

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**LINDA DELANEY, COMPLAINANT  
DOCKET NO. E-21189**

**And**

**MARIA TOLARCZYK, COMPLAINANT  
DOCKET NO. E-21421**

**v.**

**HEAVY & HIGHWAY CONSTRUCTION WORKERS' LOCAL UNION #158,  
AFFILIATED WITH THE LABORERS INTERNATIONAL UNION OF NORTH  
AMERICA, AFL-CIO, RESPONDENT:**

**STIPULATIONS OF FACT**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF HEARING PANEL**

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**LINDA DELANEY, COMPLAINANT  
DOCKET NO. E-21189**

**And**

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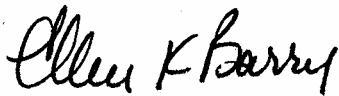
**v.**

**HEAVY & HIGHWAY CONSTRUCTION WORKERS' LOCAL UNION #158,  
AFFILIATED WITH THE LABORERS INTERNATIONAL UNION OF NORTH  
AMERICA, AFL-CIO, RESPONDENT:**

**STIPULATIONS OF FACT**

1. Complainant Linda Delaney is an adult female residing at R.D. 1, Box 52, East Waterford, Juniata County, Pennsylvania.
2. Complainant Maria Tolarczyk is an adult female residing at 1505 Lyon Court, Charlotte, North Carolina.
3. Complainant Delaney filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at Docket No. E-21189 on October 1, 1981. (A copy of this complaint is attached and is labeled Attachment 1.)
4. On or about October 7, 1981, Alfonso Broadus of the Commission staff duly served all parties to this action with a copy of the Delaney complaint, in a manner which satisfies the requirements of 1 Pa. Code §33.32. (Attachment 2)
5. On or about October 28, 1981, Complainant Tolarczyk filed a notarized complaint with the Commission at Docket No. E-21421. (Attachment 3)
6. On or about November 12, 1981, Randall Smedley of the Commission staff duly served all parties to this action with a copy of the Tolarczyk complaint, in a manner which satisfies the requirements of 1 Pa. Code §33.32. (Attachment 4)
7. On or about August 25, 1983, Complainant Delaney filed a notarized Amended Complaint with the Commission at Docket No. E-21189. (Attachment 5)
8. On or about August 22, 1983, Complainant Tolarczyk filed a notarized Amended Complaint with the Commission at Docket No. E-21421. (Attachment 6)
9. Both the Amended Complaints were served simultaneously by Edward Zook on August 31, 1983, upon all parties to this action, in a manner which satisfies the requirements of 1 Pa. Code §33.32. (Attachment 7)

10. By letter dated September 12, 1983, and pleading entitled "Answers to the Amended Complaints", the Respondent by its attorney, Ira H. Weinstock, answered the Amended Complaints of Delaney and Tolarczyk. (Attachment 8)
11. Complainants Delaney and Tolarczyk are both females.
12. Complainant Delaney filed a Membership Employment Request with Respondent's Local Union Hall in Harrisburg on or about August 24, 1981.
13. Victoria Parkes, white female, filed a Membership Employment Request with Respondent's Local Union Hall in Harrisburg on or about August 24, 1981.
14. On or about July 30, 1981, representatives of Worthy Brothers Pipeline Corporation and representatives of Respondent's Local Union Hall attended a "pre-job conference", pursuant to which a document entitled "pre-job conference report" was completed.
15. Delaney, on at least one (1) occasion appeared at the Shermansdale job site looking for work.
16. Respondent entered an agreement with Worthy Brothers Pipeline Corporation to supply laborers to the Worthy job site, known as the Shermansdale job site.
17. Respondent Laborers International Union Local 158 resides at 2601 Herr Street, Harrisburg, Dauphin County, Pennsylvania 17103.



COUNSEL FOR COMPLAINANTS

COUNSEL FOR RESPONDENT

#### **FINDINGS OF FACT**

The facts contained in the "Stipulations of Fact" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout:

S.F. Stipulations of Fact  
N.T. Notes of Testimony  
C.E. Complainant's Exhibit  
R.E. Respondent's Exhibit

1. During August of 1981 through December of 1981, Worthy Brothers Pipeline Corporation (hereinafter "Worthy Brothers") was putting in a natural gas pipeline through Juniata and Perry Counties. (C.E. 2, R.E. 4, N.T. 10, 11, 238)
2. On or about July 30, 1981, Respondent representatives met with Worthy Brothers representatives at a "pre-job conference" during which the extent of the Respondent's worker referral role was generally established. (C.E. 2)
3. The Worthy Brothers construction site through Juniata and Perry Counties extended for 17.9 miles; however, a focal job site was established in Shermansdale. (C.E. 2)
4. The Respondent placed Harry Miller (hereinafter "Miller") as the Respondent's labor union steward at the Shermansdale site. (C.E. 2, N.T. 252)

5. In the Fall of 1981, the construction industry was not economically healthy and many laborers were out of work. This minimized one's chance for unskilled labor since so many skilled experienced workers were also looking for work during this time period. (N.T. 229, 230, 273)
6. In 1981, the Respondent's craft jurisdiction was over Heavy and Highway laborers in a very large geographic area covering 29 counties in Northeastern Pennsylvania. (N.T. 212)
7. In 1981, the Respondent had five business agents and a business manager, one of whom was Edwin C. Metzger (hereinafter "Metzger") who was responsible for the geographic area which included Perry and Juniata Counties. (N.T. 211, 213)
8. In 1981, the Respondent maintained a non-exclusive hiring hall which meant that Worthy Brothers and other contractors who were in need of workers could request referrals from the Respondent for needed workers. (N.T. 214)
9. Individuals seeking the Respondent's assistance with referrals could come to the Respondent's business office in Harrisburg and speak to one of the Respondent's business agents and make an application to be placed on the Respondent's referral list. (N.T. 214-216)
10. Knowledge of an applicant's prior work experience was essential because contractors calling the Respondent seeking the referral of workers most often requested laborers with particular skills and experience. (N.T. 215)
11. Worthy Brothers' requests for referrals from the Respondent specified the need for "experienced pipeline hands." (N.T. 220, 226)
12. Worthy Brothers communicated its labor needs to Metzger through the Respondent's Union Steward, Miller. (N.T. 218)
13. Miller had no authority to select individuals for referral. Instead, Metzger made the referral decisions based on the names on the referral list prepared by the Respondent's business agents. (N.T. 218, 219)
14. An applicant placed on the Respondent's referral list was unable to specify where he or she wanted to work. Instead, an individual on the referral list could be referred to any referral seeking contractor within the Respondent's 29 county geographic jurisdiction. (N.T. 231)
15. Under Section III (I) of the National Pipeline Agreement applicable between the Respondent and Worthy Brothers, Worthy Brothers was permitted to recruit from other sources and the Respondent was simply one of the principal sources of qualified laborers. (R.E. 2)
16. When Worthy Brothers wanted a referral from the Respondent, ideally, Worthy Brothers would convey its needs to Miller the day before the laborers were needed and Miller would then have ample time to convey this information to Metzger who would in turn review his referral list and advise those individuals highest on his list who possessed the requested qualifications to report the next day at the Shermansdale site. (N.T. 218, 239, 252)
17. Frequently, Worthy Brothers waited until the morning that a need for laborers arose to convey their needs to the Respondent. (N.T. 218, 239, 252)
18. When this occurred, Miller called Metzger and the referral list was expeditiously reviewed and referrals were made of qualified individuals highest on the list who were also present at the Shermansdale site on that morning. (N.T. 218, 239, 252)

19. Worthy Brothers' foremen and other representatives had the authority to and quite often did put workers directly to work without going through the Respondent's referral system. (N.T. 239)
20. When a contractor requested a specific skilled laborer, the Respondent reviewed its referral list and referred the particular laborer highest on the list who possessed the requested qualifications. (N.T. 217)
21. When a contractor simply requested a laborer, the listed applicant who was placed on the referral list earliest was referred. (N.T. 217)
22. At about the end of July of 1981, after learning of possible job openings on the Worthy Brothers' pipeline, Complainant, Linda Delaney (hereinafter "Delaney") went to the Shermansdale job site looking for employment.
23. On Delaney's first visit to the Shermansdale job site, she contacted Miller and was instructed by Miller that there would be no hiring for approximately two weeks. (N.T. 153)
24. Acting on Miller's advise, Delaney returned after approximately two weeks and along with a lot of others, began to come daily in hopes of being selected for work. (N.T. 152)
25. In August, Miller instructed Delaney that she could go to the Respondent's hiring hall and apply to be placed on the Respondent's referral list. (N.T. 153, 154)
26. On August 24, 1981, Delaney did apply and was placed on the Respondent's referral list. (N.T. 154)
27. Delaney met with Metzger and was told that if she could not get on the Worthy Brothers' pipeline, there was a chance she could be placed with a contractor working on the turnpike. (N.T. 155)
28. Delaney was also instructed to call Metzger periodically. (N.T. 155)
29. Until October of 1981, each morning Monday through Friday, Delaney went to the Shermansdale job site with hopes of being selected for employment. (N.T. 164)
30. Delaney frequently attempted to gain work at the Shermansdale site by speaking directly with Worthy Brothers' foremen who often directly hired employees without initial union referral. (N.T. 165)
31. Of the people waiting each morning at the job site, some were hired, some were not. (N.T. 169)
32. Between August 19 through October 3, 1981, Complainant Maria Tolarczyk Douglas (hereinafter "Tolarczyk") went to the Shermansdale job site on the morning of each workday attempting to get a job on the Worthy Brothers' pipeline. (N.T. 14)
33. At first, Tolarczyk spoke only with Worthy Brothers' foremen who advised her to fill out an application with Worthy Brothers. (N.T. 14, 15)
34. On approximately Tolarczyk's third day at the job site, she spoke with Miller and was instructed that jobs could be obtained directly through the Worthy Brothers' foremen. (N.T. 17)
35. Tolarczyk had acquaintances who had obtained jobs on the Worthy Brothers' pipeline directly through Worthy Brothers' foremen. (N.T. 42)
36. Tolarczyk knew she could have registered at the Union Hall but chose to pursue work directly through Worthy Brothers' foremen similar to the method used by many of her acquaintances. (N.T.43)
37. The Worthy Brothers' pipeline job at the Shermansdale site lasted until December of 1981. (R.E. 4, N.T. 11)

## OPINION

### I. PROCEDURAL HISTORY

Both of these cases which were consolidated for the purpose of public hearing, arise on complaints filed against the Heavy and Highway Construction Workers' Union Location 158, Affiliated with the Laborers' International Union of North America, AFL-CIO (hereinafter either the "Respondent" or the "Union").

On or about October 1, 1981, Complainant, Linda Delaney (hereinafter "Delaney") filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter the "PHRC"). In her complaint, Delaney alleges that the Respondent discriminated against her because of her sex, female, in violation of Section 5(c) of the Pennsylvania Human Relations Act. Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq. (hereinafter the "PHRA"). On or about August 25, 1983, Delaney filed a notarized Amended Complaint in which she alleged a violation of Section 5(b)(4) of the PHRA.

On or about October 28, 1981, Complainant Maria Tolarczyk Douglas (hereinafter "Tolarczyk") filed a notarized complaint with the PHRC. In her complaint, Tolarczyk also alleged that the Respondent discriminated against her because of her sex, female, in violation of Section 5(c) of the PHRA. On or about August 22, 1983, Complainant Tolarczyk filed a notarized Amended Complaint in which she alleged a violation of Section 5(b)(4) of the Act.

Both complaints were investigated and a determination was made that probable cause existed to credit the allegations of both complaints.

Thereafter, the Commission and the parties attempted conciliation but these efforts were unsuccessful. Accordingly, Public Hearings were approved for both complaints. The Public Hearings were held on these consolidated complaints on April 23 & 24, 1986, before Commissioners Rita Clark, Hearing Panel Chairperson, Elizabeth Scott and Raquel Otero de Yiengst. Carl H. Summerson served as Panel Advisor. Ellen K. Barry and Sallie A. Rodgers, Assistant Chief Counsels for the Commission presented the case on behalf of the complaints, and Paul J. Dellasega appeared on behalf of the Respondent.

### ANALYSIS

The nature of the allegations and evidence presented has caused us to analyze these cases solely as disparate treatment cases. See Peagues v. Mississippi State Employment Service, 699 F.2d 760, 31 FEP 257 (5th Cir. 1983). Additionally, we are concerned solely with the liability of the Union.

In the leading case of McDonnell Douglas Corp. v. Green, 411 U.S. 192, 5 FEP 965 (1973), the U.S. Supreme Court set forth the basic allocation of burdens and the order of presentation of proof in a Title VII case alleging disparate treatment. Under this formula, which has been adopted by the PA Supreme Court for analyzing evidence in a case under the PHRA, General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976), the Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. If the Complainant succeeds, the burden then shifts to the Respondent to produce evidence which demonstrates a legitimate, non-discriminatory reason for the adverse employment decision. If the

Respondent is successful, the Complainant must have a full and fair opportunity to prove by a preponderance of the evidence that the proffered reasons are a pretext for discrimination. This burden merges with the Complainant's ultimate burden of persuading the fact finder that she has been the victim of discrimination. See Texas v. Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 25 FEP 113 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 31 FEP 609 (1983).

A prima facie case of discrimination, identifying the discriminatory criterion "as the likely reason for the denial of a job opportunity," White v. City of San Diego, 605 F.2d 455, 458, 20 FEP 1649 (9th Cir. 1979), must be established by a preponderance of the evidence. Burdine, 450 U.S. at 252-53. A properly established prima facie case allows an inference of illegal discrimination, creating a legally mandatory, rebuttable presumption against the Respondent. *Id.* at 254 n. 7; Casillas v. United States Navy, 735 F.2d 338, 343, 34 FEP 1493 (9th Cir. 1984).

McDonnell Douglas set forth the specific elements of a prima facie case of disparate treatment. Under its oft repeated test, a Complainant must show: (a) that she belongs to a protected group; (2) that she applied for and was qualified for a job for which the Respondent was seeking applicants; (3) that, despite her qualifications, she was rejected; and (4) that, after her rejection, the position remained open and the Respondent continued to seek applicants from persons of her qualifications. McDonnell Douglas, 411 U.S. at 802.

It has repeatedly been emphasized that this four-part test is not rigid; its satisfaction depends on the facts of each case. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 575-76, 17 FEP 1062 (1978); Spaulding v. University of Washington, 740 F.2d 686, 700, 35 FEP 217 (9th Cir. 1984); White, 605 F.2d at 458; Reed v. Printing Equipment Division of Western Gear, 75 Pa. Cmwlth. 360, 462 A.2d 292 (1983). The exact elements of a prima facie case are not hard and fast rules, but rather a set of standards whose application to differing factual situations requires individualized variations, Spruill v. PennDOT, Docket No. E-18816 (PHRC, February 28, 1983); Fisher v. Montgomery County Sheriff's Dept., Docket No. E-21522 (PHRC, August 9, 1984); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

Since McDonnell Douglas involved a refusal to hire, not a refusal to refer, the four-prong formula must be adapted in these cases. Since a Complainant's burden to show a prima facie case is not onerous, see Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), a prima facie case is established upon a showing that:

- (a) A Complainant belongs to a protected class;
- (b) A Complainant either submitted an application to the Union to participate in the Union's referral system, or attempted to be referred by the Union without first applying to the Union: for a position for which she was qualified;
- (c) A Complainant was not referred; and,
- (d) The Union either referred other male applicants or selected other male non-applicants.

After a comprehensive evaluation of the evidence in light of common experience we find that each Complainant has established a prima facie case of refusal to refer.

### **LINDA DELANEY'S PRIMA FACIE CASE**

As a woman, Delaney clearly belongs to a protected class. She applied to the Respondent to be placed on the Union's referral list. Regarding the question of qualifications, both Delaney and Tolarczyk indicated there were pipeline laborer jobs they could do. Also, on the pipeline, there were general laborer jobs listed in the master collective bargaining agreement.

Clearly, Delaney was not referred, and males on the Respondent's referral list were referred by the Respondent. Accordingly, Delaney has set forth a prima facie case of sex discrimination.

### **MARIA TOLARCZYK'S PRIMA FACIE CASE**

Tolarczyk's circumstances differ substantially from the initial showing Delaney was able to make. The critical difference between the experience of both Complainants can be found in the second stage of a prima facie showing. The evidence in Delaney's circumstance clearly shows she submitted an application to the Union to be placed on the Union referral list. With Tolarczyk, the evidence in this regard is not only unclear, the evidence strongly suggests that Tolarczyk never did submit an application to be placed on the referral list.

A question of Tolarczyk's credibility was raised on several occasions during her testimony on cross examination. At one point Tolarczyk testified that she had known about the union hall registration procedure, however, she immediately retracted this assertion. Beginning on Page 42 of the transcript, Tolarczyk was relating that she had learned of the probable job openings coming up at Worthy Brothers in August through December from pipeline workers before the pipeline came to Pennsylvania. She related that the pipeline workers with whom she had spoken told her of the existence of a labor contract which she never reviewed. The questions and Tolarczyk's answers continued at line 18 of page 42 as follows:

Q. Did they ever tell you there was a hiring hall?

A. From all my understanding, the way these particular people that I had known that were hired on at the Baltimore job site, they went on the job, was hired by the company and then obtained their union book; but, they had to be working for the company before you could get a union book.

Q. SO they had obtained their job from a company and not from a union?

A. Right.

Q. And your understanding at the time was that you didn't have to go through any kind of labor union in order to obtain employment?

A. I knew there had been registration at the Union Hall, but I was -- my knowledge was from the individuals that I knew. They got hired on by the company, then received their labor book or labor card as referred to as a book.

Q. At the time in May of '81, you knew you had to register at a Union Hall?

A. Repeat that.

Q. You said you knew they had registered at the Union Hall.

A. No, I didn't. I didn't. I did not know that. I didn't assume that. I didn't know that.



Q. You didn't just testify to that a few minutes ago?

A. If I did, I did it in error.

Clearly, Tolarczyk was familiar with one viable option open to her in her efforts to obtain a job with Worthy Brothers. She could convince a Worthy Brothers' foreman to hire her and subsequently she would become a union member. Tolarczyk also began to indicate "I knew there had been registration at the Union Hall, but I was..." However, she abruptly changed that focus of her revelation and later denied knowing of the union hiring hall process.

It is of particular interest that Tolarczyk would say she had known about union hall registration. Also, when Tolarczyk's answer to the first question listed above is reviewed, it is clear she chose not to answer the question asked. We believe she tried to sidestep the critical question but found herself beginning to reveal the fact that she was aware of the hiring hall option. Later in the same line of questions, Tolarczyk asks for a question to be repeated. It looks like she knew she had said the wrong thing and was looking for a moment to think. When that moment was unavailable, she simply denied saying what she had just said.

The question of whether Tolarczyk knew about the hiring hall application process before she first went to the Shermansdale site is fundamentally critical. Tolarczyk rests most of her case on an allegation which suggests Miller never properly told her how to register with the union. She claims she was given the run around and was unaware of the hiring hall application process and referral list until approximately the 3<sup>rd</sup> week of September 1981. she then contends that after she applied at the union hall she was still not placed on the referral list, On October 3, 1981, she ceased going to the Shermansdale job site.

A review of Tolarczyk's total testimony makes it apparent that Tolarczyk possibly never did apply to be placed on the Respondent's referral list. First, Delaney testified that she probably told Tolarczyk of the option of going to the Respondent's union hall to apply to be put on the union's referral list.

Next, Tolarczyk's direct examination conveniently left out the fact that during the period of time she was having a difficult time getting a job with Worthy Brothers, she had a fiancé who was a member of the Teamsters Union who was working with Worthy Brothers at the Shermansdale job site. When asked about her fiancé, Tolarczyk first took the position that her fiancé was not around during the period when she was trying to get hired. She then quickly waived agreeing that he had been aware of the difficulties she contends she was experiencing. Although her story changed significantly, Tolarczyk maintained her fiancé did not tell her about the opportunity of signing up at the hiring hall. Tolarczyk said the reason was because her fiancé was unaware of union activities.

Tolarczyk's testimony makes it quite clear that she had a fundamental working knowledge of the various unions at the Shermansdale job site. for example, Tolarczyk knew that there had been a driver hired under the labor union contract and not the teamsters. (N.T. 78) She also knew that not only laborer union members worked on the pipeline. (N.T. 42) Tolarczyk's description of her acquaintances in Maryland before August 1981 depicted these individuals as being from a

variety of local unions. On one hand, Tolarczyk has a great degree of knowledge of the way the pipeline employment process worked, but on the other hand, she contends that she was ignorant of the existence of the hiring hall process.

The remaining unexplained discrepancy regarding whether Tolarczyk actually applied to be on the Respondent's referral list is the fact that no application for Tolarczyk was found in the Respondent's files. There was an application for Delaney but not for Tolarczyk.

A combination of common experience and Tolarczyk's weakened credibility reveals that the likely chain of events was that Tolarczyk's intention was to attempt to get on the pipeline using the same method which had been successful for her acquaintances. When she came to the Shermansdale job site, she went directly to the Worthy Brothers' foremen seeking a direct hire. The evidence points to the conclusion that Tolarczyk knew of the alternate union referral list process but chose to pursue a job through the foremen. It is also apparent that Tolarczyk never did register with the union. Accordingly, Tolarczyk is unable to meet her burden of establishing a prima facie case as easily as did Delaney.

Despite Tolarczyk's inability to establish that she applied for the referral system, she is not totally excluded from an opportunity to present a prima facie case. Tolarczyk contends that there was yet a third method of being hired.

Tolarczyk successfully establishes a prima facie case because of her contention that referrals were made of male non-applicants who like Tolarczyk and Delaney came each morning to the Shermansdale job site. Tolarczyk contends that on occasion Worthy Brothers came to Miller in need of immediate referrals. She suggests that such referrals were made from those who simply came to the job site hopeful of being selected for employment.

#### **THE UNION'S REBUTTAL**

Since both Delaney and Tolarczyk were able to set forth prima facie cases, the burden of production shifted to the Respondent to present evidence which demonstrates a legitimate, non-discriminatory reason for the non-referral of the Complainants. In its defense, the Respondent reviewed its procedures.

The Respondent was a non-exclusive hiring hall. This meant that contractors doing business within the wide geographic jurisdiction of the Respondent were not obligated to seek referrals from the union only. Employees were permitted to hire whomever they wanted. Additionally, if the union did refer an employee, the contractors had the ultimate right to reject any referral made.

The Respondent indicated that the union had to comply with an employer's wishes or lose credibility with the employer. Specifically, Worthy Brothers was said to have asked Metzger to refer only experienced pipeline workers.

Metzger testified that he gave no one favorable treatment. He ascertained an individual's skills and experiences during his interview with them at the time of an individual's application to the union. Metzger says he did this because contractors often requested referrals of workers with

specific experience. Additionally Metzger indicated that the Respondent's referral system did not permit any applicant to seek a referral to only one job. Once an individual was placed on the Respondent's referral list, there was a possibility of being referred to any employer doing business within the geographic jurisdiction of the union.

The referral system theoretically was designed to be a smooth operating method to provide union workers to employers seeking laborers. An employer was supposed to notify the union of its personnel needs at least a day before a worker was actually needed. This would provide the union with time to review the referral list and notify the earliest applicant to report to a particular employer. However, in practice, employers, including Worthy Brothers, notoriously waited until the morning of a need for personnel to request a referral. Metzger indicated that he believed employers did this so foremen could hire friends and other workers of their choice with the least amount of friction created.

Employers coming to the union on the morning of their personnel need also seemed to be the cause of the conditions which found many unemployed workers coming to the job site each morning with hopes of being picked to fill an immediate need. Metzger indicated that when Worthy Brothers asked for referrals on an immediate basis, Miller called Metzger and Metzger would instruct Miller regarding who from the referral list should be referred if they were physically present at the job site.

Metzger related that at the time of the Worthy Brothers' project, industry within the jurisdiction of the union had suffered economically. This caused many union laborers to be out of work. The union's membership had dropped from approximately 2000 to near 1500 between 1979 and 1981. Metzger indicated that for anyone applying for work in August of 1981, there was an extremely minimal chance of work for unskilled labor.

During the course of Worthy Brothers' project in Perry and Juniata Counties, it appears that approximately 90 individuals were put on as Worthy Brothers' employees. Of this number, Metzger indicated that the union had only referred approximately 30. When the Worthy Brothers job began, the referral list contained between 200 to 250 names. In other words, there were at least this many names on the list before either Delaney or Tolarczyk first came to the Shermansdale job site.

Whether a referral was a general referral for a general laborer or a specific referral of an individual with a particular skill experience, the referrals made did not even come close to the point on the referral list where either Delaney or Tolarczyk would have been had they been immediately placed on the list the first day they began to look for work. Regarding Tolarczyk's prima facie showing, the Respondent flatly denied referring non-applicants.

Finally, with respect to Delaney, shortly after she applied to the union, Metzger testified that D. C. Spinoza, another contractor, had requested a female unskilled laborer. Metzger attempted to reach Delaney to refer her but was unsuccessful. Metzger testified that he attempted to call Delaney and when she could not be reached by telephone, he went to the Shermansdale job site and attempted to physically locate her.

### **BURDEN TO SHOW PRETEXT**

Since the Respondent's evidence successfully fulfills its burden in both cases to present a legitimate non-discriminatory reason for its actions, the burden shifts back to the Complainants to show that the reasons articulated by the Respondent are pretextual.

The Complainants rely almost exclusively on their contention that Miller did not give them accurate information regarding the union's referral process. The Complainants have a considerable problem with Miller's instruction to see a Worthy Brothers' foremen for a job. Clearly, workers were being hired by these foremen.

As previously discussed, Tolarczyk's primary purpose for coming to the job site was her attempt to follow the same process which had been successful for pipeline worker acquaintances she had. In fact, the evidence suggests that Tolarczyk fully intended to obtain her job through the foremen.

Delaney's situation is similar in that Miller did first tell her to see the Worthy Brothers' foremen. However, Miller told Delaney about the referral process shortly thereafter. It appears that the effects of the deflated economic conditions in the industry at the time caused almost anyone in the industry to readily realize that a large number of experienced laborers were unemployed. The union's referral list held little promise for a new applicant. Frankly, anyone wishing to break into this industry at that point in time would have been best advised to see a foreman.

Regarding the Complainants' contentions that non-applicants not on the referral list were referred, such conclusory allegations are not supported by the evidence. To make a finding that the Respondent made such referrals requires some factual showing. In these cases, the Complainants merely stated conclusively that such referrals were made. When asked for factual support of those conclusions, none was given. In fact, only the Complainants testified during the case on behalf of the complaints. The only other witness presented was Metzger during the Respondent's case.

During the testimony of both Delaney and Tolarczyk unsupported conclusions were made that men not on the referral list were hired after a referral, however, these men were not called as witnesses. The Respondent's denial that such referrals were made has accordingly not been shown to be false by a preponderance of the evidence. It is clear that the Complainants were simply guessing that this happened. Tolarczyk testified that the hiring process took place in a trailer and that there had been no personal observation of the process.

If witnesses were available to support the conclusory allegations of the Complainants, we are at a loss to understand why they were not called to testify.

Finally, the Complainants both testified that they had a deeply held belief that they were treated unfairly by Miller. Once again, simply being treated unfairly is not enough. The treatment must be different from that given to men. Tolarczyk agreed that many of her acquaintances and her fiancé were unfamiliar with the Respondent's referral process. This would lead to the conclusion that Miller did not tell anyone about the process. In other words, once again the evidence fell short of showing discriminatory treatment by a preponderance of the evidence. We cannot make

a judgment which only addresses the fairness of a particular process. Instead the process must be shown to be applied in a disparate manner.

After an extremely thoughtful analysis of the issues presented, and thorough consideration of the evidence presented, we find that neither Tolarczyk nor Delaney has established that the reasons presented by the Respondent for the Complainants not being referred were pretextual.

Accordingly, the Complainants' complaints must be dismissed.

COMMONWEALTH OF PENNSYLVANIA  
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MARIA TOLARCZYK, COMPLAINANT  
DOCKET NO. E-21421

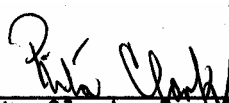
v.

HEAVY & HIGHWAY CONSTRUCTION WORKERS' LOCAL UNION #158,  
AFFILIATED WITH THE LABORERS INTERNATIONAL UNION OF NORTH  
AMERICA, AFL-CIO, RESPONDENT:

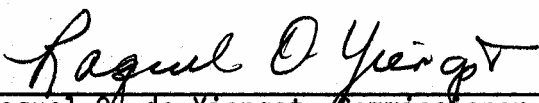
RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in this case, we the Hearing Panel conclude that the Respondent did not violate the PA Human Relations Act, and therefore recommend that the foregoing Findings of Fact, Conclusions of law, and Opinion be adopted by the full PA Human Relations Commission, and that a Final order of dismissal be entered pursuant to Section 9 of the Act.

March 30, 1987  
Date

  
Rita Clark, Panel Chairperson

March 30, 1987  
Date

  
Raquel O de Yiengst, Commissioner

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

LINDA DELANEY, COMPLAINANT  
DOCKET NO. E-21189

And

MARIA TOLARCZYK, COMPLAINANT  
DOCKET NO. E-21421

v.

HEAVY & HIGHWAY CONSTRUCTION WORKERS' LOCAL UNION #158,  
AFFILIATED WITH THE LABORERS INTERNATIONAL UNION OF NORTH  
AMERICA, AFL-CIO, RESPONDENT:

**FINAL ORDER**

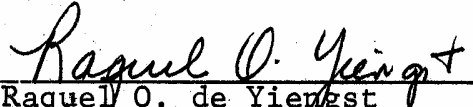
AND NOW, this 6<sup>th</sup> day of April, 1987, following review of the entire record in this case, including the transcript of testimony, exhibits, briefs, and pleadings, the PA Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Panel, pursuant to Section 9 of the PA Human Relations Act, and therefore

**ORDERS**

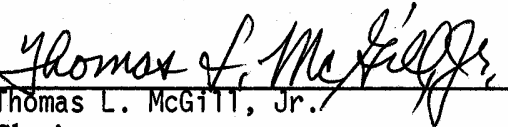
that the complaints in these cases be, and the same hereby are dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ATTEST:

  
Raquel O. de Yiengst  
Assistant Secretary

BY:

  
Thomas L. McGill, Jr.  
Chairperson