues in the unfair labor practice proceeding. Accordingly, if the General Counsel pleads in his complaint for a remedy requiring the Union to make the grievant whole for losses allegedly suffered as a consequence of the Union's mishandling of a grievance, the Respondent Union may, in its answer, give notice that it wishes to litigate the merits of the grievance in the initial unfair labor practice proceeding. If the judge decides that this is appropriate, he should seek the position of the General Counsel and Charging Party or Parties. Only if all are in agreement will the hearing be expanded to include this issue.[21] This should be handled as a preliminary pretrial matter, so as to provide all parties adequate notice and opportunity to prepare fully for the issues to be disposed of in the proceeding.

D. Application of the Revised Rules to the Issue of the Respondent's Handling of the Alamillo Grievance

In this case, the judge reasonably applied the principles of *Mack-Wayne II*, since it was then the applicable precedent. He concluded that the General Counsel had established that Bryant's grievance against Alamillo was "out of the realm of the clearly frivolous," and he accordingly found that the General Counsel had met the burden required for a provisional make-whole remedy. The judge further found that the Respondent Union had elected to defer litigation of the merits of the grievance to the compliance phase. The case is thus in the same procedural posture it would be in had the presumption we announced today been in effect and the Union failed to consent to litigating the merits of the grievance in the initial proceeding. There is, accordingly, no need to reopen the unfair labor practice proceeding and no injury to due process rights in failing to do so.

In keeping with our change in the burdens of proof, discussed in section A above, we will modify the Order so that it will be clear that, if the grievance cannot be resolved through the usual contractual channels and the question of how the grievant would have fared must be resolved in compliance, a make-whole remedy may be imposed only if the General Counsel shows that Bryant "would have won on the merits" if the grievance had been "properly pursued" by the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Iron Workers Local Union 377, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–

[20] In providing for this bifurcated procedure, we are not postponing litigation of the merits of the unfair labor practice to the compliance stage. The issue that is deferred to compliance is merely the question whether the Respondent should have backpay liability for the violation found in the unfair labor practice proceeding. We note that the policy of deferring consideration of such factually complex issues that relate purely to the remedy has been approved by numerous courts as a means of avoiding unnecessary litigation in the event that no violation is found in the unfair labor practice proceeding. *Holyoke Visiting Nurses Assn. v. NLRB*, 11 F.3d 302, 308 (1st Cir. 1993), and cases there cited.

[21] We disagree with Chairman Gould's position that this matter should be left entirely to the judge. We think that this is a matter of Board policy, and we have set forth policy reasons against litigating the merits of the grievance in the unfair labor practice proceeding. In addition, we have provided flexibility by giving the parties the option of litigating the merits of the grievance in the unfair labor practice proceeding, subject to approval by the judge. Thus, we believe that we have provided a sound policy, and that we have built in adequate flexibility.

CIO, San Francisco, California, its officers, agents, and representatives, shall take the action set forth in the Order, as modified below.

1. Substitute the following for paragraph 2(c).

"(c) In the event that it is not possible for the Respondent to pursue on Ronald W. Bryant's behalf the grievance that Bryant sought to file concerning Alamillo's declared refusal to employ him, and if the General Counsel shows in compliance that a timely pursued grievance on that issue would have been successful, make Bryant whole for any increase in damages he suffered as a consequence of the Respondent's refusal to process that grievance, together with interest."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

WE WILL NOT arbitrarily, discriminatorily, or in bad faith refuse, on request, to process grievances sought to be processed by employees towards whom we owe a duty of fair representation.

WE WILL NOT cause or attempt to cause an employer to discriminate against employee-applicants in violation of Section 8(a)(3) of the Act by refusing to dispatch the applicants to employers based on their dues arrearages, where such refusals are not privileged by, or done pursuant to, a lawful union-security provision in a labor agreement governing the employment of the applicants.

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

WE WILL promptly request Alamillo Reinforcing Steel Corporation to rescind and withdraw its letter to us declaring that Ronald W. Bryant is ineligible for employment with Alamillo, and that it make Bryant whole for any wages or other benefits he lost as a consequence of our refusal, based on that letter, to refer Bryant to employment with Alamillo on or about June 3, 1991; and if Alamillo refuses those requests or either of them WE WILL promptly initiate and pursue in good faith and with due diligence a grievance on Ronald W. Bryant's behalf seeking the same relief, including to arbitration or to any other disputes-resolution forum established by our labor agreement with Alamillo that was in effect on June 3, 1991.

WE WILL permit Ronald W. Bryant to be represented by his own counsel at any grievance proceedings, including arbitration or other resolution proceedings that may follow from our efforts on Bryant's behalf, and WE WILL pay the reasonable legal fees of such counsel.

WE WILL, in the event that it is not possible for us to pursue on Ronald W. Bryant's behalf the grievance that he sought to file concerning Alamillo's declared refusal to employ him, and if the General Counsel of the National Labor Relations Board shows in compliance proceedings that a timely pursued grievance on that issue would have been successful, make Bryant whole for any increases in damages he suffered as a consequence of our refusal to process that grievance, together with interest.

IRON WORKERS LOCAL UNION 377, INTERNATIONAL BROTHERHOOD OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL–CIO

CHAIRMAN GOULD, concurring in part and dissenting in part.

I join the majority opinion on the determination of allocation of burdens and damages in cases where it has been established that the union breached its duty of fair representation by mishandling an employee's grievance and the General Counsel seeks a make-whole remedy. I write separately to express additional reasons for abandoning the provisional make-whole remedial formula set forth in *Rubber Workers Local 250 (Mack-Wayne Closures)*, 290 NLRB 817 (1988), and to set forth my view on the appropriate method of limiting the union's liability in such cases. I dissent only on the procedural issue of requiring the agreement of all parties and the approval of the judge on the question of whether to litigate the merits of the grievance in the unfair labor practice hearing or at the compliance stage of the proceedings. For the reasons set forth below, I would leave that choice solely to the discretion of the judge.

In my judgment, our decision today is consistent with principles long-established by the Supreme Court concerning the accommodation of statutory schemes involving labor and employment issues[1] and the importance of a uniform national labor policy.[2] Thus, in *Southern Steamship*, the Court admonished the Board to recognize the purpose of other employment legislation and to administer the Act in a manner which accommodates other statutory schemes. The Court stated:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative

[1] *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942).
[2] *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

> body that it undertake this accommodation without excessive emphasis upon its immediate task. [Id. at 47.]

Here, as was discussed in section A of the analysis section of the majority opinion, the Federal courts have determined in duty of fair representation cases in the Section 301 context that the burden of proving the merits of an unresolved grievance rests with the plaintiff and that a finding of merit is required before a backpay order can be imposed on a union. While the duty of fair representation in Section 301 suits and in Section 8(b)(1)(A) actions is not the same, the Supreme Court has noted their similarity. In *Del Costello v. Teamsters*, 462 U.S. 151, 170 (1983), the Court stated: "[T]he family resemblance [between the duties of fair representation under Sec. 301 and Sec. 8(b)(1)(A)] is undeniable, and indeed there is a substantial overlap."

Given the similarity of the two areas of law, it makes little sense for the Board to strike out on a separate course vastly different from that taken by the courts. Indeed, under the rationale of *Southern Steamship*, supra, such a separate course would appear to be an example of the single-mindedness the Court cautioned against. It is more in keeping with the Court's teaching for the Board to take the course it announces today of using the body of Federal labor law concerning the duty of fair representation in the Section 301 context as a model for allocating burdens of proof in 8(b)(1)(A) cases.

The approach we adopt today also is consistent with the Supreme Court's interest in uniform Federal labor law. The Court has demonstrated such an interest in a variety of contexts over a substantial period of time. Certainly, the Court's demand in *Southern Steamship*, supra, that the Board attempt to accommodate other employment legislation was born, in part, from the interest in maintaining harmony and uniformity among various statutory schemes. The Court expressed a similar interest in *Lincoln Mills*, supra. There, the Court construed Section 301(a) as authorizing Federal courts to fashion a body of Federal law for the enforcement of collective-bargaining agreements rather than construing the section, as some courts had, as simply jurisdictional and not a source of substantive law. The Court found that the substantive law to be applied in suits under Section 301 is "federal law which the courts must fashion from the policy of our national labor laws."[3]

So great has been the Court's interest in uniformity of Federal labor law that it departed from the norm of looking to state law for the borrowing of a statute of limitations in a Section 301 suit, and looked, instead, to the National Labor Relations Act for the statute of limitations. In *Del Costello*, supra, the Court noted that it normally looks to state law for the borrowing of statutes of limitation in Federal causes of action where there is no express statute of limitations. In determining that it was more appropriate to borrow from Federal labor law in a Section 301 suit, the Court cited Justice Stewart's concurring opinion in *United Parcel Service v. Mitchell*, 451 U.S. 56, 70–71 (1981):

> "[t]he need for uniformity" among procedures followed for similar claims, ibid., as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of [Section] 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this. [Citations and footnote omitted.]

Abandoning the *Mack-Wayne* remedial formula and looking to the Federal labor law concerning the allocation of burdens of proof in duty of fair representation cases in the Section 301 context, contributes to the uniformity of national labor law, and is, therefore, consistent with the Supreme Court's teaching.

All of these reasons also support our determination, set forth in section B of the Analysis section of the majority opinion, to follow the Supreme Court in limiting the Union's liability to the portion of the employee's damages caused by the Union's breach of the duty of fair representation in mishandling the grievance.

Having determined that the Union's liability should so be limited, I would also address the appropriate method of limitation. In *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983), the district court instructed the jury that it could apportion liability on the basis of a hypothetical arbitration decision which would have reinstated Bowen if the union had fulfilled its duty. It suggested to the jury that the employer could be liable for damages before that date and the union for damages after the date. 459 U.S. at 215. The Court expressly found it unnecessary to decide whether the district court's instructions were proper because the union had not objected to the method of apportionment. Id. at 230 fn. 19. There is, accordingly, no guidance from the Court on this matter.

Some district courts have adopted the approach taken by the *Bowen* district court. See, e.g., *Caputo v. Letter Carriers*, 730 F.Supp. 1221, 1236 (E.D.N.Y. 1990). However, in *Aguinaga v. Commercial Workers*, 720 F.Supp. 862 (D. Kan. 1989), the district court noted some problems raised by this approach. It observed that using a hypothetical arbitration decision date would require an amount of guesswork to arrive at dates when various stages of the grievance procedure would have been completed. The court also observed that such an approach might result in a union bearing a majority of the backpay award even though it did not initiate the misconduct and was not the primary wrongdoer. The court concluded that it would use a different method of apportionment. It chose to apportion damages on a percentage basis which

[3] 353 U.S. at 456. See also *Mine Workers v. Pennington*, 381 U.S. 657 (1965), involving labor issues in the antitrust context. There, the Court's primary concern was to harmonize the antitrust policies of the Sherman Act with the national labor policy of promoting the settlement of industrial disputes through collective bargaining.

would allow the court to assess less than 50 percent of the fault against the union if the evidence so warranted.

I find that the percentage basis used in *Aguinaga* is an appropriate method for limiting liability in 8(b)(1)(A) cases involving the union's breach of its duty of fair representation by mishandling a grievance. It not only avoids the speculation concerning stages of the grievance-arbitration procedure, but also more closely assures that the union will be assessed, in accord with the principle of *Vaca*, only for the increase of damages caused to the employee by its breach of the duty of fair representation.

Finally, I dissent from my colleagues' decision to require the agreement of the General Counsel and the Charging Party and the approval of the judge to chose whether to litigate the merits of the grievance in the unfair labor practice proceeding or at the compliance stage of the proceeding. I would, instead, leave that choice solely to the discretion of the judge. In my opinion, the judge is better situated to decide the issue based on his assessment of the most efficient litigation that is possible without prejudicing the rights of the parties, while remaining mindful of the Act's preference for private resolution of contractual labor disputes. I find my colleagues' approach particularly inappropriate because it permits the union, whose misconduct is at issue, to preclude the litigation on the merits of the grievance at the unfair labor practice hearing.

I would not adopt standards regarding when it is appropriate for the judge to defer litigation on the merits of the grievance to compliance, since this must be decided with regard to the facts and circumstances of each case. Relevant factors include: the extent to which the rights of the respondent union and the charging party will be prejudiced by litigating the merits issue at the unfair labor practice hearing; whether the employer is willing to waive procedural bars such as that the grievance was not timely filed; the Act's preference for the private resolution of contractual labor disputes; the efficient administration of the Board's resources; and the extent to which duty of fair representation issues have produced evidence directly relevant to the merits of the grievance. In such cases, it may be particularly appropriate to litigate the merits issue in the unfair labor practice proceeding in order to conserve the Board's resources and avoid duplicative litigation. Another often reoccurring circumstance under which it may be appropriate to resolve the merits issue in the unfair labor practice proceeding is where contractual time limits bar resolution of the grievance through negotiated procedures.[4]

[4] In such cases the judge should first confirm that the parties have attempted to obtain a waiver of the limitations period from the employer before proceeding to litigate the merits issue. Experience shows, however, that most employers will not waive time limits because they fear it will create considerable employee pressure for a waiver in every grievance in which the problem arises. See W. Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term*: Justice Brennan's Term, 53 U. Colo. L. Rev. 1, 28–37 (1981).

In all other respects, I join the majority opinion.

MEMBER HURTGEN AND MEMBER BRAME, dissenting in part.

We join in the majority's decision, except for section B in which our colleagues decide that a full make-whole remedy for the aggrieved employee shall no longer be available to rectify the type of 8(b)(1)(A) violation which was committed by the Respondent Union here. Because we would adhere to the well-established Board policy of seeking full relief for the victims of unfair labor practices, we dissent from the majority's awarding "half-a-loaf" relief to one class of unfair labor practice victims.

Under Section 10(c) of the Act, the Board must fashion an appropriate remedy for the unfair labor practices committed by respondents. In carrying out this responsibility, the Board has traditionally been guided by the goal of restoring the status quo ante and fashioning a remedy which will eradicate the consequences of the unfair labor practice which it has found. Significantly, except for the majority's decision here, we know of no area in which the Board has established a stated goal of giving less than a full make-whole remedy for employee losses resulting from unfair labor practices.

In the instant case, the employee's grievance would have been processed but for the Union's unfair labor practice. And, assuming that the General Counsel can meet the burden imposed on him in this case, the employee would have prevailed on the grievance. Despite this, our colleagues leave the employee with something less than he would have secured through a grievance victory. The situation is therefore anomalous. If the employee had been wronged only by the Employer, i.e., if the Union had processed the grievance, he would get a full remedy. But, because the Employer breached the contract and the Union committed an unfair labor practice, he gets only a partial remedy.

Our colleagues attempt to justify this inequitable result by attempting to analogize this situation to the damage apportionment followed in "hybrid" duty of fair representation/Section 301 breach of contract suits. According to our colleagues' reasoning, this new found partial remedy for an employee who has suffered losses due to an 8(b)(1)(A) violation is appropriate because it is consistent with the remedy granted in these "hybrid" cases. That view depends entirely on the appropriateness of our colleagues' analogy to Section 301 remedies but, as hereinafter shown, that analogy is fundamentally flawed.

Bowen v. Postal Service, 459 U.S. 212 (1983), and the other court decisions relied on by the majority differ considerably from an unfair labor practice case involving a breach of the union's duty of fair representation. In the typical Section 301 hybrid lawsuit, the aggrieved employee may name as defendants and seek relief from two

wrongdoers, the union and the employer, and a single defendant may seek to include the other actors pursuant to Rule 14 or 19 of the Federal Rules of Civil Procedure. *Bowen* resolved the question of how much each wrongdoer must pay the employee after liability has been determined and the loss measured. Rather than applying joint and several liability to the defendants before it, the Court allocated the loss among them. Although losses are thereby shared, Section 301 recovery is full. The Supreme Court further stated that if the aggrieved employee "does not collect the damages apportioned against the union, [the Employer] remains secondarily liable for the full loss of backpay." Id. at fn. 12.[1] Thus, the Court's apportionment of damages between the two wrongdoers before it does not require the demise of full recovery for the aggrieved employee in an 8(b)(1)(A) unfair labor practice proceeding.

By contrast, in the typical 8(b)(1)(A) "refusal-to-process" context, the union is the only party that has committed the unfair labor practice. That is, the employer's breach of contract, even if shown, is not an unfair labor practice. Thus, unlike the courts in Section 301 cases, the Board in 8(b)(1)(A) cases is not presented with two wrongdoers. Instead, the Board has one wrongdoer, the union, which committed the unfair labor practice. But for the union's unfair labor practice, the employee would have secured a complete victory in the grievance proceeding.[2] Unlike our colleagues, we would here give the employee the full fruits of that grievance victory and restore him to the position he would have been in if the union had processed his grievance.[3]

The majority also asserts that aggrieved employees can be made whole if they file a hybrid lawsuit rather than a charge with the Board. However, few, if any, employees would understand that there is a remedial difference between a "hybrid" lawsuit and an NLRB charge. And, by the time that the Board orders the partial remedy, it will be too late for the employee to begin a "hybrid" lawsuit.[4] Further, even if employees somehow learn the difference between Board and court remedies, they may be forced by economic circumstances to seek only NLRB relief. A Section 301 lawsuit can be an expensive proposition for a single individual who proceeds against an employer and a union, two institutions that are likely to have far more resources available to them than the employee. Furthermore, the more the Board forces aggrieved employees to a different forum to achieve a full make-whole remedy, the more we impair the full rights Congress afforded them under the Act and the more we diminish the likelihood of seeking resort to the Board's processes to protect the full spectrum of Section 7 rights.[5]

Jonathan J. Seagle, Esq., for the General Counsel.
Barry E. Hinkle, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for the Respondent.
Ronald W. Bryant, pro se, of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard these consolidated unfair labor practice cases in trial on June 7, 1993, in San Francisco, California.[1] They trace from a series of charges and amended charges that Ronald W. Bryant filed in 1991 and 1992 against Iron Workers Local Union 377, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (the Respondent or Respondent Union). After investigating these charges, the Regional Director for Region 20 issued a series of complaints and amended complaints against the Respondent in 1992 and 1993.[2] Taken to-

[1] Our colleagues fail to appreciate the purpose of our reference to the above-quoted language. Thus, as noted above, we emphasize that the typical Sec. 301 hybrid lawsuit differs considerably from a breach of the duty of fair representation unfair labor practice proceeding. Our reference to *Bowen* merely makes the point that the payment scheme which the Court devised for the defendants to follow in the Sec. 301 context never impinged on the Court's explicit recognition of a full remedy for the aggrieved employee. In fact, the Court gave added protection to the employee's full remedy by imposing secondary liability on the defendant employer.

[2] For example, in the instant case there is no allegation that Alamillo Reinforcing Steel Corporation's alleged breach of the contract—i.e., its refusal to accept Charging Party Bryant as a referral for a June 3, 1991 job—violated the Act. The Respondent Union committed the unfair labor practice when it arbitrarily failed to process Bryant's grievance against Alamillo. Assuming arguendo that the General Counsel can show in subsequent compliance proceedings that Bryant "would have won on the merits" if his grievance had been "properly pursued" by the Union, Bryant would have secured a grievance victory warranting a full remedy.

[3] Not unlike an attorney who has accepted, but failed to carry out, a representation, the union should not be excused from making whole the losses suffered because of its unlawful action on the ground that the initial loss was caused by a nonparty's act. Unlike legal counsel who must answer in damages caused by negligence, we require that the union's actions be wrongful. But, like counsel, whose fault was the immediate and proximate cause of the loss, the union should have to restore its victim to the position he would have had *but for* the wrongful decisions.

[4] See *Del Costello v. Teamsters*, 462 U.S. 151 (1983) (the 6-month statute of limitations of Sec. 10(6) of the Act also governs Sec. 301 lawsuits).

[5] In addition, a full make-whole remedy avoids the calculation problems that our colleagues readily acknowledge exist under their damage apportionment approach.

[1] I originally opened the trial record on November 19, 1992, then granted counsel for the General Counsel's motion to postpone proceedings indefinitely, to permit the General Counsel to seek enforcement of certain subpoenas in a United States District Court.

[2] In Case 20–CB–8663, Bryant filed a charge on April 25, 1991, and the Regional Director issued a separate complaint on June 7, 1991. In Case 20–CB–8846, Bryant filed an original charge on November 22, 1991, and an amended charge on January 2, 1992. The Regional Director issued a separate complaint in that case on January 7 1992, and an amended complaint on June 7, 1993. (The Regional Director issued an order consolidating Cases 20–CB–8663 and 20–CB–8846 on January 7, 1992.) In Case 20–CB–8991, Bryant filed an original charge on April 7, 1992, and an amended charge on May 28, 1992. The Regional Director issued a separate complaint in that case on June 1, 1992, and an

gether, the several complaints charge that in 1991[3] the Respondent violated Section 8(b)(1)(A) and, in some instances, Section 8(b)(2) of the Act by (1) refusing in April and May to allow Bryant to review hiring hall referral records; (2) refusing in June to dispatch Bryant to a job with Alamillo Reinforcing Steel Corporation (Alamillo); (3) refusing thereafter to initiate a grievance against Alamillo for refusing to employ Bryant; (4) refusing in November to dispatch Bryant to a job with Kimmins Abatement Corporation (Kimmins); and (5) telling Bryant in a December 30 letter that he owed "supplemental dues," and "threaten[ing]" that it would "possibly refuse" to dispatch Bryant if he did not pay up on those supplemental dues. The complaints further allege that the Respondent acted in all but the latter instance for reasons which were "arbitrary," and as to items (1) and (3), that it also acted for reasons which were "unfair," "invidious," and "a breach of the fiduciary duty owed the employees whom it represents." The Respondent denies all claims of wrongdoing.

.At the trial, counsel for the General Counsel rested his case-in-chief after introducing certain documentary exhibits, and calling three witnesses—Kimmins' agent, Dan Hoffner, the Respondent's business agent, Randall Oyler, and Charging Party Bryant. The Respondent called no witnesses of its own and did not otherwise challenge the testimony presented by the General Counsel's witnesses, but rested its own case after introducing copies of its Local bylaws, and the constitution of the International Union with which it is affiliated. The General Counsel and the Respondent thereafter filed posttrial briefs.[4]

I have studied the entire record, the parties' briefs, and the authorities they invoke. Based on the following findings and reasoning, I will sustain the complaints in certain respects and dismiss them in others.

FINDINGS OF FACT AND LEGAL ANALYSES

I. JURISDICTION

Section 8(b)(1)(A) and (2) of the Act make unlawful certain actions by "labor organizations," elsewhere defined in Section 2(5) of the Act. The Respondent admits the legal conclusion pleaded in the complaint that it is a labor organization within the meaning of Section 2(5) of the Act. I so find, based on record evidence incidentally showing, as required by Section 2(5), that the Respondent is an organization in which employees participate, and that it exists in part for the purpose of dealing with employers of ironworker employees working within its territorial jurisdiction (roughly, the city of San Francisco) concerning their grievances, labor disputes, rates of pay, hours of employment, or conditions of work.

Under established interpretations of the United States Constitution and of the Act, not worth retracing here, the Board's statutory jurisdiction cannot be invoked unless the General Counsel can show that the actions of the labor organization (the Union) targeted by a complaint have more than de minimis impact on commerce between and among the States. This is usually established by proof that the union's actions in some manner implicate the operations of an employer over whom the Board would assert jurisdiction. In apparent recognition of these considerations, the complaints make several assertions of fact concerning the existence of labor agreements between the Respondent and certain businesses and business groups, and concerning the operations of those businesses or business groups. (The latter allegations are calculated to show that the businesses or business groups meet the Board's "discretionary" tests for asserting jurisdiction over "non-retail" enterprises, i.e., the $50,000 "direct or indirect inflow or outflow" tests.) Focusing on those elements of the complaints, these are my findings and conclusions:

The record shows that during all times material to the complaints, the Respondent was a party to labor agreements with many construction industry businesses. One such agreement—apparently governing the employment relationship between employees represented by the Respondent and the largest number of the construction firms they work for—was one negotiated between the District Council of Iron Workers of the State of California and Vicinity (the District Council), on behalf of its Local Union affiliates,[5] and an association of businesses called Iron Worker Employers, State of California and a Portion of Nevada (the Association).[6] This "Master Agreement" was effective from July 1, 1989, through June 30, 1992. The Respondent has admitted complaint counts alleging that in calendar year 1991, the employers bound by the Association's actions to the Master Agreement "collectively purchased and received at their California facilities and jobsites products, goods, and materials valued in excess of $50,000 directly from points outside the State of California for use within the State of California." I so find, although I question what real jurisdictional significance such facts may hold.[7]

amended complaint on June 9, 1992. (The Regional Director issued an order consolidating the latter case with the first two on June 1, 1992.)

[3] All dates below are in 1991 unless I specify otherwise

[4] Briefs were originally due on July 16, 1993, but the deadline was extended to August 3, 1993, on the joint application of the General Counsel and the Respondent.

[5] The District Council is composed of various local unions representing ironworkers, including the Respondent, and the record shows that the District Council likewise exists in part for the purpose of representing those local unions and their respective employee constituents in labor relations dealings with employers. For what it is worth, the Respondent admits and I find that the District Council is likewise a 2(5) labor organization.

[6] The Association negotiated on behalf of certain subsidary associations and their member-employers.

[7] The General Counsel has not explained why the "collective" operations of the Association's members have any jurisdictional significance to this case. The question is nevertheless pertinent in the aftermath of *John Deklewa & Sons*, 282 NLRB 1375 (1987), which, among other major revisions in the interpretation of the law applicable to the construction industry, left in doubt whether multiemployer bargaining units in that industry would in the future be considered appropriate ones. (See especially 282 NLRB at 1385 fn. 42.) And seemingly, if a multiemployer group did not create a single, appropriate multiemployer bargaining unit, then it would be irrelevant for jurisdictional purposes to aggregate the collective operations of those employers. However, as we shall see, there are only two counts in the complaints which might rely on the collective operations of the Association's members as the basis for asserting jurisdiction: (a) the count in Case 20–CB–8663, alleging that the Respondent unlawfully denied Bryant access to hiring hall records; and (b) the count in the complaint in Case 20–CB–8991 alleging that the Respondent unlawfully threatened to possibly refuse to dispatch Bryant in the future based on his dues delinquencies. (Thus, in each of those cases, the alleged violations are not linked to the operations of any specific employer, but presumably implicate the operations of all the Association members bound to the Master Agreement.) I will dismiss those counts on their legal merits, and therefore I will not find it necessary to decide whether, after *Deklewa*, it was legally permissible for jurisdictional purposes to aggregate the interstate volumes of busi-

More pertinently, as the General Counsel now concedes in amended pleadings, neither of the two employers specifically named in the complaints—Alamillo and Kimmins—had delegated their bargaining rights to the Association for purposes of binding them to the Master Agreement, and therefore they cannot in any case be considered to be part of the multiemployer group supposed to be commonly bound to the Master Agreement. However, I find from the pleadings or from undisputed evidence that Alamillo and Kimmins were bound by separate agreements with the District Council to honor the terms of the Master Agreement. Thus, insofar as the complaints charge that the Respondent's actions implicated the operations of Alamillo and Kimmins, jurisdiction will attach if the record shows that those operations were each operations over which the Board may assert jurisdiction.

The pleadings establish and I find that Alamillo is a corporation engaged as a contractor in the construction industry with offices in Benicia, California; that in calendar year 1991, Alamillo purchased and received goods worth more than $50,000 directly from points outside California; and that it also performed more than $50,000 worth of services for Granite Construction, an enterprise within California which itself performed more than $50,000 worth of services to businesses and governmental entities outside California. Thus, even under the Board's discretionary (i.e., not constitutionally mandated) tests for asserting jurisdiction, Alamillo clearly meets one or more of the direct or indirect inflow or outlfow tests, and therefore it was at material times an employer "in commerce" or "affect[ing] commerce" within the meaning of Section 2(6) and (7) of the Act.

The Respondent has denied complaint allegations describing Kimmins' operations. The undisputed evidence introduced by the General Counsel shows that Kimmins is a Delaware corporation with headquarters in Tampa, Florida, and operating offices in Niagara Falls, New York, from which it entered into contracts with the California Department of Transportation (Caltrans), a State of California agency, to perform services on a freeway construction job in San Francisco. In calendar year 1991, Kimmins performed more than $50,000 worth of services for Caltrans on that freeway job. Based on those facts, I find that Kimmins, too, was an employer whose operations at material times involved the direct transfer across state lines of at least $50,000, and therefore that Kimmins, too, was an employer within the meaning of Section 2(6) and (7) of the Act.

Therefore, given that the Respondent is a statutory labor organization, and that Alamillo and Kimmins are each employers over whom the Board may take jurisdiction, I find that the Board's jurisdiction is properly invoked with respect to the Respondent's complained of actions specifically associated with those two employers.

II. BACKGROUND: LEGAL SETTING

A. Main Personalities: Their Relationships

Charging Party Bryant became a member of the Respondent in 1979 and achieved journeyman ironworker status in 1981. He was eventually dropped from the Respondent's membership rolls in 1992, after admittedly failing to pay up on certain supplemental dues arrearages the Respondent claimed he owed.[8] At all relevant times, Gene Vick was the Respondent's business manager and financial secretary and its chief paid executive. Randall Oyler was its business agent, working under Vick's supervision, with responsibilities which included dispatching jobseekers to jobs from the Respondent's San Francisco hiring hall.

In the years before Bryant filed the three charges in the instant cases, he had filed four other unfair labor practice charges against the Respondent. He withdrew one of these, and two others were dismissed by the Regional Director for Region 20, but the fourth charge resulted in the Regional Director's issuance of a complaint, which was thereafter resolved in some undisclosed manner without litigation. In addition, both before and during the period covered by the complaints, Bryant had regularly lodged complaints against the Respondent with the San Francisco Human Rights Commission, claiming in one way or another that the Respondent was discriminating against himself and other African-Americans in its handling of job referrals.[9]

Despite this history of challenges, Bryant had admittedly received hundreds of dispatches to jobs through the Respondent's hiring hall. And even if we might presume that Bryant's challenges were unwelcome to the Respondent, the record holds no direct evidence that the Respondent's agents were hostile towards Bryant because of those challenges, or because Bryant was black. The only evidence of any affirmative hostility shown towards Bryant, which I shall find equivocal in its import, is in Bryant's uncontested description of an angry exchange between himself and Vick during a membership meeting sometime in January 1991. It happened when Vick announced to the membership that work was going to be good. Bryant interrupted with the question, "Who was work going to be good for?" Vick replied, "Fuck you Ronald," and Bryant rejoined in like terms. The Respondent's president then threatened to have the sergeant-at-arms remove Bryant from the meeting, and things soon quieted down.

B. The Labor Relations and Hiring Hall Schemes Implicit in the Master Agreement

The recognitional and representational arrangements intended by the Master Agreement are complex and to some extent inexplicit. It appears that employers bound to the Master Agreement have effectively recognized the District Council and its Local Union affiliates (including the Respondent) as the joint exclusive collective-bargaining representatives of their employees working in defined "Iron Worker . . . job classifications" within the territorial jurisdiction of the District Council, with the local union affiliates having the primary representative role when it comes to administering and enforcing the Master Agreement on jobs within their respective local territorial jurisdictions.[10]

ness done by the separate businesses comprising the Association's membership.

[8] The complaints do not challenge the Respondent's 1992 dropping of Bryant from membership.

[9] Bryant explained that, typically, his charges with the San Francisco Human Rights Commission were resolved by the Respondent's agreeing to dispatch him to a job.

[10] At sec. 1, p. 3 of the Master Agreement, "the Union" is defined as "any of the Local Unions affiliated with the District Council." It is on this basis that I infer that a "joint representation" scheme is contemplated by the Master Agreement.

Section 5 of the Master Agreement recites that "when an individual employer requires workmen to perform any work covered by this Agreement he shall hire applicants to perform such work in accordance with this Agreement." And section 5 contains a detailed body of rules governing employment of workers,[11] intended "to maintain an efficient system of production in the industry, to provide for an orderly procedure for the referral of applicants for employment, and to preserve the legitimate interests of employees in their employment." These rules provide generally that the employers bound to the Master Agreement must obtain journeymen from the rolls of registrants in the hiring hall operated by the local union having territorial jurisdiction over the work to be performed.[12]

However, section 5 contains exceptions to this general rule; it allows employers "to employ directly a minimum number of key employees who may include a General Foreman and a Foreman[,]" and as well, "to employ directly on any job in the locality in which the individual employer maintains a principal place of business all employees required on such job or jobs, provided such employees are regular employees of the individual employer who have been employed by him fifty per cent (50%) of the working time of the applicants during the previous twelve (12) months."[13] In addition, it allows employers to "employ applicants from any source[,] if the . . . Local Union [is] unable to fill the requisition of an individual employer for employees within a forty-eight (48) hour period after such requisition is made by the individual employer (Saturdays, Sundays, and holidays excepted)[.]"[14] Finally, section 5 guarantees that employers have the right "to reject any applicant referred by the appropriate Local Union."[15]

C. The Applicability of the Duty of Fair Representation; the Arbitrariness Standard

As previously noted, the complaints allege that the Respondent acted "arbitrarily" against Bryant in all but one instance, and in two instances also acted "for reasons which are unfair, invidious and a breach of the fiduciary duty owed the employees it represents." By salting the complaints with such words, the prosecution is obviously alleging that the Respondent owed and violated a statutory duty of fair representation vis a vis Bryant, as that duty was recognized and discussed in similar terms by the Board in *Miranda*.[16] (In this regard, I note that in more recent cases, the Board has adopted the formulation of the duty of fair representation used by the Supreme Court in *Vaca*,[17] and thus holds that "[a] breach of the duty of fair representation occurs only when the representative's conduct is `arbitrary, discriminatory, or in bad faith.'"[18]

In a case like this one, where a union is alleged to have violated its duty of fair representation in its operation of a hiring hall, it is the General Counsel's burden at the threshhold to establish that the hiring hall is an "exclusive" one; for absent that showing, the duty of fair representation does not attach.[19] From the cases, it appears that the definition of "exclusive" for these purposes is not strict, or literal, and that the Board will find that the union's duty of fair representation exists even where there are shown to be exceptions to the exclusive nature of the hiring hall operation.[20] Here, too, I find that despite the limited allowances for the "direct employment" of employees by employers in certain circumstances, the Master Agreement has effectively established the Local Unions party to it including the Respondent as the normal and customary hiring and referral sources for journeymen employees, like Bryant, used by employers bound to the Master Agreement.[21] Therefore I conclude that, when acting under the Master Agreement as the employee referral medium to employers bound to the Master Agreement, including Alamillo and Kimmins, the Respondent operated under a statutory duty of fair representation.

It is worth commenting at this introductory point about the General Counsel's current focus in alleging that the Respondent breached its duty of fair representation towards Bryant, and my own focus in testing these allegations: Despite some of the terms of opprobrium used in the complaints to describe the Respondent's motives in the complained of instances, the General Counsel does not now claim that the Respondent acted against Bryant for specifically hostile or other "invidious" reasons; rather, the prosecutor argues on brief that the Respondent's actions must be seen as unlawful even if not based on personal hostility.[22] In any case, the record is too spare to allow

[11] At sec. 1, p. 3 of the Master Agreement, "the Union" is defined as "any of the Local Unions affiliated with the District Council." It is on this basis that I infer that a "joint representation" scheme is contemplated by the Master Agreement.

[12] As to "journeymen," see sec. 5,C, Master Agreement, p. 5. However, in California, the employment of apprentices is specifically exempted from the provisions of sec. 5, and is controlled instead by an "Apprenticeship Standards Agreement approved by the Department of Industrial Relations of the State of California." Id. at subsec. K, pp. 22–23.

[13] Id. at subsec. B-1, p. 12.

[14] Id. at subsec. L, p. 23.

[15] Id. at subsec. E, p. 15. And see also sec. 4, dealing generally with union security, which provides at subsec. E (pp. 11–12), that "[t]he individual employer shall be the sole judge of the qualifications of all of his employees and may on such grounds discharge any of them."

[16] *Miranda Fuel Co*., 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). (Although it denied enforcement of the Board's *Miranda* decision, the Second Circuit later affirmed that a breach of the duty of fair representation violates Sec. 8(b)(1)(A) of the Act. See *NLRB v. Teamsters Local 282*, 740 F.2d 141, 145–146 (2d Cir. (1984).)

[17] *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). See also *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

[18] See, e.g., *Sheet Metal Workers Local 49 (Aztech International)*, 291 NLRB 282, 283 (1988); *Teamsters Local 528 (Walsh Construction)*, 272 NLRB 28 (1984).

[19] *Teamsters Local 460 (Superior Asphalt Co.)*, 300 NLRB 441 (1990).

[20] See, e.g., *Morrison-Knudsen Co*., 291 NLRB 250, 258–59 (1988), and authorities cited; and *Teamsters Local 328 (Blount Bros.)*, 274 NLRB 1053, 1057 (1985). Cf. *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690 (1976). In none of those cases, however, can I discern the precise standard being employed for determining the point at which "exceptions" to actual exclusivity are enough to render the hiring hall a "non-exclusive" one for purposes of the duty of fair representation.

[21] Specifically, mindful of the Board's teachings and clarifications in *Teamsters Local 460 (Superior Asphalt)*, supra, I find that the hiring hall arrangement here leaves the Respondent with substantial "power to put jobs out of the reach of workers" (id. at 441), and that in the complained of instances involving dispatches to Alamillo and Kimmins, the Respondent clearly had power and exercised it to put those jobs outside Bryant's reach.

[22] Counsel for the General Counsel stresses on brief that the unfair labor practice counts alleging unlawfully "arbitrary" failures by the

a finding that personal antagonism towards Bryant tainted the Respondent's treatment of Bryant in the complained of instances.[23] For both of these reasons, therefore, my focus below will be on the question whether the Respondent's actions were unlawfully arbitrary, which is itself a notion that eludes clear definition in the cases.[24] But the authorities are at least in harmony about one thing when it comes to "arbitrariness" questions: For a union's alleged arbitrariness to rise to the level of a violation of Section 8(b)(1)(A) or (2), it must be shown to involve "something more than mere negligence on the union's part."[25]

III. ALLEGED UNFAIR LABOR PRACTICES

A. Refusal to Grant Bryant's April Request for Dispatch Records

Relying on Bryant's testimony, I find that sometime in April, Bryant approached Oyler at the hiring hall (apparently while Oyler was dispatching workers to jobs), and asked to see the Respondent's dispatch records for the past 6 months. Bryant explained to Oyler that he wanted to develop a "chronology" of his own work history during that period. Oyler told Bryant that he would not let Bryant have the dispatch slips to look through, but would instead make his own review of those records and "would develop that chronology for [Bryant] and then give [Bryant] copies of the dispatch slips."[26] Bryant does not describe any further exchanges with Oyler on the point, and therefore I infer that Bryant acceded to Oyler's suggestion, thereby effectively narrowing his request for access to those records which would presumably suffice to establish the personal work chronology he was nominally seeking. However, Oyler never thereafter followed through even on his more narrow offer.

Before analyzing the legal significance of these facts, one other circumstance is worth mentioning: Bryant apparently never pursued his April request for access to the Respondent's referral records, not even after Oyler clearly had defaulted on his offer. It is true that Bryant filed an unfair labor practice charge in Case 20–CB–8663 on April 25, and in that charge made several accusations against the Respondent in generalized terms, but nowhere did his charge put the Respondent on notice of any dispute about Bryant's access to hiring hall records.[27] Relatedly, I note that the June 7 complaint in that case—limited to an allegation of unlawful denial of access to records—includes claims that Bryant did pursue his request for access to the referral records after his April encounter with Oyler (and that Vick, too, was involved in a subsequent refusal to give Bryant such access).[28] But these particular claims were never proved.[29] Thus, the record holds no substantial evidence of any post-April attempt by Bryant to pursue access to the Respondent's referral records with the Respondent.[30]

I31Turning now to the merits: The legal principles associated with an employee's right of access to a union's referral records are well-known. As an element of its duty of fair representation, "[a] union has an obligation to deal fairly with an employee's request for job referral information and . . . an employee is entitled to access to job referral lists to determine his relative position to protect his referral rights."[31] Therefore, "[a] union breaches its duty of fair representation in violation of Section 8(b)(1)(A) of the NLRA when it arbitrarily denies a member's request for job referral information, when that request is reasonably directed towards ascertaining whether the

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Respondent to refer Bryant to Alamillo and to Kimmins do "not require a showing of animus on the part of Respondent toward Bryant." I take this to mean in context that the General Counsel does not abandon any claim that the Respondent acted "arbitrarily" in each instance.. But I interpret it as a substantial abandonment of any claim that the Respondent acted against Bryant out of personal hostility

[23] It is true that Vick showed personal hostility towards Bryant in the January union meeting. But union meetings are frequently unruly affairs, involving the trading of taunts and barbs and other kinds of angry flareups between and among members and the union leadership. And it is entirely unclear on this record what it was that triggered Vick's hostile statement to Bryant. (Was it Bryant's interruption of Vick? Was it Bryant's prior history of charges against the Respondent? We simply cannot know.) In any case, the single incident of animosity between Bryant and Vick in a union meeting does not reliably establish that the Respondent harbored an abiding resentment of Bryant. Much less does it reliably establish that, in taking the later actions in April through December challenged by the complaint, the Respondent was motivated by "unfair," or "irrelevant," or "invidious" motives, such as Bryant's race, or because he filed charges with the Board or the San Francisco Human Rights Commission. Therefore, my analysis will not be influenced by the January exchange between Vick and Bryant.

[24] As Chairman Stevens noted in the context of a dissenting opinion, "'Arbitrariness' has been the most vexing and difficult of the duty of fair representation inquiries." *Sheet Metal Workers Local 49 (Aztech International)*, 291 NLRB 282, 283 (1988), citing *Robesky v. Qantas Empire Airways*, 573 F.2d 1082 (9th Cir. 1978).

[25] *Teamsters Local 692 (Great Western)*, 209 NLRB 466, 447–448 (1974); *Office Employees Local 2*, 268 NLRB 1353, 1354–1356 (1984), affd. sub nom. *Eichelberger v. NLRB*, 765 F.2d 851, 854 (1985); and *Sheet Metal Workers Local 49 (Aztech International)*, supra at 282.

[26] While Bryant's descriptions of this transaction potentially invite a variety of interpretations, I think the most natural understanding of what Bryant was describing was that Oyler was not willing to turn over the entire body of the Respondent's dispatch records for the past 6 months, but was willing to pull from those records and give to Bryant those slips showing dispatches Bryant had received in the recent 6-month period. I observe that this was seemingly enough to accommodate Bryant's announced reason for wanting to review the records, i.e., to develop a personal chronology of his work history.

[27] Bryant's April 25 charge, alleging 8(b)(1)(A) and (2) violations, stated:

> During the preceding six month period, the above named labor organization . . . has discriminated against Ronald W. Bryant applying unfair hiring hall practices and theatening Bryant in an attempt to discourage him from exercising his Section 7 rights. Additionally, the above named labor organization . . . has unlawfully attempted to cause Employers to discriminate against . . . Bryant.

[28] The complaint in Case 20–CB–8663 alleged that Bryant requested "Respondent on both April 30 and May 28 to "permit him to review its dispatch records," and that "since on or about April 30 . . . by Oyler and June 3 . . . by Vick," the Respondent has "failed and refused to allow Bryant access to its dispatch records."

[29] This record contains no evidence of a "May 28" request by Bryant regarding review of dispatch records, nor of any "June 3" refusal on Vick's part of such a request.

[30] Bryant elliptically suggested at one point that he may have revived his original April request to Oyler in a letter to the Respondent. However, no such letter was produced, and after I noted this fact at trial, counsel for the General Counsel disclaimed any reliance on any such letter, stating that he was relying solely on the verbal exchange between Bryant and Oyler in April. In all the circumstances, I infer that Bryant's vague reference to a letter in this context was simply mistaken, and that Bryant did not, in fact, ever pursue the request he made to Oyler in April.

[31] *Teamsters Local 282 (AGC of New York)*, 280 NLRB 733, 735 (1986). See also *Operating Engineers Local 825 (Building Contractors)*, 284 NLRB 188, 189 (1987).

member has been fairly treated with respect to obtaining job referrals."[32]

The threshhold question is whether Bryant's request to examine the Union's referral records was made for any of the protected purposes recognized by the foregoing authorities, i.e., "to protect his referral rights," or "to ascertain whether [he had] been fairly treated with respect to obtaining job referrals." The record is confusing and leaves ground for doubt on this point. It is true that in explaining *from the witness stand* his original request to Oyler, Bryant testified that he wanted to "be able to show that there were jobs available over that six-month period of time that I had been denied that I was fully qualified for." But this explanation is to some extent inconsistent with what Bryant said to Oyler in April (merely that he wanted to develop a personal work "chronology,"[33]) and seemingly inconsistent, as well, with Bryant's behavior in acquiescing in Oyler's offer to provide Bryant only with his own dispatch slips for the last 6 months.[34] Despite these apparent inconsistencies, I will assume for purposes of this decision that Bryant sought access to the records for the reasons he advanced on the witness stand. I will further assume that, because Bryant's initial request was (at least subjectively) directed towards "ascertaining whether [he had] been fairly treated with respect to obtaining job referrals," it was one that triggered on the Respondent's part a statutory duty not arbitrarily to deny Bryant's request.

Here, the evidence shows that Oyler's offer to pull out Bryant's job referral slips for the past 6 months was apparently acceptable to Bryant, but that for *some* reason, never explained by the Respondent, Oyler failed to follow through, and for *some* reason, never explained by the prosecution, Bryant did not further pursue his request even after Oyler had failed to follow through. I judge that this evidence is ultimately equivocal on the critical question whether Oyler's failure to follow through was or was not the product of mere negligence or forgetfulness. As I have previously discussed, union actions falling in the latter category do not implicate the statutory duty of fair representation.[35] And the Board has expressly placed on the General Counsel the burden of "demonstrat[ing] that `something more than mere negligence' occurred to justify a finding of arbitrariness and, therefore, a breach of the union's statutory duty."[36]

The evidence does not satisfy the General Counsel's burden of showing that something more than negligence animated the Respondent's failure to satisfy Bryant's request because it is just as likely than not on this record that Oyler, interrupted in his normal dispatching duties when Bryant raised his request, simply forgot about the request and his own offer after he went back to his regular duties. Moreover, in assessing whether Oyler's failure to follow through on his offer to Bryant was unlawfully arbitrary, I treat as a mitigating circumstance that Bryant was himself somewhat misleading in identifying his purpose to Oyler for wanting access to the referral records. Thus, absent any proof that Oyler had some special reason to believe that Bryant was seeking to vindicate his statutory right to fairness in referrals, I find it plausible that Oyler's failure to follow through on Bryant's request involved, at most, a kind of negligent forgetfulness.[37] In addition, by failing to pursue his request after Oyler had defaulted on his offer, Bryant, too, "must bear some portion of the responsibility for sleeping on [his] rights."[38] Because it is fatal to the complaint that the evidence does not permit a finding that something more than mere negligence informed Oyler's default, I will dismiss the complaint in Case 20–CB–8663 in its entirety.

B. Refusal to Dispatch Bryant to Alamillo; Refusal to Grieve Alamillo's Refusal to Employ Bryant

The complaint in Case 20–CB–8846 alleges as distinct violations that the Respondent, "since on or about June 3," has refused to dispatch Bryant to Alamillo, and has refused to process a grievance against Alamillo over the latter's refusal to hire Bryant. These are the facts commonly relevant to both counts.

Bryant had worked for Alamillo on a job at the Moscone Center in San Francisco in September 1990. He admittedly "walked off that job . . . quit that job," apparently in the same month, after sensing from remarks made by Alamillo's general foreman, Pete Hills, that Hills intended to give him punitively difficult work assignments.[39] On June 3, Bryant was registered for referral and was present in the hall when Oyler called out a reinforcing iron job for Alamillo at the Moscone Center. Bryant was the only one to respond, but when he appeared at the dispatch window and tendered his dues receipt to claim the job, Oyler said he would not dispatch Bryant to Alamillo because Bryant "had worked there in the past and the company had sent a letter stating that they did not want [Bryant] to return to that project." Oyler then showed Bryant a copy of Alamillo's letter, one apparently bearing a September 1990 date.[40] (Bryant in-

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[32] *NLRB v. Carpenters Local 608*, 811 F.2d 149, 152 (2d Cir. 1987).

[33] Clearly, Oyler knew that Bryant wanted to compile a chronology of his referrals in the past 6 months, but Oyler was not told how Bryant intended to use that chronology. Thus, Oyler could not know if Bryant intended to use the chronology to protect his referral rights, or perhaps instead intended it for some purpose unrelated to any concerns about the fairness of the referral system, or the fairness of his own treatment within it, such as for income tax reporting purposes.

[34] Clearly, if Bryant wanted (as he testified) to show that he had been unfairly bypassed for referrals in the preceding 6 months, he would need to review all the records of dispatches and referrals made by the Respondent during that period, not just his own chronology of referrals. And therefore if Bryant subjectively intended to seek out evidence of bypassing, I would have expected him to resist in some way Oyler's far more limited offer. Yet he apparently did not so resist or object.

[35] And see *Operating Engineers Local 18 (Ohio Pipeline Construction)*, 144 NLRB 1365, 1368 (1965); and *Teamsters Local 692 (Great Western)*, 209 NLRB at 447–448.

[36] *Office Employees Local 2*, 268 NLRB at 1355, citing *Teamsters Local 692 (Great Western)*, 209 NLRB at 447–448.

[37] Compare Oyler's conduct to Union Agent Sheridan's in *Office Employees Local 2*, supra, where the Board found no violation because "Sheridan's inability to provide a substantial justification for his failure to notify Eichelberger means nothing more than that Sheridan was negligent." 268 NLRB at 1356.

[38] Id.

[39] Bryant had earlier worked under Hills on a different job at the Fillmore Center when both he and Hills were employed by a different employer, not Alamillo, and Bryant felt that he had received discriminatorily harsh assignments from Hills on the Fillmore Center job.

[40] Although there is no dispute that Alamillo sent a letter to the Respondent in some manner indicating that it would not accept Bryant as an employee, the letter itself was not introduced into this record, even though, as I narrate below, Bryant soon was shown another copy of it by an agent of the San Francisco Human Rights Commission, and no showing was made that the letter was unavailable to the General Counsel. Under the best evidence rule (codified in Fed.R.Evid. 1002 and 1004), the contents of this writing should not have been proved by testimony. But absent objection from the Respondent's counsel, who seemed to accept Bryant's descriptions of the letter's contents, I accept Bryant's descriptions as roughly accurate.

sists that he was unaware of Alamillo's position regarding his rehire until Oyler showed him the letter.) Bryant protested to Oyler that "there should be no reason why I couldn't go to work on that project because the general foreman who I'd had a problem with in the past [referring to Hills] was no longer on the project." Oyler was apparently unmoved by this, for he did not give Bryant the dispatch.[41]

Later on June 3, Bryant conferred with an agent at the offices of the San Francisco Human Rights Commission, who showed Bryant a copy of Alamillo's letter that the Commission had likewise received, somehow. Still later, at about 2 p.m., after he had returned home, Bryant called Vick at the Respondent's offices. He told Vick he wanted to file a grievance against Alamillo because Alamillo's letter amounted to an attempt to bar him from employment, which, Bryant argued, was a violation of the Equal Employment Opportunity section of the Master Agreement.[42] Asked by the General Counsel, "What was Mr. Vick's response?" Bryant testified, at this time,"I believe Mr. Vick said that he would file a grievance."[43]

That same day, Bryant composed a handwritten letter to Vick, which the Respondent apparently received on June 11. Bryant said in that letter, in pertinent part:

> There was a job order placed for Alamilleo [sic] Steel this morning at 7:30 am. Randy Oyler was dispatcher. I was denied the job because I had been dispatched to to this jobsite before.
>
> I have seen and read this letter today. I beleave [sic] it is in violation of the Agreement's Section 5 Employment #(7) page 22.[44] This letter states that I have been banned from all their jobs. It also violates the E.E.O Section.
>
> As I stated to you during our conversation Regarding [sic] this matter, I want a grievance filed Against [sic] this contractor. I have done nothing to deserve this treatment for so long a time.

On September 13, Bryant signed and transmitted another letter to Vick, this one typed, which Vick apparently received the same day. In this second letter, Bryant stated pertinently,

> On or about June 11, I submitted a letter requesting that a grievance be filed against Alamillo Steel because they sent you a letter banning me from employment on all of their projects.
>
> On June 3, 1991 I saw that letter for the first time. I contacted you by phone and informed you that I wanted a grievance filed against that company. You informed me you would file a grievance.
>
> Why hasn't a grievance been filed yet? I expect a reply from you within ten (10) days.

Vick replied in a letter to Bryant the same day. In what was apparently his last word on the subject, he said in that letter,

> In reference to your letter of Sept. 13, 1991, as I told you when discussing this matter in early June of this year, this local union does not honor Alamillo's request as contended in their letter to Local #377; thus no reason to file a grievance seems apparent.

Analyzing these facts in their totality, I observe at the outset that Oyler's and Vick's respective statements to Bryant on June 3 and September 13 are difficult to harmonize rationally. Indeed, taken together, these statements evoke the mood of Alice in Wonderland, or Catch 22. (The Respondent, through Oyler, effectively declared on June 3 that he would not dispatch Bryant to Alamillo because he was persona non grata at that company, thereby seemingly "honoring" Alamillo's letter. But the Respondent, through Vick, declared contrarily on September 13 that because the Respondent "does *not* honor" Alamillo's request, there was no reason for a grievance over Alamillo's blackballing of Bryant.) And the Respondent made no attempt at trial or on brief to harmonize or otherwise explain these inconsistent statements. Thus, it is easy to liken the Respondent's interposing of two incompatible explanations for its respective actions on June 3 and September 13 to that of a rider trying to straddle two horses galloping in opposite directions. Predictably, the effort has left the Respondent astride of neither mount, and vulnerable to charges of unlawfully arbitrary behavior in each challenged instance, as I explain below. However, for reasons also noted below, I cannot entirely embrace the General Counsel's theories of violation, and will find only that Vick's dismissal of Bryant's grievance request violated the Act.

Focusing first on Oyler's refusal to refer Bryant to Alamillo, I agree with the General Counsel that an appropriate starting point for analysis is the Board's summary of prior holdings in *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50 (1982), enfd. 701 F.2d 504 (5th Cir. 1983). There, the Board said,

> 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.[45]

The General Counsel, relying on this summary, argues on brief:

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[41] The record does not show how, if at all, Alamillo's job call was filled, only that Bryant did not get the job.

[42] Subsec. N of sec. 5 of the Master Agreement, captioned Equal Employment Opportunity, recites pertinently,

> The Employers and the Union recognize they are required by law not to discriminate against any person with regard to employment or union membership because of race, religion, age, color, sex, national origin or ancestry and hereby declare their acceptance and support of such laws. This shall apply to hiring, placement for employment, training during employment, rates of pay or other forms of compensation, selection for training including apprenticeship.

[43] Bryant's reply here seemed uncertain and somewhat improvised, and it contradicts an out-of-court averral Vick made in a letter to Bryant on September 13, quoted infra. Vick's averral in the September 13 letter is inadmissible hearsay as to what Vick told Bryant on June 3. Therefore, despite doubts about the quality of Bryant's recollection here, it stands uncontradicted, and I will assume that Bryant recalled Vick's June 3 reply accurately.

[44] Bryant was referring to provision 7, under subsec. I of sec. 5 of the Master Agreement. Provision 7 states,

> No individual who is rejected by the individual employer shall be rereferred to such individual employer with respect to the same request pursuant to which he was initially referred.

[45] 262 NLRB at 51, citations omitted.

> The record evidence establishes that Respondent's refusal to dispatch Bryant to Alamillo on June 3 involved a *departure* from established *contractual* hiring hall procedures. The contractual provisions *make clear* that an employer has no right to prohibit the dispatch of employees by Respondent in advance of the dispatch.[46]

I cannot agree that the provisions of the Master Agreement speak clear[ly] to the question of the right of an employer to reject a potential applicant in advance. Although referring to "contractual hiring hall procedures," the General Counsel calls my attention to only one clause in the Master Agreement, i.e., the provision cited by Bryant in his June 3 letter to Vick, supra (sec. 5,I,7: "No individual who is rejected by the individual employer shall be rereferred to such individual employer with respect to the same request pursuant to which he was originally referred"). I remain unpersuaded. This provision is hardly "clear" as to whether or not an "employer has [a] right to prohibit the dispatch of [an employee] in advance of the dispatch."[47] Much less does this provision define the duties of the Respondent when an employer has declared in advance that a certain employee will not be accepted. Rather, the provision invoked by the General Counsel provides, at best, an arguable basis for supposing that predispatch rejections by an employer are not permitted. And the General Counsel's construction of this clause has additional pitfalls, given other provisions, supra, generally ceding to employers the right to discharge employees, and specifically granting employers the right to reject any applicant referred by the appropriate Local Union.

Elaborating the latter point, I observe that if the General Counsel were correct in his arguable interpretation of the Master Agreement as prohibiting in-advance rejections, it would seem to follow that the parties to the Master Agreement intended unions and employers to go through a seemingly useless ritual: Thus, under the General Counsel's understanding of the Master Agreement, the referring union, even when pre-advised by an employer needing a worker that an applicant otherwise in-line for the referral will be rejected by the employer (which the employer has an undisputed right to do), would nevertheless be obliged to issue a dispatch to the disfavored applicant, and the employer, in turn, would then be obliged to reject the applicant on his or her arrival at the jobsite, and send him or her back to the hiring hall. And only after the union and the employer had thus completed this dance might the union then send an acceptable applicant to the employer. Clearly, a whole day or more might be lost in the observance of this ritual, a period in which the employer would be without the services of an acceptable worker, and a worker acceptable to the employer would be without work or pay. This *may* be what the parties to the Master Agreement intended, but if so, it would be hard to square such a procedure with other provisions in the Master Agreement, most notably the preamble to Section 5, which recites that the hiring procedures are intended, inter alia, to "maintain an *efficient* system of production in the industry," and "to provide for an *orderly* procedure for the referral of applicants."

For these reasons, if the only evidence of "established procedure" were the provision cited by the General Counsel, I would be hard-pressed to find that Oyler "depart[ed] from established exclusive hiring hall procedure" in refusing to refer Bryant to Alamillo.[48] Rather, absent some further indication that the Respondent generally deemed itself bound to perform the ritual dance described above, I would find it not at all "arbitrary" on Oyler's part that he refused to dispatch Bryant to Alamillo, when such a dispatch would be apparently futile, given an employer's unquestioned right to reject any referred applicant, and would potentially deprive another, "acceptable" out-of-work applicant of a day's or more pay.[49] And I would therefore readily dismiss the refusal-to-refer-to Alamillo count in the complaint if only these facts were before me.

But these are not the only facts, and the General Counsel does not limit himself entirely to arguments dubiously linked to section 5,I,7 of the Master Agreement. Thus, the General Counsel also states (although seemingly as a mere "moreover" observation), "It is also significant that Vick's letter of September 13 to Bryant recognized that the Union was not obligated to honor Alamillo's request." Here, I find no basis for the General Counsel's apparent assumption that Vick's statement in the September 13 letter was specifically grounded in an interpretation of section 5,I,7, or of any other contract provision for that matter. But I think the General Counsel gets closer to the mark in making this observation; for it is at least possible to infer that when Vick asserted that the Respondent does not honor Alamillo's request, he was implicitly suggesting that Oyler s*hould not* have honored that request on June 3. Thus, it is with Vick's September 13 statements in mind that I *might* find that Oyler's June 3 refusal to dispatch Bryant involved some departure at least from *Vick's* declaration of the Respondent's policy concerning Alamillo's letter.

Does it follow from Vick's statement that Oyler's action on June 3 was unlawfully arbitrary, and therefore a violation of Section 8(b)(1)(A) and (2), as alleged? I think not, although it is tempting to so conclude, particularly where the Respondent has never attempted to rationalize Oyler's actions in the light of Vick's later statement. But such a conclusion, however tempting, strikes me as an artificial one on this record. I have already suggested reasons grounded in the contract and in the inherent probabilities why it was not unlawfully arbitrary for Oyler to have refused to go through the seemingly futile and wasteful action of issuing a dispatch slip to Bryant. Therefore, it is easier for me to suppose on this record that it was Vick—not

[46] G.C. Br. at 11; emphasis added. It also deserves emphasis that in attempting to show that the Respondent "depart[ed] from established exclusive hiring hall procedures," the General Counsel has focused here on what he believes the "contract" provides. This focus is understandable, given that the record is otherwise devoid of any evidence of the Respondent's pre-June 3 "practice," if any, when confronted with an employer's "in-advance" rejection of a specific worker.

[47] The General Counsel distractingly argues (Br. at 11; emphasis added) that "[t]his clause demonstrates that there is no basis for the contention that Alamillo could prohibit the dispatch of Bryant *to any of its projects*." This may arguably be so, but the Respondent has never made any such "contention," and therefore the General Counsel appears to be swatting at a straw man. More fundamentally, the General Counsel's claim here is beside the point sought to be proved by the General Counsel, which was that Alamillo had "no right to prohibit the dispatch of employees . . . *in advance of the dispatch*."

[48] *Operating Engineers Local 406*, supra. And see, e.g., *Plumbers Local 598 (Mechanical Contractors of Washington)*, 276 NLRB 487, 488 (1985).

[49] *Ford Motor Co. v. Huffman*, supra: "[A union's] statutory obligation to represent all members of an appropriate unit requires [it] to make an honest effort to serve the interests of all of those members, without hostility to any." 345 U.S. at 337. "The complete satisfaction of all who are represented is hardly to be expected." Id. at 338.

Oyler—who acted arbitrarily, i.e., perfunctorily, and without rational basis, when he claimed falsely that the Respondent "does not honor" Alamillo's letter, and used this false claim as the basis for refusing to honor Bryant's grievance request.

Thus, when Vick invoked a reason for not advancing a grievance on Bryant's behalf that was nonsensical, given Oyler's earlier action, he plainly ignored Bryant's interest in getting to the bottom of a very real problem for Bryant—Alamillo's September 1990 declared refusal to employ Bryant in the future. This was a refusal that Bryant had specifically challenged on two independent contractual grounds after he learned of it (1) that the Master Agreement barred Alamillo from rejecting applicants in advance of referral; and (2) that in any case, Alamillo's rejection of Bryant violated the Equal Employment Opportunity provisions of the contract.[50] Vick's letter facially suggests that he gave no consideration to the merits of either point; indeed, so far as this record shows, Vick did not conduct even the semblance of an inquiry into Bryant's claim that Alamillo's refusal to reemploy him involved contractually proscribed race discrimination. Instead, in a classic example of obscurantism that carries its own indicia of bad faith, Vick merely evaded the issues raised by Bryant's grievance request by *pretending* that Alamillo's letter presented no real problem for Bryant.

In summary, I would not rely on Vick's later statement to find that Oyler's June 3 refusal to dispatch Bryant to Alamillo was unlawfully arbitrary, and I find no other grounds for concluding that Oyler's action involved a departure from established exclusive hiring hall procedures. I will therefore dismiss the complaint in Case 20–CB–8846 insofar as it alleges that Oyler's action violated Section 8(b)(1)(A) and/or Section 8(b)(2). But because Vick dismissed Bryant's grievance request perfunctorily, and in apparent bad faith, I conclude that the Respondent violated its duty of fair representation towards Bryant, and thereby violated Section 8(b)(1)(A), as alleged.

C. Refusal to Dispatch Bryant to Kimmins

The complaint in Case 20–CB–8991, as significantly amended on June 9, 1992, alleges that the Respondent arbitrarily refused to refer Bryant to Kimmins on November 27, in violation of Section 8(b)(1)(A) and (2). As we shall see, the claim in the complaint that the refusal to refer Bryant to Kimmins was arbitrary is simply distracting makeweight, for the theory of violation argued by the General Counsel depends not at all on a fair representation analysis; rather, the General Counsel relies entirely on the Board's 1981 holding in *Iron Workers Local 118 (Pittsburgh Des Moines Steel Co.)*,[51] restricting a construction industry union's right to refuse dispatch to dues delinquent members to those situations where the member's delinquency arose while working within the *same bargaining unit* to which the member now seeks a dispatch. For reasons I elaborate below, I will not need to reach the theory advanced by the General Counsel under *Iron Workers Local 118*, but will find on other grounds that the Respondent's refusal to dispatch Bryant to Kimmins was not demonstrated by the Respondent to have been done *pursuant* to a valid union-security clause.

The central facts are not complicated: On November 27, at the Respondent's hiring hall, Bryant responded to Oyler's call for a certified welder on a Kimmins job at the Hayes Street Freeway project. Another registrant, Sam Cole, likewise answered this job call. Bryant had been registered on the Respondent's out-of-work list since August 27, but Cole, according to Bryant's uncontradicted testimony, had a more recent out-of-work date. For this reason, Bryant normally would have been entitled to dispatch preference over Cole.[52] However, Bryant admittedly had not yet paid a "supplemental" dues amount owing for "November." And when Bryant tendered to Oyler his most recent dues receipt, which apparently reflected this arguable arrearage, Oyler excused himself, saying that he had to talk with Vick, and left the dispatch window. Minutes later, Oyler returned, saying that Vick had ordered that Bryant would have to pay "at least one more month's dues to be eligible for the dispatch," apparently referring to a $100 amount. Bryant replied that he didn't have the money. Oyler suggested that Bryant pass the hat in the hall to get the money. Bryant declined to do this. Oyler then gave the dispatch to Cole.

These facts are enough to establish, prima facie, a violation of Section 8(b)(1)(A) and (2), i.e., a "denial of employment" to Bryant by the Respondent within the meaning of *Operating Engineers Local 406 (Ford, Bacon & Davis)*, supra. However, as that case further instructs, the Respondent may escape a finding of violation if it "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." The Respondent's counsel on brief invokes only the union-security provisions of the Master Agreement by way of defense. The provision identified by the Respondent states in pertinent part (emphasis added):

> Every person performing work covered by this Agreement who is a member of the Union[53] and in the employment of an individual employer covered by this Agreement . . . shall, as a condition of employment, or continued employment, remain a *member in good standing* in the Union *in the appropriate Local Union of the Union.*[54]

The Respondent's argument on brief is vague, superficial, and quite summary in character.[55] But it is implicit in that argument that the Respondent would have me find at the start that the union-security clause in the Master Agreement was what, in fact, animated Oyler's refusal to dispatch Bryant to Kimmins.

[50] At p. 12 of his brief, the General Counsel now defines Bryant's grievance narrowly, as raising only a single issue, namely, the existence of discrimination on the part of Alamillo with respect to the hiring of Bryant. This is curious, and seemingly arbitrary on the General Counsel's part, given his previously mentioned claims that Alamillo's in-advance rejection of Bryant was contractually unprivileged, and given that Bryant's June 3 letter raised the same point, *in addition* to the claim that Alamillo's refusal to hire him violated the E.E.O provisions of the Master Agreement. Thus, I do not adopt the General Counsel's narrow interpretation of the issue raised by Bryant's grievance request.

[51] 257 NLRB 564, 566–567 (1981).

[52] Thus, testifying about general referral practices, Oyler stated:

> A job order's called in you may have one or more . . . workers interested in the particular job. At that point . . . we look at the list to see their position on the list, and the person with the highest position on the list would be offered the job.

[53] Here, it is useful to recall again that at sec. 1, p. 3 of the Master Agreement, "the Union" is defined as "any of the Local Unions affiliated with the District Council."

[54] The Respondent's counsel on brief has misquoted in several respects the phrases following the words, "as a condition of employment. . . ."

[55] R. Br. at 5–6.

However, even this implicit threshhold claim is not supported by any affirmative evidence; rather, all that the record shows is that Oyler refused to give Bryant the dispatch because Bryant refused to come up with another $100 in supplemental dues money. Whether or not Oyler (or Vick, who had apparently instructed Oyler) had in mind the specific provisions of the union-security clause is simply a matter for speculation. Nevertheless, that omission of proof perhaps might be overlooked, because our experience tends to condition us to assume that when a union agent demands that a registrant pay dues before issuing a dispatch, the agent *probably* believes that the union has some lawful basis for imposing that requirement, and a union-security clause in a governing labor agreement is normally the basis on which such a right is secured to a union. Thus, despite the absence of any affirmative evidence as to Oyler's (or Vick's) specific reasoning in refusing to dispatch Bryant to Kimmins, I will assume, arguendo, that the refusal to dispatch was supposed by Oyler (or Vick) to be justified by the union-security clause.

But the Respondent *also* failed to introduce any evidence whatsoever tending to show that Bryant was *not* in compliance with the union-security clause its counsel now relies on. Specifically, the Respondent has failed to show that Bryant was *not* a "member in good standing . . . in the appropriate Local Union" at the time Oyler refused to dispatch him. I recognize that the definition of "member[ship] in good standing" is normally located in a union's constitution or bylaws. And true, the Respondent's lawyer summarily invokes the Respondent's bylaws and the International's constitution in his argument on brief. But I wonder if the Respondent's counsel looked up the definitions of "member in good standing" to be found in those documents; for if he had, he would have discovered that each of them plainly allow a member to be "in arrears" for up to one month before being subject to classification as "not in good standing."[56] Thus, while Bryant's testimony might allow a finding that he was "in arrears" on a supplemental dues obligation to the Respondent as of November 27, his same testimony (the only evidence on the point) also indicates that he was not "more than one month" in arrears as of that date. Therefore, his arrearage was not enough under the Respondent's bylaws nor under the International constitution to take him out of the category of "member in good standing."[57]

It is on this basis that I conclude that the Respondent has failed to demonstrate that its interference with Bryant's employment with Kimmins was "*pursuant* to a valid union security clause." Indeed, so far as this record shows, as of November 27, Bryant was a "member in good standing" within the meaning of the union-security clause and the Respondent's governing bylaws. Therefore, I find it unnecessary to reach the General Counsel's theory of violation, which presumes under *Iron Workers Local 118*, supra, that the Respondent was obliged to give Bryant a new grace period of work for Kimmins before invoking the union-security clause as a basis for seeking his discharge, or preventing his further dispatch to Kimmins.[58]

D. Vick's December 30 Letter to Bryant

The complaint in Case 20–CB–8991 further alleges as a separate violation of Section 8(b)(1)(A) that the Respondent, in a letter from Vick to Bryant on December 30, threatened that Vick would "possibly refuse" to dispatch Bryant, if he did not pay up on certain supplemental dues claimed to be owed. The record shows that this happened.[59] What is lacking is any statement by the General Counsel of a theory as to why this hypothetical threat by Vick violated Section 8(b)(1)(A), as alleged. Indeed, the General Counsel's brief does not even make a *factual* reference to Vick's December 30 letter, much less does it advance a theory of violation. In the circumstances, I presume that the General Counsel has abandoned any contention that Vick's letter broke the law, and I will not speculate as to what theory might have originally inspired the complaint in this respect. It suffices to observe that it is not *necessarily* unlawful for a union to threaten to possibly refuse to dispatch a dues delinquent employee. On the contrary,

> a valid union-security clause can be enforced *at the hiring hall level by a refusal to dispatch an employee whose dues are in arrears*, so long as the employee has already worked for the statutory grace period in the bargaining unit to which the collective-bargaining agreement containing the union-security clause applies.[60]

Here, the General Counsel has not attacked the abstract validity of the union-security clause in the Master Agreement, and the record will not allow a finding that Vick's threat to "possibly refuse" to dispatch Bryant in the future was a threat to take action which would not be privileged under that union-security clause. Accordingly, where the General Counsel has abandoned his original attack on Vick's letter, and where the record lacks any basis for finding that Vick's letter necessarily intended an

[56] The Respondent's bylaws (R. Exh. 2) contain only a single reference to "good standing," at art. I, sec. 1, dealing with "Regular Meetings." (Id. at p. 2). There, at subpar. (C),(1), the bylaws state:

> Only members who are in good standing (not more than one (1) month in arrears with payment of dues and/or assessments) shall be permitted to attend any meeting of this Local Union.

The International's constitution (R. Exh. 1) is seemingly irrelevant to this issue, because the union-security clause at issue expressly refers to "member[ship] . . . in the . . . Local Union." But it provides no support for the Respondent either. Art. II, sec. 7 of the constiution, dealing with "Continuous Good Standing," (id. at p. 6), states:

> [A] member shall not be considered in good standing who is more than one (1) month in arrears in payment of dues.

[57] In this regard I further recall that the Respondent did not drop Bryant from membership until an uncertain point in 1992.

[58] The General Counsel relies on two facts; first, Kimmins was an "individual signatory to a contract with Respondent," and second, Bryant had never before worked for Kimmins. Based on those facts, the essence of the General Counsel's legal theory is that Kimmins' employees constituted a separate bargaining unit, governed by a different contractual union-security clause than the union-security clause governing the "multi-employer bargaining unit" in which the General Counsel supposes (without record basis) that Bryant had been previously employed, and in which the General Counsel supposes (without record basis) that Bryant's dues delinquency arose.

[59] Thus the record shows that, in the context of a five-paragraph letter to Bryant on December 30, Vick told Bryant, inter alia, that Bryant now owed the Respondent a "Supplemental Dues debt of $272.84," reminded him that the Respondent needed this money in order to be able to "operate," and that it was Bryant's "responsibility to pay these dues on time and it is my responsibility to collect them if they are delinquent." "Therefore," stated Vick,

> [I]f your financial responsibility to this Local isn't kept, be assured I'll keep mine by taking the necessary action to collect the amount owed in full by removing you from employment if employed, or possibly refusing dispatch, based on not being current on your dues.

[60] *Iron Workers Local 118*, supra, 257 NLRB at 566; emphasis added; citations omitted.

unlawful application of the union-security clause, I will dismiss the complaint in Case 20–CB–8991 insofar as it alleges that Vick's letter violated the Act.

CONCLUSIONS OF LAW

Based on the foregoing findings and analyses, I reach these conclusions of law:

1. The Respondent did not violate the Act when, on or after an uncertain date in April, it failed to give Bryant access to the referral records he had once sought to review.

2. The Respondent did not violate the Act when it refused to dispatch Bryant to Alamillo on June 3.

3. When Vick on September 13 dismissed Bryant's request to grieve Alamillo's declared refusal to hire Bryant, the Respondent violated its statutory duty of fair representation towards Bryant, and thereby restrained or coerced Bryant in the exercise of the rights guaranteed in Section 7 of the Act, and thereby violated Section 8(b)(1)(A) of the Act.

4. When Oyler refused to dispatch Bryant to Kimmins on November 27, the Respondent caused or attempted to cause an employer to discriminate against Bryant in violation of Section 8(a)(3) of the Act, and thereby violated Section 8(b)(2) of the Act, and derivatively, Section 8(b)(1)(A) of the Act.

5. The Respondent did not violate the Act when Vick threatened in a letter to Bryant on December 30 that he would possibly refuse to dispatch Bryant in the future if Bryant did not cure his dues arrearage.

THE REMEDY

Having found that the Respondent in certain respects violated Section 8(b)(1)(A) and (2) in its treatment of Bryant, I shall order that the Respondent cease and desist from these unlawful actions or from like or related actions, and that it take certain affirmative steps necessary to restore the status quo ante its unlawful actions, including by posting an appropriate notice and by taking the following additional remedial steps:

A. Unlawful Dismissal of Bryant's Grievance; Mack-Wayne Remedy

As to the Respondent's unlawful dismissal of Bryant's grievance request, counsel for the General Counsel in his brief "submits that a *Mack-Wayne* Closures remedy is warranted." He is referring to the Board's Supplemental Decision and Order in *Rubber Workers Local 250 (Mack-Wayne Closures*), 290 NLRB 817 (1988) (*Mack-Wayne II*). He does not identify with greater particularity how that case might inform the remedial order, and as I discuss below, some details of its application are less than certain. Nevertheless, for the reasons I note below, I agree that a "provisional make-whole remedy" of the type prescribed in *Mack-Wayne II* is appropriate.

1. The holdings of *Mack-Wayne I* and *Mack-Wayne II*

In its original decision (*Mack-Wayne I*),[61] the Board found that the union had violated Section 8(b)(1)(A) by taking certain actions that amounted to an arbitrary refusal to process employee O'Neill's grievance over his discharge, and ordered the union to request the employer to reinstate O'Neill, and if the employer refused, to promptly pursue the remaining stages of the grievance procedure, including arbitration, in good faith with all due diligence. Additionally, the Board ordered the union to permit O'Neill to be represented by his own counsel during the remaining stages of the grievance procedure and at any arbitration proceeding, and to pay the reasonable legal fees of such counsel. Finally, the Board entered a provisional make-whole remedy, that is, it ordered that in the event that it was not possible for the union to pursue the remaining stages of the grievance procedure for any procedural or substantive reason, the union must make O'Neill whole for any loss of pay he may have suffered as a result of the union's wrongful conduct. Explaining this, the Board said that any uncertainty about the underlying merits of O'Neill's grievance was traceable to the union's own violation in failing to give O'Neill fair representation at the stage when the grievance was submitted for consideration by a joint union-employer panel, and therefore, such a provisional make-whole remedy was "necessary in order to restore the status quo, remedy the injury, and deter the wrongdoer."[62]

In *Mack-Wayne II*, decided by the Board after seeking and obtaining a remand from the Third Circuit, where *Mack-Wayne I* was then pending the Board's application for enforcement, the Board clarified its original reasoning and order, "in the light of the Ninth Circuit's decision in *San Francisco Pressmen v. NLRB*."[63] Thus, the Board conceded that a make-whole remedy is appropriate only where there exists a "nexus between the unfair labor practice and the make-whole remedy," i.e., *some* basis for supposing that absent the union's unfair representation, the grievant would have prevailed, and therefore some basis for supposing that the grievant suffered "damage" from the unfair representation for which he or she should be made whole.[64] However, adhering to its view in *Mack-Wayne I* that the "wrongdoer" union should bear the principal consequences of any uncertainty over the merits of the grievance, the Board fashioned an allocation-of-burden scheme under which the General Counsel would establish the necessary "nexus" for the make-whole remedy simply by showing that the grievance was "not 'clearly frivolous.'" And where the General Counsel met this threshhold burden, it would be left to the union to establish that the grievance in any case lacked merit; and therefore, that its unfair representation did not "cause" the grievant any "further injury."[65]

The Board stressed that "[a]ny provisional make-whole remedy we order will only take effect if the union *has failed or has attempted and been unable* to have the employer consider the grievance on its merits. Thus, a provisional make-whole remedy only becomes important if the *grievance cannot be resolved pursuant to the agreed-on process.*"[66] In addition, the Board "recognize[d] that there are circumstances when the union and the employee may be faced with a difficult and inequitable 'Hobson's Choice making it unfair . . . to *require* the union to attempt to prove in the unfair labor practice case that the grievance lacks merit.'"[67] With this recognition in mind, the Board held that,

[61] *Rubber Workers Local 250 (Mack-Wayne Closures)*, 279 NLRB 1074 (1986).

[62] My characterizations of the Board's holding in *Mack-Wayne I* borrow substantially from the Board's own characterizations of that holding in *Mack-Wayne II*. 290 NLRB at 817.

[63] 290 NLRB at 817, referring to the Ninth Circuit's decision reported at 794 F.2d 420 (1986).

[64] 290 NLRB at 818–819.

[65] Id. at 819.

[66] Id. at 821; emphasis added.

[67] Id.

> in the context of this class of cases only, the union should be given the option of litigating the merits of the employee's grievance at either the unfair labor practice hearing or at the subsequent compliance stage. We will not allow the union, however, to litigate this issue twice. Prior to the close of the unfair labor practice hearing, the union must have made an unambiguous election to litigate the merits of the grievance at the unfair labor practice hearing or at the compliance stage.[68]

Finally, in the portion of *Mack-Wayne II* that I will find the most difficult to apply to this case, the Board *remanded* the case to the judge to give the union the opportunity to make the "election" in question, directing that, should the union elect to litigate the merits issue now, the judge should "convene a hearing for that purpose," and thereafter prepare a "supplemental decision."[69]

2. Application to this case

Did the General Counsel establish that Bryant's grievance was "not 'clearly frivolous?'" Exactly how one shows this in a given case is doubtful; proving a negative is always problematic, and the *Mack-Wayne* cases provide no real guidance on the point. But seemingly, it takes next to nothing to establish this negative proposition, i.e., only that there was some arguable basis for the claims in Bryant's grievance. I have previously noted that Bryant's grievance raised two discrete claims first, that section 5,I,7 barred Alamillo from rejecting him in advance; and second, that Alamillo's rejection of him in any case violated the Equal Employment Opportunity requirements of the Master Agreement. I have already observed that, despite its seemingly impractical implications, section 5,I,7 provides some arguable basis for barring in advance rejections; therefore, Bryant's claim in this respect was not clearly frivolous. As to Bryant's second claim, I note (a) that Bryant is black, and (b) that Alamillo rejected him from reemployment. Whether or not this pair of facts makes out a prima facie case of race discrimination by Alamillo in violation of the Equal Employment Opportunity clause is not the question; the only question is whether or not these facts take Bryant's claim out of the realm of the "clearly frivolous." I find that they do. Therefore, I find that the General Counsel made out the (minimal) threshhold case required to establish the presumptive appropriateness of a provisional make-whole remedy under *Mack-Wayne II*.

Did the Respondent attempt at the unfair labor practice hearing to meet its burden of coming forward to demonstrate that Bryant's grievance was unmeritiorious, and therefore that its unlawfully unfair dismissal of his grievance did not cause him any damage warranting a make-whole remedy? Clearly not; indeed, the Respondent failed utterly to introduce any testimony or other evidence tending to show that either of the two claims advanced in Bryant's grievance were meritless. And neither can Vick's September 13 letter to Bryant be taken as an attempt by the Respondent to show lack of merit to Bryant's grievance; at most, that letter seemed to claim (quite spuriously), that Alamillo's rejection of Bryant was simply not a problem for Bryant.

Does this mean that the Respondent effectively "elected" not to litigate the merits of Bryant's grievance at the unfair labor practice trial stage, but rather to defer such litigation to the compliance stage, if necessary? I think so, but this is the question about which I find the greatest basis for doubt. An alternative way of understanding what happened is that the Respondent made no election whatsoever, given that it was not until the General Counsel submitted his brief that it became clear that the prosecution was seeking a *Mack-Wayne II* remedy. And if this alternative view were to control, it would seem to follow that I would be required to reopen the record to give the Respondent an opportunity to make such an election, and, if the Respondent opted now to litigate the merits of Bryant's grievance, that I convene yet another hearing on this matter before issuing any decision in these cases (or, alternatively, that I sever a portion of these cases and decide all but the refusal-to-grieve elements, while awaiting further word from the Respondent as to its election).

These latter alternatives would obviously cause substantial delays in the disposition of all or part of these cases, and they are not clearly called for by *Mack-Wayne II*. When this case was tried, *Mack-Wayne II* had been on the books for nearly 5 years; and clearly, the Respondent cannot claim ignorance of its holdings, and of its right to have litigated the merits of Bryant's grievance at the unfair labor practice hearing stage, if it so desired. What *Mack-Wayne II* requires is that the Respondent have been given the "option" to conduct such litigation during this trial; and obviously, it had exactly that option, which it apparently chose to forgo. Neither does it call for a different result that the General Counsel did not affirmatively put the Respondent on notice before the instant trial that it was seeking a *Mack-Wayne II* remedy for the Respondent's unlawful dismissal of Bryant's grievance request. *Mack-Wayne II* does not affirmatively require the General Counsel to provide a union such notice; indeed, it implicitly gives the General Counsel the option of conducting litigation in such a way as to either establish a "not clearly frivolous" basis for the grievance, or to "forgo" such proof.[70] Seemingly, therefore, the Board allows the form of the General Counsel's litigation efforts to signal the type of remedy that will be sought. In addition, I deem it significant that, months after the General Counsel submitted his brief, seeking a *Mack-Wayne II* remedy, the Respondent has not requested me to reopen the record for purposes of litigating the merits of Bryant's grievance. In all the circumstances, therefore, I find that the Respondent, by failing to litigate the merits of Bryant's grievance at the instant trial, has implicitly elected to conduct such litigation only at the compliance stage, if necessary. And I would not reopen this record at this stage simply to give the Respondent yet one more opportunity to explicitly affirm an election that it has implicitly made already.

Accordingly, consistent with *Mack-Wayne II*, I will enter a provisional make-whole order that substantially conforms to the one entered by the Board in *Mack-Wayne I*.[71] Specifically, with the unique facts of this case in mind, I will require the Respondent not only to promptly request that Alamillo rescind its letter to the Respondent barring Bryant from employment, but further request that Alamillo make Bryant whole for the wages and benefits he lost as a consequence of his failure to be referred to Alamillo on June 3 which failure to be referred was in turn a

[68] 290 NLRB at 821.

[69] Id. at 822.

[70] 290 NLRB at 818–819.

[71] In *Mack-Wayne II*, the Board said it would give effect to the remedy ordered in *Mack-Wayne I*, if the union did not elect, after remand, to litigate the merits of O'Neill's grievance at the unfair labor practice stage. Id. at 822.

foreseeable consequence of Alamillo's letter. (Recall here that I have found that it was not unlawfully arbitrary for the Respondent to have honored Alamillo's letter on June 3.) If Alamillo fails to honor both requests, or either of them, my order requires the Respondent to pursue both requests, or either of them, as the case may be, through the grievance procedure established by the Master Agreement, including to arbitration or other form of resolution available under the Master Agreement, all in good faith and with due diligence. And I will require the Respondent to bear the reasonable costs of an attorney of Bryant's choosing to represent him at any grievance proceedings, including arbitration, that may take place. Finally, in the event the Respondent is unable to obtain the requested relief from Alamillo voluntarily, or in the event the Respondent is unable for any reason to pursue Bryant's grievance to a resolution on its merits, then my order contemplates that the Respondent make Bryant whole directly for his losses, in the manner provided in *Mack-Wayne I.*

B. Refusal to Dispatch Bryant to Kimmins; Conventional Make-Whole Remedy

As to the Respondent's unlawful refusal to dispatch Bryant to Kimmins, I will provide the conventional remedy for that type of violation, i.e., that it make Bryant whole for any losses of earnings or benefits he may have suffered, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[72]

ORDER

The Respondent, Iron Workers Local Union 377, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Arbitrarily, discriminatorily or in bad faith refusing, on request, to process grievances sought to be processed by employees towards whom it owes a duty of fair representation.

(b) Causing or attempting to cause an employer to discriminate against employee-applicants in violation of Section 8(a)(3) of the Act by refusing to dispatch the applicants to employers based on their dues arrearages, where such refusals are not privileged by, or done pursuant to, a lawful union-security provision in a labor agreement governing the employment of the applicants.

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

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

(a) Promptly request Alamillo Steel Reinforcing Company to rescind and withdraw its letter to the Respondent declaring that Ronald W. Bryant is ineligible for employment with Alamillo, and to make Bryant whole for any wages or other benefits he lost as a consequence of the Respondent's refusal, based on that letter, to refer Bryant to employment with Alamillo on or about June 3, 1991; and if Alamillo refuses those requests, or either of them, promptly initiate and pursue in good faith and with due diligence a grievance on Bryant's behalf seeking the same relief, including to arbitration or to any other disputes-resolution forum established by the Respondent's labor agreement with Alamillo that was in effect on June 3, 1991.

(b) Permit Ronald Bryant to be represented by his own counsel at any grievance proceedings, including arbitration or other resolution proceedings, and pay the reasonable legal fees of such counsel.

(c) In the event that it is not possible for the Respondent to pursue a grievance on Ronald Bryant's behalf, resulting in the Respondent's inability to resolve on their merits the grievances raised by Bryant against Alamillo's declared refusal to employ him, make Bryant whole for any loss of pay or benefits he may have suffered as a consequence of his failure to be employed by Alamillo on or about June 3, 1991, by paying him the amount he would have earned from Alamillo from that date, together with interest, less his net earnings during the backpay period.

(d) Make Ronald Bryant whole for any losses of pay or benefits he suffered as a consequence of the Respondent's refusal to dispatch Bryant to Kimmins Abatement Company on or about November 27, 1991, by paying him the amount he would have earned from Kimmins from that date, together with interest, less his net earnings during the backpay period.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all dispatch and referral records, and all other records it may possess that are necessary or useful to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its union office and its hiring hall in San Francisco, California, copies of the attached notice marked Appendix.[73] Copies of the notice, on forms provided by the Regional Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and/or 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.

(g) Sign and return to the Regional Director sufficient copies of the notice for posting by Alamillo Steel Reinforcing Company and Kimmins Abatement Company, if willing, at all places where notices to employees are customarily posted.

(h) 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.

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act not specifically found.

[72] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[73] 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."