

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED BROTHERHOOD OF CARPENTERS)
LOCAL 43 and NEW ENGLAND REGIONAL)
COUNCIL OF CARPENTERS)
(McDowell Building & Foundation, Inc)) Case No. 34-CB-3047
)
And)
)
KEVIN LEBOVITZ, an individual)

**BRIEF OF RESPONDENTS NEW ENGLAND REGIONAL
COUNCIL OF CARPENTERS AND CARPENTERS LOCAL 43
IN SUPPORT OF EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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Respondents New England Regional Council of Carpenters and Carpenters Local 43 respectfully submit this brief in support of their exceptions to the decision of the Administrative Law Judge.

STATEMENT OF THE CASE

This cases centers on a provision in a collective bargaining agreement between the New England Regional Council of Carpenters and the three Carpenters Locals in Connecticut, Locals 24, 43, and 210, and a multi-employer association of construction industry contractors. The clause in question, the so-called “mobility” clause, evolved relatively recently from traditional local area hiring requirements in what at the time were separate agreements between each of the three Connecticut Locals and the employer association. Local 43’s agreement, which covered work performed in the greater Hartford area of the state, at the time provided as follows:

Preference in hiring and employment shall be given to persons who have been permanent residents within the territory covered by this Agreement for at least one (1) year prior to the date of the hiring for the job involved.

(Resp. Exh.2, Local 43/CCIA 1996-99 Agreement, p.13, Art. 13, Section B). The last agreement in which this version of the local hiring requirement appeared was the agreement covering the period 1996 to 1999.

Shortly after that agreement had been negotiated, Local 43’s parent organization, the United Brotherhood of Carpenters and Joiners of America, undertook a significant restructuring of the union. In recognition of the regionalization of construction markets, the UBC created regional councils having substantial authority, including collective bargaining authority, over the local unions within each council. In July 1996, the New England Regional Council of Carpenters was established, covering the 6 New England states. (Tr. 101-03).

After the creation of the Council, upon the expiration of the 1996-99 Local 43 agreement and the agreements of the two other Connecticut Locals, the successor to the individual local agreements in Connecticut became a single agreement between the Council, the three Locals and the employer association. Moreover, instead of a variety of individual Local Union agreements covering only the geographic area of each Local Union, the 1999 agreement effectively covered not just the entire state of Connecticut, but all of the six New England states including Connecticut.

Thus, in addition to the fact that the agreement itself applied by its terms to the geographic areas covered by the three Connecticut Locals, the agreement also included a provision that made the agreement applicable to work performed in all six New England states by applying the terms of each local area agreement to all work performed within New England. (Tr. 104-05). This six-state-agreement provision remains as Article IV, Section 1 of the current agreement:

SECTION 1.

This Agreement shall apply to and be effective on all carpentry work in accordance with Article II, Section 1 and 2, performed by the Employer within the state of Connecticut.

Effectively immediately all Carpentry work (including building and heavy and highway work) performed in Massachusetts, Rhode Island, Maine, New Hampshire and Vermont shall be performed in accordance with the terms and conditions of the local area agreements of the Carpenters Local Unions in Massachusetts and Rhode Island, Maine, New Hampshire and Vermont.

(GC Exh. 3 at 16).

This obviously was a significant concession by the employers, which previously could pick and choose the areas within New England in which they would operate on a union basis.

The six state agreement effectively bound them to all the local area agreements negotiated by the Council and its constituent local unions throughout New England.

In exchange for this extraordinary concession, and in further recognition of the regionalization of construction markets, the employers obtained relief from the traditional local hiring requirement that had previously been in the various local agreements, such as the one noted above in Local 43's agreement. (Tr. 105-06). The local hiring requirements made it all but impossible for contractors with work around the Council to bring their regular crews into another Local's area.

Accordingly, the Council and its constituent Local Unions agreed to a "mobility" provision. The new clause, as it appears in the current agreement, provides as follows:

Notwithstanding any language to the contrary in any area collective bargaining agreement, for work in Connecticut, Massachusetts and Rhode Island and for work in Maine, New Hampshire and Vermont, the Employer shall have the right to employ any carpenter who is a member in good standing of any local affiliate of the New England Regional Council of Carpenters pursuant to the following conditions:

- a. The carpenter employee has worked a minimum of three (3) weeks for the Employer in the previous five (5) months.
- b. If the Employer fails to notify a local union prior to commencing work on a project in that local's geographical jurisdiction, the Employer shall lose mobility of man power privileges for that project, and the Employer shall be restricted in its employment of carpenters to those carpenters who normally work in the geographical area of the local union where the project is located.

(GC Exh. 3 at 17, Section 3; see also Resp. Exh. 3 (1999 Agreement)).

While this provision replaced the terms of the old local hiring requirement, it did not eliminate them. Thus, in the event an employer's employees do not satisfy the mobility rule (3 weeks of employment in the previous 5 months), the default rule remains a local hiring requirement. This is implicit in the express provision in the clause describing what happens if a

contractor “loses” mobility: “the Employer shall be restricted in its employment of carpenters to those carpenters who normally work in the geographical area of the local union where the project is located.” In other words, if an employer cannot satisfy the mobility rules for members of its workforce, the local hiring requirement remains in effect.

Mr. Meadows, Local 43’s Business Manager, testified in detail about the Local’s policy of strict enforcement of the mobility policy. (Tr. 117, 123-24). He also testified about the Local’s well-established and long-standing system for enforcement of the clause. (Tr. 117-20). The Local’s stewards are charged with the duty of, not just checking to make sure employees are satisfying the union security clause by being paid up in their dues, but checking those they do not know to be Local 43 members for the duration of their employment with the employer before starting to work in the Local’s area. They go so far as to ask for pay stubs to confirm the length of time the individual has been employed (Tr. 118), and have even brought members up on internal union charges for failing to cooperate with the steward who is checking for mobility. (GC Exh. 12(A) - (D)). If an employee does not satisfy mobility, the steward notifies the employer and, if the employer takes no action, notifies the Mr. Meadows or Mr. Alvaranga. (Tr. 119).

The Local regularly provides training to its stewards, and checking mobility is part of regular steward training. (Tr. 121-22). This is reflected in the syllabus for the Local’s steward class that Mr. wrote up in December of 2007, prior to the events late in the month involving Mr. Lebovitz. (Resp. Exh. 4). There is no evidence that the syllabus was prepared in response to the charge filed in this case, which was not even filed until December 26 and was not served until December 28, 2007. (GC Exh. 1(a) and (b)). Mr. Haggerty, a Local 43 steward, confirmed that he regularly monitors mobility consistent with Mr. Meadows’ description of the practice, and

estimated that he has checked mobility a *thousand times*. (Tr. 160-62)(emphasis added). The General Counsel produced no evidence to rebut any of this testimony with respect to the Local's general policy with respect to enforcement or its general practice for monitoring compliance in the field through its stewards. The evidence likewise confirms that Local 43 consistently enforces the mobility clause in practice. Messrs. Meadows and Haggerty testified about the history of enforcement of the clause. (Tr. Tr. 124-26, 163-64).

But the most compelling evidence by far came from the two employers who testified at the hearing. John Kendzierski, the principal of Professional Drywall Construction, Inc., and Robert Fitch, the principal of New Haven Partitions, testified about their experiences working in Local 43's area with respect to enforcement of the mobility clause. Both companies have sizable workforces and are based outside of Local 43's area but regularly work in its area. (Tr. 187-89, 199-200). They both testified in detail about very specific instances when, particularly when the mobility rules were new (but even recently, as well, through inadvertence), they had on several occasions sent new employees into Local 43's area who did not satisfy the mobility clause. (Tr. 190, 200-03). Mr. Kendzierski testified about 2 specific instances in 2004 and 2007 (Tr. 187-88, 190, 194), and Mr. Fitch testified about 3 specific instances over the years, the first of which involved several employees. (Tr. 200-03, 205, 208). They confirmed that, in each and every case, the Local 43 steward checked mobility and advised the company, and that in each case they removed the offending employee from the project. (Tr. 190, 193, 201). *The General Counsel offered no evidence to the contrary.*

Moreover, they both testified that, in their experience, of the various local union territories in which they perform work, Local 43 was more strict than any of the others about enforcement of the mobility clause, as well as other provisions of the agreement. (Tr. 189, 191,

203). In fact, Mr. Kendzierski candidly expressed some frustration about the Local's strict enforcement of the clause, but acknowledged that the requirements were part of the agreement that that the Local had the right to insist on compliance. (Tr. 189, 191). *The General Counsel offered no evidence to the contrary.*

This testimony was confirmed by the New England Council's area manager for Connecticut, Glenn Marshall, who also serves as the Business Manager of Local 210 in the west and southwestern area of the state. He similarly testified that, of the three Connecticut locals, Local 43 was consistently more strict than the others in enforcing the mobility clause. He compared Local 43's enforcement to his own, which of the three is most flexible. He explained that this was due to the inability of Local 210 to provide its own local members to contractors working in the area. (Tr. 107-08). This flexibility is consistent with Mr. Meadows' testimony that he is similarly flexible in the far less frequent occasions in his area when he is unable to refer out of work carpenters to contractors working in his area. (Tr. 123-24).

ARGUMENT

I. THE MOBILITY CLAUSE IS LAWFUL ON ITS FACE AND AS IT IS ENFORCED BY LOCAL 43

The General Counsel alleged and the ALJ concluded that the mobility clause at issue here is unlawful on its face under Section 8(b)(1), and that the Union violated Section 8(b)(1) and (2) by enforcing it with respect to Mr. Lebovitz. Neither conclusion is correct.

A. The Mobility Clause is Lawful on its Face

1. The Mobility Clause is Not a Restriction on Hiring, but is an Exception to a Lawful Local Geographic Hiring Requirement

The fundamental problem with the ALJ's analysis of the mobility clause on its face is that he ignored the full "face," so to speak, of the clause. In doing so, he completely

misapprehended the clause as a restriction on hiring when, in fact, it is precisely the opposite. Particularly when viewed in the context of the history of its negotiation, but even on the face of it, the clause is nothing but an *exception* to an ordinary and entirely lawful local geographic hiring requirement. Moreover, it is an exception to a restrictive local hiring requirement that, far from constituting a “restriction,” greatly expands employment opportunities.

The contractual origins of the clause, before the creation of the Regional Council, consisted of a provision in Local 43’s agreement that restricted hiring to those who permanently resided in the area for at least a year. (Resp. Exh. 2 at 13, Art. 13, Section B). In response to the employers’ agreement in 1999, following the creation of the Regional Council, to be bound by all the local agreements throughout the six New England states, the Council agreed to a broad exception to the standard local hiring requirement. When drafting the new agreement, however, the parties simply replaced the language containing the local hiring requirement with the present mobility clause. (GC Exh. 3 at 17). But it is plain from the terms of the clause itself that the parties intended the concept of a local hiring requirement to remain in effect as the basic rule governing hiring.

Thus, the clause in its present form states the mobility rule, imposes certain notice requirements, and provides for the *loss* of mobility as a penalty for failing to comply with the notice requirement. It further *expressly* defines the consequence of the loss of mobility as limiting the employer to local hires:

[T]he employer shall lose the mobility of manpower privileges for the project, and the employer shall be restricted in its employment of carpenters who normally work in the geographical area of the local union where the project is located.

(GC Exh. 3 at 17). In other words, in the *absence* of mobility, the normal rule governing hiring is a local hiring requirement -- which neither the General Counsel nor the ALJ contend is

unlawful. *See, e.g., Bricklayers, Masons & Plasterers Local 28*, 134 NLRB 751 (1961). Indeed, the ALJ correctly noted that “geographic hiring preferences are lawful so long as they are not based on union membership.” (Decision at 12).

As a result, when read in its totality, the clause provides that the default rule requires the employer to hire local carpenters for particular projects -- except in cases where the employer’s out-of-area carpenter employee has worked for at least three weeks in the last 5 months. If the employer fails to provide notice to the local union of the project in its area, the employer loses the right to the mobility exception to the local hiring requirement and, as a result, reverts back the general local geographic hiring requirements.

Thus, on the face of the clause at issue here, local hiring requirements are the default rule, unless the employer can satisfy the mobility exception. Even the ALJ noted that the parties to the Agreement understood the mobility clause as applying only to carpenters brought into a particular Local union’s area from another area. (Decision at 13). By referring to the clause as a “restriction” on travelers, however, he reflected his own misunderstanding of the clause. In the absence of the clause, those very carpenters brought in from outside the area of the Local Union where the project is located would be all but prohibited from working at all in that area by operation of the local hiring requirement. The mobility provision, with its easily satisfied requirement of only three weeks of prior employment, greatly expanded the work opportunities of those who would have been prohibited from working in a local area by the local hiring requirement.

The ALJ’s rejection of this view of the clause as an exception to a default local hiring rule is clearly wrong. (Decision at 12-13). He altogether ignored the bargaining history noted above leading up to the clause, and erroneously asserted that a “close reading” of the contract

reveals that it “allows employers to hire any applicant.” (Decision at 12). In doing so, he ignored the fact that the contracts before the advent of the mobility clause contained local hiring restrictions, and that the mobility clause *retains* that restriction by necessary implication when it explains what happens to an employer that “loses” mobility: “the Employer shall be restricted in its employment of carpenters to those carpenters who normally work in the geographical area of the local union where the project is located.” (GC Exh. 3 at 17, Section 3; see also Resp. Exh. 3 (1999 Agreement)).

There is no other reasoned way to construe that provision. If a local hiring requirement is what happens to employers that “lose” mobility for failing to notify the Local prior to starting work, it necessarily must be what governs them if they fail in the first instance to satisfy the clause’s requirements that out-of-area carpenters must have worked for the employer for three weeks.

The ALJ’s observation that this is not a “notice” case is beside the point. (Decision at 13-14). The point is that, although the local hiring requirement is stated as the consequence for “losing” mobility by failing to give notice of a project, it likewise is what governs in the absence of qualifying for mobility in the first place.

- 2. As an Exception to the Local Hiring Requirement, the Mobility Provision is Lawful**
 - a. The Term Membership in the Mobility Clause is Coextensive With That Term as it is Used in the Union Security Clause, and Refers to Carpenters Regardless of Their Literal Membership Status**

The question, then, is whether the mobility clause, as an exception to an ordinary local hiring requirement that actually expands employment opportunities, is lawful. To answer that question, one must consider not just the mobility clause in isolation, but the operation of other provisions of the contract that are interrelated with the mobility clause. In particular, the

requirement of three weeks of employment in the mobility clause must be considered together with the operation of the union security clause.

That clause requires new hires “to become and remain members of the Union in good standing” after 7 days of employment. (GC Exh. 3 at 16, Article V, Sections 1, 2). Of course, although that clause on its face requires that new hires must become and remain “members ... in good standing” of the Union, the term “member in good standing” essentially is a term of art that means either an actual member or one who has complied with the statutory requirements of tendering initiation fees and dues, or a “financial core member,” regardless of whether the individual chooses to become an actual “member” of the union. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). The two clauses, the union security clause and the local hire/mobility clause, are closely interrelated, they must be read together, and their use of the term “membership” is synonymous. The ALJ misapprehended the Union’s argument on this point. (Decision at 12).

Moreover, the mobility exception to the local hiring restriction applies only to those who have worked for three weeks for the employer. *By definition*, such three week employees will have been subject to the seven day security clause.

Accordingly, the General Counsel’s assertion and the ALJ’s conclusion that the *mobility* clause “requires union membership in order for a carpenter to work in Local 43’s geographic jurisdiction” (Decision at 12) again completely misapprehends the clause. It is the contract’s security clause that requires membership after seven days of employment. The three week employee who satisfies the mobility exception, simply by virtue of being employed for three weeks anywhere else in New England outside of Local 43’s area, *has already been required to*

become a member in good standing by operation and within the meaning of the security clause that governs that work.

In other words, the mobility clause does not “require” membership, because those who fall within its three weeks of prior employment requirement have *already become* members. Instead, the mobility clause assumes that it is applying *only* to those who have already become members in other areas of Connecticut or elsewhere in New England. Its reference to “members” is simply a reflection of the practical or functional reality that *anyone* who has been employed for more than three weeks in the New England area necessarily will be a member of a local union affiliated with the Council, whether an actual or a “financial core” member. Particularly given the close interrelationship between these two clauses of the agreement governing hiring, there is no basis whatever for concluding that the term “member in good standing” as used in the mobility clause has any meaning other than the meaning the same term has in the security clause. The only real operative “requirement” for satisfaction of the mobility clause, then, is the three weeks of employment requirement.

The error of the ALJ’s determination is reflected in the fact that, if the clause by its terms simply applied to “carpenters who normally work in the six New England states and who have been employed for three weeks,” there is no question that the clause would be lawful. Yet that is precisely the full extent of the meaning of the clause as it is presently written. The reference to “members” in the current clause in essence is superfluous, and really does not need to be stated since it goes without saying that anyone who satisfies the definition formulated above will be a “member in good standing” pursuant to the security clause. But stating it in the clause as it is presently written is simply stating the obvious, and does not make the clause any more unlawful than the clause would be without the reference to “members.”

b. The Mobility Clause does not Enforce Security Clauses Outside the bargaining Unit

The ALJ's erred as a matter of law in concluding that the clause is unlawful because it attempts to enforce a union security clause "outside the bargaining unit." (Decision at 12-13). In reaching that conclusion, he ignored some essential differences between the facts in this case and the cases upon which he relied. In *Iron Workers Union Local 433*, 272 NLRB 530 (1984), the charging party was a traveler where the outside local would not refer him because he was delinquent in his dues obligation to his home local. In *Millwright and Machinery Erectors Local 740 (Tallman Constructors)*, 238 NLRB 159 (1978), the Board was careful to contrast the circumstances of that case, a single employer bargaining unit, to situations involving a multi-employer bargaining unit.

In this case, the locals referenced in the mobility clause are not simply other unaffiliated locals chartered by the same international union as in the *Iron Workers* case. Instead, they are all the constituent locals within the New England Regional Council of Carpenters. Moreover, this case does not involve a single employer bargaining unit as was the case in *Tallman*. By virtue of the six-state agreement provision in the Connecticut agreement (GC Exh. 3 at 16, Art. IV, Section 1), the employers have agreed to be bound by all the area agreements with all the Carpenters locals of the Regional Council throughout all six New England states. In effect, the agreement created a multi-employer unit consisting of all the Carpenters locals throughout New England. *See, e.g., Kroger Co.*, 148 NLRB 569, 571 (1964)(no formal association or single master agreement required). As a result, referencing the individual carpenter's membership status in all the other constituent locals of the Council under what is effectively a New England-wide multi-employer unit is not at all inconsistent with the cases upon which the General Counsel relies or is otherwise unlawful.

In any event, even if there is no New England-wide multi-employer unit, there undeniably is one covering the state of Connecticut. Prior to the creation of the Council in July of 1996, each of the three Connecticut locals negotiated its own separate collective bargaining agreement with the multi-employer association. (Resp. Exh. 2). Thereafter, starting in 1999, the Regional Council and its three constituent Locals in Connecticut negotiated with the employer association a series of successive collective bargaining agreements including the present agreement, each of which consists of a single master agreement that provides terms and conditions for all work throughout the entire state and within the territorial jurisdictions of Locals 24, 43, and 210. (Resp. Exh. 3, GC Exh. 3). Mr. Lebovitz' employer, McDowell Building & Foundation, Inc., is a member of the multi-employer unit. (Tr. 18; CG Exh. 3 at 4, Art I, Section 1, and at 40 (list of employer members of the unit)).

Accordingly, at least as far as the maintenance and enforcement of the mobility clause with respect to Mr. Lebovitz, a member of Local 24, is concerned, there is no issue concerning Local 43's enforcement of enforcement of a security clause "outside the bargaining unit" because Locals 24 and 43 undeniably are part of the same bargaining unit, and the security clause that applies to both is contained in the same agreement that governs the multi-employer unit.

The ALJ failed even to consider, let alone address, any of these matters and, as a consequence, his conclusions were erroneous as a matter of law.

c. The Clause Does not Apply Only to "Travelers," but Applies to Out-of-Area Carpenters Whether Union or Non-Union.

Finally, the ALJ erroneously concluded that the clause discriminates between members and non-members, and noted that "Local 43 did not produce any evidence that the clause had been applied to *exclude* non-members." (Decision at 13)(emphasis added). That assertion is

misleading, since the Union produced evidence that the clause had been *invoked* against a non-member. Mr. Meadows testified that, when a Local 43 steward was checking for mobility in the summer of 2007 and found an individual from Massachusetts who was not a member of any union, the steward contacted him, as is the practice, because the individual did not satisfy the three weeks of prior employment provision of the mobility clause. (Tr. 125-26). Mr. Meadows testified that, as he has done in the past when there is full employment and the Local has no carpenters within the required area of specialization to refer to visiting contractors (the “cupboard was bare, so to speak”), he decided to waive the mobility clause requirement with respect to that individual (Tr. 125-26), without regard to the fact that the individual was not a member of any union. The parties stipulated that there was full employment in the Local at the time in the summer of 2007. (Tr. 210).

The ALJ stated that the non-union individual from Western Massachusetts got in touch with the Local there, Local 108, “satisfied their requirements, and continued working.” (Decision at 6). According to the ALJ, the “requirements” of Local 108 “obviously” would have required him to “join the Union.” (Decision at 6). There is *absolutely* no basis whatever in the record for that assertion. Mr. Meadows testified only that the individual “was given the *opportunity* to contact the Agent in [Local] 108 and he continued working on the jobsite” as a consequence of the waiver he had granted. (Tr. 126)(emphasis added). There is no record evidence even that the individual actually did contact the Agent in Local 108 or, if he did, that there were any Local 108 “requirements” with respect to the individual or, if there were, that they consisted of a requirement that he join Local 108 and pay his dues or, if there was, that he actually became a member of Local 108 or any other union. In other words, there is no basis in the record that he worked in Local 43’s area only *after* he joined and paid his dues to Local 108

or to any other local union. The evidence shows *only* that Local 43 invoked the mobility clause with respect to an individual who was *not a member of any local union*.

The evidence thus clearly reflects that the Local “applies” the 3 weeks of prior employment clause to “non-members,” even though under the circumstances in that situation the Local exercised its right not to enforce the clause to “exclude” the non-member. Had Mr. Meadows not granted the waiver, the individual would have been barred by the clause from working on the project -- not because of anything having to do with his union membership or lack thereof, but because he did not satisfy the three weeks of prior employment requirement.

The real irony here is that, although Mr. Lebovitz complains about the mobility clause, the reality is that, without it, his own opportunities to work outside of the territorial jurisdiction of his home local, Local 24, would have been severely restricted. Indeed, under the pre-Regional Council agreement in Local 43’s area, contractors were restricted to hiring those who were “permanent residents” in the Local’s area “for at least one year.” (Resp. Exh. 2 at 13, Art. 13, Section B). Under that clause, it is likely that Mr. Lebovitz, who lives in Mystic in southeast Connecticut in Local 24’s area, could never have been employed in Local 43’s area. He joined Local 24 in October 1999 (Tr. 53), just after the first agreement under the Regional Council had been negotiated, so he never knew life under the old restrictive hiring rules. He has worked a fair amount of time in Local 43’s area during his ten years as a member of Local 24, but the only reason he was able to do so is because of the very mobility clause that he challenges in this case.

B. The Mobility Clause is Lawful as Enforced By Local 43

While in a facial challenge to a contract clause under Section 8(b)(1)(A) one may consider only the clause as it is written without regard to its enforcement, the only remedy available for Mr. Lebovitz is a remedy for a violation of Section 8(b)(2) and that occurs only

where the enforcement of the clause is discriminatory. *See Bricklayers, Truckpointers, and Stone Masons Local 1 (Denton's Truckpointing)*, 308 NLRB 350, 351 (1992). But, as demonstrated above with respect to the Local's treatment of the individual from Massachusetts who was not a member of *any* union and who had not worked the requisite three weeks (Tr. 125-26), the evidence establishes that Local 43 actually applies the mobility clause to everyone, regardless of their membership or non-membership in any union. There is no evidence to the contrary. The burden was on the General Counsel to prove that the Local actually enforced the clause in a discriminatory manner, but the General Counsel introduced not a shred of evidence that the Local had failed in a single instance to enforce the clause against non-members of any union.

Even with respect to a Section 8(b)(1)(A) violation, it is one thing to say that a contract provision is unlawful on its face and that the mere maintenance of the provision violates Section 8(b)(1)(A), but it is another thing altogether to say that the violation caused a particular individual an injury for which a remedy is available. In this respect, as even the General Counsel formulated the issue, the Union must have relied on the offending provision with respect to its application of the clause to the individual. In other words, even if the mere maintenance of the "membership" provision of the mobility clause in the agreement violates Section 8(b)(1)(A), giving rise to some sort of a cease and desist remedy, there is no Section 8(b)(2) violation *with respect to Mr. Lebovitz* if the Local did not rely on that provision of the clause when it invoked the clause with respect to his employment on the project. Accordingly, it is critical to be clear about which specific provision of the clause Local 43 sought to invoke when it sought to bar him from the project.

As set forth in Section I(A)(2)(a) above, the only real operative provision of the mobility requirement is the three weeks of employment provision for out-of-area carpenters. The “membership” provision is effectively irrelevant, and the Local did not “rely” on *that provision* of the clause in applying it to Mr. Lebovitz’ employment. Local 43 attempted to enforce the clause against Mr. Lebovitz not because of anything to do with the “membership” provision, as the incident with the carpenter from Massachusetts confirms, but because of the three weeks of employment provision *regardless* of his membership. The Local checks and enforces the three weeks of employment provision in the mobility clause with respect to *everyone*, members and non-members of any union.

Moreover, it is significant that Mr. Lebovitz worked a lot in Local 43’s area, when he satisfied the three weeks of prior employment requirement. (Tr. 54). The *only* difference between those prior instances where he worked in Local 43’s area and the present case had nothing whatever to do with the “membership” provision of the clause, but *solely* with the three weeks of employment and the local hiring requirement provisions of the clause.

Accordingly, even if the maintenance of “membership” provision of the mobility clause is found to be unlawful under Section 8(b)(1)(A) and even if Mr. Lebovitz did not quit on his own accord but the Local is found to have caused his termination, there is no basis for finding violations of either Section 8(b)(1)(A) or Section 8(b)(2) and no basis for a remedy for Mr. Lebovitz for that termination *because that termination had nothing to do with the “membership” provision of the mobility clause*. Instead, it had everything to do with the lawful *geographic restriction on hiring* that is the default hiring requirement for employers who do not have employees who satisfy the three weeks of prior employment provision. Since Mr. Lebovitz had not worked for McDowell for three weeks, by the express terms of the mobility clause the

employer was “restricted in its employment of carpenters to those carpenters who normally work” in Local 43’s geographic area. In other words, to the extent the Local actually enforced the mobility clause to bar Mr. Lebovitz from the project, it was to enforce the “three weeks of employment” and the local hiring provisions and not the “membership” provision of the mobility clause.

The ALJ failed even to consider, let alone address, any of these matters and, as a consequence, his conclusions were erroneous as a matter of law.

Finally, neither the three weeks of prior employment nor the geographic restriction on hiring provisions, on their face, applies only to “travelers” from sister locals, and the ALJ’s conclusions concerning discrimination against travelers (meaning only members of sister locals of the UBC) are incorrect as a matter of law. Instead, the clauses apply to all carpenters *regardless of their membership in any union* and are therefore a lawful provisions placing geographic restrictions on hiring. *See, e.g., Bricklayers, Masons & Plasterers Local 28*, 134 NLRB 751 (1961)(cited by General Counsel at 20).

Thus, as set forth in Section I(A)(2)(c) above, Local 43 applies the three weeks of prior employment clause equally to “travelers” from other locals, as well as to individuals from out of the area who are not members of *any* union. The summer before the incident involving Mr. Lebovitz, a Local 43 steward invoked the clause with respect to an individual who had traveled down from Western Massachusetts and who was not a member of the Western Massachusetts Carpenters local or any other union. Accordingly, in analyzing Local 43’s actual *application* of the three weeks of prior employment clause for Section 8(b)(1) or (2) purposes, Local 43 does not distinguish between travelers from sister locals and non-union individuals. The Local’s actual enforcement of the clause is not based on union membership, but *solely* on lawful

geographic and length of employment considerations. Consequently, the cases upon which the ALJ relied involving local unions that discriminated against travelers, solely based on their membership in another local union, are entirely inapplicable. (Decision at 14-15).

II. LOCAL 43 DID NOT RETALIATE AGAINST LEBOVITZ

A. THE LOCAL DID NOT ACT WITH ANIMUS AGAINST LEBOVITZ

The ALJ found that Local 43 retaliated against Mr. Lebovitz for having filed a ULP charge against the Local several years ago. This finding is based on statements allegedly made by the Local's steward, John Haggerty, and by the Local's Business Representative, Martin Alvaranga. Neither one of them, in their own accounts of the conversations at issue, made any mention of any prior trouble with Mr. Lebovitz. (Tr. 146-51, 169). For his part, Mr. Alvaranga mentioned in passing knowing of Mr. Lebovitz from his past work in the area. He did so, however, only in the context of confirming the employer's view that he was a good worker but reiterating the Local's position that the mobility rules had to be followed by everyone. (Tr. 147-48).

Most significantly, even the employer's owner, Daniel Carvalho, confirmed that Mr. Alvaranga himself recommended that the employer just move Mr. Lebovitz to a project elsewhere for three weeks so he could return to Local 43's area with the mobility requirements satisfied. (Tr. 33, 36, 148, 149). Volunteering this as a strategy for avoiding laying off Mr. Lebovitz and getting him back on the project in Local 43's area is completely inconsistent with the conduct of someone who is acting with the intent of retaliating against Mr. Lebovitz.

It is significant that the collective bargaining agreement that Local 43 was enforcing is a joint agreement between the multi-employer association and Local 43 as well as Local 210 and Mr. Lebovitz's home local, Local 24. The rules dealing with local hiring requirements and the

mobility exceptions are in a significant sense rules that each local, *including Mr. Lebovitz's own local*, has agreed upon concerning the conditions under which its own members work in and out of their own local area. Mr. Alvaranga's direct appeal to Mr. Lebovitz was undertaken only after his employer had resisted doing what every other employer had done in the past and removed the disqualified employee, and was done in an effort to get Mr. Lebovitz to play by the rules that Mr. Lebovitz's own local had agreed upon. Moreover, Mr. Alvaranga's request was entirely consistent with Local 43's Trade Rules, which requires that members must "comply with the terms and conditions of the Collective Bargaining Agreement and shall not accept or enter into any arrangements with a contractor who violates the Collective Bargaining Agreement." (Resp. Exh, 5 at 25, Section 19).

It is likewise significant that Mr. Lebovitz left his employment on his own accord. Local 43 surely did not cause his employer to terminate him. By his own account, his employer had told him that he should remain working. Local 43 likewise surely did not coerce him to leave. Mr. Alvaranga had no authority, apparent or otherwise, to direct him to quit his employment, and indeed his own employer repeatedly directed him not to do so. (Tr. 95). And, even by Mr. Lebovitz's own account, Mr. Alvaranga carefully explained the mobility rules in civil terms, and there is no claim that Mr. Alvaranga either in his words or manner threatened him. (Tr. 91). After his conversation with Mr. Alvaranga, Mr. Lebovitz actually seemed eager to leave immediately. (Tr. 92). In fact, Mr. Alvaranga told him that he did not have to leave right away in response to Mr. Lebovitz's statement during their conversation on the site during the work day on December 24 that he would leave the project immediately. (Tr. 92, 150). Under these circumstances, Mr. Lebovitz clearly made a decision to defy his own employer's direction and to voluntarily quit his employment.

B. THE LOCAL CONSISTENTLY ENFORCES THE MOBILITY RULE, AND WOULD HAVE DONE SO WITH RESPECT TO LEBOVITZ REGARDLESS OF ANY PAST HISTORY WITH HIM

The undeniable fact is that, regardless of whether any Local 43 representative harbored any animus toward Mr. Lebovitz in connection with prior events, Local 43 consistently enforces the local hiring requirement to ensure contractor compliance with the mobility exception, and has consistently made the same demands on other contractors that it made on McDowell here. Accordingly, under *Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), there is no violation here. The ALJ, however, as set forth below, ignored significant evidence the Union introduced in support of its defense.

As an initial matter, the ALJ is foreclosed from finding to the contrary based on Mr. Lebovitz' own admission that Local 43 regularly enforces the clause. Thus, in January 2009, Mr. Lebovitz submitted a complaint to the General President of the United Brotherhood of Carpenters about "officials of Local 43." (Tr. 97; Resp. Exh. 1). He raised the question of whether the mobility provision in the agreement violates the UBC Constitution. In doing so, although the clause is contained in the contract that governs all three Connecticut UBC locals including Local 24, his home Local, he singled out Local 43 for his complaints. He asserted that "officials of Local 43 are blatantly and *quite regularly*" violating the Constitution by enforcing the clause. (Id. at lines 3 and 4)(emphasis added).

This statement amounts to an admission by the Charging Party himself that not only effectively nullified the General Counsel's claim in this case that Local 43 singled him out for enforcement of the clause, but it effectively conceded the essential factual basis of Union's *Wright Line* defense.

The ALJ inexplicably failed even to mention this admission. Indeed, he only mentioned the letter in passing as nothing more than a “complaint” about the mobility rule and, in doing so, effectively mischaracterized the content of that letter. (Decision at 11). The failure is extraordinary because, on the face of it, the admission is extremely damaging to the very foundation of the General Counsel’s retaliation case. Mr. Lebovitz cannot claim in this case that Local 43 singled him out for selective enforcement of the mobility clause at the same time he is proclaiming elsewhere that Local “quite regularly” does the opposite.

In any event, the testimony of the witnesses simply confirmed that Mr. Lebovitz was entirely correct in complaining that Local 43 strictly and “quite regularly” enforces the mobility provision of the agreement.

Mr. Meadows, Local 43’s Business Manager, testified in detail about the Local’s policy of strict enforcement of the mobility policy. (Tr. 117, 123-24). He also testified about the Local’s well-established and long-standing system for enforcement of the clause. (Tr. 117-20). The Local’s stewards are charged with the duty of, not just checking to make sure employees are satisfying the union security clause by being paid up in their dues, but checking those they do not know to be Local 43 members for the duration of their employment with the employer before starting to work in the Local’s area. They go so far as to ask for pay stubs to confirm the length of time the individual has been employed (Tr. 118), and have even brought members up on internal union charges for failing to cooperate with the steward who is checking for mobility. (GC Exh. 12(A) - (D)). If an employee does not satisfy mobility, the steward notifies the employer and, if the employer takes no action, notifies the Mr. Meadows or Mr. Alvaranga. (Tr. 119).

The Local regularly provides training to its stewards, and checking mobility is part of regular steward training. (Tr. 121-22). This is reflected in the syllabus for the Local's steward class that Mr. wrote up in December of 2007, prior to the events late in the month involving Mr. Lebovitz. (Resp. Exh. 4). There is no evidence that the syllabus was prepared in response to the charge filed in this case, which was not even filed until December 26 and was not served until December 28, 2007. (GC Exh. 1(a) and (b)). Mr. Haggerty, a Local 43 steward, confirmed that he regularly monitors mobility consistent with Mr. Meadows' description of the practice, and estimated that he has checked mobility a *thousand times*. (Tr. 160-62)(emphasis added). The General Counsel produced no evidence to rebut any of this testimony with respect to the Local's general policy with respect to enforcement or its general practice for monitoring compliance in the field through its stewards. The evidence likewise confirms that Local 43 consistently enforces the mobility clause in practice. Messrs. Meadows and Haggerty testified about the history of enforcement of the clause. (Tr. Tr. 124-26, 163-64).

But the most compelling evidence by far came from the two employers who testified at the hearing. John Kendzierski, the principal of Professional Drywall Construction, Inc., and Robert Fitch, the principal of New Haven Partitions, testified about their experiences working in Local 43's area with respect to enforcement of the mobility clause. Both companies have sizable workforces that are based outside of Local 43's area but that regularly work in its area. (Tr. 187-89, 199-200). They both testified in detail about very specific instances when, particularly when the mobility rules were new (but even recently, as well, through inadvertence), they had on several occasions sent new employees into Local 43's area who did not satisfy the mobility clause. (Tr. 190, 200-03). Mr. Kendzierski testified about 3 specific instances in 2004 and 2007 (Tr. 187-88, 190, 194), and Mr. Fitch testified about 2 specific instances over the years, the first

of which involved several employees. (Tr. 200-03, 205, 208). They confirmed that, in each and every case, the Local 43 steward checked mobility and advised the company, and that in each case they removed the offending employee from the project. (Tr. 190, 193, 201). *The General Counsel offered no evidence to the contrary.*

Moreover, they both testified that, in their experience, of the various local union territories in which they perform work, Local 43 was more strict than any of the others about enforcement of the mobility clause, as well as other provisions of the agreement. (Tr. 189, 191, 203). In fact, Mr. Kendzierski candidly expressed some frustration about the Local's strict enforcement of the clause, but acknowledged that the requirements were part of the agreement that that the Local had the right to insist on compliance. (Tr. 189, 191). *The General Counsel offered no evidence to the contrary.*

Incredibly, the ALJ made no mention whatever of the testimony of the two contractors in his analysis of the Union's *Wright Line* defense. (Decision at 16-17).

This testimony was confirmed by the New England Council's area manager for Connecticut, Glenn Marshall, who also serves as the Business Manager of Local 210 in the west and southwestern area of the state. He similarly testified that, of the three Connecticut locals, Local 43 was consistently more strict than the others in enforcing the mobility clause. He compared Local 43's enforcement to his own, which of the three is most flexible. He explained that this was due to the inability of Local 210 to provide its own local members to contractors working in the area. (Tr. 107-08). This flexibility is consistent with Mr. Meadows' testimony that he is similarly flexible in the far less frequent occasions in his area when he is unable to refer out of work carpenters to contractors working in his area. (Tr. 123-24).

There is no evidence whatever, however, that Local 43 does anything other than strictly enforce the clause when it has out of work members available to refer. Mr. Lebovitz started work in Local 43's area with the employer in the end of December 2007, a time of year when for obvious reasons, construction activity declines and unemployment rises. The parties stipulated that levels of employment ranged from full employment in the summer of 2007, and that unemployment ranged during the winter from 70 by the end of December 2007 to as much as 130 during the peak of winter in 2008. (Tr. 210).

This evidence conclusively establishes that, regardless of what Local 43 representatives may have thought about Mr. Lebovitz, it enforced the mobility clause in his case against the employer here *precisely* as it consistently enforces the clause with respect to all employers and all employees. *There is no evidence to the contrary.* Accordingly, there is no basis for a finding that the Local enforced the clause with respect to Mr. Lebovitz' employment in December 2007 based on any retaliatory motive.

At bottom, Respondents' evidence in support of its *Wright Line* defense is overwhelming and completely undisputed. If anything, Mr. Lebovitz *himself* expressly admitted as much in his complaint to the UBC General President that Local 43 "blatantly and quite regularly" enforces the mobility clause. (Resp. Exh. 1 at 1). It is perfectly obvious that, regardless of what any Local 43 representative may have felt about Mr. Lebovitz, Local 43 sought his removal from the project completely consistent with its longstanding and consistent policy and practice of enforcing the clause with respect to *all* carpenters, just like him, who do not satisfy the three weeks of employment requirement of the mobility clause.

The ALJ repeatedly dismissed the Union's evidence about its enforcement of the mobility clause on the basis that it offered "no documentation" in support of its testimonial evidence.

(Decision at 6, 16). Of course, as the testimony reflected, mobility issues were usually handled informally by the steward on the jobsite or by a Business Agent over the phone, and no contractor had ever declined to comply once the violation had been called to its attention so no formal grievances ever had to be filed. (Tr. 119-21). As a result, due to the very nature of the events, it is of no significance *whatever* that there is little if any “documentation” of the Local’s enforcement of the clause.

Moreover, neither the General Counsel nor the ALJ as much as suggested that there was some obligation or even a reason for the Union to maintain a “documentary record” of its enforcement of the mobility clause. Contract enforcement, whether on the shop floor or on a construction site, involves a multitude of informal adjustments that are never reduced to writing. Under the circumstances of this case, there is no rational basis for drawing any negative inference from the lack of “documentation” of Local 43’s contract enforcement when there was never any occasion to document it. The ALJ surely never articulated one.

In a similar vein, the ALJ drew a negative inference from what he characterized as a *post hoc* attempt to document enforcement of the mobility rule. “Curiously,” he noted, shortly after the enforcement of the clause with respect to Mr. Lebovitz, a Local 43 steward filed internal union charges against several non-Local 43 members “ostensibly for non-compliance with the mobility rule.” (Decision at 17). But those internal union charges actually did *not* involve non-compliance with the mobility rule. Indeed, in his recitation of facts, the ALJ correctly noted that the 4 individuals actually qualified for mobility, but that they had refused to cooperate with the steward to show their pay stubs proving the extent of their prior employment with the employer in question. (Decision at 6). If the Local was interested in creating a record of enforcement of

the mobility rule, it is hardly likely that it would have chosen such an idiosyncratic instance to make its case.

The ALJ also stated that there was evidence that “fellow union carpenters” had violated the mobility rule without consequences, and he concluded that “*Respondent* has not historically enforced the mobility rule in a consistent manner.” (Decision at 11, 16)(emphasis added). In the trial testimony to which the ALJ was referring, however, Mr. Lebovitz was asked on direct examination about instances in which a Local 24 member had gone to work in Local 43’s area without satisfying mobility. (Tr. 75). His testimony, however, concerned the accounts that had been provided to him by individuals who were members of Local 43 and *who went to work in Local 24’s area* without satisfying the mobility requirement. (Tr. 75-77).

Thus, Mr. Lebovitz testified that Kerry Harris was “a 43 guy,” that Doug Sturgis was “out of 43,” and that they both had worked down in Local 24’s area. (Tr. 76-77). Local 24, of course, if not a “Respondent” in this case. The issue here is not Local 24’s history of enforcement of the clause, but Local 43’s history. If anything, this evidence just proves the point that *other* Locals were more lax in their enforcement of the mobility rules.

In any event, there is no evidence *whatever* in the record that Local 43 did anything *other than* strictly and consistently enforce the mobility clause in its area, except in periods of high employment where the Local had no local carpenters to refer to a visiting employer, as the Local 43 witnesses testified. At the time of Local 43’s enforcement of the mobility clause with respect to Mr. Lebovitz in December of 2007, 70 members were unemployed in Local 43 (Tr. 210) and no justification for waiving the rule in his case.

Finally, the ALJ's effort to address the implications of the undisputed evidence that, of the three Connecticut Carpenters Locals, Local 43 enforces the clause most rigidly is nonsensical to the point of being bizarre.

Thus, as noted above, the evidence establishes that the three Connecticut Locals, each governed by the same clause in the same agreement, enforces the clause differently. Of course, Unions have a wide range of discretion in the degree to which they choose to enforce their collective bargaining agreements. There is nothing sinister or even wrong when a union decides to make accommodations to an employer when strict enforcement of the agreement would not be in the best interests of the bargaining parties.

Here, the evidence established that each Local Union varied in the extent to which it enforced the mobility clause, and there were sound reasons for that varied practice. Local 210, the most lenient of the three, is located in primarily rural and suburban south west Connecticut and has difficulty providing local carpenters to out of area contractors. It plainly makes little sense to enforce either a local hiring requirement or the mobility clause strictly when the Local is unable to provide local carpenters to visiting contractors. Local 43, in contrast, which is based in the greater metropolitan Hartford area, is in a much more urban area and is much more able to provide local carpenters to visiting contractors. It plainly makes much more sense to enforce a local hiring requirement and the mobility clause in a more strict manner in Local 43's area when the Local there is much more able to provide local carpenters. Local 24 covers eastern Connecticut, and for demographic reasons of its own, is more strict than Local 210 but less strict than Local 43 in its enforcement of the clause.

The General Counsel made no effort to dispute this evidence, and the ALJ seemed to accept it as an accurate reflection of the enforcement practices of the three Local Unions.

(Decision at 17). The ALJ made no suggestion that these differences in the extent of enforcement of the clause were based on anything other than legitimate considerations facing each of the three Local Unions involved. He drew from those facts, however, the following bizarre conclusion:

The discretion exercised by each of the three Connecticut locals in enforcing the mobility rule, and especially the discretion exercised in this regard by Local 43, only supports my belief that the rule was enforced against Lebovitz because of animus and no other reason.

(Decision at 17).

Perhaps his conclusion might make some sense if he were considering the actions of Local 210, which had exercised the *most* discretion in the enforcement of the clause. Instead, however, he drew the conclusion about Local 43, which exercised the *least* discretion and most rigidly enforced the rule. The analysis is illogical, at best. It simply makes no sense to say that, although the Locals have discretion in the enforcement of the rule, the fact that Local 43 strictly enforces the rule somehow proves that it was motivated by animus, rather than by its undisputed policy and practice of strictly enforcing the rule. This is particularly so given the fact that neither the General Counsel nor the ALJ disputed the legitimate labor/management interests underlying either the *fact* or the *varying extent* of discretion exercised by the three locals. Declaring that Local 43's strict enforcement of the mobility rules somehow proves, or even tends to establish, that it acted with animus in this case is just plain irrational.

III. THE SECURITY CLAUSE ISSUE

Respondents do not dispute the General Counsel's position with respect to the challenged portion of the security clause in Article V of the collective bargaining agreement. It is a clause that has been in the agreement for a long time, there is no evidence that it has ever been

enforced, and Respondents plan to propose its removal from the contract during the next round of collective bargaining upon the expiration of the current agreement in 2010.

IV. THE REMEDY

To extent any provisions contained in a collective bargaining agreement are found to be unlawful, Respondents cannot simply “revise” the agreements. They are the product of collective bargaining and can be “revised” only by collective bargaining. The most that can be ordered as a remedy with respect to the terms of the agreement itself is that the Union seek the removal of the offending provisions during the next round of collective bargaining upon the expiration of the current agreement in 2010. Care also must be given to address the precise provision of the clauses that may be found to be unlawful. For example, even under the General Counsel’s theory and the ALJ’s conclusions, the bulk of the mobility clause is entirely lawful; only the reference to “members in good standing” presents the legal issue, and the balance of the clause, including the three weeks of employment provision, is lawful and can be enforced to the extent it refers simply to carpenters who normally work in the six New England states.

Likewise, care must also be given to consideration of a remedy for Mr. Lebovitz, even if maintenance of the “membership” provision of the mobility clause is found to be a Section 8(b)(1)(A) violation on its face. It bears repeating that only enforcement of the offending provision of the clause could give rise to a damages remedy for Mr. Lebovitz, and, as set forth above, to the extent the Local sought to enforce provisions of the mobility clause, it was not enforcing the “membership” provision of that clause.

CONCLUSION

For the foregoing reasons, the ALJ's decision should be reversed and the complaint should be dismissed.

Date: August 13, 2009

Respectfully submitted,

/s/ Christopher N. Souris

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CERTIFICATE OF SERVICE

I, Christopher N. Souris, hereby certify that I caused a copy of the foregoing to be served this 13th day of August, 2009 by email Regional Director Jonathan Kreisberg and Attorney Thomas E. Quigley, NLRB Region 34, 280 Trumbull Street, Hartford CT 06103 and by overnight mail to Kevin Lebovitz (for whom no email address has been provided), 31 Willow Street, Mystic, CT 06355.

/s/ Christopher N. Souris