

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15**

BIG MOOSE, LLC *

and *

HUMBERTO RECIO, AN INDIVIDUAL *

and *

**Case Nos. 15-CA-19735
15-CB-5998**

**INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
LOCAL 478 (THE GREEN LANTERN)** *

and *

HUMBERTO RECIO, AN INDIVIDUAL *

**COUNSEL FOR THE ACTING GENERAL COUNSEL’S BRIEF IN SUPPORT
OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE
LAW JUDGE**

NOW COMES Zachary E. Herlands, Counsel for the Acting General Counsel (General Counsel) to submit this Brief in Support of Cross-Exceptions to the Administrative Law Judge’s (ALJ) Decision and Order (ALJD) in the above-captioned cases.

I. STATEMENT OF THE CASE¹

a. Background

On May 25, 2010,² Charging Party Humberto Recio (Recio), an individual, filed a charge in Case No. 15-CB-5998 alleging the International Alliance of Theatrical Stage Employees,

¹ Reference to the Exhibits of the General Counsel and Respondent Union will be designated as “GCX” and “UX” respectively, with the appropriate number or numbers for those exhibits. Reference to the transcript and the ALJD in this matter will be designated as “Tr.” and “ALJD” respectively. An Arabic numeral(s) after “Tr.” or “ALJD” is a spot cite to a particular page of the transcript or the ALJD; and an Arabic numeral(s) following a page spot cite references specific lines of the page cited, e.g. Tr. 15 at 13-16 is transcript page 15 at lines 13-16.

² All dates are from 2010, unless otherwise noted.

Local 478 (Respondent Union or Union) violated Sections 8(b)(1) and (2) of the National Labor Relations Act (Act). GCX 1(a). The charge was subsequently amended on November 30. GCX (k). Recio filed a charge in Case No. 15-CA-19735 alleging Big Moose, LLC (Respondent Employer or Employer) violated Sections 8(a)(1) and (3) of the Act on September 1, and amended the charge on November 30. GCX 1(e), (h). A Consolidated Complaint and Notice of Hearing issued on December 30, and Administrative Law Judge Michael A. Marcionese presided over the hearing on April 4 and 5, 2011.

On February 2, 2012, the ALJ issued his ALJD in which he concluded Respondent Union violated Sections 8(b)(1)(A) and (2) of the Act when it caused Respondent Employer to discharge Recio on March 11 (CNOH Paragraphs 10(a), 11, 12, and 16). By acquiescing in Respondent Union's request to discharge Recio, the ALJ held Respondent Employer violated Sections 8(a)(1) and (3) of the Act by discriminating against its employees on the basis of Union membership and telling Recio he was being terminated because of the Union (CNOH Paragraphs 8 and 13(a), 14, and 17). Further, the ALJ concluded Respondent Union violated Section 8(b)(1)(A) of the Act when Business Agent Michael McHugh (McHugh) told Recio on March 17 that he was not allowed to work within the Union's jurisdiction until he completed a transfer application (CNOH Paragraphs 9(a) and 15). Lastly, the ALJ held Respondent Union violated Section 8(b)(1)(A) of the Act when it caused Recio to turn down employment opportunities because of its coercive conduct (CNOH Paragraphs 9(b) and 15). The ALJ failed to find that Recio was terminated on April 28 in violation of the Act (CNOH Paragraphs 10(b), 13(b), 16, and 17).

On March 1, 2012, Respondent Union filed Exceptions to the ALJD excepting to the ALJ's credibility determinations, adverse inferences, and conclusions of law with respect to

those parts of the ALJD where the ALJ held the Union violated the Act. Respondent Employer did not file Exceptions to the ALJD. By Order dated March 12, 2012, the Deputy Executive Secretary, Gary W. Shinnars, extended the time to file Cross-Exceptions and Answering Briefs until March 29, 2012.

b. Relevant Facts and General Counsel's Chronology of Events

Charging Party Humberto Recio has worked in the movie business as a rigging gaffer for approximately twenty-seven years. TR 39. Based in Florida, Recio has traveled to Louisiana on several occasions since 2004 for work because in recent years, Louisiana has seen a boom in film production. TR 40-41. A member of IATSE Local 477 (Local 477) in Florida, Recio worked as a "traveler" (a member of a sister local union working temporarily working in another Union's location) in Respondent Union's jurisdiction in Louisiana. TR 39-41 at 338-339.

In March, Recio was hired by the production team of *Green Lantern* shooting the movie in the New Orleans metropolitan area, for a job that was expected to last through August. TR 46-47, 261. In anticipation of such a lengthy and steady job, Recio rented an apartment, secured utility services, and set up cable television in Louisiana. TR 50, 295-296, 303 at 14-15. However, Union Business Agent McHugh, disgusted by so many Florida-based union members steadily coming to Louisiana to work without following proper Union permitting procedures, caused Recio's supervisor, Best Boy Earl Woods (Woods), to terminate Recio on March 11. TR 51-54. Woods fired Recio because McHugh wanted Recio to take care of his Union "paperwork." TR 51 at 14-18. On March 17 at the Union Hall, Recio met with McHugh, who explained to him that he was tired of "Florida guys" working in Louisiana without following proper Union procedures. TR 54 at 7-8. To take care of the issue, McHugh insisted Recio complete a Union membership application and pay the \$450 transfer fee to become a member of the Union if he wanted to work

in Louisiana. TR 53-54, 341, 360-362, 388. Membership in the Union was dependent, however, upon being voted in by a majority of members at the next membership meeting. TR 56-57, 341.

Recio, now unemployed, followed McHugh's instructions and turned down a job offer in Louisiana because McHugh told him he could not work in the jurisdiction until his Union membership paperwork was settled. TR 59 at 20-23. When the Union membership considered Recio's application at its April meeting, however, the vote was tied and Recio was neither rejected nor approved for membership. TR 60, 348. McHugh told Recio this was the first time this had ever happened, and that Recio's application would be voted on again at the next membership meeting two months later in June. *Id.* Given this unusual turn of events, McHugh permitted Recio to return to work in the jurisdiction, albeit with strict controls because "at that point, [Recio] was following the permit procedures." TR 61-61, 348 at 13-14. Recio had to directly report to McHugh, however, and could only work on a show-by-show basis sanctioned by McHugh. TR 61-62, 348.

After McHugh told Recio that he could return to work on *Green Lantern*, Recio contacted his former supervisor Woods and told him McHugh had given him permission to return. TR 72-74. However, at this point, Woods could only offer Recio his old job back for four to five weeks. *Id.* After learning he would only be returned to work for four to five weeks, it no longer made sense for Recio to join the Union for a job of such short duration. TR 75-76. Recio had already been waiting, unemployed, for nearly six weeks to get admitted into the Union. The next vote, scheduled for June, was over two months away, and Recio realized he could not be confident of ultimately being accepted for membership because of the tie vote in April. TR 61-62, 74-76. Consequently, Recio decided to withdraw his Union membership application and request a refund of the hefty \$450 transfer fee. TR 75 at 8-14, 76.

McHugh admits that he called the production department of *Green Lantern* (Woods and Dave Dunbar) after Recio returned to work and after he learned that Recio withdrew his Union membership application. TR 351, 359-360. McHugh, however, testified he only called to inquire about Recio because he was concerned for Recio's welfare on the job. TR 351-352. Yet, within days after Recio's refund request, and after only four days of work on the job, Woods telephoned Recio and terminated him a second time. TR 78 at 4-8. Consequently, after this *second* discharge, Recio terminated the lease on his Louisiana apartment and on April 30, he returned to Florida and ultimately filed the charges which led to these proceedings. TR 80, 113.

II. EXCEPTIONS

Exception No. 1

General Counsel excepts to the ALJ's conclusion that the timing of Recio's withdrawn Union membership application and his last day of work on *Green Lantern* on April 28, 2010, is merely coincidental. ALJD 11 at 12-13.

Exception No. 2

General Counsel excepts to the ALJ's conclusion that there is a lack of evidence of Union causation of the second termination on April 28. ALJD 11 at 21-22.

Exception No. 3

General Counsel excepts to the ALJ's conclusion that Recio's loss of work was not caused by the Union. ALJD 11 at 38.

Exception No. 4

General Counsel excepts to the ALJ's conclusion that Recio voluntarily relinquished employment with the Employer on April 28. ALJD 11 at 38-39.

Exception No. 5

General Counsel excepts to the ALJ's conclusion that the impediment to employment that existed between Recio's first and second terminations had been removed. ALJD 11 at 31-34.

Exception No. 6

General Counsel excepts to the ALJ's failure to affirmatively find that Union Business Agent Michael McHugh telephoned Respondent Employer's supervisors Earl Woods and Dave Dunbar before Recio's last day of employment on *Green Lantern* on April 28. ALJD 11 at 14-21.

Exception No. 7

General Counsel excepts to the ALJ's failure to find that McHugh telephoned Woods and Dunbar in response to Recio's withdrawal of his Union membership application and refund of his \$450 transfer fee. ALJD 11 at 15-16.

Exception No. 8

General Counsel excepts to the ALJ's willingness to credit McHugh's and Woods' testimony regarding the second termination on April 28. ALJD 11.

Exception No. 9

General Counsel excepts to the ALJ's failure to find that the Respondent Employer discharged its employee Recio on or about April 28. ALJD 11 at 49-52.

Exception No. 10

General Counsel excepts to the ALJ's failure to credit Recio regarding his discussion with Woods on April 28. ALJD 11.

Exception No. 11

General Counsel excepts to the ALJ's decision to end the backpay period for Recio on April 22. ALJD 11, 36-45.

Exception No. 12

General Counsel excepts to the ALJ's failure to find that on or about April 28, Respondent Union caused Respondent Employer to cease employing its employee Recio. ALJD 11 at 37-51.

Exception No. 13

General Counsel excepts to the ALJ's failure to find that the Respondent Union violated Sections 8(b)(1)(a) and (2) of the Act by causing the Respondent Employer to cease employing Recio on or about April 28. ALJD 11 at 37-51.

Exception No. 14

General Counsel excepts to the ALJ's failure to find that on or about April 28, the Respondent Employer violated Sections 8(a)(1) and (3) of the Act by discharging Recio. ALJD 11 at 37-39.

III. ANALYSIS

In the ALJD the ALJ determined that both Respondents acted in concert to terminate Recio from his employment in violation of the Act when he was first terminated on March 11. ALJD 9-10. The ALJ credited Recio that Woods told him McHugh was behind the termination, which was corroborated by McHugh's subsequent statements and actions. ALJD 9 at 35-36. The ALJ's failure to find both Respondents responsible for the second termination, however, is inconsistent with the facts and the law, which support a finding of violations for both terminations: March 11 and April 28. General Counsel's Cross-Exceptions find fault with the ALJ's evaluation of the record evidence, erroneous credibility determinations, and his incorrect application of the legal standards to the facts at hand.

Although the ALJ cites the applicable legal standards in the ALJD, he failed to apply them properly to Recio's April 28 termination. In non-exclusive hiring hall situations, a union violates Sections 8(b)(1)(A) and (2) of the National Labor Relations Act (Act) when it interferes with an employee's continued employment due to the employee's union membership status. *Carpenters Local 2369 (Tri-State Ohbayashi)*, 287 NLRB 760, 763 (1987); *Stage Employees IATSE Local 478*, 2010 WL 561889 (N.L.R.B. Div. of Judges Feb. 9, 2010) (finding Union violated the Act when Business Agent Michael McHugh caused employer to rescind offer of employment to member of Florida local). It follows that an employer violates Sections 8(a)(1) and (3) of the Act when it complies with this interference. *Kvaener Songer, Inc.*, 343 NLRB 1343, 1346 (2004). Specifically, the central inquiry of a Section 8(b)(2) violation is the causal relationship between a union's conduct and its effect on a discriminatee's employment. *Stage Employees IATSE Local 665 (Columbia Picture)*, 268 NLRB 570, 572 (1984). This connection can be made without direct evidence, as reasonable inferences of a union's request for employer action are sufficient to find violations of Sections 8(b)(1) and (2). *Serv. Emps. Int'l Union, Local 87 (Able Bldg. Maint. Co.)*, 349 NLRB 408, 411-412 (2007). *See also Avon Roofing & Sheet Metal Co.*, 312 NLRB 499 (1993) (violation of Act when employer refused to recall workers against whom the union had animus).

The ALJ appears oddly confounded by the causation issue. Here, Union causation is clearly established by the events preceding the second termination which are wholly consistent with the result that followed. The facts showing the causal relationship are clearly demonstrated through the animus McHugh held toward Recio, McHugh's insistence that Recio follow Union protocols, the timing of Recio's withdrawn application, and McHugh's contacts with the Employer about Recio. First, McHugh's animus towards Recio was established when he told

Recio he was tired of “Florida guys” taking work in Louisiana. TR 51, 54 at 7-8.³ The depth of his animus was made clear when he caused Recio’s first termination from *Green Lantern* for failing to follow Union rules about working in Louisiana. TR 51-52. Second, the nexus is established because the timing of Recio’s second termination is anything but “coincidental.” ALJD 11 at 12. Within days after Recio withdrew his Union membership application and the Union refunded Recio his \$450 transfer fee, McHugh called and spoke to Recio’s supervisors, Woods and Dunbar. TR 351, 359-360. Within the week, Recio was terminated, *again*.⁴ TR 78, 351, 359-360; GCX 5.

Although Woods unsurprisingly did not confess to Recio his complicity with the Union’s unlawful agenda a second time, Respondent Employer did not present any basis for the termination at all; this time, it argues that Recio just quit. This is simply incredible. After procuring a Louisiana apartment, setting up cable and utility services, and then waiting around six weeks to try and get his job back, it is unbelievable that Recio would walk off the job merely days after being rehired. TR 50, 78, 295-296. The only rational explanation is that for the second time, McHugh had Recio discharged because he was not following McHugh’s perceived orders. Because Recio withdrew his application and initiation fee instead of waiting another two months for the next Union membership vote, the Union, through McHugh, immediately punished Recio with termination. TR 75-78. This result falls directly in line with McHugh’s previous actions regarding Recio’s first termination just seven weeks earlier and McHugh’s animosity towards

³ Regarding the first termination on March 11, the ALJ correctly concluded that Woods terminated Recio at McHugh’s behest because Recio’s paperwork was not straight. ALJD 9-10.

⁴ McHugh testified that he called Woods and Dunbar to find out if Recio was having any problems on the job. TR 351 at 17-18. However, this begs the question, if McHugh was so concerned with Recio’s wellbeing on Green Lantern, why did he contact Woods and Dunbar instead of directly calling Recio himself? McHugh’s version of events does not follow logic and thus cannot be credited.

nonmembers who fail to follow his directions. *See Stage Employees IATSE Local 478*, 2010 WL 561889 (N.L.R.B. Div. of Judges Feb. 9, 2010).

Based on Recio's actions and McHugh's admitted call to Woods and Dunbar, it can be reasonably inferred that the call was made *before* Recio was fired. It can also be inferred that McHugh's call is what prompted Recio's second termination because after speaking to McHugh Woods fired Recio, just as he had done on March 11.⁵ These conclusions are supported by the record evidence, whereas the ALJ's finding that there is no evidence in the record that establishes that McHugh called Woods and Dunbar before Recio's last day of employment on April 28 does not follow logic.⁶ ALJD 11. There is no reasonable explanation as to why McHugh would call Woods and Dunbar if he had already learned that Recio had voluntarily left the job (as both Respondents argue). The only plausible scenario is that McHugh learned of Recio's withdrawal of his application and immediately called Woods and Dunbar in response. Because the only likely explanation is that the phone call was made before Recio's termination, the immediate timing of the McHugh's communications with the Employer demonstrates the causal connection between the Union's conduct and the effect on Recio's employment. Furthermore, it should be noted, and the ALJ correctly concluded, that the only other time McHugh called Woods about Recio was to instruct Woods to tell Recio that he could not work until he straightened out his paperwork. ALJD 9 at 20-23.

⁵ Even absent a factual finding that McHugh explicitly demanded the Employer discharge Recio, there is ample evidence to show that the Union unlawfully interfered with Recio's employment. Unlawful interference need not consist of an express request, demand, or threat. *Stage Employees IATSE Local 665 (Columbia Picture)*, 268 NLRB 570, 572 (1984); *See Electrical Workers Local 441*, 221 NLRB 214 (1975) (holding union violated Section 8(b)(2) even though it did not threaten the employer); *Northwestern Montana District Council of Carpenters' Unions (Glacier Park Co.)*, 126 NLRB 889, 897 (1960) (finding express demand or request is not essential to a violation of Section 8(b)(2) of the Act).

⁶ General Counsel requested both McHugh's and Woods' phone records, but they were not supplied. TR 360; General Counsel *Subpoena Duces Tecum* #B-613540.

The ALJ erred in giving any credence to McHugh's testimony that his call to Woods and Dunbar came in response to a communication he had with Mahoney and not because Recio withdrew his application. ALJD 11 at 14-16. Having already credited Recio and discredited Woods and McHugh regarding the first termination, with no explanation or justification provided, the ALJ gives credence to McHugh's testimony regarding this point. ALDJ 11 at 13-16. When an ALJ's theory of credibility is based on inadequate reasons or no reasons at all, his findings cannot be upheld. *NLRB v. E-Systems, Inc.*, 642 F.2d 118, 120 (5th Cir.1981); ALJD 11. Here, the ALJ offered no justification for crediting McHugh after previously discrediting him. Accordingly, the ALJ's credibility determination in this instance should be rejected. *See NLRB v. Cutting, Inc.*, 701 F. 2d 659, 666-667 (7th Cir. 1983) (rejecting ALJ's credibility findings because the judge gave no reasons for crediting witnesses, and thus the findings "provide no basis for assessing the relative credibility of the witnesses").

In addition, the ALJ relies on the fact that the Employer did not contradict McHugh's testimony in finding Recio voluntarily left the job.⁷ ALJD 11 at 45-47. However, reasonable inferences against the Employer may be drawn from circumstantial evidence, including the Employer's failure to provide a legitimate business justification for taking action against Recio. *Wenner Ford Tractor Rentals, Inc.*, 315 NLRB 964, 965 (1994) (violation when employer failed to articulate business reasons for demoting employee who opposed officials in internal union

⁷ The ALJ notes that this case differs from *Stage Employees IATSE Local 478*, because there, employer witnesses contradicted McHugh and Union President LoCicero, who testified in that proceeding. *Stage Employees IATSE Local 478*, 2010 WL 561889 (N.L.R.B. Div. of Judges Feb. 9, 2010). The ALJ, however, fails to recognize the striking similarities. Both cases involve members from Local 477 seeking employment in the Union's geographical jurisdiction. In *Stage Employees IATSE Local 478*, ALJ Brakebusch discredited McHugh and credited the employer's testimony that McHugh asked that the Local 477 member not be considered for employment because he was not a Union member and because there was a problem with that member paying his Union dues. *Id.* ALJ Brakebusch found the Union, through McHugh, violated Section 8(b)(2) of the Act when he caused the employer to rescind an offer of employment to the Local 477 member. Here, the facts are almost identical and McHugh's conduct is eerily similar. He expressed his distaste for Local 477 members working in the Union's jurisdiction when he told Recio he was tired of "Florida guys" taking work in Louisiana. TR 54 at 7-8. Upon learning that Recio withdrew his Union membership application which made him another "Florida guy" working in Louisiana, McHugh immediately called Woods and Dunbar and had Recio removed from the job. TR 78-79, 351, 359-360.

election). Because the Employer failed to offer a *Wright Line* defense for Recio's second termination on April 28, the case turns solely on credibility. *See Wright Line*, 251 NLRB 1083, 1089 (1980); *James H. Woods, d/b/a Cruise And Tour Servs.*, 330 NLRB 1231, fn 2 (2000) (ALJ depended on witness credibility after Respondent did not establish a legitimate basis under *Wright Line* for its discharge of the discriminatees). The fact that Woods did not contradict McHugh's testimony in no way changes the fact that McHugh had Recio fired on April 28. The ALJ already discredited both McHugh's and Woods' version of events surrounding the first termination. ALJD 9-10. Their version of events regarding the second termination is equally flawed, as it is unsupported by anyone's subsequent actions.

In addition, in determining incorrectly that Recio had voluntarily quit his job on *Green Lantern* on April 28, the ALJ gives weight to the fact that Recio could not recall Woods supplying him with a reason for his termination. ALJD 11 at 9-10. Recio testified that Woods simply told him that he was not needed anymore and as a result, Recio should find other work on April 28. TR 78-79. That Woods did not explain himself or provide a reason this time is immaterial. The fact remains that Woods discharged Recio for the second time on April 28.

The ALJ also erroneously concluded that "whatever" impediment to employment that existed between Recio's first and second terminations had been removed because McHugh told Recio he could return to work and Recio actually did return to work. ALJD 11 at 31-34. It is unclear why the ALJ does not define the impediment at this stage in the ALJD after he previously ruled that the impediment that existed was Recio's failure to complete a Union membership application, obtain a valid work permit, and abide by McHugh's orders. ALJD 9-10. As described above, Recio could only return to work by submitting an application and paying the transfer fee. TR 57-58. After finally doing that, McHugh removed the impediment and told

Recio he could work on a show-by-show basis and specifically, he could return to work on *Green Lantern*. TR 61-62. While correct that the impediment was removed when Recio did finally complete the membership application, the ALJ failed to note that this removal was temporary and short-lived. Upon learning that Recio withdrew his application and requested a refund for the paid transfer fee, McHugh again found that Recio disobeyed his orders. As a result and just as he did regarding the first termination, McHugh took action. TR 78-79. He called Woods and Dunbar about Recio and within only a few days, Recio was terminated. TR 351, 359-360. Once again, one can reasonably infer that McHugh caused Recio's termination for the second time. *Id.*

Just as the ALJ found the Union and Employer violated the Act when Recio was first terminated on March 11, the record evidence supports a finding that the Union and Employer acted in a similar fashion on April 28, when Recio was terminated for the second time. As a result, the backpay period should not be tolled effective April 22. Rather, the backpay should run for the full production of *Green Lantern*, which is the job length Recio was originally promised.⁸ TR 49-50, 114, 205, 304.

IV. CONCLUSION

Through McHugh's well-established animus towards Recio and the close nexus in time between Recio's withdrawal of his Union membership application and subsequent termination, it is clear that the Union caused the termination of Recio on April 28. The ALJ erred in not making the requisite finding to support that violation.

Dated at New Orleans, Louisiana this 29th day of March 2012.

⁸ In his ALJD, the ALJ ordered the Union to make Recio whole for any wages and benefits he would have earned had he accepted the offer to work on *Drive Angry*. ALJD 12, 44-49. It is unclear how this should be computed. Accordingly, General Counsel requests backpay in the form of wages and benefits for the entire run of production for either *Drive Angry* or *Green Lantern*, depending on which is greater.

/s/Zachary E. Herlands/s/

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2012, I electronically filed a copy of the foregoing Counsel for the Acting General Counsel's Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge with the Executive Secretary of the National Labor Relations Board and forwarded a copy by electronic mail to the following:

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