

**International Union of Operating Engineers, Local  
627 and Stacy M. Loerwald.** Case 17-CB-  
072671

April 17, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN  
AND BLOCK

On August 21, 2012, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>1</sup>

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

<sup>1</sup> Member Griffin, who is a member of the present panel, has recused himself and took no part in the consideration of this case.

<sup>2</sup> The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Applying both *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and the duty-of-fair-representation framework described in *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973) (subsequent history omitted), the judge found, and we agree, that under either theory, the Respondent violated Sec. 8(b)(1)(A) and (2) by removing Stacy M. Loerwald from its out-of-work referral list and refusing to let her re-register on the list. We note that neither the Respondent nor the Acting General Counsel excepted to the judge's decision to analyze the allegation under both of these frameworks.

In adopting the judge's finding that the above-mentioned conduct was unlawful under *Wright Line*, we clarify the judge's recitation of the law as follows. Under *Wright Line*, the Acting General Counsel had to first prove, by a preponderance of the evidence, that Loerwald's protected conduct was a motivating factor in the Respondent's adverse action. Once the Acting General Counsel made a showing of discriminatory motivation by proving Loerwald's protected activity, the Respondent's knowledge of that activity, and the Respondent's animus against her protected conduct, the burden of persuasion shifted to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct. See *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB 533, 536 fn. 18 (2013). For the reasons she stated, we agree with the judge that the Acting General Counsel met his initial burden, and that the Respondent failed to show that it would have taken the same action absent Loerwald's protected activity.

<sup>3</sup> We have modified the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB 518, 519 fn. 10

ORDER

The National Labor Relations Board orders that the Respondent, International Union of Operating Engineers, Local 627, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing requests from Stacy M. Loerwald or other applicants for employment to examine the out-of-work referral list.

(b) Removing Loerwald or any qualified applicant for employment from its out-of-work referral list for arbitrary or discriminatory reasons.

(c) Refusing to re-register Loerwald or any other qualified applicant for employment to his or her rightful place on the out-of-work referral list for arbitrary or discriminatory reasons.

(d) Causing or attempting to cause any employer that is signatory to its collective-bargaining agreement to refuse to hire Loerwald or any other qualified applicant for discriminatory or arbitrary reasons.

(e) Refusing to stamp the Oklahoma Employment Security Commission work search book of any applicant for employment for arbitrary or discriminatory reasons.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Grant Stacy M. Loerwald's requests to examine the out-of-work referral list. In addition, if the versions of the out-of-work lists as they existed on the dates she requested to see them are saved or retrievable in any form, permit her to examine the lists as they existed on any and all of those dates.

(b) Within 14 days from the date of this Order, restore Stacy M. Loerwald to the out-of-work list in her rightful order of priority.

(c) Make Stacy M. Loerwald whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(d) Compensate Loerwald for any adverse income tax consequences of receiving her backpay in one lump sum.

(e) Within 14 days from the date of this Order, remove from its files any reference to Stacy M. Loerwald's removal from the out-of-work referral list, and within 3 days thereafter, notify her in writing that this has been

(2012) (holding that a respondent that has never been an employer of the discriminatee is subject to the tax-compensation remedy but not the Social Security reporting requirement). We have also substituted a new notice to conform to the Order as modified.

done and that her removal from the list will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all hiring-hall referral records, payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its offices, hiring halls, and any other relevant facilities in Oklahoma City and Tulsa, Oklahoma, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Within 14 days after service by the Region, deliver to the Regional Director for Region 17 signed copies of the notice in sufficient number for posting by employers signatory to the collective-bargaining agreement, if they wish, in all places where notices to employees are customarily posted at their facilities within the area served by the Respondent.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 17 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to provide applicants for employment, upon request, the opportunity to examine the out-of-work referral list.

WE WILL NOT remove applicants for employment from the out-of-work referral list, or refuse to permit them to register on the list, for arbitrary or discriminatory reasons.

WE WILL NOT cause or attempt to cause any employer to discriminate against employees seeking referrals for employment.

WE WILL NOT refuse to stamp the Oklahoma Employment Security Commission work search book presented to us by any applicant for employment for arbitrary or discriminatory reasons.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL grant Stacy M. Loerwald's requests to examine the out-of-work referral list.

WE WILL, within 14 days from the date of the Board's Order, restore Stacy M. Loerwald to the out-of-work referral list in her rightful order of priority.

WE WILL make Stacy M. Loerwald whole for any loss of earnings and other benefits resulting from our removal of her from, and our refusal to reinstate her to, the out-of-work referral list, less any net interim earnings, plus interest.

WE WILL compensate Loerwald for any adverse income tax consequences of receiving her backpay in one lump sum.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Stacy M. Loerwald's removal from the out-of-work referral list, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that her removal from the list will not be used against her in any way.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627

*Charles T. Hoskin, Esq.*, for the General Counsel.  
*James C. Thomas, Esq.*, for the Respondent.  
*Barrett T. Bowers, Esq.*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Oklahoma City, Oklahoma, on May 8, 2012. Stacy M. Loerwald (Loerwald) filed the charge on January 18, 2012, and amended it on March 26 and April 3, 2012. The Acting General Counsel issued the complaint on March 30, 2012. The International Union of Operating Engineers, Local 627 (Respondent, THE Union, or Local 627) filed a timely answer denying all material allegations.

The complaint alleges that Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by, on various dates, refusing to grant Loerwald's requests to examine its exclusive hiring hall work referral list and records and by refusing to sign her Oklahoma Employment Security Commission work search book. At the hearing, the Acting General Counsel moved to amend the complaint to allege that Respondent refused to permit Loerwald to examine the work referral list on additional specified dates. I granted the motion to amend because the allegation is closely related to the allegations in the charge and the original complaint. *Payless Drug Stores*, 313 NLRB 1220, 1221 (1994). The complaint further alleges that Respondent violated Section 8(b)(1)(A) and 8(2) of the Act by removing Loerwald from the out-of-work referral list and refusing to permit her to re-register.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the Acting General Counsel and Respondent's briefs,<sup>1</sup> I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Oklahoma Commercial and Industrial Builders and Steel Erectors Association (the Association), with its principal office and place of business in Tulsa, Oklahoma, is an organization of employers engaged in the construction industry. One function of the Association is to represent its employer-members in negotiating and administering collective-bargaining agreements with labor organizations. During the past 12 months and at all material times, the employer-members of the Association collectively purchased and received goods valued in excess of \$50,000 directly from points outside the State of Oklahoma, and performed services valued in excess of \$50,000 in States other than Oklahoma. I find that the employer-members of the Association have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find, and it is uncontested, that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> The Charging Party did not file a brief.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background of Local 627

Respondent is a labor organization that deals primarily in the construction industry, and currently represents approximately 1200 employee-members (Tr. 202, 247).<sup>2</sup> Its facilities are divided into two districts which are located in Tulsa, Oklahoma (District 1), and Oklahoma City, Oklahoma (District 2). (Tr. 24.) In August 2011,<sup>3</sup> Michael Stark Jr. was elected the new business manager of the Respondent Union, defeating Larry Gaines, the former business manager. (Tr. 210–211.) Upon taking office, Stark effectively established a new administration and replaced the business agents at both districts. Stark also was charged with implementing a stronger adherence to the Union's procedures and bylaws per the request of its regional director. (Tr. 193, 210–211, 21.) According to Stark, the administration before his did not strictly follow the written protocols. (Tr. 208.)

#### 1. Respondent's hiring hall

It is undisputed that at all material times Respondent has run an exclusive hiring hall, where employers who are signatory to collective-bargaining agreements with Respondent are required to utilize the hiring hall for all employee hiring needs. Likewise, any employees wishing to work for an employer signatory to the bargaining agreement must also utilize the hiring hall to gain such employment. (Jt. Exh. 1; Tr. 15–16.) To help facilitate the exclusive hiring hall, the Respondent maintains an "Out of Work List" (OWL) at each of its facilities to organize which employee-members of the Union are not working and therefore may be referred to a job. (Tr. 21–22, 202–203.)

#### 2. The out-of-work list

The OWL is Respondent's main resource for tracking which employee-members are currently unemployed and what their qualifications are. The document is typically 20 pages long with 8 to 10 names per page. (GC Exhs. 25–33; Tr. 98.) The names are listed in the order in which the employees were put on the OWL. Information provided on the OWL includes the employee's name, address, phone number, experience, qualifications, and the date that his/her last job ended. (GC Exhs. 25–33; Tr. 20–21.) During the previous administration, one OWL was shared between both districts; however after the administration shift, separate lists were created for each district. (Tr. 24.)

Business agents control and update the OWL. When a signatory contractor contacts the business agent, that contractor describes the position(s) they are looking to fill and gives various qualification requirements. The business agent then looks down the list, working from top to bottom, finds the first quali-

<sup>2</sup> Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for Acting General Counsel's exhibit; and "Jt. Exh." for joint exhibit. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based by review and consideration of the entire record.

<sup>3</sup> All dates in are in 2011, unless otherwise specified.

fied employee-member, and offers him or her a job. (Tr. 177–178, 189.) To contact the employee to make the offer, the business agent typically calls the employee at the phone number he or she has listed on a form described below. (Tr. 178, 190.) If the employee accepts, he or she is then dispatched to the jobsite. Once physically at the job, the contractor then has the option to terminate the employee at any time, even before the employee begins work. (Tr. 35; GC Exh. 3, p. 33.) To initially register for the OWL, an employee-member must first fill out an Out-of-Work Applicant Experience Record which details that employee’s personal information and working qualifications. (Tr. 202.) Regarding the personal information, the record asks for various contact information, including the employee’s name, address, home phone, cell phone, and email. The record also asks for either the employee’s driver’s license number or social security number (GC Exh. 2). Over time, as the employee gains more qualifications, he or she is expected to occasionally fill out new records to keep the information current. (Tr. 202.) Once on the OWL, the employee-member stays on the list until he or she accepts a job. (Tr. 189.) After accepting a job, the employee is then taken off the list. Upon finishing, quitting, or being fired from a job, the employee may then contact the hiring hall, inform the Union that the job has ended, and be placed back at the bottom of the list.<sup>4</sup> (Tr. 21–22.)

The “Out of Work List Procedures” is a document enumerating a number of rules that the employee-members are supposed to follow when placed upon the OWL. (GC Exh. 9.)<sup>5</sup> The relevant provisions state:

It shall be the responsibility of the applicant to notify the union hall of any change in their address and telephone number and to remove their name from the list if they are unavailable for work and further to notify all districts in which they are registered when dispatched to work from any district.

An applicant when referred to a job shall be removed from the out-of-work list. . . .

. . . .

*Failure to maintain a working telephone number where an applicant can be notified of work opportunities will result in the applicant being removed from the list and an applicant must re-register to be placed back on the list.*

Applicants who refuse three (3) job referral opportunities for any reason will be placed on the bottom of the list in the district in which the three (3) referrals occur.

(GC Exh. 9; emphasis added.) Jan Coleman, who served as a business agent for the Union from mid-2008 until August 2011, had never read the OWL procedures prior to the hearing, though he was generally familiar with the rules. (Tr. 174, 195.) Stark, on the other hand, became familiar with the document when he became a member of the Union roughly 14 years ago.

<sup>4</sup> There are certain exceptions detailed in the OWL procedures that allow an employee-member to reclaim their old position on the list despite having recently accepted and finished work. (GC Exh 9.) Those exceptions, however, are not at issue in this litigation.

<sup>5</sup> The OWL procedures are undated.

(Tr. 206–207.)

Respondent’s bylaws also specify a number of requirements regarding the OWL. (Jt. Exh. 4, p. 21.) Article XVIII, section 3 begins by stating, “An out-of-work list consisting of Engineers available for work, shall be posted at Local 627’s office; and job referrals shall, in compliance with the law, be made on a non-discriminatory basis.” The bylaws then list employee-member duties—most of which are included in the OWL procedures document. Notably however, there is no provision in the bylaws that says an employee-member shall be removed from the list for not maintaining a working telephone number.<sup>6</sup>

The bylaws’ posting requirement for the OWL, as quoted above, has also been a source of controversy. Coleman’s interpretation of the posting requirement was that the OWL had to be available for any employee-members who wished to see it (Tr. 176, 184). On average, Coleman showed the list once or twice a week to employee-members who asked to see it, and typically he left the list open on his desk. (Tr. 175–176.) Stark agreed that employee-members have a right to see the list, but stated that the posting requirement was satisfied by merely having current information entered into Respondent’s internal computer system. (Tr. 217–219, 223, 225.)

#### *B. Unemployment “Check-in” Requirements*

In order to successfully receive unemployment benefits from the State of Oklahoma, an individual must satisfy a number of work search requirements. (GC Exh. 23.) One such requirement is that the unemployed person must contact two different employers each week to seek employment, and then they may not repeat contacting those employers for 4 weeks. The Oklahoma Employment Security Commission further instructs that “Union members that have a hiring hall must contact the hiring hall each week.” To ensure the Commission’s requirements are being met, the unemployed person must maintain a provided booklet that logs all of their job search activities. Loerwald was required to have the Union stamp her booklet weekly to verify that she was looking for work and had “checked-in” with the Union (Tr. 78–79).

#### *C. Loerwald’s Interactions with the Respondent Union*

Loerwald has been an employee-member of the Union and has utilized the hiring hall at all relevant times. (Tr. 17.)

##### *1. Prior lawsuits*

Prior to filing the charges that led to the instant complaint, Loerwald had filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) against Respondent. The attendant lawsuit, which was pending in court at the time of the hearing, has three plaintiffs, including Loerwald.<sup>7</sup> (Tr. 125.)

<sup>6</sup> Neither the bylaws nor the OWL procedures address how to register or re-register for the OWL.

<sup>7</sup> By way of background, the lawsuit was filed on October 5, 2011. Filing a charge with the EEOC is a prerequisite to filing a lawsuit in court. My findings herein, however, rely predominantly on the timing of Loerwald’s actions the Union deemed as attempting to prove her lawsuit, discussed herein, not on the date it was filed.

## 2. Attempts to get jobs

By September 2011, Loerwald had been out of work for almost 2 months. In early September, Loerwald approached the current business agent at the Oklahoma City District (District 2), Alan Farris, about getting a job with Deep South Rigging, a signatory contractor with the Union. (Tr. 27–28.) On September 16, Loerwald then spoke on the phone with Perry Morgan, the business agent for the Tulsa District (District 1). According to Loerwald, Morgan told her that she had passed Deep South’s background check, giving Loerwald the impression that she had received the job.<sup>8</sup> (Tr. 29–30.) Loerwald arranged for housing in Ponca City, where the job was to be, and moved there prior to the start of the job. On September 29, however, Morgan called Loerwald and informed her that she had in fact not passed the background check due to her criminal history, and consequently did not receive the job. Loerwald was frustrated by this experience. (Tr. 29–30.)

On September 28, while her status with Deep South was still in question, Loerwald contacted Farris. During their conversation, Farris told Loerwald that if the Deep South job did not work out, there was a new job likely to be available in Enid, Oklahoma, working for Northwest Crane at the Koch Refinery plant. Farris explained to Loerwald that she was the first oiler he had on the list. (Tr. 31.) By October 13, Loerwald had been rejected by Deep South and had still not heard from Northwest, so she contacted Farris. Farris informed her that Northwest had requested that the Union refer five employees but then had only contacted three to be hired. Loerwald was not one of the three employees contacted and subsequently did not gain employment with Northwest. (Tr. 31–33.) Loerwald was disturbed by this event, based on her understanding that the signatory contractors lack the authority to pick and choose which employees the hiring hall sends because it undermines the OWL process.<sup>9</sup> (Tr. 34–35.) Loerwald’s fears were more or less confirmed when she learned that two of the three people who got the Northwest Crane job, Mr. Tipher<sup>10</sup> and Cody Luster, were below her on the OWL and therefore should not have been hired before her. (Tr. 54–55.)

## 3. Loerwald removes her phone number from the out-of-work list

Due to the two failed job prospects, Loerwald ultimately decided to remove her phone number from the OWL and replace it with a fax number. (Tr. 44.) Her reason for doing this was not to remove herself from the OWL, but instead to force the

<sup>8</sup> Stark disputes this but I do not find resolution of the dispute necessary. Regardless of what precisely Morgan said, Loerwald was clearly left with the impression that she had gotten the job offer, as shown by her moving to Ponca City.

<sup>9</sup> Specifically, as set forth above, contractors are only able to reject an employee sent by the Union once they physically arrive at the job, and therefore rejecting employees before that point is impermissibly premature. Though the result is the same, i.e., the employee does not start the job, the distinction is important. If the Union does not send the qualified employee who is at the top of the list, any recourse would lie with the Union. If the Union sends the employee to the job but the employer rejects her, any recourse would lie with the employer.

<sup>10</sup> Tipher’s first name is not in the record.

Union to communicate job offers to her through fax so that she would have a “tangible” and “bona fide” job offer when such opportunities arose. (Tr. 45.)

On October 14, Loerwald went into the union hall to see Farris. She brought a digital recorder with her that day and recorded her conversations. Before meeting with Farris, Loerwald asked the union secretary, Rhea Ellen Bobo, to remove Loerwald’s phone number from the OWL. (Tr. 36.) That conversation was captured by Loerwald’s digital recorder as follows:

MS. LOERWALD: My phone number, I need you to eradicate from the system, get it off the out-of-work list today.

MS. BOBO: How are they going to contact you for work purposes? Do you got another one?

MS. LOERWALD: It’s a fax number.

MS. BOBO: Okay. It’s a fax number?

MS. LOERWALD: Yep.

(GC Exh. 3, p. 3.)<sup>11</sup> Bobo did not tell Loerwald that removal of her phone number would take her out of compliance with the OWL procedures. (Tr. 68.)

Immediately after that conversation, Loerwald met with Farris. During their discussion, Farris indicated that Northwest Crane should not have asked for five employees and then only had three sent. (GC Exh. 3, pp. 31–32.) Farris also stated that, “I’ve had three refusals on a bunch of people in here that I haven’t started pulling them down on the list. Because these people have been on the list six months.” (GC Exh. 3, p. 30.) Given that both the bylaws and the OWL procedures say that an employee-member who refuses a job three times must be moved to the bottom of the list, this comment made Loerwald concerned that the OWL was not being properly maintained. (Tr. 49.)

## 4. Loerwald’s contact with the Union during October and November

The day after speaking with Farris, Loerwald called Stark to voice her various concerns. (Tr. 51.) Stark told Loerwald he would look into some of her complaints. (GC Exh. 4.)

On October 17, Loerwald’s attorney, Barrett Bowers, sent a letter to Respondent’s attorney, James Thomas. It referenced Loerwald’s discrimination suit against the Union, and noted that since the lawsuit was filed, Loerwald had been in contact with the union officers in order to obtain work. Bowers instructed Respondent only to communicate with Loerwald when they had a “bona fide job offer.” The letter provided Loerwald’s fax number, and instructed the Union to either fax or email job offers to her.<sup>12</sup> (GC Exh. 5; Tr. 56.)

On October 20, Loerwald again visited the Oklahoma City union hall and recorded her conversations. (Tr. 56–57.) While talking with Farris, Loerwald requested to see the OWL. Farris retrieved the list from his truck, flipped to the page with Loerwald’s name on it, and showed it to her. When Loerwald

<sup>11</sup> All recorded conversations were later transcribed and verified as accurate.

<sup>12</sup> There is no response to this letter of record prior to November.

reached to take the list from Farris, he refused to let go, and she was not able to view the other pages. (Tr. 61–62.) Loerwald testified that previously, on October 14, Farris had allowed her to personally examine multiple pages of the list in his office. (Tr. 63.)

On November 2, Loerwald visited the union hall to see the OWL, and again captured her conversations on her digital recorder. (Tr. 64–65.) This time Stark was present at the union hall, and Loerwald asked him directly if she could see the list. Stark told her that it was not union policy to show employees the list every day, and then told her the Union “doesn’t stand for” harassment of the business agents. (GC Exh. 8, pp. 2–3.) The two then argued about whether or not Loerwald had been skipped over on the list and what Morgan had initially told her in regard to the Deep South job. Specifically, Stark maintained that all Morgan told Loerwald was that she was on the OWL—not that she had passed the background check. At the end of their conversation, Loerwald asked if Stark was refusing her access to the OWL, and Stark responded by stating, “You’re on the out-of-work list, and that’s all I need to tell you. Go talk to your attorney about it.” (GC Exh. 8, p. 4–8.) Stark testified that he could have provided Loerwald with the OWL, but that he did not “believe it would have satisfied her personally.” (Tr. 229.)

#### 5. Loerwald’s removal from the out-of-work list

On November 7, Bowers received two letters from Thomas expressing that Loerwald had been removed from the OWL. (GC Exh. 9, 10; Tr. 66.) Both letters were captioned with “*Loerwald et al. v. White Construction et al.*,” and contained the case number for her EEOC suit. The first letter explained as follows:

I have reviewed the “Out of work list” and the Union’s Procedures relating to that list, and I have found that Ms. Loerwald is clearly in violation of Local 627’s Procedures. Consequently, effective November 7, 2011, Ms. Loerwald has been removed from the list until such time she is in compliance with the Union’s procedures.

The letter also expressed concern about Loerwald “harassing” the business agents and other employees by her “futile attempt to gain evidence” for her court case. The second letter merely stated, “Please find attached the policy by which Ms. Loerwald has been removed from the out of work list.” Attached to that letter was a copy of the two-page OWL procedures document. Neither letter explicitly stated which term of the OWL procedures had caused Loerwald’s removal from the list. Nonetheless, the parties seem to agree that it was Loerwald’s failure to maintain a working phone number. (Tr. 212–214.)

The next day, November 8, Bowers responded to Thomas’ letters. Bowers stated that Loerwald was still in compliance with the OWL procedures because Respondent had Loerwald’s counsel’s phone number, and that should be sufficient given that Loerwald had wished to be contacted exclusively through counsel. Bowers also expressed that Respondent was not following its own rules set forth in the bylaws because the business agents refused to allow Loerwald access the OWL in vio-

lation of article XVIII, section 3 (requiring that the Out-of-Work List be “posted”). (GC Exh. 11.)

More letters were exchanged between the parties’ attorneys throughout November. Finally, on November 18, Bowers sent a letter to Thomas providing Loerwald’s phone number. (GC Exhs. 12–14.) The letter further requested that Loerwald be reinstated to her original position on the OWL immediately. (GC Exh. 14.) Nevertheless, Loerwald was not put back on the OWL.

#### 6. The November 11 union meeting

On the evening of November 11, Loerwald attended a union hall meeting with the intention of voicing her concerns about the OWL. (Tr. 73–74.) Coleman, the Union’s treasurer and former business agent, also attended. (Tr. 72–73, 182–183.) After the meeting, Loerwald had a conversation with Coleman in the parking lot. Coleman disclosed to Loerwald that Farris and Curtis Chambers, the second appointed business agent for the Oklahoma City District, had approached him asking for his interpretation of the radicalism clause under Respondent’s constitution. (Tr. 74, 183.) Coleman testified that though they never expressly stated that it was Loerwald they were hoping to use the clause against, Farris and Curtis strongly implied as much. (Tr. 184.) Still, Coleman assured Loerwald that the clause did not likely apply to her and that she did not need to worry about it. (Tr. 185.)

#### 7. Loerwald’s visits to the union hall through January 2012

For the next 2 months, Loerwald visited the union hall regularly in order to see the OWL and to have her unemployment booklet stamped. On November 23, Loerwald went to the union hall and Bobo’s daughter stamped her booklet. Loerwald then asked Farris if she could see the OWL. Farris told Loerwald that he did not have a copy of the list printed out, and that because he was installing a new system for his computer, he would not have a copy until after Thanksgiving. (Tr. 78–80; GC Exh. 15.)

On November 30, after Thanksgiving, Loerwald again went to the union hall. Once again Loerwald asked Farris to see the OWL, and when he refused, she asked if she was even on the list. (Tr. 81–83; GC Exh. 16.) The pertinent part of their conversation went as follows:

MS LOERWALD: I’d like to see [the Out of Work List]

ALAN FARRIS: Well I can’t show you the one I’ve just been working on, I’ve got all kinds of notes on it.

MS LOERWALD: Um k, so notes is the only reason why I’m not allowed to view it?

ALAN FARRIS: Well I’ve got personal information on it. You know every time I talk to somebody, I make notes about it.

MS LOERWALD: Am I back on the list?

ALAN FARRIS: Right uh well as of uh, the day you took your phone, your names on there, but there’s no phone number to it.

....

MS LOERWALD: Am I still on the list where I was originally at?

ALAN FARRIS: No you’re not.

MS LOERWALD: Where am I?

ALAN FARRIS: You took yourself off it.

MS LOERWALD: No actually I didn't, so where did you put me on the list Mr. Farris?

ALAN FARRIS: I didn't put you anywhere, if you want to visit with Mike about, then go visit with Mike about it.

(GC Exh. 16.)

On December 5 and 14, Loerwald again visited the union hall to get her unemployment booklet stamped and to see the OWL. On both visits Loerwald asked Farris about the list, and both times he told her that she was not allowed to see it. (Tr. 84–85; GC Exh. 17.) On January 4, 2012, Loerwald went to the union hall twice. On her first visit, she requested to see the OWL. Farris told her that he did not have a copy she could look at but that he would print one out and redact all the private information for her in the afternoon. (Tr. 90; GC Exh. 19.) When Loerwald returned in the afternoon, Farris was not at the union hall, but eventually Bobo gave Loerwald the redacted copy of the OWL. (Tr. 93–94.) Almost all the information on the OWL was redacted, including names. However, by holding the pages to a window, Loerwald was able to read the names on the list, and did not see her name. (Tr. 95–97.)

On January 10, 2012, Loerwald returned to the union hall to have her unemployment booklet stamped. This time, however, Bobo refused to stamp the booklet. When questioned why, Bobo told Loerwald that Stark had instructed her not to stamp it because she was not registered on the OWL. (Tr. 100–101; GC Exh. 21.) Loerwald attempted to see the OWL and have her book stamped one last time on January 17, 2012, but again was denied by both Bobo and Farris. (Tr. 101–102, 105–106.)

### III. DECISION AND ANALYSIS

#### A. Alleged Denial of Requests to Examine the Out-of-Work List

The Acting General Counsel, at complaint paragraphs 5(b) and 6, alleges that the Union violated Section 8(b)(1)(A) of the Act by refusing Loerwald's requests to examine the exclusive hiring hall work referral list and referral records.

Section 8(b)(1)(A) of the Act provides that it is an unfair labor practice for a labor organization or its agents to restrain or coerce employees "in the exercise of the rights guaranteed in section 7 [section 157 of this title]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The rights guaranteed in Section 7 include, in pertinent part, the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

As a judicially recognized protection implicit within the Act, a union has a duty of fair representation to its members. See *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). More specifically, in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), the Supreme Court defined this duty as "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." The Board

thus has determined that a union's breach of the duty of fair representation qualifies as an unfair labor practice under the Act. See *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963).

Within the Union's broad duty of fair representation there exist a number of more specifically defined obligations in the exclusive hiring hall context. One of these obligations is that unions must provide their members access to its job referral lists so that the members may determine whether or not their referral rights are being protected. See *Operating Engineers Local 324*, 226 NLRB 587 (1976); *Electrical Workers Local 24 (Mona Electric)*, 356 NLRB 581, 581 fn. 3 (2011). The Board has explained that a member's right to referral information must be respected by the union because it is the member's only means to "fully investigate whether or not [their] referral rights [are] being protected." *Operating Engineers Local 324*, supra. Accordingly, the Board has found on numerous occasions that a union operating an exclusive hiring hall commits an unfair labor practice when it denies members access to its referral records. See, e.g., *Plumbers Local 32 (Anthony Construction Co.)*, 346 NLRB 1095, 1096 (2006); *Boilermakers Local 197 (Northeastern State Boilermaker Employers)*, 318 NLRB 205 (1995) (finding that the respondent union arbitrarily denied one of its members a photocopy of referral records in violation of Sec. 8(b)(1)(A)); *Iron Workers Local 709 (E.I. Dupont & Co.)*, 296 NLRB 199 (1989) (affirming the administrative law judge's decision that union violated the Act by refusing to let a members review the out-of-work list). Some Board cases have articulated a more stringent standard, requiring the union to permit inspection of the referral records upon a "reasonable belief" that the union treated him unfairly. See, e.g., *Boilermakers*, supra.

Turning to the instant case, even under the more stringent standard, I find that Loerwald reasonably believed she was being treated unfairly by the hiring hall for a number of reasons. As discussed fully in the statement of facts, she believed that the Union should have referred her to the Northwest Crane job because she was the first qualified member on the OWL, yet she was never sent to the jobsite. Farris acknowledged that she should have been sent. (GC Exh. 3, pp. 31–34.) In addition, Loerwald learned that Farris was not moving members to the bottom of the list after three job refusals, as the bylaws require. (GC Exh. 3, p. 30.) Finally, I find the repeated denials of access themselves, and the arguments that ensued during Loerwald's attempts to see the OWL, reasonably caused Loerwald to believe it was not being properly maintained.

It is undeniable that on numerous occasions the Union refused Loerwald access to the OWL. Beginning on November 2, both the Union's business manager, Stark, and the Union's business agent, Farris, continuously withheld the referral list from Loerwald, citing to a variety of inadequate excuses.

On November 2, Stark told Loerwald that it was not the Union's policy to show members the OWL every day. (GC Exh. 8, pp. 2–3.) At the end of their discussion, when asked if he was refusing Loerwald access to the list, Stark replied, "You're on the out-of-work list, and that's all I need to tell you. Go talk to your attorney about it." (GC Exh. 8, p. 7.) I find this to be an unlawful denial of the Charging Party's right to review the

OWL.

On November 23, Loerwald again requested to see the OWL. This time Farris denied her access, stating that he did not currently have a copy printed out and that he was installing a new system on his computer that would make it impossible for her to see the list until after Thanksgiving. (GC Exh. 15.) Given the nature of the OWL and the constant updates it requires, I find it implausible that Farris was unable to produce a copy of the list for Loerwald at this time. Additionally, the Union's bylaws explicitly state that the OWL "shall be posted at Local 627's office." (Jt. Exh. 4.) This rule thus demonstrates the Union's recognition of its own duty to have the list available to its members, and therefore runs contrary to Farris' excuses.<sup>13</sup> I therefore find this also to be an unlawful denial of Loerwald's rights.

On November 30, after Thanksgiving, Loerwald attempted to follow up on Farris' promise; however he again refused her access to the OWL. This time Farris claimed that she was not allowed to see the list because he had written notes with other members' personal information on it. (GC Exh. 16.) I find this excuse to also lack merit. The record has shown that the OWL is a computer-generated document. Therefore, if the notes Farris referred to were handwritten, he could have easily printed out a new copy of the list. If the notes had been made on the computer, this too could have easily been cured with some form of redaction or revision. Indeed, under Farris' rationale, the Union could feasibly never have to show members the list because of personal notes on the document. This runs contrary to the Act and established precedent, and I find that it was an unlawful denial of Loerwald's right to inspect the OWL.

On December 5 and 14, Loerwald again asked Farris if she could see the OWL. On both occasions, Farris refused. Accordingly, I find that these two instances amount to unlawful denials of Loerwald's right to see the OWL.

At hearing, I granted the Acting General Counsel's request to amend the complaint to allege another unlawful refusal on January 4, 2012. On that occasion, Loerwald received a copy of the OWL with all information blacked out except for the page numbers, the date the document was printed, and the workers' qualifications. (Tr. 96.) I find that without any identifying information, such as names or member numbers, the list was useless for purposes of determining whether or not

<sup>13</sup> When questioned about how he interpreted the bylaws' posting requirement, Stark stated that he believed it just meant the list has to be "posted in a computer." (Tr. 216.) This interpretation is absurd. Stark's attempt to find refuge in the technological version of "post" also fails to comport with any reasonable definition of the term. In his testimony, he made the analogy of posting to Craigslist, which places items on-line and open for others to view. Indeed, the hope of posting an item for sale on such a site is that many will view the item and want to buy it. This type of posting is in line with one of the term's accepted definitions. For illustration purposes only, *Merriam-Webster* defines "post" as it relates to an electronic posting as: "to publish (as a message) in an online forum (as an electronic bulletin board)." See <http://www.merriam-webster.com/dictionary/post>. Maintaining a list in an internal computer system, without open access to the list, however, is out of line with any rational definition of the term. Nonetheless, it is clear that Farris still did not satisfy his own interpretation of "post" because his computer was ostensibly unable to produce the list.

Loerwald was registered, or where she stood in comparison to others. Therefore, I find that on January 4, 2012, Respondent again unlawfully denied Loerwald access to the OWL.

Finally, in its brief, counsel for the Acting General Counsel notes two other occasions where the Union denied Loerwald access to the OWL that were not originally pleaded in the complaint. Counsel contends that because all of the relevant witnesses were available and testified about these instances, they were fully litigated and should be ruled on as well. I agree, and further find that the allegations are closely connected to the complaint allegations. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); *Hi-Tech Cable Corp.*, 318 NLRB 280, 280 (1995), enfd. in part 128 F.3d 271 (5th Cir. 1997).<sup>14</sup>

The first additional alleged denial occurred on October 20, 2011. On that day, Loerwald requested to see the OWL, and Farris showed her the page she was on but did not let her see any other pages. (Tr. 61-62, 259.) I find that this sort of limited access to the OWL was inadequate for allowing Loerwald to "fully investigate" whether or not the list was being properly maintained. *Operating Engineers Local 324*, 226 NLRB at 587; (Tr. 61). Therefore, because Farris stopped Loerwald from reviewing the entire OWL, I find that the Respondent again committed an unfair labor practice.

Lastly, the Acting General Counsel alleges that on January 17, 2012, Loerwald once more attempted to see the OWL but was again denied. The transcript of Farris and Loerwald's recorded conversation from that day reveals that she told him she was there to see the OWL. Farris' eventual response, however, was to deny her access to the list and tell her that she should go "speak with [her] attorney" about it. (GC Exh. 22.) Accordingly, I find that the Respondent again unlawfully denied Loerwald her right to review the OWL.<sup>15</sup>

Respondent argues that once she was taken off the OWL, Loerwald had no right to see the list, and her attempts to do so were useless and futile. Respondent cites to no authority, most likely because none exists. The cases cited at the outset of this section hold that the right to see the list belongs to the employee-members, not just to those who are on the list.<sup>16</sup> Certainly a claim, such as here, that a member was improperly removed from a referral list, is "reasonably directed towards ascertaining whether the member has been fairly treated with respect to obtaining job referrals." *NLRB v. Carpenters Local 608*, 811 F.2d 149, 152 (2d Cir. 1987), enfg. 279 NLRB 747 (1986). I therefore reject this argument and find that Loerwald had a right to see the OWL even when her name was not on it. To hold otherwise would sanction the act of arbitrarily removing a member from the list.

Overall, I find that each of the afore-mentioned denials was in breach of the Union's duty of fair representation in violation

<sup>14</sup> Though deciding these denials will not alter the remedy, I am ruling on the two additional allegations to make the record complete.

<sup>15</sup> It is clear that the union business agents, including Coleman (Tr. 184), found Loerwald's repeated attempts to see the OWL as a pain. This does not matter, absent evidence, which does not exist here, that Loerwald behaved in such a way as to lose the Act's protection.

<sup>16</sup> In any event, as discussed below, Loerwald should have remained on the OWL.

of Section 8(b)(1)(A) of the Act.

*B. Alleged Removal from the Out-of-Work List and Failure to Permit Re-Registration*

The Acting General Counsel, at complaint paragraphs 5(c) and 7, alleges that the Union violated Section 8(b)(1)(A) and (2) of the Act as follows: "On or about November 7, 2011, and continuing to date, Respondent has failed and refused to permit Loerwald to register for referral from its exclusive hiring hall to employer-members of the Association or to other employers signatory or bound by the CBA or to permit Loerwald's name to remain on the exclusive hiring hall referral list."<sup>17</sup>

Section 8(b)(1)(A) is set forth in section A of this decision. Section 8(b)(2) makes it an unfair labor practice for a union: "To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of [the Act] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Causing or attempting to cause an employer to discriminate does not necessarily require an overt demand by the union to discriminate. Rather, the discrimination in some cases may take the form of the union's mere failure to refer the employee for work, without any direction to the employer. In *Electrical Workers, Local 675 (S & M Electric Co.)*, 223 NLRB 1499 (1976), enfd. mem. 556 F.2d 574 (4th Cir. 1977), the Board noted:

The Board has consistently found a violation of Section 8(b)(1)(A) and (2) of the Act where a union has discriminatorily refused to refer an employee for employment pursuant to the terms of an exclusive referral system in effect between the union and the employer. Such union conduct, by its very nature, indirectly induces the employer to refuse employment to that employee in violation of Section 8(a)(3).

[Footnote omitted.]

There is more than one way to prove a 8(b)(1)(A) and (2) allegation that a union operating an exclusive hiring hall has managed its referral list to the detriment of a member's employment status. When the allegation involves discriminatory motivation for engaging in activity protected by Section 7 of the Act, the Board has utilized the framework for proving claims of discrimination adopted in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Board has also recognized that when a union operating an exclusive hiring hall fails to follow established procedures and acts in a manner that is arbitrary, provid-

<sup>17</sup> It appears as if the word "to" should appear after "signatory" but the allegation, though rather cumbersome, is clear enough. In his closing brief, the Acting General Counsel framed the allegation as removing Loerwald from the referral list and then failing to restore her to it. Though the complaint does not allege that she was unlawfully "removed" from the referral list, it does state that the Union refused to "permit Loerwald's name to remain on the exclusive hiring hall referral list" as of November 7. Refusing to allow Loerwald's name to remain on the list and removing it from the list are effectively the same.

ed the actions amount to more than occasional negligent mistakes, a violation may be found without regard to motive. Both are discussed below, and I note each paradigm relies on most of the same facts. The key difference is that the former focuses on whether or not the facts support animus related to Section 7 activity, while the latter does not.

1. Retaliation for protected activity analysis

The Acting General Counsel asserts that the Union's actions in taking Loerwald off the OWL and refusing to permit her to re-register were taken in retaliation for her protected activity. In cases alleging unlawful discrimination or otherwise turning on motivation, the Board has adopted the framework set forth in *Wright Line*, supra. See *Plasterers Local 21*, 264 NLRB 192 (1982); *Teamsters "General" Local 200*, 357 NLRB 1844 (2011).<sup>18</sup>

Under *Wright Line*, the Acting General Counsel must establish (1) that the employee/union member engaged in protected activity; (2) the employer/union has knowledge of that activity; and (3) animus or hostility toward this activity was a motivating factor in the employer/union's decision to take the adverse action in question against the employee/union member. If such a showing is made, the burden of persuasion shifts to the employer/union to show that it would have taken the same action even in the absence of the protected activity. *Transportation Management Corp.*, 462 U.S. 393 (1983).

Respondent disputes that Loerwald engaged in protected activity, but the record shows that she did. Loerwald engaged in protected concerted activity when she, along with two other plaintiffs, filed an EEOC charge and then a discrimination lawsuit against Respondent. *Meyers Industries*, 268 NLRB 493 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In addition, as detailed above, Loerwald was open and vocal in her criticism of how the Union was operating the hiring hall, and in particular the OWL. This is protected by Section 7, regardless of whether or not it is concerted. See, e.g., *Teamsters, Local 657 (Texia Productions, Inc.)*, 342 NLRB 637 (2004); See also *Plasterers Local 21*, 264 NLRB at 192 (individual employee's right to criticize union leadership

<sup>18</sup> As noted, because the Union operates an exclusive hiring hall, there is no need to show retaliation for protected Sec. 7 activity to establish an unfair labor practice claim. The need to use *Wright Line* has arisen primarily in cases where the hiring hall is nonexclusive. In such cases, the Board has held the union does not have a duty of fair representation in making referrals because it lacks the power to put jobs out of the workers' reach. See *Carpenters Local 537 (E. I. Du Pont 7 Co.)*, 303 NLRB 419, 420 (1991) (Because union member and other applicants "can obtain employment with Dupont either through the Respondent's hiring hall or by applying directly, there is no exclusive referral relationship and thus no justification for the imposition of a duty of fair representation in referrals."). See also *Laborers Local 889 (Anthony Ferrante & Sons)*, 251 NLRB 1579 (1980); *Teamsters Local 460 (Superior Asphalt Co.)*, 300 NLRB 441 (1990). In such cases the Board has required a showing of unlawful motivation to prove a violation.

clearly protected by the Act).

The Union's knowledge of Loerwald's criticisms of its business agents is direct and well supported by the evidence. The Union's knowledge of the EEOC charge and lawsuit is likewise direct and well supported by letters between the attorneys, the tape recordings of conversations between Loerwald and the union agents, and the testimony at the hearing.

I find that Loerwald's protected activity was a motivating factor in the Union's decision to remove her from the OWL and as its continued refusal to re-enlist her. It is uncontested that on November 7, Respondent removed Loerwald from the OWL, asserting that she was out of compliance with the OWL procedures by failing to maintain a working telephone number. In the letter effectuating the removal, Thomas informed Bowers that Loerwald had been "harassing" the Union's agents in order to see the OWL. He proceeded to say that since then, he had reviewed the Union's OWL procedures, found Loerwald out of compliance, and thus she had been removed from the list. (GC Exh. 10.) I find this chain of events to be highly suspect. Loerwald removed her telephone number on October 14, yet her name was not removed from the OWL until November 7, on the heels of her contentious arguments with the business agents. The decision to enforce the OWL procedures thus coincided not with Loerwald removing her phone number, but with her arguments about how the list was being maintained, her demands to see the list, and ultimately Thomas' letter to Bowers addressing Loerwald's "harassing" conduct in connection with her EEOC complaint. The removal of her name from the OWL is thus directly tied to the business agents' complaint that she was "harassing" them to see the OWL (protected union activity) in a "futile" effort to gain evidence for her discrimination lawsuit (protected concerted activity). Both occurred on the same day by way of the same letter. There can be no doubt, based both on the business agents' complaints of harassment, as well as the tenor of the conversations Loerwald recorded, that Stark and Farris held significant animus toward her because of her lawsuit and her criticism of how the Union operated the OWL.

I further find that the Union did not adequately notify Loerwald of the OWL procedures' requirement to provide the Union with a working phone number. A union must provide adequate notice of its hiring hall procedures.<sup>19</sup> *Electrical Workers, Local 11 (Los Angeles NECA)*, 270 NLRB 424, 426 (1984), *enfd.* 772 F.2d 571 (9th Cir. 1985). Coleman, the prior business agent in charge of maintaining the OWL until August 2011, had not read the OWL procedures before, and did not give Loerwald a copy. Respondent argues that Coleman's lack of knowledge is not worthy of belief. Significantly, however, Stark testified that it would not surprise him to learn that Coleman was unaware of the OWL procedures. (Tr. 205.) In light of this, I credit Loerwald's testimony that she was similarly unaware of them. I find her lack of awareness is attributable to the Union via then-Business Agent Coleman's failure to provide her with a copy of the OWL procedures—a document he

<sup>19</sup> This was not alleged as a separate violation, and is not considered as such.

first read at the hearing.<sup>20</sup> (Tr. 174, 195.) As such, I find that the Union failed to give Loerwald adequate notice of the requirement to have a working telephone number until November 7 at 5:20 p.m. (GC Exh. 9; fn. 21.)

On November 8, Bowers sent a letter to Thomas explaining that "Local 627 is aware that Ms. Loerwald does not wish to be contacted directly but instead through her counsel. Local 627 is also aware or should be aware of the telephone number to reach Ms. Loerwald's counsel." The letter, both as part of the letterhead and within its body, contains Bowers' phone number. (GC Exh. 11.) I find that this correspondence effectively cured any deficiencies regarding the working telephone number requirement, and that Loerwald therefore should promptly have been placed back on the OWL.<sup>21</sup> Notably, the Union has pointed to no rule that requires the telephone number to be the member's own. Moreover, both Coleman and Stark testified that, for members who did not have personal phone numbers, it was common practice to call individuals other than the member and leave messages.<sup>22</sup> (Tr. 178, 180–181, 232.)

In addition, the Acting General Counsel presented evidence of disparate treatment. For 5 months, between October 13, 2011, and March 30, 2012, union member Justin Weant remained on the OWL without a working telephone number.<sup>23</sup> (GC Exhs. 25–33.) On several copies of the list, handwritten notes reading "take off" appeared next to Weant's name, and yet on subsequent versions, his name remained. (GC Exhs. 29, 33.) Farris personally attempted to reach Weant in order to update his records. (Tr. 257–259.) This treatment is in stark contrast to the Union's prompt removal of Loerwald from the OWL once it became aware she was not in compliance with the OWL procedures.<sup>24</sup> Farris testified that some other employees

<sup>20</sup> In addition, the bylaws do not reference the need for a working phone number, and Bobo did not tell Loerwald, during their interaction on October 14 or at any point, that removing her phone number from the OWL would result in her name being removed from it. Moreover, in Bowers' October 17 letter to Thomas, he instructed the Union to contact Loerwald for job offers by fax or email, but heard nothing back indicating this was inadequate until November 7.

<sup>21</sup> Loerwald was not given adequate notice of her noncompliance until after the close of business on November 7. While the first letter Murphy sent stating that Loerwald had been removed from the OWL was time stamped at 1:50 p.m., this letter did not address the reason for her removal other than being out of compliance with unspecified procedures. (GC Exh. 10.) Indeed, Bowers was not presented with the OWL procedures that Loerwald was in violation of until he received the Union's followup letter time stamped on the same day at 5:20 pm. (GC Exh. 9.) As such, Loerwald was deprived of any meaningful opportunity to address her removal until after the close of business. Loerwald, through Bowers, promptly cured any asserted violation, as detailed herein, on November 8. (GC Exh. 11.)

<sup>22</sup> Coleman also contacted members by email during his tenure as business agent. (Tr. 181.) The Union had access to Loerwald's email address at all relevant times. (GC Exh. 2; Tr. 26.)

<sup>23</sup> The Union argues that this was an inadvertent mistake. I am not considering it in isolation, but rather in connection with the other evidence pertaining to the Union's management of the OWL.

<sup>24</sup> The timing of events further undermines the Union's argument that the business agents were simply adhering to the rules. Loerwald removed her telephone number on October 14. Her name was not removed from the OWL until November 7. That same day, Thomas

were also taken off the list for lack of a working phone number. (Tr. 257.) The timing of these removals was not established, however, and the record lacks sufficient detail to provide meaningful comparison. Did these employees have fax and/or email numbers on file? Did they personally see the business agents on a regular basis? Did the Union make any attempts to contact them prior to removing them to the list, as it did for Weant? The lack of such details renders this testimony of little value.

The suspicious timing, along with the other evidence, including disparate treatment, compels a finding that Loerwald has met her prima facie burden under *Wright Line*.

To rebut Loerwald's prima facie case and prevail, the Union must establish, by preponderant evidence, that it would have taken the same actions even in the absence of her protected activity. *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enf'd. 99 F.3d 1139 (6th Cir. 1996).

In its brief, Respondent argues that Loerwald never requested to have her name returned to the OWL and therefore it was properly kept off. I disagree. In the letter sent to Thomas on November 8, Bowers ended his first paragraph by explicitly demanding that Loerwald's name "be place[d] back on the out of work list in the same position where it was prior to removal." (GC Exh. 11.) Ten days later, on November 18, Loerwald's attorney sent yet another letter providing her personal phone number and explaining once again that it was important that Loerwald be registered on the OWL. Finally, Loerwald's practice of visiting the union hall on a regular basis and constantly communicating with Respondent's business manager and agents made it abundantly clear that she wanted to be on the list. I thus find it highly disingenuous for Respondent to claim that Loerwald never requested to have her name returned to the OWL.

Respondent asserts that communicating through her attorney was an improper means for Loerwald to request to be put back on the OWL. As the Acting General Counsel aptly points out, however, this is incongruous with Respondent's actions. Indeed, Loerwald was first notified of her noncompliance with the OWL procedures and removal from the list by way of correspondence between the Union's counsel and her attorney. Subsequent to that, on January 4, 2012, Farris stated in a recorded conversation that he would contact Loerwald through her attorney about a possible job. (GC Exh. 19, p. 4.) These facts, paired against the lack of evidence introducing any standard procedure for re-registration, beg the conclusion that Loerwald put forth a sufficient effort to be placed back on the list. See *Boilermakers Local 667 (Union Boiler Co.)*, 242 NLRB 1153, 1155 (1979) (violation premised upon vagueness and indefiniteness of rule itself). The Union's requirement that Loerwald use some particular yet undisclosed method of communicating

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informed Bowers that Loerwald had been "harassing" the Union's agents by asking to see the OWL. He proceeded to say that since then, he reviewed the OWL and procedures, and found her out of compliance with the OWL procedures. The next sentence states that, consequently, Loerwald was removed from the list. (GC Exh. 10.) Coupled with other evidence regarding motivation discussed herein, this persuades me that Thomas' discovery of the "noncompliance" led to Loerwald's removal from the list, not the business agents' desire to follow the rules.

her desire to be placed back on the OWL points to pretext.

Respondent further argues that the OWL procedures do not permit a union member to merely provide his or her attorney's phone number. The OWL procedures themselves belie this and state that "Failure to maintain a working telephone number where an applicant can be notified of work opportunities will result in the applicant being removed from the list and an applicant must re-register to be placed back on the list" (emphasis added) (GC Exh. 9). Notably, this language does not indicate that the working telephone number must belong to the union member. Moreover, as noted above, it was within the Union's practice to leave messages for members with relatives, neighbors, and others when they themselves did not have working numbers. Accordingly, I find that by providing her attorney's number to the Union's attorney, with instructions to use it as her job contact number, Loerwald sufficiently complied with the OWL procedures.<sup>25</sup>

Respondent's assertion that the business agents were making an effort to better comply with the rules and, as a result, Loerwald was no longer receiving special treatment likewise lacks merit. First, there was no evidence presented that Loerwald ever received any special treatment related to the OWL. With regard to better adherence to the rules, Respondent maintains that it was simply enforcing its OWL procedures. This argument is rife with holes. First, as detailed in the prima facie analysis above, I find the Union did not provide Loerwald with the OWL procedures. Next, Loerwald supplied Respondent with a working telephone number on November 8, when she became aware this was a requirement of the OWL procedures. By any reasonable reading of the procedures, and in the context of existing practice, this constituted compliance. She was not asking for special treatment by her request to be put back on the list. Rather, she was asking to be treated like other members. Moreover, the Union selectively enforced its supposed enhanced adherence to the rules, as illustrated by Farris' decision to keep members at their same spots on the list after three refusals, in contravention of the bylaws, and by the Union's treatment of Weant.

Finally, Respondent argues that under *Operating Engineers Local 513 (Ozark Constructors)*, 355 NLRB 145 (2010), labor organizations have a right to set and enforce rules regulating internal affairs and the discipline of members. The Acting General Counsel does not contest this, and Respondent is correct that unions have such a right. However, a union's right to make internal rules does not permit it to create a system of enforcement that is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. at 190. Had the Union applied its OWL procedures in a fair and consistent manner, its provisions would likely have been valid under the Act. However, as demonstrated by the discriminatory treatment of Loerwald, this was not the case in the present action.

As noted and explained throughout this decision, I find the Union's stated reasons for removing Loerwald from the OWL

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<sup>25</sup> Because I have found that providing Loerwald's attorney's phone number to the Union complied with the OWL procedures, I need not decide today whether or not listing a fax number or email address would have also been sufficient.

are unworthy of belief. It is abundantly clear that relations between Loerwald and Union Agents Stark and Farris have soured. It is likewise abundantly clear that the source of the union agents' animus toward Loerwald comes from her "harassing" behavior of attempting to see the OWL to gain evidence to support her lawsuit, as well as her criticism of their practices in administering the OWL. But for these strained relations, I am convinced that the union agents, who saw Loerwald regularly and were clearly aware that she wanted to be referred for work all relevant times, would have taken simple steps to tell her she needed to provide a working phone number and/or that she had needed to provide this number in some particular manner, and her place on the OWL would have remained intact. Accordingly, I find that Respondent has failed to meet its burden, and the evidence shows the Union acted with an unlawful discriminatory motive, as alleged, in violation of Section 8(b)(1)(A) and (2).

## 2. Breach of duty-of-fair representation analysis

In the context of an exclusive hiring hall, arbitrary or unfair hiring hall practices that attempt to cause or do cause the derogation of an employee's employment status violate Section 8(b)(1)(A) and (2) of the Act. *Miranda Fuel Co.*, supra; *Steamfitters Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999), remanded 233 F.3d 611 (D.C. Cir. 2000), supp. decision 336 NLRB 549 (2001), enfd. 325 F.3d 301 (2003). This is the case even absent a showing of discriminatory motivation.

A necessary element of an 8(a)(3) and 8(b)(2) violation based on a breach of fair representation theory is a finding that the union's actions encourage membership in a labor organization. *Miranda Fuel Co.*, supra. The Board has held that a union conducting an exclusive hiring hall "has a duty to conform with and apply lawful contractual standards in administering the referral system, and any departure from the established procedures resulting in a denial of employment constitutes discrimination which inherently encourages union membership." *Electrical Workers, Local 11 (Los Angeles NECA)*, 270 NLRB at 425.

In *Operating Engineers Local 18 (Ohio Contractors)*, 204 NLRB 681 (1973), revd. on other grounds 496 F.2d 1308 (6th Cir. 1974), the Board, citing to the Supreme Court's decision in *Radio Officers' Union [A. H. Bull Steamship Co.] v. NLRB*, 347 U.S. 17 (1954), set forth a two-part test governing derogation of employment in the exclusive hiring hall context:

When a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer-or, if you please, adopt a presumption that-the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power. But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.

[Footnote omitted.]<sup>26</sup> See also *Iron Workers Local 15 (Gateway Industries)*, 291 NLRB 369, 371 (1988).

I find that the Union's actions in removing Loerwald from the list and barring her return, detailed above, satisfy this presumption.<sup>27</sup>

The Union asserts that its treatment of Loerwald was part of an effort to better enforce the rules. I reject this, as set forth in the *Wright Line* analysis. As such, I find the Union's actions with regard to Loerwald and the OWL were not necessary to its effective performance in representing its constituency, notwithstanding that I have also found those actions to be unlawfully motivated.

In its brief, Respondent argues on a more basic level that Loerwald had not engaged in concerted activity, and therefore was not protected by the Act. As detailed above, I find that she engaged in protected concerted activity and protected union activity. Even if my finding is in error, however, this argument still fails. Citing mainly to the Supreme Court's decision in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984), the Union argues that Loerwald's actions were for personal gain and not the mutual aid and protection of other members. This argument, however, fails to acknowledge the Union's well-established duty of fair representation. *City Disposal Systems*, while certainly good law, does not speak to the specific issues at hand, and instead only describes when an employee's actions more generally may operate as a collective enforcement of a bargaining agreement. 465 U.S. at 823-824.

In *Vaca v. Sipes*, 386 U.S. at 177, the Supreme Court held that the union's "statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Therefore the union's discriminatory or arbitrary treatment of even one member counts as a violation of this duty of fair representation because it violates the union's obligation to act impartially towards its members. See *Miranda Fuel Co.*, supra. Even if Loerwald's complaint of discriminatory treatment was a completely individual plight, divorced from activity the Act protects, it would still be cognizable.

Respondent further asserts that because Loerwald did not file a formal grievance regarding the two employers who rejected her (as required by the collective-bargaining agreement), her conduct was unprotected even if it was concerted. This argument misses the point of the present action entirely. Loerwald claims that the Union has discriminated against her, not that the employers have.

<sup>26</sup> This holding applies both to union and nonunion members. See *Bricklayers Local 7 (Masonry Builders)*, 224 NLRB 206 (1976), enfd. 563 F.2d 977 (9th Cir. 1977); and *Plumbers Local 460 (McAuliffe Mechanical)*, 280 NLRB 1230 (1986).

<sup>27</sup> The factual findings supporting my conclusion that Respondent acted with discriminatory intent likewise support the conclusion that Respondent acted arbitrarily and not in accordance with a valid defined and communicated set of standards. Indeed, it is difficult to imagine a set of facts supporting a finding based on discriminatory intent that would not support a finding that the Union breached its duty of fair representation.

Based on the foregoing, I find that the Union breached its duty of fair representation by arbitrarily removing Loerwald from the OWL, and thereafter keeping her off of it. I further find that by these actions, the Union precluded any job referrals and thereby induced potential employers to refuse her employment. *Electrical Workers Local 675 (S & M Electric Co.)*, supra.

*C. Alleged Refusal to Stamp Loerwald's  
Unemployment Booklet*

At complaint paragraphs 5(d) and 6, the Acting General Counsel alleges that Respondent violated Section 8(b)(1)(A) by failing to stamp Loerwald's Oklahoma Employment Security Commission's work search book.

Rhea Ellen Bobo, Respondent's secretary, testified that in order for her to stamp a member's unemployment book, that person would need to be registered on the OWL. (Tr. 252.) She further admitted that under Stark's direction, she stopped stamping Loerwald's unemployment book in January 2012 because Loerwald was no longer registered on the OWL. (Tr. 253–254.) Because I have found that Loerwald should have remained on the OWL, I further find that Respondent's refusal to stamp Loerwald's unemployment book on January 10 and 17, 2012, was a continuation of its breach of duty of fair representation. Therefore I find that Respondent violated Section 8(b)(1)(A) of the Act as alleged.

CONCLUSIONS OF LAW

1. By arbitrarily and discriminatorily denying Stacy M. Loerwald's requests to examine the exclusive hiring hall out-of-work referral list, the Respondent has breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

2. By arbitrarily and discriminatorily removing Stacy M. Loerwald from the out-of-work referral list, the Respondent violated Section 8(b)(1)(A) and (2), and has caused employers to discriminate in violation of Section 8(a)(3) of the Act.

3. By arbitrarily and discriminatorily failing and refusing to permit Stacy M. Loerwald to re-register on the out-of-work referral list, the Respondent violated Section 8(b)(1)(A) and (2) and has caused employers to discriminate in violation of Sec-

tion 8(a)(3) of the Act

4. By arbitrarily and discriminatorily failing to stamp Stacy M. Loerwald's Oklahoma Employment Security Commission's work search book, the Respondent violated Section 8(b)(1)(A) of the Act.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Accordingly, I shall recommend the following specific actions. Respondent will be required to permit Loerwald to see the out-of-work referral list. Respondent will further be required to rescind Loerwald's removal from the out-of-work list, restore her to the list in rightful order of priority, and make her whole for any loss of earnings or benefits that may have resulted from its unlawful conduct. Any backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest compounded daily as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall also be required to remove from its files any reference to Loerwald's removal from the out-of-work referral list, and to notify Loerwald in writing that this has been done and that the removal will not be used against her in any way.

Finally, in accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB 44, 48–49 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. *Id.*, slip op. at 3. See, e.g., *Teamsters Local 25*, 358 NLRB 54 (2012).

[Recommended Order omitted from publication.]