JD(SF)-55-06
Albuquerque, NM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL UNION NO. 131, AFL-CIO
(Permian Elevator Corporation of Albuquerque)

and **Case 28-CB-6384**

PHILIP BOWLER, an Individual

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL UNION NO. 131, AFL-CIO
(Otis Elevator Company)

and **Cases 28-CB-6385**
28-CB-6439

LAWRENCE J. GOSS, an Individual

Sandra L. Lyons, Esq., Phoenix, AZ, for
the General Counsel.
Jennifer Simon, Esq., Washington, D.C., for
the Respondent.

DECISION

Statement of the Case

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Albuquerque, New Mexico, on August 22-23, 2006. Philip Bowler (Bowler), an individual, filed an original and an amended unfair labor practice charge in case 28-CB-6384 on February 27 and May 22, 2006, respectively. Lawrence J. Goss (Goss), an individual, filed an original and an amended unfair labor practice charge in case 28-CB-6385 on March 2 and May 23, respectively, and filed an unfair labor practice charge in case 28-CB-6439 on June 16, 2006. Based on those charges as amended, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a second consolidated complaint on August 2, 2006. The complaint alleges that International Union of Elevator Constructors, Local Union No. 131, AFL-CIO (the Respondent or the Union) violated Section 8(b)(1)(A) and 8(b)(2)

of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices and raising a number of affirmative defenses.[1]

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record,[2] my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses, I now make the following findings of fact and conclusions of law.[3]

Findings of Fact

I. Jurisdiction

The complaint alleges, the answer admits, and I find that Otis Elevator Company (Otis) is a New Jersey corporation, with an office and place of business in Albuquerque, New Mexico, where it is engaged in the business of the sales and service of elevators and escalators. Also, I find that during the 12-month period ending March 2, 2006, Otis, in conducting its business operations purchased and received at its Albuquerque facility goods valued in excess of $50,000 directly from points located outside the State of New Mexico.

Accordingly, I conclude that Otis is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Further, the complaint alleges, the answer admits, and I find that Permian Elevator Corporation of Albuquerque (Permian) is a New Mexico corporation, with an office and place of business in Albuquerque, New Mexico, where it is engaged in the business of elevator installation and repair. Also, I find that during the 12-month period ending February 27, 2006, Permian, in conducting its business operations purchased and received at its Albuquerque facility goods valued in excess of $50,000 directly from points located outside the State of New Mexico.

Accordingly, I conclude that Permian is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

---

[1] All pleadings reflect the complaint and answer as those documents were finally amended.

[2] Counsel for the General Counsel and counsel for the Respondent filed with the undersigned separate motions to correct the record. Each motion is unopposed, and after reviewing them and the existing record, I conclude that they should both be granted. Accordingly, the record is hereby corrected as is requested in each motion. Further, I hereby admit into evidence as G.C. Ex. 18 the Motion to Correct the Record filed by the General Counsel and as U. Ex. 12 the Motion to Correct the Transcript filed by the Respondent.

[3] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonably probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

II. Labor Organization

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act. Also, I find that at all material times, the Union has been a constituent local union of the International Union of Elevator Constructors, AFL-CIO (the International). Further, I find that during this same period of time, the International has been a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. The Dispute

Not surprisingly, the parties see this case in very different ways. The General Counsel contends that in the operation of its exclusive hiring hall, the Respondent has intentionally discriminated against Bowler and Goss. Allegedly, the Respondent failed to enforce the collective bargaining agreement against certain signatory employers and insist that they hire Bowler and Goss. It is the General Counsel's position that the Respondent engaged in unlawful conduct against Bowler because he was a member of a different local union of the International and because he was in arrears in union dues to that local. In the case of Goss, it is alleged that the Respondent acted in an arbitrary, invidious and capricious manner because he had been recently arrested and fired by his employer for his alleged criminal conduct and also because he was nominated for the position of business representative in the Union.

The complaint alleges that the Respondent's conduct towards Bowler and Goss served to unlawfully restrain and coerce employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act. By its conduct the Respondent is also alleged to have caused and attempted to cause signatory employers to fail to hire Bowler and Goss in violation of Section 8(b)(2) of the Act. Obviously, the Respondent disagrees, contending that its operation of the hiring hall was in conformity with the collective bargaining agreement between the International and the signatory employers working in the Union's jurisdiction and was proper under extant Board law. The Respondent denies taking any action against Bowler or Goss as could be legitimately considered a violation of the Act.

Preliminarily, I would note that I found the facts in this case to be "muddled," with certain witnesses having very different views of what had transpired. This is especially true regarding the current operation of the Union's hiring hall as compared with its past practice. In any event, I have made credibility determinations where necessary, such that the factual background can be viewed with some clarity.

B. The Facts

The Union is based in Albuquerque, New Mexico, and covers a geographical area including the entire state of New Mexico, and West Texas, principally El Paso. It has approximately 107 members. The International Union of Elevator Constructors, AFL-CIO (the International) negotiates all collective bargaining agreements with signatory employers. The past practice has been for the International and the employers to negotiate a master agreement, after which each signatory employer signs its own separate collective bargaining agreement, which is identical to the master agreement except for the name of the individual company. The bargaining unit is nation wide in scope. The International enters into the contract "for and on behalf of its affiliated local unions." The local unions then individually administer the contract in their respective jurisdictions. There are six signatory employers that perform work within the

jurisdiction of the Union. These six employers are as follows: Otis Elevator, Kone Elevator, Thyssen Krupp Elevator, Permian Elevator, Schindler Elevator, and Emco Elevator. All six employers have identical contracts with the International.

The current collective bargaining agreement is effective from July 9, 2002 to July 8, 2007. (G.C. Ex. 2.) The contract has historically recognized three categories of employees, mechanics, who are full journeyman, apprentices, and helpers. The apprentices and helpers are less skilled than the journeyman, and in most cases aspire to become journeyman and are in a training program to do so. The mechanics are paid more than the apprentices and helpers under the terms of the contract. In some situations, where there is an absence of available "qualified" mechanics, the Union and the signatory employer may agree to the employer's conversion of apprentices or helpers to that of "temporary mechanics." Such a temporary mechanic is paid at the rate of a full journeyman mechanic and is expected to perform the work of a mechanic. At such time as the temporary mechanic is reassigned to his former position as an apprentice or helper, the contract requires that he be paid at least at his designated apprentice or helper rate. Of course, the signatory employer has the option of paying him more, including at the mechanic rate. In the industry, the reassignment is typically referred to as a "set back," "put back," or "kick back" to the employee's former classification. The "set back" employee is no longer permitted to perform the work of a journeyman mechanic.

There are several clauses in the collective bargaining agreement that are especially pertinent to the issues in this case. Article X, paragraph 4, "Designation of Helpers and Apprentice's Work and Qualifications" reads in part:

> An Apprentice may work as a Temporary Mechanic provided he/she has completed a minimum of his/her first year apprenticeship requirement…and upon agreement of the Employer and the Union Representative…and at the same scale as a regular Mechanic…. Employers may select Apprentices and Helpers in its employ to work as Temporary Mechanics under the provisions of this paragraph if there are no qualified Mechanics available in that local.
>
> Apprentices serving as Temporary Mechanics will be put back to Apprentice Status when their temporary assignment is completed or within fifteen (15) working days of when the Employer is notified there is a qualified Mechanic available whichever comes first….
>
> ….
>
> It is agreed that the withdrawal of or failure to issue a Temporary Mechanic's card will not be used by the Union to advance its position with respect to a dispute unrelated to this paragraph of Article X.

Article XXII, paragraph 1(b), "Hiring, Layoffs and Transfers" reads in part:

> The Company shall hire experienced Mechanics, Helpers and Apprentices who permanently live in the area, are seeking employment and are qualified to perform the work required by the Company before hiring a transient employee or a new inexperienced employee. An employee shall be considered a transient until he makes a showing that he is permanently changing his home and residing in the territorial jurisdiction of the local with which he has registered for referral….When hiring an experienced mechanic, helper or apprentice the Company shall use the Union as the first source of applicants for employment….If the Union fails to refer qualified workmen within the specified period the Company may obtain workmen from any other available source. The Company has the right to reject any and all applicants referred to it by the Union. The Company, where requested by the Union, shall give, in writing, the reason for any rejection.

It is the General Counsel's contention that under the terms of the collective bargaining agreement between the International and the signatory employers, and also as practiced in the past by the Union, that after receiving notice that a qualified mechanic is on the out of work list, a signatory employer who is using temporary mechanics has 15 days to "set back" its temporary mechanics, unless it hires the out of work mechanic, or some other employer hires him such that he is no longer on the out of work list. According to the General Counsel's theory of the case, a signatory employer with temporary mechanics can reject the mechanic "on the bench." However, if the mechanic remains out of work, the rejecting employer must "set back" any temporary mechanics in its employee within 15 days of receipt of the notice.

According to the Respondent, under the terms of the contract, as interpreted in a number of arbitration decisions, and also as practiced in the past by the Union, a signatory employer that rejects the out of work mechanic for hire is not required to "set back" any temporary mechanics that it is employing. The contract gives signatory employers the right to reject a mechanic for hire for any reason. Under the Respondent's theory of the case, it is only when a signatory employer, after receiving notice of a mechanic on the bench, fails to reject that mechanic that it is obligated to "set back" any temporary mechanics in its employ within 15 days of receipt of the notice. The Respondent would further argue that having "set back" its temporary mechanics, the signatory employer is still under no obligation to hire or even to specifically reject the out of work mechanic. Also, the Respondent would content that a signatory employer's rejection of a mechanic on the bench can be either oral or written, and need not be in writing nor specify reasons for the rejection, unless the Union specifically requests that it be so.

This dispute between the parties as to the meaning and application of these provisions of the contract and the method by which the contract was applied in the past practice of the Union in operating its hiring hall is the gavamen of this case. While much evidence is in dispute and can be resolved only through credibility determinations, as is reflected below, some evidence is uncontested.

Perry Chase is the Respondent's business representative and has held that position for approximately one and a half years. Previously, he was the Respondent's president and a member of its executive board. In his current position, Chase is the sole operator of the union hiring hall. Additionally, one of Chase's primary responsibilities is to enforce the collective bargaining agreement with the six signatory employers working in the Union's jurisdiction. This includes enforcing the Union's exclusive hiring hall referral system and the filing and processing of grievances. It should be noted that New Mexico is a non-right to work state, and the contract between the International and the signatory employers working in the Union's jurisdiction contains a "union security clause," Article III.

Philip Bowler has been an elevator mechanic for ten years. Bowler was a member of the Respondent Union until 2000, when he moved to Phoenix, Arizona, and became a member of Local 140 of the International. However, he returned to Albuquerque and worked for Thyssen Krupp from approximately fall 2004 until his discharge in October 2005. Bowler asked Chase to file a grievance over his discharge, but Chase declined to do so.[4] Chase suggested to Bowler that there was significant work available out of the local union in New Orleans, due to the destruction caused by hurricane Katrina. As a result, Bowler traveled to New Orleans and was placed on the "out of work" list. After about one month of "sitting on the bench" at the local

[4] Subsequently, Bowler filed a charge with the NLRB against the Union for an alleged failure to properly represent him. However, the Agency ultimately dismissed the charge.

union, Bowler decided that his referral prospects were not good. He testified that during the time he was on the out of work list in New Orleans, there were apprentices working as "temporary mechanics" who were not "set back" to their former positions as apprentices despite the fact that he, a mechanic, was available to work.

Unable to find work in New Orleans, Bowler went to Phoenix, where he also was not referred out of the Local 140 hiring hall, despite the fact that there were apprentices working as temporary mechanics, who were not "set back." In late December 2005, he returned to Albuquerque where he contacted Chase by telephone on December 30 and by letter dated January 3, 2006, asking to be placed on the Union's out of work list. Chase immediately did so, following his customary practice, which was to fax a standard letter to all the signatory employers. This generic letter dated January 2, 2006, informed the employers that there was a "qualified mechanic available for work." Further, it informed them that, "All temporary mechanic assignments will end in accordance with Article X, Paragraph 4 of the Master Agreement." (G.C. Ex. 5.) As was also customary, the letter did not name the qualified mechanic, as Chase testified that he did not want to "embarrass" the out of work mechanic. However, it is undisputed that for the most part the signatory employers learned the identity of any mechanics on the bench, either from asking Chase or through conversations with other members of the Union.

It is undisputed that three of the six signatory employers responded to Chase's letter. Thyssen Krupp, Otis, and Kone all rejected Bowler, while Emco, Permian, and Schindler failed to respond. Thyssen Krupp faxed Chase a letter dated January 6, 2006, declining to hire Bowler because of his previous employment history with the company where he was found to have engaged in "disrespectful insubordination" and had demonstrated an "unsatisfactory [work] performance." (G.C. Ex. 6.) On January 11, 2006, Kone faxed Chase a letter rejecting Bower and attaching several documents. These attachments were letters Bowler had received previously when employed by Kone. They documented a history of unsatisfactory work performance, culminating in his discharge from Kone in August 2004, due to his "work ethic and attitude," including multiple unexcused absences. (G.C. Ex. 8.) Finally, Bob Roos, the Service Operations Manager/Construction Superintendent for Otis had a telephone conversation with Chase in early to mid-January during which Roos rejected Bowler for employment, promising to follow the conversation with a letter. Subsequently, a letter dated January 6, 2006 was faxed by Roos to Chase declining to hire Bowler due to his past employment record with Otis during which he had "failed to complete jobs on time or to the satisfaction of the customers and his supervisor." (G.C. Ex. 7.)

The parties stipulated at the hearing that two of the six signatory employers working in the Union's jurisdiction, Emco and Schindler, had no temporary mechanics employed by them during the period in which either Bowler or Goss was on the out of work list. Accordingly, these two employers are not a factor in the determination of whether Bowler and/or Goss were unlawfully discriminated against by the Union.

However, Permian did employ a single temporary mechanic during at least part of the period in which Bowler was on the out of work list, and it is undisputed that Permian never responded to Chase's faxed letter of January 2, 2006, regarding a "qualified mechanic [Bowler] available for work." Anthony Bennett, Permian's foreman, testified that Permian does not typically seek to hire or reject mechanics that are on the bench, so it does not normally respond to Chase's generic letters. Permian is a small employer that can not usually afford to hire which ever mechanic is on the bench. Permian's past practice when receiving a "mechanic on the bench" letter has always been to "set back" any temporary mechanics that it employs and then to wait, hoping a larger signatory employer will hire the mechanic. Then, upon learning that the mechanic has been hired, Permian permits its "set back" temporary mechanics to resume their

temporary mechanic duties. In any event, in this particular instance, Bennett testified that he never received a "mechanic on the bench" letter, and so Permian did not "set back" its sole temporary mechanic in January 2006.

Bowler remained on the out of work list until approximately February 13, 2006, when he has hired by Kone. Sam Stewart, Kone's branch manager in New Mexico, testified that the only reason why Bowler was hired was because Kone had just fired Larry Goss, the other charging party, for alleged criminal activity in a company vehicle. Stewart testified that Kone, which had already rejected Bowler for employment, "was in desperate need of a mechanic," otherwise it would not have hired Bowler. Still, it is obvious that Kone had serious reservations about hiring Bowler, as it required that he sign a document acknowledging that Kone had the authority to discharge him for any infraction involving work ethics, timeliness, attendance, or attitude during a six month probationary period. (U. Ex. 4.)

Prior to starting his employment at Kone, and at Chase's insistence, Bowler signed a "transient agreement." In the document dated February 13, 2006, Bowler acknowledges that he is "a transient worker in [the Union's jurisdiction] and as such will give preference to brothers and sisters of Local 131, should the occasion ever arise." (G.C. Ex. 9.) According to Chase's testimony, the collective bargaining agreement gives a traveling mechanic priority over a temporary mechanic during a layoff. However, the contract also clearly gives applicants for referral who "permanently live in the area" preference in hiring over those who are transient workers. (G.C. Ex. 2, Article XXII, Paragraph 1(b)) There is no dispute, that despite the fact that Bowler was living in Albuquerque, he never presented evidence to Chase that he was "permanently" living in the jurisdiction of the Union, nor did he ever request that his union membership be transferred from union local 140 to that of the Respondent.

Over the course of the period of time in question, there were a number of conversations between Bowler and Chase which must be discussed. From the time that Bowler was placed on the out of work list, until the time that he secured employment with Kone, Bowler called Chase every few days to check on the efforts that Chase was making in having him referred to a signatory employer. It is undisputed that at some point Chase learned from the business representative of local union 140 in Phoenix, which was Bowler's home local, that Bowler was in arrears on his dues payment to that local. According to Bowler, he owed local union 140 approximately $80.

Bowler testified that on January 23, 2006, he called Chase to determine the status of his request to be referred for employment. Chase is alleged to have responded by asking Bowler if he was going to pay the dues that Chase had heard Bowler owed to local union 140. According to Bowler, Chase said that "he couldn't put [Bowler] to work unless [Bowler] paid [his] dues." Bowler replied that he was "broke," but that if Chase would put him to work, he would be happy to pay local union 140 out of his first pay check. Although in its answer to the complaint the Respondent denies that Chase committed any unfair labor practices on the date of this alleged conversation, in his testimony at the hearing Chase does not deny that the words were spoken.

The issue of Bowler's being in arrears on his dues payment to local union 140 was first mentioned to members of the Union at a monthly union meeting held in El Paso, Texas on January 19, 2006. The Union conducts monthly union meetings in both Albuquerque and El Paso for its members residing in those cities. There were approximately 10-15 members of the Respondent present for the monthly meeting in El Paso. Two of the attendees, Mark Sanetra and Lorenza Oscar Duran, testified at the hearing. According to Duran, he asked Chase whether there were any mechanics on the out of work list. Chase responded that Bowler was on the bench. Duran questioned how it could happen that there were temporary mechanics

working for signatory employers, when Bowler, a journeyman mechanic, was on the bench. Chase defended the referral system by saying that Bowler "was from another local," and that he "was in arrears in his dues" to that local. Duran was sympathetic enough to suggest that he and other members might be willing to pay Bowler's delinquent dues to local union 140 if they could determine how much money Bowler owed. Sanetra's testimony corroborated Duran. However, Sanetra's testimony was even more detailed, alleging that Chase said that Bowler was not being referred out to jobs because he was in arrears to his home local, and because he was not a member of the Respondent. Chase is alleged to have said that if Bowler was looking for work, he should leave the jurisdiction of the Union (local 131), and go on the bench at local 140, his home local. Once again, while the Respondent's answer denies that any such statements were made by Chase, at the hearing he remained mute on this subject.

As time progressed, Bowler continued to call Chase and inquire as to his status on the out of work list. Such a telephone conversation occurred on January 26, 2006. According to Bowler, Chase asked him whether he had paid his back dues to local union 140. As he had responded several days earlier to a similar question, Bowler told Chase that he was presently financially unable to pay his dues. According to Bowler, Chase told him that the issue of his delinquent dues was between Bowler and Jerry Cluff, the business representative for local union 140. Chase did not deny the substance of this conversation during the hearing. However, the Respondent's answer denied that any such conversation occurred.

Sam Stewart, Kone's branch manager, was a particularly credible witness, as his employer had no particular interest in the outcome of this proceeding. As was noted earlier, Kone had informed Chase in early January 2006 of its rejection of Bowler for hire and of the reasons for that rejection. In any event, shortly thereafter Chase called Stewart. According to Stewart, Chase informed him that Bowler was "ineligible for employment in Local 131 because of delinquent dues in Phoenix." As with similar allegations, Chase did not deny during his testimony that such a conversation had in fact occurred.

It is undisputed that in early February 2006, Bowler's brothers, who resided in Phoenix, paid his delinquent dues to local union 140. Shortly thereafter, Stewart called Chase seeking a mechanic to hire. As was noted earlier, after having fired Larry Goss, Kone was desperate for a journeyman mechanic. Chase informed Stewart that Bowler was now "eligible" for referral, and Stewart agreed to hire him. While Stewart testified that Chase did not give a reason for Bowler's sudden eligibility for referral, there can be little doubt that the only matter that had changed in Bowler's situation was his payment of back dues to local union 140. In any event, as mentioned above, Kone hired Bowler because of its desperate need for a mechanic, despite having recently rejected him. Having learned that Bowler was still on the bench and was now eligible for referral, Stewart accepted Bowler's referral, although Stewart continued to have serious reservations about Bowler's desirability as an employee.

It is the position of the General Counsel that the Respondent failed to enforce the collective bargaining agreement against signatory employers and require them to "set back" temporary mechanics within 15 days of being notified that Bowler, a journeyman mechanic, was on the out of work list. According to the General Counsel's theory of the case, Chase failed to properly operate the Respondent's hiring hall and have Bowler referred to signatory employers, because Bowler was not a member of the Union and/or because he was delinquent in his dues to local union 140. The Union contends that the hiring hall was operated properly, and that signatory employers that employed temporary mechanics and that rejected Bowler for hire were under no obligation to "set back" their temporary mechanics. Further, the Union argues that

Bowler was a transient mechanic and that the collective bargaining agreement specifically gives priority in hiring to applicants for referral who "permanently live" in the jurisdiction of the Union over those who are transients.

Larry Goss is an elevator mechanic and has been a member of the Union for six or seven years. Goss worked for Kone until February 7, 2006, when he was discharged after being arrested while in one of Kone's vehicles. Regarding this arrest, the parties stipulated as follows: "Larry Goss was arrested in early February 2006 for aggravated battery with great bodily injury. The alleged incident occurred in a vehicle belonging to Kone, Mr. Goss' employer at the time. The case is still pending, but Mr. Goss has not been convicted of any charges."

Following his termination from Kone, Goss immediately requested that Chase place him on the out of work list. In a letter dated February 7, 2006, Chase informed all the signatory contractors of the presence of a "qualified mechanic available for work," and of the requirement that "[a]ll temporary mechanic assignments will end in accordance with Article X, Paragraph 4 of the Master Agreement." (G.C. Ex. 10.) This was the Union's standard generic letter used when a mechanic was placed on the out of work list. In conformity with the Union's usual practice, the letter did not name Goss as the mechanic out of work. However, it is undisputed that the signatory contractors were aware of which mechanic was on the bench. It is also undisputed that Goss' arrest was covered extensively in the Albuquerque news media.

In response to his letter, Chase received rejection letters from two signatory contractors, Otis and Thyssen Krupp. He received no response from Schindler, Emco, Kone, and Permian. However, as noted earlier, the parties stipulated that Schindler and Emco did not have any temporary mechanics working for them "for the relevant time period in this litigation with respect to either when Mr. Bowler was on the bench or Mr. Goss was on the bench." Further, in their respective testimony at the hearing, both Goss and Chase took the position that as Kone had just fired Goss, it could not reasonably be expected that Kone would respond to the Union's mechanic on the bench letter.

Thyssen Krupp faxed a letter on February 21, 2006 to Chase rejecting Goss for employment based on Goss' "recent employment history within the industry, the disrepute and embarrassment that he brought upon his former employer and himself as well as the serious questions his actions raise for any future potential employer regarding his judgment and behavior…." Further, the letter noted that, "we do not believe that he is a qualified mechanic…and therefore do not feel bound under the agreement to end the assignments of any temporary mechanics within our employ." (G.C. Ex. 11.)

The Otis letter was faxed to Chase on March 7, 2006. In the letter, Otis rejects Goss for employment due to his past history with the company during which he requested to be paid "excessive cartage,"… had "fail[ed] to adequately communicate with supervisors,"… and "refus[ed] to follow Otis' required [ ] procedures." Further, the letter alluded to Goss' recent arrest, stating that "Otis has great concerns about Larry's alleged misconduct while working for his prior employer." (G.C. Ex. 12.) Chase testified that even before he received this letter from Otis, he had a telephone conversation with Gary Weldon, Otis' branch manager in Albuquerque, who in response to Chase's "mechanic on the bench letter," asked Chase which bench Goss was on, the union bench or the "jailhouse bench?" Weldon's testimony corroborated Chase, and Weldon added that during the phone conversation he informed Chase that Goss was "not eligible to be rehired" and that formal written notice would soon follow.

`The final signatory employer with a temporary mechanic was Permian. As noted earlier, Permian does not usually respond to Chase's "mechanic on the bench" letters. Rather than rejecting or hiring the mechanic, Permian normally simply "sets back" its temporary mechanic. Then, Permian waits, hoping a larger signatory employer will hire the mechanic. If that happens, or when for whatever reason the mechanic is no longer on the out of work list, Permian will seek to restore the "set back" employee to his temporary mechanic status. Anthony Bennett, Permian's foreman, testified that in conformity with its usual practice, after receiving Chase's fax of February 7, 2006, Permian "set back" its sole temporary mechanic, Steven Bennett.[5] Permian waited 14 days, which it was entitled to do under the terms of the parties' collective bargaining agreement, and when it learned that no other employer had hired Goss and he was still on the bench, Permian "set back" Steven Bennett. Anthony Bennett testified that Steven Bennett remained "set back," performing only apprentice job duties, for the remainder of the time Goss was out of work. Further, Anthony Bennett testified that consistent with Permian's usual practice, he did not specifically reject Goss, or send any communication to Chase about this matter.

Chase testified that he was verbally informed by Permian that Goss was being rejected. However, he admitted that in an affidavit given to a Board agent during the investigation of these cases, he did not indicate that such information was forthcoming from Permian. While Chase's testimony may be suspect, I do not believe that it is particularly significant whether he received a definitive answer from Permian about employing Goss or not. It is undisputed that Permian's usual practice upon receiving Chase's "mechanic on the bench" letter was to "set back" its temporary mechanic. That is precisely what Permian did.[6] Having done so, and having no other temporary mechanics in its employ, Permian was under no contractual obligation to specifically notify Chase as to its interest in Goss.

It is undisputed that during February, March, April, and May, Goss continually called Chase asking whether Chase had required the signatory employers to "set back" their temporary mechanics. It is not entirely clear what response Chase gave to Goss. According to Goss, Chase told him that he was not going to require the employers to "set back" their temporary mechanics because of the circumstances under which Goss had been arrested and fired by Kone, and/or that Chase could take no action against the employers until the International told him to do so. Chase admits that his affidavit suggests that he gave such a response to Goss. However, in his testimony he contends that the employers had done what the contract required them to do, and that was what he told Goss. Specifically, he informed Goss that Thyssen Krupp and Otis had submitted written rejection letters. Goss pressed Chase for copies of those rejection letters, and after a delay, he was provided by Chase with the letters from Thyssen Krupp and Otis.

[5] Steven Bennett is the son of Anthony Bennett.

[6] I found Anthony Bennett to be a credible witness with no motive to fabricate his testimony. Counsel for the General Counsel contends that based on certain union records indicating the payment of full mechanic's dues for Steven Bennett, that Permian, in fact, did not "set back" its temporary mechanic in response to Chase's letter. (G.C. Ex. 16.) However, I find counsel's reliance on these confusing, questionable documents to be less than convincing. In my view, much more convincing was Anthony Bennett's credible testimony that Permian's temporary mechanic was "set back."

After reviewing the rejection letters, Goss disputed some of the allegations made against him by Thussen Krupp and Otis. At Goss' insistence, Chase sent the two employers a follow up letter seeking additional and more specific information regarding the reasons for their rejection of Goss for rehire. (G.C. Ex. 13 & 14.) Shortly thereafter, on about May 14, 2006, Goss was offered a job by Thyssen Krupp, which he subsequently accepted.

It should be noted that at the union meeting on March 9, 2006, Goss was nominated for the position of union business representative. The election was held in early April, on different dates in Albuquerque and El Paso. Chase was reelected, receiving twice the number of votes of his nearest opponent and more than four times the votes of Goss. The General Counsel seems to suggest that unhappiness with Goss over his campaign for union office my have been the reason why Chase did not more aggressively seek to have Goss referred for employment.

The complaint alleges an incident that occurred on June 8, 2006, in a building parking lot, after a union meeting, to constitute a violation of the Act. Following the union meeting, there was a confrontation between Goss and the Union's vice president, Danny Lamar. Goss contends that Lamar approached him and said that Goss needed to drop the charges that he had filed against the Union with the Board. According to Goss, he replied that he would not do so, after which he alleges that Lamar said, "I know a lot of people and I'll do everything in my power so that you will never be able to spend that money… and you will never live to spend that money." At his point several union members separated the two men and Goss drove away.

Lamar admits talking with Goss in the parking lot, but claims that Goss approached him. According to Lamar, they spoke about Goss' charges filed with the Board, but Lamar denies demanding that Goss withdraw the charges. He specifically denies threatening Goss physically or otherwise. Lamar testified that he was upset because the talk at the union meeting about Goss' charges was interfering with union business. He admits that he did not approve of the "badgering of the Union," and that he told Goss, "I think you should just drop the charges." However, he repeatedly denies making any threats to Goss.

Union member Allen Hunter was present in the parking lot during this confrontation. He testified that Lamar seemed "angry" and that the two men were yelling at each other. He does not know what Lamar and Goss said to each other before he walked over to them. While in the presence of Lamar and Goss, Hunter never heard Lamar demand that Goss withdraw his charge, nor did he ever hear Lamar physically threaten Goss. He does acknowledge stepping between Goss and Lamar, just to make sure that matters did not get out of hand. Further, from the testimony it appears fairly certain that all three men had at least some alcoholic beverages to drink before the incident began.

It is the position of the General Counsel that the Respondent failed to enforce the collective bargaining agreement against signatory employers and require them to "set back" temporary mechanics within 15 days of being notified that Goss, a journeyman mechanic, was on the out of work list. According to the General Counsel's theory of the case, Chase failed to properly operate the Respondent's hiring hall and have Goss referred to signatory employers, because Goss had been arrested for criminal activity, and/or because Goss ran against Chase for union office. The Union contends that the hiring hall was operated properly, and that signatory employers that employed temporary mechanics and that rejected Goss for hire were under no obligation to "set back" their temporary mechanics. Further, the Union contends that there is no evidence of any animus expressed or demonstrated by Chase towards Goss.

C. Legal Analysis and Conclusions

1. The Operation of the Hiring Hall

The central issue in this case is whether the Union has operated its hiring hall in a discriminatory fashion in regards to Goss and Bowler. The parties disagree as to the proper way in which the Union is required to operate its hiring hall, specifically concerning the referral of out of work mechanics when signatory employers are employing temporary mechanics. The appropriate clauses in the collective bargaining agreement are set forth above. In an effort to support its position that Chase was operating the hiring hall as required by the contract, the Union offered a number of arbitration decisions rendered in cases where the local union involved was other than the Respondent, but where the contract between the International and the signatory employers contained almost identical language to that contained in the contract before the undersigned. Although I am clearly not bound by any such arbitration decisions, never the less, it is at least instructive to consider how adjudicators in other forums resolved similar issues.

An arbitration decision involving local union 2 of the International (U. Ex. 9.) presented an issue almost identical to that before the undersigned. In this case, the arbitrator decided that a signatory employer had the right under the contract to reject a mechanic for employment for any reason. Once the employer did so, the mechanic on the out of work list would no longer be considered a "qualified mechanic" so far as that employer was concerned, and under the terms of the contract the employer would then be able to continue to utilize its temporary mechanics. Under these circumstances, the arbitrator ruled that the employer was not required to "set back" its temporary mechanics, or if it had already done so, could reinstate them. This decision was dated August 4, 2001.

In a different arbitration decision which involved the local union with jurisdiction in Hawaii (U. Ex. 11.), the arbitrator determined that under the terms of the contract between the International and Otis Elevator Company that the parties must give priority in hiring to "local" workers over those in "transient status." This dispute arose in the context of whether a temporary mechanic, who was a "local" worker, must be "set back" where the mechanic on the bench was a "transient." The arbitrator ruled that under the terms of the contract, the "local" temporary mechanic had priority and could not be "set back" simply because there was a qualified "transient" mechanic on the bench. This decision was dated June 4, 1999.

In my view, the decisions reached by the two arbitrators mentioned above are based on reasonable interpretations of the almost identical language which is contained in the collective bargaining agreement in the matter before me. My reading of the contractual language is in accord with the two arbitrators. Accordingly, I conclude that the contract between the International and the signatory employers gives priority in hiring to workers who "permanently live" in the jurisdiction of the Union, over those who are "transients." Further, the contract gives a signatory employer the right to reject an out of work mechanic for any reason, and the rejecting employer is only required to state a reason in writing when the Union requests that it do so. Under this interpretation, it is certainly reasonable to conclude that once a mechanic on the bench has been rejected for hire by an employer and the Union has been informed of that rejection, that the employer is not required to "set back" its temporary mechanics. That was the conclusion reached by the arbitrator in the matter involving local union 2 of the International, and I reach the same conclusion.

It is still necessary, however, to determine whether the Union has maintained this interpretation of the contract in its past referral practices. Chase testified that since becoming the Respondent's business representative, this is the way the hiring hall has operated. A number of representatives of signatory employers supported Chase's position. Anthony Bennett, Permian's foreman, testified that an employer is only required to "set back" its temporary mechanic if it neither rejects or hires the mechanic on the bench, and the mechanic remains on the out of work list for 15 days. According to Bennett, this has been the practice Permian has utilized with the Union "since 1991." Gary Weldon, Otis' branch manager, testified that when the employer receives a "mechanic on the bench" letter from the Union, it endeavors to determine specifically which mechanic is out of work. Once Otis knows the identity of the mechanic, a representative contacts the Union to indicate whether the employer rejects or accepts that worker. It is clear from his testimony that Otis takes the positions that it is only obligated to "set back" any temporary mechanics in its employ if it fails to reject the mechanic on the bench. According to Weldon, sometimes Otis makes the rejection orally and sometimes in writing. Where requested to do so by the Union, Otis will furnish a written rejection letter. In any event, whether made orally or in writing, Otis usually gives the Union a reason for its rejection. I find Bennett and Weldon to be particularly credible witnesses. Their employers were not parties to the conflict, and they had no motive to fabricate their testimony.[7]

It is especially interesting to note that Bowler's testimony about his treatment while on the out of work list in the jurisdiction of both the locals in Phoenix and New Orleans supports the Respondent's contention that the Union interpreted the collective bargaining agreement in much the same way as other locals of the International. Bowler complained that while he was on the bench in both Phoenix and New Orleans that there were temporary mechanics working for signatory employers who were not "set back."

In response to the evidence that Chase operated the hiring hall in conformity with the contract, counsel for the General Counsel offered the testimony of the Union's former business representative, Bob Michels. He had been the business representative for 15 years, retiring in April of 2003, at a time when the current collective bargaining agreement was in effect.

Preliminarily, I will note that I found Michels' testimony to be very confusing. Much of his testimony was, at best, ambiguous, and in some instances he repeatedly contradicted himself. On direct examination by counsel for the General Counsel, he testified that the Union's past practice has been to "knock back immediately" any temporary mechanics employed when a mechanic goes on the out of work list. Michels also contended that a signatory employer can only reject a mechanic on the bench "for cause." Further, he testified that a mechanic takes priority in hiring over a temporary mechanic, even if the mechanic is a "traveler." However, on cross-examination, after admitting that he has had no involvement with the operation of the hiring hall since retirement, Michels acknowledged that the contract does not say that an employer can only reject for cause. Also, he was forced to admit that a signatory employer does not have to give notification of rejection of a mechanic in writing, unless specifically asked by the Union to do so.

At this point, it is important to note that, in general, I did not find Chase to be a particularly credible witness. Under cross-examination by counsel for the General Counsel, Chase was forced to admit that his affidavits, given to a Board agent during the investigation of these cases, conflicted directly with the testimony that he was giving at the hearing. His

[7] The Board has noted that such witnesses are inherently credible. *Pioneer Hotel, Inc*., 324 NLRB 918, 928 (1997).

frequently offered excuse for this inconsistency was his alleged unfamiliarity with the collective bargaining agreement at the time that he gave his affidavits. Also, offered as an excuse for his inconsistency was his alleged nervousness, embarrassment, and fear of giving a statement to the Board at time when he was unrepresented. I simply do not accept this explanation. From my observation of his testimony, he did not appear to be an unintelligent or unsophisticated individual. In addition to currently serving as business representative, Chase previously held the positions of president and member of the executive board of the Union. In total, he has served as an officer of the Respondent for approximately 10 years. In my opinion, he is more knowledgeable in union and legal affairs and significantly less reticent and sensitive than he wanted to appear.

I conclude that Chase's inconsistencies were largely the product of having to shift his defense so that certain of his actions could be construed has having other than a discriminatory intent. As noted, I found a significant portion of his testimony to be incredible. Later in this decision I will specifically note where I found his testimony to be less than truthful. However, even a generally untruthful witness may in part testify honestly. Such is also the case for Chase. When having to choose between Michels, also an unreliable witness, and Chase, as to the operation of the hiring hall, I choose Chase.

Chase's testimony regarding the operation of the union hiring hall as it related to the "set back" of temporary mechanics when journeyman mechanics were on the bench was in conformity with my reading of the collective bargaining agreement, as well as the decisions of the two arbitrators mentioned above. Additionally, the testimony of two signatory employers' representatives, Weldon and Bennett, supported Chase's contention that the union hiring hall had operated in this fashion for a significant period of time.

Accordingly, I conclude that in general Chase operated the union hiring hall in conformity with the collective bargaining agreement. However, the issue of whether Chase followed the usual referral practices in regards to Goss and Bowler, or treated them in a discriminatory fashion, must still be resolved.

2. Bowler's Situation

It is well established that union hiring halls are legitimate hiring systems when their operations are reflected in a nondiscriminatory manner in collective bargaining agreements. *Local 357, International Brotherhood of Teamsters v. NLRB,* 365 U.S. 667 (1961). It is just as well established that the hiring hall rules themselves must be reasonable and nondiscriminatory, and the union must apply them fairly and in good faith. *Teamsters Local 631 (Vosberg Equipment, Inc. and Bechtel Nevada, Inc.)* 340 NLRB 881 (2003); *IBEW Local 6 (San Francisco Electrical Contractors Assoc.; Butcher Electric)* 318 NLRB 109, 123-124 (1995). The Board has specifically stated that the operation of the hiring hall "must neither foster nor countenance discrimination with regard to access to, or referral from, the hall on the basis of [i]nternational union membership, local union membership, or any other arbitrary, invidious, or irrelevant considerations." *Sachs Electric Company,* 248 NLRB 669, 670 (1980).

As was noted earlier, upon returning to Albuquerque from his unsuccessful search for work in New Orleans and Phoenix, Bowler asked Chase on December 30, 2006, to place him on the Union's out of work list. Chase immediately sent the signatory contractors the generic "mechanic on the bench" letter, which required that "[a]ll temporary mechanic assignments end…." (G.C. Ex. 5.) However, the question remains as to what Chase did to enforce the "set back" provisions of the contract, and, if he failed to act, why did he do so?

It has already been established that of the six signatory employers, three of them, Thyssen Krupp, Otis, and Kone, all informed the Union that they were rejecting Bowler for employment. For the reasons stated above, I conclude that under those circumstances, these employers were not required to "set back" their temporary mechanics. Two others employers, Emco and Schindler, did not respond to Chase. They had no temporary mechanics, and so were not contractually bound to do anything. However, Permian did have one temporary mechanic at the time, and yet neither rejected Bowler nor "set back" its temporary mechanic. According to Permian's foreman, Anthony Bennett, Permian never received a "mechanic on the bench" letter from the Union and so was unaware at that time that any mechanic, including Bowler was out of work. Permian continued to employ its temporary mechanic.

While it is not entirely clear from his testimony, it appears that Chase is contending that he thought Permian "set back" its temporary mechanic in response to his "mechanic on the bench" letter. Further, Chase testified that Bowler was a "transient" working out of the Union's jurisdiction, and the contract required that priority in hiring be given to those workers "living permanently" in the area. (G.C. Ex. 2, Article XXII, Paragraph 1(b).) Since Bowler was a member of local union 140 in Phoenix, Chase is implicitly arguing that Bowler did not live permanently in the Union's jurisdiction and, therefore, an employer with a temporary mechanic who lived permanently in the area could not be required to "set back" that temporary mechanic in favor of Bowler.

There are several serious problems with this defense. As counsel for the General Counsel repeatedly noted, in the earlier affidavits that Chase gave to the Board, he never argued that an employer could not be required to "set back" its temporary mechanics who resided permanently in the area in favor of Bowler, a transient. Again, as counsel for the General Counsel points out, this is a "shifting defense" on the part of the Respondent, and not entitled to much weight. Further, for the reasons given earlier in this decision, I do not find Chase particularly credible, and I do not accept his explanation that his affidavits are deficient because at the time he did not understand the contract as well as he does presently, and because he was nervous and without legal representation.

Chase's true motives are demonstrated in the statements that he made to various employees and an employer's representative. Those statements are conclusive evidence that Chase was not interested in enforcing the collective bargaining agreement on behalf of Bowler, both because Bowler was not a member of the Union, and because he was in arrears in his dues to local union 140. Chase did not attempt to enforce the contract against Permian and require that signatory employer to "set back" its temporary mechanic, because he harbored animus towards Bowler, who was a non-member of the Union and who was deficient in his dues to his home local.

Bowler credibly testified that on January 23, 2006, during a telephone conversation, Chase asked him if he was going to pay the delinquent dues that Chase had heard Bowler owed to local union 140. Chase informed Bowler that he "couldn't put [Bowler] to work unless [Bowler] paid his dues." While Chase testified that he told Bowler to pay his back dues to local union 140, he was silent as to whether he threatened Bowler with not being referred to employment unless he paid his delinquent dues. In any event, for the reasons given earlier, I find Chase incredible and accept Bowler's version of this conversation.

On January 26, 2006, Bowler and Chase had a second, similar telephone conversation. Chase asked Bowler whether he had paid his back dues to local union 140. As he had in the earlier conversation, Bowler explained to Chase that he was presently financially unable to pay his delinquent dues. According to Bowler, Chase told him that the matter was between Bowler

and Jerry Cluff, the business representative for local union 140. As previously mentioned, in his testimony Chase acknowledges telling Bowler to pay his back dues to local union 140. However, from his testimony it is unclear just how many times he admits saying this to Bowler. In any event, implicit in Chase's continued admonishment to Bowler to pay his dues was the threat not to refer him to employment unless he did so.

Further, Chase had brought the subject of Bowler's back dues and non-member status to the attention of the union members attending a union meeting in El Paso on January 19, 2006. According to the credible testimony of Lorenza Oscar Duran, Chase defended the referral system and Bowler's presence on the bench while temporary mechanics were working by saying that Bowler "was from another local," and that he "was in arrears in his dues" to that local. Mark Sanetra, also present for the meeting, credibly supported Duran's testimony and added that Chase said that, if Bowler was looking for work, he should leave the jurisdiction of the Union (local 131), and go on the bench at local 140, his home local. During his testimony, Chase was mute regarding these alleged statements. However, Duran and Sanetra were credible witnesses with no motive to fabricate the incident, and I accept their testimony as accurate.

Finally, in early to mid-January 2006, Chase had a telephone conversation with Sam Stewart, Kone's branch manager. Stewart was a particularly credible witness, as his employer had no particular interest in the outcome of this proceeding. Kone had informed the Union in early January 2006 of its rejection of Bowler for hire and of the reasons for that rejection. In any event, shortly thereafter Chase called Stewart. According to Stewart, Chase informed him that Bowler was "ineligible for employment in Local 131 because of delinquent dues in Phoenix." As with similar allegations, Chase did not deny during his testimony that such a conversation had in fact occurred. It is worth noting again that once Bowler paid his delinquent dues, Chase informed Stewart that Bowler was now "eligible" for referral. Kone did hire Bowler, because, according to Stewart, by that time the employer had a desperate need for a mechanic.

Counsel for the Respondent argues in her post-hearing brief that in the construction industry, unions may lawfully condition the order of hiring hall referrals on length of area residence. As far as it goes, that is an accurate assessment of the extant state of the law. In *IBEW Local 8 (Romanoff Electric Corp.)*, 221 NLRB 1131 (1975), the Board held that it is lawful for hiring hall referral preferences to be given to local applicants. In that case, the Board concluded that the General Counsel had failed to meet its burden and establish that there was an unlawful purpose or motive behind the union's action in favoring area residents over transients. As long as the preference is based on local residence, and not membership in a local union, there is no violation of the Act when local applicants are given referral preferences. *J Willis & Sons Masonry,* 191 NLRB 872 (1971), citing *Bricklayers, Masons, Plasters' Union No. 28 (Plaza Builders),* 134 NLRB 751 (1961).

However, the law is well established that where there is discriminatory referral treatment because of a lack of membership in the union or simply because an applicant is a traveler, the Act has been violated. As the Board stated in *Sacks Electric Company, supra,* referrals must not be made on the basis of "[i]nternational union membership, local union membership, or any other arbitrary, invidious, or irrelevant consideration." See *Plumbers Local 305 (Stone & Webster),* 282 NLRB 83, 89 (1986).

It is also well established law that it is a violation of the Act for a union to condition referral through its exclusive hiring hall on the payment by a traveler of union dues owed to that traveler's home union local. See *Iron Workers Union, Local 433,* 272 NLRB 530 (1984), enfd. 767 F.2d 1438 (9th Cir. 1985). There are also many analogous cases where the Board has held

that a union's demand for payment of back dues arising during a period when there was no contractual obligation to maintain membership in the union, or during a period when the employee was not employed in the bargaining unit, cannot lawfully be imposed as a condition of employment even under a valid union-security clause.[8] See *Carpenters Local 17 (A & M Wallboard),* 318 NLRB 196 (1995), citing *Millwright & Machinery Erectors Local 740 (Tallman Constructors),* 238 NLRB 159, 160-161 (1978). Thus, a union violates the Act by refusing to refer an applicant for employment based on a failure to pay dues to another local union or in a unit different from the one in which the applicant is seeking referral.

As is apparent by Chase's statements to members of the Union at a union meeting in El Paso, Texas on January 19, 2006, he was not going to refer Bowler for employment and require that signatory employers "set back" their temporary mechanics, because Bowler was not a member of the Union, but rather a member of local union 140 in Phoenix. At the time, a signatory employer, Permian, had neither rejected Bowler for employment nor "set back" its temporary mechanic, as required by the contract.

By such conduct, the Union was restraining and coercing employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act. Accordingly, I find that by Chase's action the Union violated the Act as alleged in paragraphs 6(c)(2) and (7) of the complaint.

As is also apparent by Chase's statements to members of the Union at a union meeting in El Paso, Texas on January 19, 2006, he was not going to refer Bowler for employment and require that signatory employers "set back" their temporary mechanics, because Bowler was in arrears in his dues payment to local union 140 in Phoenix. Further, the same threat is apparent by Chase's statements made directly to Bowler over the telephone on January 23 and 26, 2006. As noted, at the time of these statements, Permian, a signatory employer, had neither rejected Bowler for employment nor "set back" its temporary mechanic, as required by the contract.

By such conduct, the Union was retraining and coercing employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the Act. Accordingly, I find that by Chase's action the Union violated the Act as alleged in Paragraphs 6(b), (c)(1), (d), and (7) of the complaint.

From the above conduct, it is clear that from December 30, 2005, when Bowler first requested to be placed on the out of work list, until approximately February 13, 2006, when he was referred to employment with Kone, the Union, through Chase, failed and refused to refer Bowler to employment with signatory employers. The Union engaged in this conduct because Bowler was delinquent in his dues to local union 140 and/or because he was not a member of the Union, and for reasons other than the failure to tender the periodic dues and initiation fees uniformly required for membership in the Union.

[8] As noted earlier, New Mexico is a non-right to work state and the collective bargaining agreement between the International and the six signatory contractors working in the jurisdiction of the Union contains a union-security clause. (G.C. Ex. 2, Article III, Membership Requirements.)

By such conduct, the Union has caused and attempted to cause an employer to discriminate against its employees in violation of Section 8(a)(3) of the Act in violation of Section 8(b)(2) of the Act. Accordingly, I find that by Chase's action the Union violated the Act as alleged in complaint paragraphs 6(a) through 6(g) and 8, as it relates to Bowler. [9]

3. Goss' Situation

As discussed above, Larry Goss, a member of the Union, was discharged by Kone on February 7, 2006. The termination letter issued by Kone stated in part that Goss was fired because of his "[u]se of a company vehicle for the purpose of conducting unlawful activities that lead [sic] to significant damages to [the] company vehicle." The damages included replacement of the windshield and removal of "contamination" which was "defined as blood." (U. Ex. 5.) The parties stipulated that Goss' arrest was for aggravated battery with great bodily injury, and that the alleged incident occurred in a vehicle belonging to Kone. As of the date of the Board hearing, Goss' criminal case was still pending, but he had not been convicted of any charges. The testimony at the hearing from various witnesses established that Goss' arrest and the charges filed against him were extensively reported by the local news media in Albuquerque and were generally known in the community of union members and among the signatory contractors.

Following his termination, Goss immediately requested to be placed on the out of work list. Chase did so, sending the six signatory employers the generic "mechanic on the bench letter" on February 7, 2006. Not unexpectedly, considering his recent arrest, Chase received rejection letters on Goss from Otis and Thyssen Krupp. In their rejection letters, both contractors mentioned Goss' recent arrest, and also his unsatisfactory work performance when previously in their employ. (G.C. Ex. 11 & 12.) Even before sending its rejection letter, Gary Weldon, Otis' branch manager, orally responded to Chase's "mechanic on the bench letter" by asking Chase which bench Goss was on, the union bench or the "jailhouse bench."

Kone had just fired Goss, and in his testimony even Goss admitted that under those circumstances it would have been unreasonable to expect Kone to respond to the "mechanic on the bench" letter. Two other signatory employers, Schindler and Emco, did not respond to Chase's letter. However, the parties stipulated that these two employers employed no temporary mechanics during the relevant period, and, so, there was no one to "set back."

The one remaining signatory employer that did not respond to Chase's letter was Permian. Earlier in this decision, I discussed at length Permian's normal practice when in receipt of a "mechanic on the bench" letter and its specific actions upon receiving the letter intended to alert the contractors that Goss was out of work. I will not repeat that discussion now, except to summarize the credible testimony of Anthony Bennett, Permian's foreman, that after waiting 14 days from the receipt of Chase's letter, Permian "set back" its one and only temporary mechanic. In conformity with its normal practice, Permian took no other action and did not formally notify the Union that it had "set back" its temporary mechanic. Chase's contention that he was informed of Permian's action is subject to some dispute. However, whether Chase was so informed or not, in fact, Permian did all that it was required to do under the terms of the contract.

[9] While not specifically alleged in the complaint, clearly said conduct also constitutes a violation of Section 8(b)(1)(A) of the Act. *Stage Employees IATSE Local 84 (Meadows Music Theatre),* 347 NLRB No. 101 (2006).

Based on the weight of the credible evidence, I conclude that following the issuance of Chase's "mechanic on the bench letter" of February 7, 2006, the six signatory employers were all in substantial compliance with the terms of the parties' collective bargaining agreement. Those contractors employing temporary mechanics, with the exception of Permian, had rejected Goss for employment and were therefore not required to "set back" their temporary mechanics. Permian, the only employer with such employees, which did not reject Goss, did "set back" its temporary mechanic.

There is no doubt, as argued by counsel for the General Counsel, that a union's duty of "fair representation" requires it to refrain from acting in an arbitrary manner and to strictly adhere to the contractual referral procedures. See *IBEW Local 48 (Oregon-Columbia Chapter of NECA),* 342 NLRB 101 (2004). Failure by a union to adhere to its contractual standards in administering a referral system violates the union's duty of fair representation. *Ironworkers Local 118,* 309 NLRB 808, 811 (1992).

In my view, Chase's duty to fairly represent Goss was satisfied by sending the "mechanic on the bench" letter dated February 7, 2006. There was nothing further Chase was required to do, as the signatory employers were in compliance with the contract. Chase abided by the terms of the contract and the normal operation of the hiring hall in regards to Goss' placement on the out of work list. However, the General Counsel contends that Chase's statements regarding Goss' arrest establish animus towards Goss and serve to disprove Chase's contention that he was doing his best to have Goss referred for employment.

During the period of his unemployment, Goss contacted Chase every few days to question Chase about what he was doing to get Goss referred out, and specifically why the temporary mechanics had not been "set back." Chase responded by telling Goss that the signatory contractors did not have to "set back" their temporary mechanics. This was an accurate statement under the terms of the contract, in light of the action taken by those employers with temporary mechanics. While Chase was being rather cryptic and terse in his response to Goss, and certainly could have been more politic in his response, there was nothing untruthful in his reply. Of course, it would not have been unnatural for Chase to be a little curt with Goss, whose repetitive calls and questions must have been somewhat annoying to Chase.

Goss was clearly unhappy with the lack of progress shown by Chase in getting him referred to employment. Still, it is important to consider that the Union is a small local, with Chase responsible for operating the hiring hall and administering the contract largely on his own. After a number of requests from Goss, Chase made copies of the Thyssen Krupp and Otis rejection letters available to him. Goss disputed certain of the statements made about his prior employment with those contractors in their rejection letters. Following Goss' complaints about the contents of those letters, Chase formally requested that the two employers furnish more details. (G.C. Ex. 13 & 14.) It was shortly after Chase sent those letters demanding more information that on about May 14, 2006, Goss was offered a job by Thyssen Krupp, which he subsequently accepted. While it is obvious that Goss wanted Chase to move with more dispatch in getting him referred for employment, there is no evidence that Chase was attempting to intentionally delay the process.

According to Goss, Chase told him in one of their conversations that the employers did not have to "set back" their temporary mechanics because Goss had been "arrested." During his testimony, Chase denies that Goss' arrest had any effect on the way in which he processed Goss' request for referral. However, he admits that in the affidavit given earlier to the Board that he indicated that he had decided not to require the employers to "set back" their temporary mechanics because the employers would not want to hire Goss as a result of his recent arrest.

In that affidavit, Chase also mentions not wanting to make the signatory employers "unhappy" by requiring them to hire Goss for a job where he would be "in the public eye" as a service mechanic. Chase admits making these statements in his affidavit, but in his testimony claims that it was all a mistake because he was nervous, and that, in fact, he had never allowed Goss' arrest to influence his efforts to find Goss a job.

As I have mentioned, Chase is not a credible witness. Never the less, there is a certain amount of logic in his contention that he did not allow Goss' arrest to influence his actions in attempting to find Goss a job. It is beyond much doubt that Chase was embarrassed about Goss' arrest. He felt that such a prominent arrest created bad publicity for the Union. Further, he anticipated that the signatory employers would not want to hire somebody who had been arrested in his employer's vehicle for alleged criminal conduct. As was reflected in the rejection letters from Thyssen Krupp and Otis, Chase was correct in this assumption. The comment from the Otis branch manager wondering whether Goss was on the "jailhouse" bench likely reinforced Chase's view that the other employers would look upon hiring Goss with displeasure.

I have no doubt that Chase mentioned the arrest to Goss, and perhaps to representatives of the signatory employers, as well to union members. After all, it had recently happened, was news, and potentially affected the way the Union was viewed by the public. However, I see no evidence that Goss' arrest motivated Chase to act in a certain way. The "bottom line" is that Chase did not violate his duty of fair representation towards Goss in operating the hiring hall or in his attempts to refer Goss for employment.

Counsel for the General Counsel also seems to suggest that Goss' internal union political activity motivated Chase to discriminate against him. As with the allegation concerning Goss' arrest, I see no evidence that such occurred. Goss was nominated on March 9, 2006, to run against Chase for the position of union business representative. There was no evidence offered that Chase exhibited any animus towards Goss because they were political rivals. Further, Chase handily won the election held in April 2006, easily defeating not only Goss, but another opponent as well.

As noted, I have concluded that Chase operated the hiring hall correctly and in conformity with the terms of the collective bargaining agreement. The evidence establishes that following Chase's "mechanic on the bench letter" issued on behalf of Goss, the signatory employers who employed temporary mechanics did what the contract required of them, and that the Union was, therefore, not obligated to take any further action. However, even assuming, for the sake of this discussion, that Permian, the one employer that I have concluded "set back" its temporary mechanic, failed to do so, I would still find no violation of the Union's duty of fair representation. Assuming Chase failed to take action against Permian, I believe that such a response was inadvertent. It is well settled Board law that such inadvertent errors in operating a hiring hall do not constitute an unfair labor practice. See *IATSE Local 592 (Saratoga Performing Arts Center),* 266 NLRB 703, 710 (1983) (where a union's sloppy and unprofessional operation of an exclusive hiring hall led to mistakes in referrals, it did not violate the Act); *Plumbers Local 520 (Aycock Inc.),* 282 NLRB 1228, 1232 (1987) (union did not violate the Act when it mistakenly placed applicant's name at the bottom of referral list, resulting in job loss); *Teamsters Local 631 (Vosberg Equipment, Inc., and Bechtel Nevada, Inc.,),* 340 NLRB 881 (2003) (no violation where the hiring hall operator made an innocent mistake and placed applicants on the wrong referral list, denying them employment).

Having concluded that the Union operated the hiring hall correctly and in conformity with the terms of the collective bargaining agreement, and further that Chase fulfilled his duty of fair representation towards Goss, I find that the Union's behavior towards Goss did not constitute a violation of Section 8(b)(2) of the Act. Accordingly, I shall recommend dismissal of complaint paragraphs 6(i),(k),(l), and 8, as it relates to Goss.

Finally, the General Counsel alleges that on June 8, 2006, the Respondent's vice president, Daniel Lamar, demanded that Goss withdraw an unfair labor practice charge that he filled with the Board against the Respondent, and threatened him with physical violence unless he did so. This alleged incident involves the aftermath of a union meeting held on the above referenced date in Albuquerque.

The meeting was the monthly union meeting held for those members who lived in Albuquerque. At the time, Goss was employed by Thyssen Krupp and he arrived for the meeting late, after leaving work. Once the meeting ended, the members filed into the parking lot of the building where it had been held. One of the apprentices had brought a 30 pack of beer to the parking lot and some of the men, including Goss and Lamar, helped themselves to the beer. Of the three men who testified about this incident, Goss, Lamar, and union member Allen Hunter, it is apparent that all three had at least some alcoholic beverage to drink that evening, although it is uncertain as to whether any of them were inebriated.

Goss testified that Lamar approached him in the parking lot. Goss indicated he is approximately 6 feet tall, weighing about 160 pounds. Lamar testified he is 6 feet tall, and weighs about 290 pounds. According to Goss, Lamar told him that he "needed to drop [the] charges with the Labor Board." Goss responded that he would not do so.[10] Goss alleges that Lamar then said, "I know a lot of people and I'll do everything in my power so that you will never be able to spend that money…and you will never live to spend that money." Goss testified that Lamar had gotten "pretty loud," at which point a number of other union members "grabbed" hold of Lamar. Goss then got into his vehicle and drove away.

As one would anticipate, Lamar's version of the confrontation is some what different. However, I should note that I found it very difficult to follow Lamar's testimony. He seemed highly agitated and nervous, and much of his testimony was disjointed and somewhat unintelligible. What follows is a summary of Lamar's testimony, as I was able to understand it.

Lamar admits talking with Goss in the parking lot, but claims that Goss approached him. According to Lamar, they spoke about Goss' charges filed with the Board, but Lamar denies demanding that Goss withdraw the charges. He specifically denies threatening Goss physically or otherwise. Lamar testified that he was upset because the talk at the union meeting about Goss' charges was interfering with union business. He admits that he did not approve of the "badgering of the Union," and that he told Goss, "I think you should just drop the charges." Lamar acknowledges being in a "mad way." However, he repeatedly denies making any threats to Goss.

[10] It is undisputed that Goss filed an unfair labor practice charge against the Respondent on March 2, 2006, which charge was amended on May 23, 2006. Those charges, which are before the undersigned for disposition in this case, allege a failure on the part of the Union to properly operate its hiring hall, to refer Goss for employment, and to adequately represent him.

Union member Allen Hunter was present in the parking lot during this confrontation. He testified that Lamar seemed "angry" and that the two men were yelling at each other. He does not know what Lamar and Goss said to each other before he walked over to them. While in the presence of Lamar and Goss, Hunter never heard Lamar demand that Goss withdraw his charge, nor did he ever hear Lamar physically threaten Goss. He does acknowledge stepping between Goss and Lamar, just to make sure that matters did not get out of hand. While interesting, Hunter's testimony sheds little light on the conversation between Lamar and Goss, as Hunter admits not overhearing it.

I find Goss more credible than Lamar. Goss testified in a clear, consistent manner. His version of the incident was inherently plausible, and had the ring of authenticity to it. Lamar, on the other hand, seemed excessively nervous, even for someone who was unfamiliar with the legal process. By his own admission, he knew that Goss had filed charges against the Union, and was unhappy that the charges were distracting the members from conducting union business. He admits being in a "mad way" at the time of the conversation. Hunter described Lamar as angry, and clearly he was directing that anger towards Goss. Under these circumstances, I believe that Lamar spoke the words attributed to him by Goss.

Physically, Lamar is a large man, and I would describe him as an imposing figure. I am convinced that under the circumstances, it was reasonable for Goss to have construed Lamar's comments to him in the parking lot to constitute a "demand" that Goss withdraw his charges, coupled with a threat of reprisals, including physical violence, unless Goss did so. It is axiomatic that a union agent violates the Act when he threatens violence against applicants for employment who are protesting the alleged discriminatory operation of an exclusive hiring hall established under a collective bargaining agreement. *Iron Workers, Local 433 (AGC of California, Inc.),* 228 NLRB 1420 (1977).

Therefore, I conclude that Lamar's comments made to Goss on June 8, 2006, restrained and coerced employees in the exercise of their Section 7 rights, constituting a violation of Section 8(b)(1)(A) of the act. Accordingly, I find that by Lamar's action the Union violated the Act, as alleged in complaint paragraphs 6(j)(1), (2), and 7.

Conclusions of Law

1. Permian Elevator Corporation of Albuquerque (Permian) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Otis Elevator Company (Otis) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondent, International Union of Elevator Constructors, Local Union No. 131, AFL-CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

4. International Union of Elevator Constructors, AFL-CIO (the International) is a labor organization within the meaning of Section 2(5) of the Act.

5. Permian, Otis, and other employers are signatories to a current collective bargaining agreement with the International. The International enters into the contract for and on behalf of its affiliated local unions, including the Respondent. Each local union, including the Respondent, individually administers the contract in its respective jurisdiction.

6. By the following acts and conduct the Respondent has violated Section 8(b)(1)(A) of the Act:

(a) Threatening not to refer an applicant for employment through its exclusive hiring hall because he was delinquent in the payment of dues to a different local union of the International;

(b) Threatening not to refer an applicant for employment through its exclusive hiring hall because he was not a member of the Respondent;

(c) Demanding that an employee, applicant for employment, and/or member of the Respondent withdraw an unfair labor practice charge that he filed with the Board against the Respondent; and

(d) Threatening an employee, applicant for employment, and/or member of the Respondent who filed an unfair labor practice charge with the Board against the Respondent, that unless he withdrew said charge, he would face reprisals, including physical violence.

7. By the following acts and conduct the Respondent has violated Section 8(b)(1)(A) and (2) of the Act:

(a) Failing and refusing to refer Philip Bowler, an applicant for employment, through its exclusive hiring hall because he was delinquent in the payment of dues to a different local union of the International; and

(b) Failing and refusing to refer Philip Bowler, an applicant for employment, through its exclusive hiring hall because he was not a member of the Respondent.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent has not violated the Act, except as set forth above.

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.

The Respondent, having discriminatorily failed and refused to refer Philip Bowler, an applicant for employment, through its exclusive hiring hall, shall be required to make Philip Bowler whole for his monetary losses and loss of contributions to the funds established by the applicable collective bargaining agreement to which the International, on behalf of the Respondent, is a party. Back monies owed shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall cease and desist from failing and refusing to refer applicants for employment through its exclusive hiring hall because said applicants are not members of the Respondent, and/or are delinquent in the payment of dues to a different local union of the International.

The Respondent shall be required to post a notice that assures its members, applicants for employment through its exclusive hiring hall, and employees of signatory employers that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, International Union of Elevator Constructors, Local Union No. 131, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from:

(a) Threatening not to refer applicants for employment through its exclusive hiring hall because they are delinquent in the payment of dues to a different local union of the International;

(b) Threatening not to refer applicants for employment through its exclusive hiring hall because they are not members of the Respondent;

(c) Demanding that employees, applicants for employment, and/or members of the Respondent withdraw unfair labor practice charges filed with the Board against the Respondent;

(d) Threatening employees, applicants for employment, and/or members of the Respondent who filed unfair labor practice charges with the Board against the Respondent, that unless they withdrew said charges, they would face reprisals, including physical violence;

(e) Failing and refusing to refer applicants for employment through its exclusive hiring hall because said applicants are not members of the Respondent, and/or are delinquent in the payment of dues to a different local union of the International; and

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

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

(a) Make Philip Bowler whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision;

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

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all out of work lists, referral lists, lists of mechanics, helpers, apprentices, and temporary mechanics working for signatory employers, dues payment lists, and any other records related to the operation of the hiring hall, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back monies and benefits due Philip Bowler under the terms of this Order;

(c) Within 14 days after service by the Region, post at its union offices/hiring halls, located in Albuquerque, New Mexico, and El Paso, Texas, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 28 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 employees and 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed either or both of the two union offices involved in these proceedings, or in the event that the Respondent does not have fixed offices where members gather in either or both Albuquerque and El Paso, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all members, applicants for referral, and/or elevator mechanics, helpers, apprentices, and temporary mechanics employed by signatory elevator contractors and working in the jurisdiction of the Respondent, and/or registered on the Respondent's out of work list at any time since December 30, 2005; and

(d) 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 complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C., October 30, 2006.

Gregory Z. Meyerson
Administrative Law Judge

[12] 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 AND EMPLOYEES

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 in any manner interfere with your exercise of these rights. Specifically:

WE WILL NOT threaten to not refer an applicant for employment through our hiring hall because he is not a member of the International Union of Elevator Constructors, Local Union No. 131, AFL-CIO (the Union).

WE WILL NOT threaten to not refer an applicant for employment through our hiring hall because he is delinquent in the payment of dues to a different local union of the International Union of Elevator Constructors, AFL-CIO (the International).

WE WILL NOT demand that a member of the Union, an applicant for employment through our hiring hall, or an employee of any elevator contractor performing work in the jurisdiction of the Union, withdraw an unfair labor practice charge that he filed against the Union with the National Labor Relations Board.

WE WILL NOT threaten a member of the Union, an applicant for employment through our hiring hall, or an employee of any elevator contractor performing work in the jurisdiction of the Union, with harm, including physical violence, for refusing to withdraw an unfair labor charge that he filed against the Union with the National Labor Relations Board.

WE WILL NOT fail and refuse to refer an applicant for employment through our hiring hall because he is not a member of the Union, or because he is delinquent in the payment of dues to a different local union of the International.

WE WILL make Philip Bowler whole for any loss of earnings, plus interest, and other benefits suffered as a result of the Union’s discrimination against him in failing and refusing to refer him for employment through our hiring hall.

WE WILL refer applicants for employment through our hiring hall in accordance with the procedures set forth in the collective bargaining agreement between the International and those signatory employers performing work in the Union's jurisdiction.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL UNION NO. 131, AFL-CIO

(Labor Organization)

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.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160

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, 602-640-2146.