UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1402, AFL-CIO
(ELLER MARITIME SERVICES, LLC)

and **Case No. 12-CB-5579**

MALCOLM BLACK, SR., An Individual

Rachel Harvey, Esq., Counsel for the General Counsel.
Frank Hamilton, III, Frank Hamilton & Associates, P.A., Counsel for Respondent.

DECISION

Statement of the Case

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was heard by me on September 18, 2006 in Tampa, Florida. The Complaint herein, which issued on June 30, 2006[1] and was based upon an unfair labor practice charge filed on March 13 by Malcolm Black, Sr., alleges that International Longshoremen's Association, Local 1402, AFL-CIO, herein called Respondent, failed and refused to refer Black to employment through its exclusive hiring hall arrangement with Eller Maritime Services LLC, herein called Eller, on March 13, for reasons that are unfair and arbitrary, and are in direct departure from its announced hiring hall procedures, in violation of Section 8(b)(1)(A) and (2) of the Act.

Findings of Fact

I. Jurisdiction

Respondent admits, and I find, that Eller has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization Status

The Respondent admits, and I find, that it has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Facts

Eller is engaged at its Tampa, Florida facility in providing stevedoring, baggage handling and related services to the public at Channelside, a docking facility for cruise ships of the Holland America and Carnival Lines. The Respondent admits that it operates an exclusive hiring hall for the referral of employees for employment with Eller at Channelside. In operating this hiring hall, the Respondent has two "shapes" in the morning. There is a 7:00 a.m. shape for the

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2006.

8:00 a.m. to 4:00 p.m. shift, and an 11:00 a.m. shape for the 12:00 Noon to 4:00 p.m. shift. James Harrell, vice president of the Respondent, has been in charge of the hiring hall since about 2001.

Black is a member of the Respondent and has been referred to work out of its hiring hall since 1977, principally as a porter or scanner. The three most prevalent jobs referred by the Respondent to Eller at Channelside for the cruise ships are porters, who handle the travelers' luggage, scanners, who take the luggage and put it through the scanning machine to be checked for security purposes, and "the store," employees who take groceries and put it on the cruise ship shelves, apparently, for restocking of its food supplies for the next cruise. Porters are assigned to work in groups called gangs and the leader of each gang, the header, chooses the individuals at the shape who will work on the gang based upon seniority. The shape days vary depending upon when the cruise ships leave and return. Harrell testified that sometime after 5:00 p.m. he receives work orders from Eller stating the number of employees that they will need the following day. After receiving this work order, he posts a notice at the union hall stating the number of workers that will be needed the following day, the job classifications, and the check in time for each job. This information is also put on the Respondent's telephone recording, so that members can call the hall to learn of job availabilities on the following day. A bell rings at the hiring hall at 7:00 a.m., for the first shape, at which time the job seekers have five minutes to shape up in order of seniority in front of the header whose gang they wish to be employed in. A second bell rings at 7:05, at which time the workers are chosen by seniority, and if an applicant has a complaint to make about a work assignment, he makes the complaint to Harrell, who has the final authority to resolve these issues. After the second bell rings, Harrell takes the work cards containing the individuals' names and social security numbers from each of the individuals chosen and gives these cards to the header, who brings them to the Eller timekeeper at Channelside. The 11:00 shape is less formal, taking place outside the union hall, without any bells.

Black appeared at the 7:00 a.m. shape for the Carnival Inspiration on March 13, but individuals with more seniority than he had were chosen, and he left the hall, to return later for the 11:00 shape. He testified that he returned to the hall at about 10:54 a.m. and, as he was driving past the hall, he saw other members, George McNair, Ira Williams, Stanley Broderick and Louis Simmons, walking to their cars as if they had already shaped and checked in at the 11:00 shape. It is admitted that Black had greater seniority than McNair, Williams and Broderick. Black rolled down the window of his car and asked Simmons if he already checked in, and Simmons nodded his head yes. Black then said that it wasn't yet 11:00 and asked why they checked in, and Simmons nodded his head like he didn't know why. Black then got out of his car and went into the Respondent's office and told the secretary that he wanted to speak to Harrell. When he didn't come out of his office immediately, Black called to Harrell that he wanted to speak to him and Harrell came out. Black told him that he checked the men in even though it wasn't 11:00. Harrell responded that they didn't go by Black's time, and Black told him that it was 10:56 on the clock on the union wall. Black said that it was wrong for him to check the men in prior to 11:00 and Harrell said that he already checked them in, and that he could check the people in whenever he wanted to. Black said that he wanted a job, and Harrell said that he wasn't going to get one, and Black said that he was going to file charges with the Board. Harrell said that he didn't care what he did. At that point, Black left the union office and went to the Board's office where he filed the instant unfair labor practice charge. Black testified that there was only one other occasion that he is aware of where the 11:00 shape occurred prior to the scheduled time, although during 2006 he only came to the 11:00 shape about once a week. In early 2005, he reported to the union office at about 10:56 a.m. and did not see anybody other than Ernest Richardson, the Respondent's recording secretary. Black asked Richardson if he already did the check in, and Richardson said that he had because he didn't think anybody else

was going to show up for the shape. He asked Black if he wanted a job and Black said that he did, and Richardson gave Black his scanner job for that afternoon.

Harrell testified that on the afternoon of March 12, he posted a notice on the bulletin board at the union hall, and placed a recording on the union's telephone, that four scanners would be needed the following day at the 11:00 shape. On March 13, at about 10:50, while he was in his office, he saw about eight applicants waiting outside in the parking lot (where the 11:00 shape takes place). He waited for about five minutes and went outside and said that he needed the four most senior men; the three most senior men lined up with Simmons and at about 10:56 these four men started to head for their cars to drive to Channelside. Initially, Harrell testified that, about the same time, Black came to the door of the union office where Harrell was standing, and told him that it was not yet 11:00 and Harrell told him that the applicants had already checked on. In answer to questions from counsel for the Respondent, he subsequently testified that while he was walking back into the union's office after the shape, Black yelled to him either from his car or crossing the street, that he, Harrell, checked on too early. A few minutes later, Black came into the union office and told him that he wanted a scanner job for the afternoon and Harrell told him that he could not get a scanner job because they already checked on. Black then said that he was going to the Labor Board, and Harrell told him that it was his problem, but that he was spending the union's money. Black left the union's office without being referred to a job that day. Harrell testified that the 11:00 scanner shape was checked on early, "…sometimes. It depends on the situation." Harrell could not be specific about the number of occasions where the 11:00 shape occurred prior to 11:00, other than to testify that it occurred on "several occasions," about five or six times over the last few years. This could occur in situations where there are more than enough applicants at the hall prior to 11:00, or where there are not enough applicants. In the latter situation, Harrell would call members and tell them to go straight to the dock to work. If an applicant showed up after the members were checked on, if the header offered an applicant with more seniority a job at that point, he would have no problem with that: "It's up to the header."

Simmons testified that on March 13 he shaped at 7:00 and, because of his seniority, went out as the header on the Storage Gang which unloads the grocery truck and takes the groceries to the ship. He worked that job from 8:00 to about 10:35, when he completed work and returned to the union hall to participate in the 11:00 shape for the afternoon scanner jobs. He arrived at the union hall at about 10:50. About three or four minutes later, Harrell came outside and told them to shape and Simmons took the cards from the most senior applicants. "And at this time Mr. Black came up and made reference to the fact that we had checked on a little early." He testified that, at the time, Black was in his car, across the street from the union hall when he yelled to Harrell, who was standing by the door to the union hall, but he did not hear Harrell respond because the three men who were going to the job with him were "scurrying off" fearful that they would lose their job that day to Black, who had more seniority than they did. Simmons told them that there was no sense in them leaving, because if Black gave him his card, "somebody is going to have to be cut off." Simmons testified that he then said to Black, who was still in his car about twenty to twenty five feet away from him, that if he wanted to go to work he should give him his card, although, "He was so into what he was saying to Mr. Harrell, I can't say whether he heard me or not." Black testified on rebuttal that Simmons never made that offer to him, and could not make the offer to him because only Harrell had the authority to give him the job. However, if Simmons had offered him the job he would have taken it even though Simmons did not have the authority to offer it. Simmons testified further that if Black had given him his card he would have given Black a job in place of the applicant with the lowest seniority. However, Black never responded to this offer and drove off and Simmons left with the three men a minute or two later.

IV. Analysis

Most of the facts herein are undisputed. It is agreed that the Respondent operates an exclusive hiring hall sending applicants to Eller, that the shape on March 13 occurred at about 10:54 or 10:55, five or six minutes early, that Black arrived at the hall prior to 11:00, about a minute or two after the shape was concluded, but before the men had left for work, and that he had more seniority than three of those who were chosen, and if the shape had taken place as scheduled at 11:00, he would have been selected and would have been employed as a scanner at Eller that day from 12:00 to 4:00. The only material credibility issue herein is Simmons' testimony that at about 10:56, when he heard Black complaining from his car about the early shape that morning, he told Black that if he gave him his card he would send him to work, although Simmons was not certain that Black heard him, because he was in his car about twenty to twenty five feet away, and was occupied with yelling at Harrell. Black denies that Simmons made this offer to him. Although I found Simmons to be a generally credible witness, I do not credit that he made this offer to Black or, if he did make the offer, Black did not hear it. First, I find that if the offer had been made, Black would have quickly accepted the offer. Further, Simmons testified that after he made the offer Black drove away, yet Black and Harrell each testified that right after Black yelled to Harrell that he had checked in early, he parked his car and came into the union office and spoke to Harrell. For these reasons, I find that either Simmons never made the offer to Black, or Black did not hear it.

The issue herein is simply stated: did the Respondent violate Section 8(b)(1)(A) and (2) of the Act by conducting its shape for scanners at approximately 10:55 on the morning of March 13, rather than the usual 11:00, thereby causing Black to lose four hours employment?

Steamfitters Local Union No. 342 (Contra Costa Electric, Inc.), 329 NLRB 688 (1999) has a long history with the Board and the courts. In that case, the union operated an exclusive hiring hall and Jacoby, the charging party, a union member for 27 years, registered for referral and told Blevins, the union's business representative in charge of the hall, that he wanted to be employed on a certain project. When Jacoby returned to the hall to inquire about the job, Blevins told him that he thought that he had already dispatched him to the job. The judge found that Blevins thought that he had left a message on Jacoby's answering machine referring him to the job, but there was no record of such a call, and Jacoby did not obtain the job in question, although he was dispatched to another job a week or two later. The judge, citing prior Board cases, found that because Blevins departed from established exclusive hiring hall procedures, which resulted in the loss of employment for Jacoby, the union violated Section 8(b)(1)(A) and (2) of the Act. Citing *Steel Workers v. Rawson*, 495 U.S. 362 (1990) and *Vaca v. Sipes*, 386 U.S. 171 (1967), the Board reversed, saying, "We read these decisions together to mean that 'mere negligence' in the operation of an exclusive hiring hall does not give rise to a claim for breach of the duty of fair representation, even by an applicant who loses an employment opportunity as a result of the union's mistake." The Board further stated, however:

> We stress that our holding today is a narrow one. We do not suggest that *gross* negligence in the operation of a hiring hall, of the type indicating disregard for established procedures, would not breach the duty of fair representation. Such conduct would likely be found to be "arbitrary," and possibly in bad faith, and thus within the proscription of *Vaca v. Sipes* and *O'Neill.* We hold only that honest, inadvertent mistakes, such as the union's in this case, do not, without more, constitute a breach of the duty. [Emphasis supplied]

After the Court, at 233 F.3d 611 (D.C. Cir 2000) reversed and remanded the case to the Board,

the Board, at 336 NLRB 549 at 550 (2001) reaffirmed "…the Board's earlier holding that inadvertent mistakes in the operation of an exclusive hiring hall arising from mere negligence do not violate the union's duty of fair representation" and do not violate Section 8(b)(1)(A) and (2) of the Act:

> In so holding, we adhere to the Board's longstanding position that any departure from the established procedures for an exclusive hiring hall that results in a denial of employment to an applicant violates the duty of fair representation and Section 8(b)(1)(A) and (2), unless the union can demonstrate that the departure was pursuant to a valid union-security clause or was necessary to the union's effective performance of its representative function. We reaffirm that such departures encourage union membership by signaling the union's power to affect the livelihoods of all hiring hall users, and thus restrain and coerce applicants in the exercise of their Section 7 rights. As indicated above, however, our past decisions have recognized that inadvertent errors in operating a hiring hall do not signal the union's power over referrals and thus do not encourage union membership or restrain and coerce applicants in violation of either the duty of fair representation or Section 8(b)(1)(A) and (2).

The Board also stated that there is no requirement that a union must operate a hiring hall "mistake free":

> An inadvertent failure to dispatch a hiring hall applicant in the proper order by definition is not deliberate and can hardly be described as "arbitrary," "invidious," "hostile," or any of the other adjectives repeatedly used to characterize unfair representation. It carries no suggestion that the union has any thought or intention of acting to an applicant's disadvantage. It may signal an error in judgment, but not favoritism or hostility.

On appeal, the Court, at 325 F.3d 301(D.C. Cir. 2003) affirmed the Board's decision, stating, "this case does not involve any allegation that the union acted with ill will, discrimination, unlawful favoritism, nor any other obviously unreasonable business practice…[rather that it] failed to refer petitioner to a job because of an admitted, albeit unintended, mistake." The Court concluded: "We are aware of no judicial decision-and petitioner cites us to none-in which a court has held that a union violates its duty of fair representation if it commits a single act of simple negligence or inadvertent error in the administration of an exclusive hiring hall." The Board came to a similar decision in *United Association of Journeymen and Apprentices, Local 375*, 330 NLRB 383 (1999), where the union's dispatcher formed the good faith but mistaken belief that the charging party applicant did not want to work during the relevant period even though he had signed the referral register. Further, in *Plumbers and Steamfitters Local 91*, 336 NLRB 541 (2001), the Board reversed the judge's finding that the union violated Section 8(b)(1)(A) and (2) of the Act by failing to refer the two charging parties for certain job referrals. The union operated an exclusive hiring hall and the judge found no evidence indicating that the failure to refer was due to protected concerted activities or other unlawful considerations, and further found that the union did not harbor animus toward the charging party. Rather, the judge found that the union agent in charge of the hall was in a hurry to get to an appointment and did not have the time to make the telephone call required under the agreed upon referral procedure. The Board cited the cases referred to above stating, "…we find, in agreement with the judge that Eaves' actions were the result of 'cutting corners' so he could attend an important meeting, and were not motivated by discrimination or animus against Moorehead." The Board stated that because of the rush that he was in: "Faced with a difficult situation, Eave's decision was not 'so far outside a wide range of reasonableness' as to be irrational," quoting from *Stage Employees Local 720*, 332 NLRB 1. (2000). In *NLRB v. AFSCME Local 1640,* 325 F3. 301 (6th Cir 2006), the Court stated: "…an unwise or even an unconsidered decision" by a union is not necessarily an

irrational decision."

A recent case, *International Brotherhood of Electrical Workers, Local 48*, 344 NLRB No. 102 (2005), involved a union that departed from its hiring hall rules. A "short call" was, at the relevant times, a job that lasted less than 30 days. Registrants dispatched to short fall jobs retained their predispatched position on the hall's out of work list. Referrals that exceeded this time period, lost their position and "rolled" to the bottom of the out of work list. The Board found that the union violated Section 8(b)(1)(A) of the Act because of numerous "mistaken departures from its hiring hall rules." The Board stated that the union had no proper procedures in place to check that registrations were done properly, despite the fact that it could have been easily verified. The Board further stated:

> Moreover, the failure to check was committed in the context of other conduct, viz., purposeful departures from the dispatch rules. That is, out-of-order dispatches went to those who were willing to engage in union organizing. In this context, the Respondent's reckless indifference to book 1 eligibility amplified the message that "applicants had better stay in good graces of the union if they want to ensure fair treatment in referrals."

I find that the Respondent's actions on March 13 in conducting the shape early cannot be excused as "mere negligence" or "an honest inadvertent mistake" as set forth in *Contra Costa Electric* and the other cases cited above. Even if it were an honest inadvertent mistake, the Respondent had an opportunity to correct it as the three selected employees with less seniority had not yet left for the job when Black appeared, yet the Respondent did nothing to correct the situation. Rather, I find as argued by Counsel for the General Counsel in her brief that it was a deliberate action of the Respondent that constituted a disregard of, departure and from, the established procedures of the exclusive hiring hall. Even though there is no evidence that the early shape was motivated by any desire to discriminate against Black, or for any other obviously unlawful reason, this deviation from the established procedures of the hiring hall resulted in Black's losing employment for the day and therefore violated Section 8(b)(1)(A) and (2) of the Act.

Conclusions of Law

By departing from the established procedures of its exclusive hiring hall on March 13, resulting in the failure to refer Malcomb Black Sr. to employment with Eller Maritime Services, LLC, the Respondent violated Section 8(b)(1)(A) and (2) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. As I have found that the Respondent deviated in its established hiring hall procedures resulting in Black losing four hours of employment, I recommend that the Respondent be ordered to make him whole for the loss that he suffered due to its actions, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Upon these findings of fact, conclusions of law and based upon the entire record, I issue the following recommended[2]

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, Continued

ORDER

The Respondent, International Longshoremen's Association, Local 1402, AFL-CIO, its officers, agents and representatives, shall

1. Cease and desist from

(a) Deliberately departing from the established procedures of its hiring hall by conducting the shape for employees to be referred to Eller, or any other employer, prior to the time previously announced by the Respondent.

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

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

(a) Make whole Malcomb Black Sr. for the loss that he suffered due to the Respondent's deviation from its established hiring hall rules for all earnings and other benefits lost as a result of this violation.

(b) Within 14 days after service by the Region, post at its union office and hiring hall in Tampa, Florida, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) 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.

Dated, Washington, D.C., October 25, 2006.

Joel P. Biblowitz
Administrative Law Judge

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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.

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

APPENDIX

NOTICE TO 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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT deliberately depart from the rules governing the operation of our hiring hall by conducting shapes at a different time than was previously announced to our members.

WE WILL NOT otherwise deliberately depart from the rules governing the operation of the hiring hall where the departure is neither pursuant to a valid union security clause nor necessary to the effective performance of our representative function.

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

WE WILL make whole Malcomb Black, Sr., with interest, for the loss that he suffered due to our departure from the established procedures of our hiring hall.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1402, AFL-CIO
(Union)

Dated_____ By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530

Tampa, Florida 33602-5824

Hours: 8 a.m. to 4:30 p.m.

813-228-2641.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 813-228-2662.