International Brotherhood of Electrical Workers, Local 48, AFL–CIO (Oregon-Columbia Chapter of National Electrical Contractors Association) *and* Paul Footlick *and* Dennis S. Coey *and* Patrick Mulcahy *and* Richard S. Smith *and* Brad Twigger *and* Terry Taylor *and* William Perry. Cases 36–CB–1798–1, 36–CB–1798–2, 36–CB–1798–3, 36–CB–1798–4, 36–CB–1798–5, 36–CB–1798–6, 36–CB–1840–1, 36–CB–1853, 36–CB–1859, and 36–CB–1947

June 13, 2005

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 23, 2004, the National Labor Relations Board issued a Decision and Order[1] in this proceeding, finding, inter alia, that the Respondent violated Section 8(b)(1)(A) of the Act by dispatching numerous individuals out of order from its Portland, Oregon hiring hall.

After filing timely requests for extensions of time, which were granted, on September 21, 2004, the Respondent filed a Motion for Reconsideration, Rehearing, and Reopening of the Record. The General Counsel filed a response to the motion.[2] The Respondent contends that the Board erred with respect to the Respondent's "short-call" and biannual re-sign rules and its dispatching of "stripped" employees; wrongly held unlawful the Respondent's preferential dispatches for salts and "peppers"; deprived the Respondent of due process; improperly shifted the burden of proof; and erred in its findings concerning a number of individual hiring hall registrants. The General Counsel agrees with the Respondent that the Board's related findings concerning the short-call rule were mistaken, and he supports the motion to this extent. In all other respects, the General Counsel opposes the Respondent's motion.

In its previous decision, the Board found as follows (342 NLRB 101, 102): a "short call" is a job that lasts less than a specified period of time; registrants dispatched to short-call jobs out of the Respondent's hiring hall retain their predispatch position on the out-of-work list (OWL) when those jobs end; and if a job exceeds the short-call time limit, the registrant loses his position and "rolls" to the bottom of the OWL. The Board found that during the relevant period, October 1992 to May 1994, the Respondent's short-call rule specified a 40-hour limit, and if a job lasted more than 40 hours, the registrant was supposed to "roll."

The Board also found that the short-call limit was lengthened from 40 hours to 30 days in November 1994. As the Respondent correctly contends in its Motion for Reconsideration, the Board erred in this finding. The Board correctly should have found that the short-call limit was lengthened from 40 hours to 30 days effective September 1992, and not November 1994. As a result, the Board should have found that, throughout the relevant period, the short-call limit was 30 days, not 40 hours.

We therefore grant the motion to correct the Board's factual findings as to (1) the date when the short-call limit was lengthened to 30 days and, consequently, (2) the duration of the short-call limit during the relevant period. Accordingly, we withdraw the short-call findings, together with other findings in our Decision and Order dependent on those facts: the findings that "Local 48 applied a nonexistent short-call rule" (342 NLRB 101, 109), that "a number of individuals worked jobs in excess of the 40-hour short-call limit without rolling to the bottom of their book" (id., slip op. at 105), and that the individuals listed in section 3 of the evidentiary appendix exceeded the short-call limit without rolling to the bottom of their book (id., slip op. at 112–114);[3] the ruling that additional instances of failure to apply the short-call rule may be established at compliance (id., slip op. at 9); and paragraph 1(c) of the Order (id., slip op. at 14). We also substitute the attached notice for that attached to our Decision and Order. In all other respects, however, we deny the motion because the Respondent has not demonstrated extraordinary circumstances warranting reconsideration, rehearing, or reopening of the record as required by Section 102.48(d)(1) of the Board's Rules and Regulations.

Having withdrawn the Board's finding that the Respondent failed to enforce its short-call rule, we nevertheless reaffirm that the Respondent's mistaken departures from its hiring hall rules violated Section 8(b)(1)(A) of the Act. As the Board previously found, the Respondent permitted numerous individuals ineligible for listing on book 1—the top priority out-of-work list—to register on that book. 342 NLRB 101, 104–105, 111–112. The Board emphasized that the Respondent had no procedures in place to check book 1 registrations,

[1] 342 NLRB 101 (2004).

[2] The Respondent has requested oral argument. The request is denied as the record, the Respondent's motion, and the General Counsel's response adequately present the issues and the positions of the parties.

[3] We reject the General Counsel's contention that, with one exception, the individuals listed in section 3 of the evidentiary appendix were still improperly dispatched because they exceeded the 30-day short-call limit without rolling to the bottom of the out-of-work list. After a careful examination of the record, we are satisfied that the evidence is insufficient to prove nonenforcement of the 30-day rule.

despite the ease with which book 1 eligibility could have been routinely verified. Supra, slip op. at 8–9. Moreover, this 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 the good graces of the union if they want to ensure fair treatment in referrals."[4] Under these circumstances, we find that the Respondent's failure to police book 1 registrations, which enabled numerous book 1–ineligible applicants to receive dispatches that should have gone to applicants properly registered on book 1, constituted gross negligence and therefore violated Section 8(b)(1)(A) under *Contra Costa Electric*, supra.[5]

In sum, the Respondent's motion is granted as described above. In all other respects, the motion is denied.

ORDER

The National Labor Relations Board affirms its original Order, as modified below, and orders that the Respondent, International Brotherhood of Electrical Workers, Local 48, AFL–CIO, Portland, Oregon, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) and reletter the remaining paragraphs accordingly.

2. Substitute the attached notice for that of the Board.

APPENDIX

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

The National Labor Relations Board has found that we violated 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 with us on your behalf

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 the hiring hall in the following ways: (i) giving preferential dispatching treatment to salts—i.e., union members who take jobs with nonunion employers to engage in union organizing—and "peppers"—i.e., newly organized employees of nonunion employers who remain with those employers to engage in union organizing; (ii) returning, off the books, to their newly organized former employer, employees who had been "stripped"—i.e., persuaded to leave that employer and join the Union—during a union organizing campaign; (iii) giving off-the-books dispatches to individuals as a reward for joining Local 48; (iv) sending discharged employees back to the discharging employer off the books; (v) permitting registrants to retain positions on the out-of-work list despite having missed a compulsory biannual re-sign; (vi) dispatching registrants requested by name under circumstances where the collective-bargaining agreement does not permit a name-request dispatch; (vii) otherwise deliberately departing from the rules governing the operation of the hiring hall where such a departure is neither pursuant to a valid union-security clause nor necessary to the effective performance of our representative function.

WE WILL NOT permit book 1–ineligible registrants to register on book 1.

---

[4] *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688, 691 (1999), petition for review granted and remanded sub nom. *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2000), on remand *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549 (2001), petition for review denied sub nom. *Jacoby v. NLRB*, 325 F.3d 301 (D.C. Cir. 2003).

[5] As before (342 NLRB 101, 109), we need not pass on whether the proper standard is that set forth in *Contra Costa Electric*, supra, or the "heightened" duty of fair representation standard applied by the Ninth and D.C. Circuits (see *Jacoby*, supra, 233 F.3d at 611; *Lucas v. NLRB*, 333 F.3d 927 (9th Cir. 2003)), because the result here is the same under either standard.

The dissent states that our conclusion was that "mistaken departures from the hiring hall rules" violated the Act. The statement is incorrect. The violation is the utter failure to monitor compliance with the rules in the context of other (purposeful) conduct.

Although Member Liebman did not participate in the original decision, she agrees that its mistaken short-call findings should be corrected. She disagrees, however, with her colleagues' conclusion that the remaining mistaken departures from the hiring hall rules nevertheless violated the Act. In her view, the Respondent's honor system for signing book 1 was not so far outside a "wide range of reasonableness" as to breach the duty of fair representation. *Air Line Pilots v. O'Neill,* 499 U.S. 65, 67 (1991); *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953). Contrary to her colleagues, she would not look to the Respondent's purposeful departures from the dispatch rules in analyzing the issue of gross negligence. Even assuming its intentional out-of-order dispatches were unlawful, those dispatches do not make its nondetection of book 1–ineligible registrants into anything more than inadvertent mistakes. Adhering to the standard set forth by the Board in *Contra Costa Electric*, supra, Member Liebman would not find that this inadvertent conduct violated Sec. 8(b)(1)(A). In all other respects, she agrees that the Respondent has not demonstrated extraordinary circumstances warranting reconsideration, rehearing, or reopening of the record.

WE WILL NOT refuse to allow registrants the opportunity to inspect and/or copy our records relating to the operation of the hiring hall.

WE WILL NOT utilize a journeyman inside wireman's examination that in major part tests knowledge of our bylaws and constitution, the contents of our collective-bargaining agreement with the Oregon-Columbia Chapter of the National Electrical Contractors Association, and labor history, rather than knowledge of the electrical trade, and WE WILL NOT utilize such an examination as the basis for denying book 1 status to William Perry.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights set forth above.

WE WILL make available the requested records relating to the operation of the hiring hall.

WE WILL, within 14 days from the date of the Board's Order, administer to William Perry, on request, a nondiscriminatory journeyman inside wireman's examination.

WE WILL make whole, with interest, all individuals who suffered loss of employment because of our unlawful conduct for all earnings and other benefits lost as a result of that conduct.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 48, AFL–CIO (OREGON-COLUMBIA CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION)