UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
BEFORE THE DIVISION OF JUDGES

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS, CARPENTERS LOCAL #1507 (PERRY OLSEN DRYWALL, INC.) Respondent and GERALD CORNELL, An Individual	Case 27-CB-5723

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF

Submitted by:

Kristyn Myers
Counsel for the Acting General Counsel
National Labor Relations Board, Region 27
600 17th Street –7th Floor North Tower
Denver, Colorado 80202
(303) 844-6657
Kristyn.Myers@nlrb.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NLRB CASES

I. Introduction

This case involves The Southwest Regional Council of Carpenters, Carpenters Local #1507's (Respondent's) unlawful arbitrary operation of its otherwise lawful exclusive hiring hall. This case was tried on June 21 and 22, 2011 before Administrative Law Judge Lana H. Parke. On September 22, 2011, Judge Parke issued a Decision and Order in which she made the following two conclusions of law: (1) Respondent violated Section 8(b)(1)(A) of the Act by refusing to permit Charging Party Gerald Cornell (Cornell) to pay the nonmember hiring hall registration fee on December 1, 2010[1] because Cornell questioned its hiring hall procedures; and (2) Respondent violated Section 8(b)(2) and 1(A) by refusing to permit Cornell to sign the out-of-work register after December 1 because he questioned its hiring hall procedures. (ALJD pg. 16).[2]

Subsequently, Respondent filed 8 exceptions to the Decision. In its exceptions, Respondent attacks Judge Parke's factual findings and the conclusions of law that flow from those findings. Respondent's exceptions can be condensed into three fundamental arguments. First, Respondent contends that Judge Parke incorrectly found that on December 1, Cornell offered to pay the nonmember fee and the Union refused to accept payment because Cornell questioned the Union's hiring hall procedures. (Exceptions 1, 2, and 3). Second, Respondent argues that Judge Parke erroneously found that after December 1, the Union continued to adhere to its refusal to permit Cornell to sign the out-of-work register because he had questioned the hiring hall procedures. (Exceptions 5 and 6). Finally, Respondent contends that Judge Parke's conclusions of law are

[1] All subsequent dates are 2010 unless otherwise noted.
[2] References to the record are as follows: ALJD refers to the Judge's Decision; Tr. refers to transcript page, followed by page and line numbers; GC Ex. refers to exhibits offered by Counsel for the General Counsel; Jt. Ex. refers to joint exhibits; and Union Ex. refers to exhibits offered by Respondent.

erroneous because they are premised on the incorrect finding of fact that on December 1 Respondent refused to allow Cornell to pay the nonmember fee and thereafter sign its out-of-work register after he questioned the Respondent's hiring hall rules. (Exceptions 4, 7, and 8).

Contrary to Respondent's arguments, the Judge's credibility resolutions and findings of fact are fully substantiated by the record evidence and should be affirmed. Moreover, Judge Park's conclusions of law are supported by Board law.

II. Relevant Background

The Respondent operates an exclusive hiring hall in Utah. (GC Ex. 1(k) and 1(m); GC Ex. 4, pgs. 7-8; Tr. 154, lines 22-23). Prospective applicants must satisfy the following criteria to be eligible for work referral through the hall: (1) meet the minimum training and experience qualifications; (2) be unemployed and available for work; (3) register on the out of work list; and (4) pay their current union dues or pay the quarterly service fee. (Union Ex. 1; Tr. 27-29). New applicants who wish to register as nonmembers must pay a $135 quarterly registration and dispatch fee (quarterly fee). (Tr. 51, lines 3-5). Applicants who wish to register as new members of Respondent must pay $48 (three months of dues) plus a $300 initiation fee, for a total of $348. (Union Ex. 3, pg. 2; Tr. 286, lines 22-25).

Respondent had a longstanding collective bargaining relationship with Perry Olsen Drywall Inc., (Employer).[3] (Tr. 58, line 20; GC Ex. 4 and GC Ex. 5). During the relevant period, the Employer's primary project was installing drywall at the Huntsman Cancer Center Institute (Huntsman project). (Tr. 61, lines 13-14). Cornell worked on the

[3] The Employer declared bankruptcy in February 2011 and ceased operating at that time. (Tr. 54, lines 12-14).

Huntsman project from November 2 through December 1 without following the proper hiring hall procedure to obtain employment with the Employer. (GC Ex. 10, pgs. 2-9). Cornell was laid off from the Huntsman project on December 1. (ALJD pg. 10). During the relevant time period, Cornell was not a member of Respondent or any other Carpenters local union.

Cornell visited Respondent's hiring hall on three occasions – November 19, November 22, and December 1. (Tr. 154, lines 18-20; Tr. 163, lines 22-23; Tr. 167, lines 17-21). The pertinent facts related to the Respondent's Exceptions took place on December 1 at Respondent's hiring hall and thereafter. On December 1, Cornell went to Respondent's hiring hall with fellow applicants Chris Barton (Barton), Mike Monk (Monk), Mike Prince (Prince), Ryan Thompson (Thompson), and Jeff Behnke (Behnke). (ALJD, pg.9). That day Respondent referred all of the applicants, except Cornell, to the Employer's Huntsman project. (ALJD pg. 9).

III. Judge Parke's findings regarding the events of December 1 should be affirmed

Respondent argues that the Judge incorrectly found that on December 1, Cornell offered to pay the nonmember hiring hall registration fee and Respondent's representative Bachman refused to accept payment after Cornell questioned him about the operation of the hiring hall under the right to work law. Respondent contends that this factual finding is based on crediting Cornell's testimony over the testimony of Bachman. Respondent further argues that the Judge erred in crediting Cornell's testimony because he was not a credible witness. Thus, Respondent asks the Board to overrule the Judge's credibility resolutions with respect to the events of December 1 and completely discredit Cornell's testimony and to credit Bachman in full.

Respondent's argument is unpersuasive on two grounds. First, contrary to Respondent's argument, Judge Parke's findings regarding the events of December 1 are not based on fully discrediting Bachman and fully crediting Cornell. Rather, the Judge's findings are based on "an amalgamation of the credible testimony of Cornell, Barton, and Bachman." (ALJD pg. 10). Second, the clear preponderance of all the evidence demonstrates that her credibility resolutions should be sustained.

Judge Parke made the following findings of fact regarding Cornell's interaction with Union Representative Bachman on December 1:

> Cornell approached Bachman and said he wanted to join the Union and that he had whatever it was going to cost with him. Bachman told Cornell that he could not help him, that the Union was not accepting new members, and that Cornell needed to get his dues taken care of. Bachman told Cornell that if he paid the nonmember quarterly fee of $135, he would sign him up on the out-of-work list, but he would be at the bottom of the list, and the Union could not put him on the Huntsman job. As Cornell produced his money, he asked Bachman how the Union got around right-to-work laws since Utah was a right to work state. Bachman abruptly returned to his office area. Cornell followed him, saying he was not trying to make him mad. Cornell tried to shake hands with Bachman, but Bachman refused. Cornell did not sign the out-of-work list.

(ALJD pg. 9-10). Judge Parke explained in detail that she based these findings on a combination of the credible testimony of Cornell, Bachman, and Barton. Specifically, she made the following credibility resolutions:

> This conversation between Cornell and Bachman is based on an amalgamation of the credible testimony of Cornell, Barton, and Bachman. Although Cornell testified that when he counted out $135 to pay the Union, Bachman declined to take it, saying he 'just couldn't do it' Barton did not recall that exchange. Since I have found Barton to be more clear and reliable in his testimony than Cornell, I discredit Cornell's account in that regard. Bachman testified that when he offered Cornell the option of paying the nonmember quarterly fee, Cornell refused to pay it, saying that according to right to work, he did not have to. As Bachman's testimony in this regard differs from Barton's credible testimony, I do not accept.

(ALJD pg. 10).

Contrary to Respondent's contentions, the record reveals that the most significant findings of fact are based on the testimony of neutral employee witness Baton, as opposed to the testimony of Cornell. Barton testified to the following sequence of events on December 1. Bachman informed Cornell that he would place him on the bottom of the out-of-work list but that he would not be referred to the Huntsman project. (Tr. 231, lines 9-11). Cornell responded "that was fine" and produced his money. (Tr. 231, lines 12-13). As Cornell was producing his money, he asked Bachman how the Respondent got around the right to work laws. (Tr. 231, lines 15-21). Bachman immediately turned around and walked away. (Tr. 231, lines 22-23). Thus, Barton's testimony, standing alone, supports the Judge's critical finding that Cornell offered to pay the nonmember hiring hall registration fee and that the Respondent refused to accept the payment after Cornell questioned Bachman about the application of Utah's right to work law to Respondent's hiring hall.

In addition, as the Judge found, Barton's testimony is substantially corroborated by Bachman and Cornell. Bachman admitted that he informed Cornell he could pay the nonmember quarterly fee. (Tr. 276, lines 12-14). In addition, the following testimony of Cornell's corroborates Barton's testimony. Bachman informed Cornell that he could pay the quarterly nonmember fee and he would register him on the out-of-work list. (Tr. 172, lines 23-25; Tr. 173, line 1). Cornell began counting his money but Bachman refused to accept it. (Tr. 173, line 12). Cornell questioned Bachman about Utah's right to work law, and Bachman stormed off. (Tr. 173, lines 14-15). The Judge specifically

discredited Bachman's testimony that Cornell said he did not have to pay anything under Utah's right to work law. (ALJD pg. 10). Thus, the Judge's key finding of fact are primarily based on Barton's testimony as supplemented by Cornell and Bachman and her findings of fact are fully substantiated by the record evidence.

Judge Parke's credibility resolutions should be sustained. It is well established that "[t]he Board does not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect." *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Thus, the Board adheres to a highly deferential standard for reviewing the credibility assessments of administrative law judges. See *Pope Concrete Products, Inc.*, 312 NLRB 1171, 1171 (1993) (refusing to overrule the judge's credibility resolutions where there were factual discrepancies between two sets of records); *Borman Inc.,* 273 NLRB 312, 312 (1984) (sustaining the judge's credibility issues despite factual errors made by the judge); but see *E.S. Sutton Realty Co.,* 336 NLRB 405, 405 (2001) (overturning the administrative law judge's credibility resolutions that were based on the witness appearing truthful where that finding was undermined by the documentary evidence).

Here, the clear preponderance of the all the relevant evidence does not support Respondent's contention that the Judge's credibility findings concerning the events of December 1 are incorrect. As discussed fully above, the Judge's findings of fact are based in substantial part on Barton's testimony. The Judge consistently credited Barton's testimony and found his recall to be clear, inherently congruous, and reliable. (ALJD pgs. 6, 7, and 10). Moreover, this is not a case where employer records or other

documentary evidence undermines Barton's testimony. In addition, Barton's testimony is corroborated in significant part by Cornell and in part by Bachman. Thus, the Board should uphold the Judge's decision to credit the testimony of neutral employee witness Barton over parts of Bachman's and Cornell's testimony and to base her findings on an amalgamation of all three's credible testimony. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962) (explaining that weight is given to the administrative law judge's credibility determinations because she "sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records"); *Hanson Material Service Corp.*, 353 NLRB 71, 71 fn. 3 (2008) (reiterating that the review of an administrative law judge's credibility resolutions is highly deferential).

Finally, to the extent that the Judge's findings are based on crediting portions of Cornell's testimony, these credibility resolutions should be affirmed. Respondent argues at length that Cornell was not a credible witness because he engaged in "bribery" and admitted that he hid from Respondent's representatives while he was working on the Huntsman project. In its Exceptions Respondent inappropriately and repeatedly asserts that Cornell "committed a crime" and "bribed" Bachman and, therefore, should not be credited.[4] The record is devoid of any evidence that Cornell has ever been charged or convicted of bribery or any crime for that matter. Rather, Cornell testified on direct examination that on November 22, during a conversation with Bachman about joining Respondent, Cornell offered to give Bachman "a few dollars for his pocket." (Tr. 166, lines 4-5). This admission, made by Cornell without being prompted and on direct examination, does not place his credibility and veracity into question. Moreover, Cornell

[4] Respondent's repeated attempts to characterize Cornell's actions as criminal were overruled by the Judge. (Tr. 190-191)

has not been charged or convicted of a crime in relation to this incident and, therefore, the statement is of limited value for credibility purposes. Even if Cornell had been convicted of a crime, the Board has credited witnesses despite prior felony convictions. See *Ideal Donut Shop*, 148 NLRB 236, 239 fn. 1 (1964) enfd. 347 F.2d 498 (7th Cir. 1965) (crediting the testimony of a witness despite the fact that the witness had been convicted of second degree burglary); see also *Franklin Iron & Metal Corp.* 315 NLRB 819 fn. 1 (1994), enfd. 83 F.3d 156 (6th Cir. 1996).

With respect to Cornell's admission that he hid on the roof, the record reveals that the Judge took this evidence into consideration. (ALJD pg. 7). Moreover, Cornell testified that he and the other employees were following the orders of the foreman. (Tr. 193, line 24). Thus, Cornell's conduct on the jobsite is not relevant to his veracity at trial.

Accordingly, the Board is respectfully urged to affirm the Judge's credibility resolutions and resulting findings of fact that that on December 1, Cornell offered to pay the nonmember hiring hall registration fee and the Respondent refused to accept it after Cornell questioned its hiring hall procedures in light of Utah's right to work law.

IV. Judge Parke's findings regarding the events after December 1 should be affirmed

Respondent argues that the Judge erred in crediting Cornell's version of the January 2011 telephone conversation between Cornell and Bachman. Respondent further argues that the Judge erred by concluding that Cornell's query in January encompassed his December 1 request to pay the nonmember fees. Regarding Cornell's credibility, the clear preponderance of the all the relevant evidence does not support Respondent's contention that the Judge's credibility findings should be overturned.

Judge Parke found that after December 1, Cornell left several voice mail messages for Respondent representatives, but no one returned his calls. (ALJD pg. 10). In January 2011, Cornell spoke to Union representative Bachman. Cornell asked if anything had changed and whether Bachman could help him get in the Union. Bachman replied that he had nothing for Cornell. (ALJD pg. 10). Judge Park Concluded that Cornell's "query as to whether anything had changed must reasonably have encompassed the [Respondent's] December 1 refusal to let him pay the nonmember fees" and that "Bachman's response that he still had nothing for Cornell was, therefore, a continuation of the [Respondent's] arbitrarily based refusal to let Cornell pay the nonmember fees." (ALJD pg. 16). In making these findings of fact, the Judge credited Cornell.

As discussed fully above, Judge Parke, in her discretion found portions of Cornell's testimony to be credible. There is no documentary or other evidence that directly conflicts with the Judge's credibility assessments. Moreover, the fact that the Judge credited part of Cornell's testimony but discredited other parts of his testimony does not render Judge Parke's credibility resolutions suspect. It is common practice and proper for a Judge to credit one part, but discredit another part of a witnesses' testimony. *Narricot Industries,* 353 NLRB 775, 775 fn. 3 (2009).

Finally, the Judge found that Bachman's statement that "he had nothing for Cornell" was a continuation of his refusal to allow Cornell to pay the nonmember fee. (ALJD pg. 16). This finding is not clearly erroneous in light of the record as a whole. As the Judge found, on December 1, Bachman refused to allow Cornell to pay the nonmember fee because Cornell questioned the hiring hall procedures in relation to Utah's right to work law. Therefore, it is plainly reasonable for Judge Parke to construe

Bachman's statement that "he had nothing for Cornell" as a continuation of Bachman's earlier refusal to allow Cornell to pay the nonmember fee for arbitrary reasons. (ALJD pg. 16). The Judge's assessment in this regard is consistent with prior findings and fits together logically with the entire sequence of events. Finally, there is nothing in the record that directly undermines the Judge's findings. Thus, under the highly deferential standard established in *Standard Dry Wall*, the Judge's credibility resolutions and inferences based on those credibility resolutions should be affirmed.

V. Judge Parke's conclusions of law are fully supported by Board law

Respondent contends that Judge Parke's conclusions of law are invalid because they are premised on erroneous findings of fact. As discussed fully above, Judge Parke's credibility resolutions and findings of fact are supported by the record and, therefore, should be sustained. Moreover, the conclusions of law, which flow from those findings of fact are fully substantiated by Board law.

Judge Parke made the following two conclusions of law:

1. By refusing to permit Cornell to pay the nonmember hiring hall registration fee on December 1 because Cornell questioned its hiring hall procedures, an arbitrary reason unrelated to valid eligibility rules, Respondent engaged in unfair labor practices within the meaning of Section 8(b)(1)(A).

2. By refusing to permit Gerald Cornell to sign its out-of-work register after December 1, 2010, because Cornell questioned its hiring hall procedures, an arbitrary reason unrelated to valid eligibility rules, Respondent has caused or attempted to cause employer discrimination within the meaning of Section 8(a)(3) of the act, and has therefore, engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(2) and (1)(A) of the act.

(ALJD pg. 16).

Under Board law, a union's operation of its hiring hall can violate the Act under two distinct legal theories. First, it is well established that any departure from established

hiring hall procedures that results in a denial of employment inherently encourages union membership and violates Section 8(b)(1)(A) and (2) of the Act. *International Union of Operating Engineers, Local 150 (Chiado)*, 352 NLRB 360, 360 (2008); *Plumbers Local Union No. 342, (Contra Costa Electric),* 336 NLRB 549, 552 (2001), enfd. 325 F.3d 301 (D.C. Cir. 2003). The Board's reasoning is that "such departures encourage union membership by signaling the union's power to affect the livelihoods of all hiring hall users, and thus restrain and coerce applicants in the exercise of their Section 7 rights." *Contra Costa Electric*, 336 NLRB at 550. When the General Council establishes that a union has departed from established hiring hall procedures, a violation is established unless the union comes forward with rebuttal evidence that the departure was justified based on a valid union-security clause or is necessary to the effective performance of the union's representative function. Id.; *International Union of Operating Engineers Local 450 (Lathan)*, 267 NLRB 775, 795 (1983). The overall burden of persuasion remains with the General Counsel. 267 NLRB at 795. In determining whether a union has established its necessity defense, the Board looks to whether the union's conduct was arbitrary. *International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local 720 (Lucas I),* 332 NLRB 1, 4 (2000).

Second, the traditional duty of fair representation law applies to exclusive hiring hall operations. *Teamsters, Chauffeurs, Warehousemen & Helpers, Local 631*, 340 NLRB 881, 881 fn. 4. (2003) (clarifying that the Board has not adopted the "heightened duty" standard articulated by the U.S. Court of Appeals for the District of Columbia). Therefore, in operating a hiring hall, a union must not make decisions that are "arbitrary, discriminatory, or in bad faith." See *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65 (1991).

In the context of exclusive hiring halls, "unions are not permitted to affect an employee's employment status for personal, arbitrary, unfair, or capricious reasons, regardless of whether those reasons are related to the employee's union membership or activities." *Contra Costa Electric*, 336 NLRB at 551 citing *Miranda Fuel Co.*, 140 NLRB 181, 186-188 (1962), enfd. denied 326 F.2d 172 (2nd Cir. 1963). However, mere, inadvertent mistakes in the operation of an exclusive hiring hall arising from mere negligence do not violate a union's duty of fair representation. *Contra Costa Electric*, 336 NLRB at 552.

Here, the credible evidence demonstrates that on December 1 Respondent's representative Bachman informed Cornell that he could pay the nonmember registration fee. (ALJD pg. 13). Cornell replied that he would do that. As Cornell produced his money he questioned Bachman about the Respondent's obligations under Utah's right to work law. Bachman refused to accept the money and stormed off. The timing and sequence of events demonstrates that Bachman refused to accept Cornell's nonmember fee because Cornell questioned him about the operation of its hiring hall in connection to the right to work law. Respondent's conduct in this regard is utterly arbitrary. Moreover, Respondent failed to articulate any legitimate reasons for its refusal to accept Cornell's nonmember fee. Thus, Respondent's refusal to accept Cornell's nonmember payment was a departure from its hiring hall rules and was coercive within the meaning of Section 8(b)(1)(A) of the Act.[5] Respondent's refusal to accept Cornell's nonmember fee also violated its duty of fair representation. See *International Longshoremen's Association, Local 846 (Virginia International Terminals)*, 314 NLRB 809, 812 (1994) (concluding

[5] The Judge concluded that this did not violate Section 8(b)(2) of the Act because Cornell was ineligible for referral on that date because he was employed. (ALJD pg. 15).

that the union's refusal to assign port numbers and register applicants for its work list was based on nepotism and other arbitrary reasons and violated its duty of fair representation).

With respect to the events after December 1, the credible evidence establishes that in January 2011 Cornell contacted Bachman and questioned whether anything had changed. (ALJD pg. 10). Bachman replied that he did not have anything for Cornell. Bachman's response is a reiteration of his December 1 arbitrarily based refusal to allow Cornell to pay the nonmember fees. It is undisputed that at this time Cornell was unemployed and in full compliance with the hiring hall rules. (ALJD pg. 10). Accordingly, Bachman's continuing arbitrary refusal to allow Cornell to pay the nonmember fee and register on the hiring hall list foreclosed any opportunity for Cornell to obtain employment through the hiring hall in violation of Section 8(b)(1)(A) and (2). See *Theatrical Wardrobe Union Local 769, IATSE (Broadway in Chicago)*, 349 NLRB 71, 75 (2007) (concluding that the union violated Section 8(b)(1)(A) and (2) by suspending the discriminatee from the referral system based on her challenge to the executive board where she was treated differently than other situated employees); *International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local 720 (Lucas II)*, 341 NLRB 1267 (2004) (concluding on remand that the union's refusal to readmit an employee to its hiring hall after a 10-month hiatus based on the employee's 15 years of prior misconduct was not necessary to the effective performance of its representative function). Respondent's conduct in this regard also breached its duty of fair representation.

VI. Conclusion

Based on the foregoing, Counsel for the Acting General Counsel respectfully urges that the Board overrule the Respondent's Exceptions and affirm the Judge's decision.

Dated: November 2, 2011

Respectfully Submitted,

Kristyn A. Myers
Counsel for the Acting General Counsel
National Labor Relations Board, Region 27
600 17th Street –7th Floor North Tower
Denver, Colorado 80202

CERTIFICATION OF SERVICE

I hereby certify that a copy of the Counsel for the Acting General Counsel's **ANSWERING BRIEF**, together with this Certificate of Service, was E-Filed or E-Mailed, as indicated below, to the following parties on: November 2, 2011.

Board's Office of Executive Secretary
1099 14th St. N.W.
Washington, DC 20570
E-Filed at www.nlrb.gov with the Division of Judges

Mr. Daniel M. Shanley, Esq.
Southwest Regional Council of Carpenters
533 S. Fremont Ave., 9th Floor
Los Angeles, CA 90071-1706
E-Mailed at dshanley@deconsel.com

Mr. Brian Olsen
Perry Olsen Drywall, Inc.
11075 S. State St., Suite 30
Sandy, UT 84070
E-Mailed at brian@perryolsendrywall.com

Mr. Gerald Cornell
1517 W Alder Rd.
Taylorsville, UT 84123
E-Mailed at jcellpsg@yahoo.com

Kristyn Myers
Counsel for the Acting Regional Counsel
National Labor Relations Board, Region 27
600 17th St., Ste. 700 North Tower
Denver, CO 80202-5433
(303) 844-0001 (direct dial)
Kristyn.Myers@nlrb.gov