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	)	

REPLY 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 reply brief in support of their exceptions to the decision of the Administrative Law Judge.

STATEMENT OF THE CASE

Respondent provides the following in response to some of the claims concerning the record in the General Counsel's statement of facts.

The General Counsel falsely states that the steward training syllabus first "surfaced" at a "membership meeting" on December 20, 2007, the day of Local 43's first encounter with Mr. Lebovitz. (Brief at 14). The record reflects that the syllabus was prepared in 2007 for a "steward class," and not for a general membership meeting as the General Counsel contends. There is no basis whatever in the record for the assertion that it "first surfaced" at the December 20 membership meeting. Moreover, the insinuation that it was prepared in 2007 in response to the Lebovitz situation is absurd, as the first indication that there was any issue concerning Lebovitz was on December 28, 2007, when the charge was served.

The General Counsel likewise falsely asserts that the internal union charges that a Local 43 steward filed against several Local 24 members were "ostensibly for non-compliance with the mobility rule." (Brief at 15). In fact, as even the Judge noted, the Local 24 members actually were in compliance with the mobility rule, the steward knew it, but nevertheless filed the charges against the members for failing to cooperate with the steward in providing documentation of their prior employment. (Decision at 6).

Similarly, the General Counsel asserts that, in the summer of 2007, Local 43 waived the mobility rule with respect to "a Local 108 *member*." (Brief at 15). As noted

in Respondents' opening brief at pages 15-17, the individual in question was from western Massachusetts, and was not a member of any union when he showed up on a project in Local 43's area. There is no evidence in the record that he *ever* joined Local 108 *or any other local union*, and the General Counsel cites none. The steward on the project contacted Local 43's Business Manager because the individual did not have the three weeks of prior employment with the employer in question and therefore failed to comply with the mobility clause but, due to full employment in the Local at the time, the Business Manager waived enforcement of the clause in his case.

Finally, contrary to the General Counsel's dismissal of the testimony of the principals of two contractors that perform a large amount of work in Connecticut, including in Local 43's area (Brief at 16), each of the witnesses testified about *specific* examples on *specific* project sites where Local 43 enforced the clause against his company. (Tr. 187-88, 190, 193-94, 200-03, 205, 208). The General Counsel offered no evidence to the contrary, and there is none.

ARGUMENT

I. THE MOBILITY CLAUSE IS LAWFUL ON ITS FACE AND AS IT WAS ENFORCED BY LOCAL 43 WITH RESPECT TO MR. LEBOVITZ

A. The Mobility Clause is Lawful on its Face

The General Counsel defends the Judge's decision by reiterating an essential flaw in the Judge's analysis: he focuses on one phrase, and totally ignores the express context of that phrase that provides the phrase with its meaning.

Thus, he contends that the mobility clause requires as a condition of employment of out-of-area carpenters that "the carpenter must be a 'member in good standing' of another Carpenter's local in New England." (Brief at 20). In doing so, he completely

ignores the fact that the clause has various provisions, and that the clause does not impose any such "restrictions" at all. In fact, the clause actually states that the employer "shall *have the right* to hire a 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:" (GC Exhibit 3 at 17, Section 3)(emphasis added).

Moreover, he totally ignores the "following conditions" provision of the clause, which obviously is an integral provision of the clause. One of the "conditions" is that the carpenter must have "worked a minimum of three (3) weeks for the Employer in the previous (5) months." (Id.). So the clause by its terms does not just apply to "members," but to "members" who have three weeks of prior employment. The "membership" provision of the clause thus cannot be read in isolation from the three weeks of prior employment provision of the clause. And when that duration of prior employment provision is considered, it becomes obvious that the *only* carpenters who have had three weeks of prior employment will be carpenters who have been subject to the seven-day security clause and who will have *already become* "members" within the meaning the *that* clause. "Members" within the meaning of that clause are nothing other than financial core members, regardless of whether they are actual members or non-members complying with the obligation to pay regular dues.

He likewise simply ignores altogether Respondents' argument concerning the Judge's conclusion that the provision is unlawful because it purports to enforce security clause obligations outside the bargaining unit. (Brief at 21-22). As Respondents noted, unlike the cases on which the Judge relied, this case involves a multi-employer bargaining unit with a Regional Council and multiple local unions. The General Counsel

completely ignored this argument. At the very least, with respect to the actual enforcement of the mobility clause in the case of Mr. Lebovitz, to the extent Local 43 was enforcing the security clause obligations of Mr. Lebovitz, a member of Local 24, it was enforcing the *same* security clause in the *same* collective bargaining agreement in which the mobility clause was contained.

Thus, Carpenters Locals 24 and 43, together with Local 210, jointly are parties to a *single* collective bargaining agreement with a multi-employer association covering all work performed in the state of Connecticut. (GC Exh. 3). As a result, all three locals are part of a single multi-employer unit, and the same security clause in that single agreement governs the obligations of both Local 43 and Local 24 members, including Mr. Lebovitz. Consequently, the cases involving the enforcement of security clauses of contracts in other bargaining units are irrelevant, and the arrangement here is entirely lawful. In *Carpenters Local 563*, 272 NLRB 1249 (1984), Carpenters Local 563 declined to refer members of sister locals because they were in arrears in their dues in their home locals. But the various locals involved in that case, like the locals here, were all part of a Council and were parties to a single collective bargaining agreement with a multi-employer association, and the Board found no violation.

The General Counsel continues to mischaracterize the mobility clause as a "restriction" on the employment opportunities of out-of-area carpenters. (Brief at 24). That characterization ignores the undeniable fact that, under the predecessor to the current mobility clause, out-of-area carpenters like Mr. Lebovitz, a Local 24 member, had virtually no prospect of working in Local 43's area because it gave a hiring preference to those who had been living in Local 43's area for at least a year. (Resp. Exh. 2 at 13, Art.

13, Section B). Unquestionably, the mobility clause expanded the opportunities of carpenters like Mr. Lebovitz to work in areas outside his home local. As long has he had at least three weeks of prior employment within the last five months with his employer, a rule that is easily satisfied, he could work anywhere in New England regardless of any local hiring restrictions. The undeniable object and effect of the mobility clause was to expand *greatly* the employment opportunities of out-of-area carpenters like Mr. Lebovitz.

The General Counsel falsely states that the contract's reference to the local hiring requirement "takes effect *only* if the employer fails" to notify the Union of the project. (Brief at 24). It plainly says no such thing. It simply says that that an employer "loses" mobility if it fails to notify the Local and is therefore subject to a local hiring requirement, and does not say that the *only* time a local hiring requirement applies is when the employer fails to give notice.

As previously noted, saying that the employer "loses" mobility and is therefore subject to a local hiring requirement by failing to give notice merely begs the question of what happens if the employer cannot satisfy the mobility requirements in the first place. In other words, in the absence of mobility, what governs hiring? Naturally, what governs hiring in absence of mobility in the first instance is the same thing that happens when one "loses" mobility – a local hiring requirement. There is no other reasonable way to read the clause.

B. The Mobility Clause was Lawfully Enforced as to Mr. Lebovitz

In his answering brief, the General Counsel essentially conflates his analysis of the provision *on its face* with the entirely separate question of how Local 43 *actually applied* the provision with respect to Mr. Lebovitz. But the distinction is critical. It is

not enough to contend that, since the "membership" provision of the clause may be unlawful on its face, every application of the clause is unlawful. The clause contains a number of provisions in addition to the membership clause, such as the three weeks of prior employment requirement.

Accordingly, in determining whether the Local unlawfully applied the clause with respect to Mr. Lebovitz, one must be careful to determine precisely what provisions of the clause the Local was actually applying in this case. If the Local did not apply or rely upon an "unlawful" provision of the clause, there is no violation with respect to Mr. Lebovitz. Even if the "membership" provision of the mobility clause is unlawful on its face, there is no violation or remedy for Mr. Lebovitz unless Local 43 actually applied or relied upon the particular offending provision of the clause in enforcing the clause in this case.

The General Counsel's assertion that "employees on a construction site" do not "artfully parse such fine legal distinctions" (Brief at 26) is nonsensical. The question is not whether construction workers on a job site make legal distinctions, fine or otherwise. The legal issue here is: What did the Local rely upon in its dealings with Mr. Lebovitz? If Local 43 did not rely upon the offending provision of the clause, but relied upon other entirely lawful provisions of the clause, there plainly can be no violation with respect to Local 43's dealings with Mr. Lebovitz.

Regardless of whether the three weeks of prior employment provision of the clause applies on its face only to union members and not to non-union carpenters, the record is undisputed that Local 43 actually invokes the clause with respect to out-of-area carpenters who lack the three weeks of prior employment *regardless of whether or not*

they are members of a union. The General Counsel failed even to address the fact that Local 43 invoked the mobility clause with respect to the individual noted on pages 2 - 3 above who was not a member of any union, who had traveled down from western Massachusetts, and who lacked the three weeks of prior employment. (Tr. 125-26). That evidence was undisputed.

Consequently, even if the "membership" provision is the offending provision of the clause on its face, Local 43 *in its actual application of the clause* invokes the clause with respect to both members and non-members alike. As a result, the operative provision of the clause, in its application generally and with respect to its application to Mr. Lebovitz in this case in particular, was the three weeks of prior employment provision. In other words, the Local did not apply or rely upon what the Judge found in his facial analysis to be the offending "membership" provision of the clause. Instead, Local 43 applied or relied upon only the three weeks of prior employment provision of the clause when it invoked the clause with respect to Mr. Lebovitz. Nor did Local 43 invoke the mobility clause with respect to Mr. Lebovitz because he had been delinquent in his dues obligation to his home Local 24. It invoked the mobility clause because, *and only because*, he lacked the three weeks of prior employment.

As even the General Counsel described it, "[i]t is undisputed that Lebovitz did not satisfy the requirements of the mobility clause *because* he had not worked a minimum of three weeks" for his employer. (Br. at 2)(emphasis added). Neither the General Counsel nor the Judge as much as suggested that the three weeks of prior employment provision of the clause is unlawful. As a result, Local 43 did not violate the Act in applying the lawful provisions of the clause with respect to Mr. Lebovitz.

II. LOCAL 43 CONSISTENTLY ENFORCES THE MOBILITY RULE AND WOULD HAVE DONE SO WITH RESPECT TO LEBOVITZ REGARDLESS OF ANY PAST HISTORY WITH HIM

The most glaring omission in the General Counsel's brief is his failure even to mention, much less address, the admission by Lebovitz himself of the essential factual basis for Local 43's *Wright Line* defense. As has been repeatedly noted, Mr. Lebovitz submitted a letter to the General President of the United Brotherhood of Carpenters complaining that "officials of Local 43 are blatantly and *quite regularly*" violating the Constitution by enforcing the mobility clause. (Resp. Exh. 1 at lines 3 and 4)(emphasis added). This is *precisely* the position Local 43 has maintained throughout this case! Yet, while this admission *by the Charging Party himself* effectively eliminates the General Counsel's claim and the Judge's determination that Local 43 does *not* "quite regularly" enforce the clause, neither the Judge nor the General Counsel even mentioned this admission in their analysis of the case. This omission is particularly damning, as it tacitly acknowledges the force of the admission.

Of equal significance is the Judge's failure even to mention in his analysis of Local 43's *Wright Line* defense the testimony of the principals of two contractors whose companies perform a large amount of work in Local 43's area. Their testimony, that Local 43 regularly enforces the mobility clause and that it does so much more rigidly than the other two Connecticut Locals, squarely confirmed Lebovitz' admission that Local 43 "blatantly and quite regularly" enforces the mobility clause in its area. Yet, the Judge made no mention of it in rejecting Local 43's *Wright Line* defense.

As the General Counsel noted in his brief, the Judge did take note of the testimony in his recitation of facts. In doing so, however, he made no indication

whatever that he discredited their testimony. Instead, like his treatment of Lebovitz' admission, he simply ignored it. There is no basis for concluding that he "implicitly" discredited their testimony (Brief at 17), since he took the trouble of expressly doing so elsewhere with respect to the testimony of Local 43's officers. Moreover, there is no basis in the record for doing so. Neither employer is a party to the case and neither has a stake in its outcome. In addition, they both simply confirmed Lebovitz' own assessment and condemnation of Local 43's general practice of strictly enforcing the mobility clause. While the General Counsel attempted to minimize the import of the testimony, each of the witnesses testified about *specific* examples on *specific* project sites where Local 43 enforced the clause against his company. (Tr. 187-88, 190, 193-94, 200-03, 205, 208). The General Counsel offered no evidence to the contrary, and there is none.

The General Counsel's contention that the Judge's determination that Local 43 officials had animus against Lebovitz was of "significance" in his rejection of Respondents' *Wright Line* defense (Brief at 33) reflects a fundamental misunderstanding of the nature of the defense, and appears to be a misunderstanding shared by the Judge himself. The whole point of the *Wright Line* defense is to address situations involving "dual motives," and to assess the extent to which, even with the existence of animus as "a" motivating factor, the disputed action would have taken place in any event.

In this case, the General Counsel's argument noted above suggests that a finding of animus itself is sufficient to *negate* the existence of any other motive. Such a view eviscerates the *Wright Line* defense, as it precludes even the existence of dual motives once animus is established. But the establishment of animus is only the first step in the analysis required under *Wright Line*. The respondent is then permitted to introduce

evidence that, *despite* having animus, it would have taken the disputed action even in the absence of animus based on its policies or practices or some other non-discriminatory motivation. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The evidence or even the existence of animus in a dual motive case, by definition cannot negate the existence of another motivating factor, or "dual motives," for the disputed action. In the General Counsel's view, however, the evidence of animus alone was a sufficient basis for the Judge to "discredit" Respondents' *Wright Line* defense. (Brief at 33). That misses the entire point of the defense, and is a point that the Judge himself missed as well.

CONCLUSION

For the foregoing reasons, and those set forth in Respondents' opening brief, the ALJ's decision should be reversed and the complaint should be dismissed.

Date: September 4, 2009

Respectfully submitted,

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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 3rd day of September, 2009 by email to Thomas E. Quigley, NLRB, Region 34, 280 Trumbull Street, Hartford CT 06103 and to Kevin Lebovitz (also by regular mail), 31 Willow Street, Mystic, CT 06355.

_/s/ Christopher N. Souris_____