

Nos. 14-9605 & 14-9613

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

USHA DHEENAN
Supervisor Attorney

JEFFREY W. BURRITT
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2948
(202) 273-2989

JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issues	2
Concise statement of the case	3
I. Relevant procedural history	3
II. The Board’s findings of fact.....	5
A. The Union operates an exclusive hiring hall and maintains an out-of-work referral list to track nonworking members and refer them to jobs for which they qualify	5
B. Loerwald files an EEOC charge against the Union, becomes frustrated by several failed job prospects, and substitutes a fax number for her phone number.....	7
C. The Union refuses Loerwald’s numerous requests to see the OWL.....	9
D. The Union notifies Loerwald that it removed her from the OWL and she responds by providing her attorney’s phone number and shortly thereafter her own phone number	10
E. The Union refuses to stamp Loerwald’s Oklahoma Employment Security Commission’s work-search book	12
II. The Board’s conclusions and order.....	12
Standard of review	13
Summary of argument.....	14

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
Argument.....	16
I. Substantial evidence supports the Board’s finding that the Union repeatedly violated the Act by refusing Lowerwald’s requests to see the OWL.....	16
A. A Union’s duty of fair representation to its members extends to its operation of a hiring hall.....	16
B. The Union unlawfully refused Loerwald’s requests to see the OWL.....	18
II. Substantial evidence supports the Board’s findings that the Union violated the Act by arbitrarily and discriminatorily removing Loerwald from the OWL and refusing to allow her to re-register	20
A. The Union’s decisions to remove Loerwald from the OWL and refuse to allow her to re-register were unlawfully motivated.....	21
1. A Union violates the Act when it retaliates a member for engaging in protected activity	21
2. The Union discriminated against Loerwald.....	23
a. Loerwald engaged in protected activity	23
b. Loerwald’s protected activity motivated the Union to remove her from the OWL and refuse her requests to re-register	24
c. The Union failed to establish that it would have taken these actions absent Loerwald’s protected activity	28
B. By removing Loerwald from the OWL, and refusing to allow her to re-register, the Union also violated its duty of fair representation ...	32

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
III. The Union violated the Act by refusing to stamp Loerwald's unemployment book.....	34
Conclusion	35
Oral argument statement	36

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Airline Pilots Association v. O’Neill</i> , 499 U.S. 65 (1991).....	32
<i>International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 197</i> , 318 NLRB 205 (1995)	18
<i>Boilermakers Local No. 374 v. NLRB</i> , 852 F.2d 1353 (D.C. Cir. 1988).....	17,25,33
<i>Breining v. Sheet Metal Workers International Association Local Union No. 6</i> , 493 U.S. 67 (1989).....	17
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978).....	23
<i>Grason Elec. Co.</i> , 296 NLRB 872 (1989), <i>rev’d on other grounds</i> , 951 F.2d 1100 (9th Cir. 1991)	30
<i>Internaitonal Brotherhood of Teamsters, Local Union No. 657</i> , 342 NLRB 637 (1976)	23
<i>King Soopers, Inc.</i> , 222 NLRB 1011 (1976)	24
<i>Link v. Wabash Railroad Co.</i> , 370 U.S. 626 (1962).....	30
<i>Local 357, International Brotherhood of Teamsters v. NLRB</i> , 365 U.S. 667 (1961).....	21
<i>Local Union 675, International Brotherhood of Electrical Workers</i> , 223 NLRB 1499 (1976), <i>enforced mem.</i> , 556 F.2d 574 (4th Cir. 1977)	21

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Lucas v. NLRB</i> , 333 F.3d 927 (9th Cir. 2003)	33
<i>Marquez v. Screen Actors Guild, Inc.</i> , 525 U.S. 33 (1998).....	17
<i>Mesker Door, Inc.</i> , 357 NLRB No. 59 (2011)	22
<i>MJ Metal Products, Inc. v. NLRB</i> , 267 F.3d 1059 (10th Cir. 2001)	22
<i>NLRB v. Carpenters Local 608</i> , 811 F.2d 149 (2d Cir. 1987).....	17,20
<i>NLRB v. International Brotherhood of Electrical Workers, Local 11</i> , 772 F.2d 571 (9th Cir. 1985)	25
<i>NLRB v. Interstate Builders, Inc.</i> , 351 F.3d 1020 (10th Cir. 2003)	13,14
<i>NLRB v. Link Belt Co.</i> , 311 U.S. 584 (1941).....	22
<i>NLRB v. Local 139, International Union of Operating Engineers</i> , 796 F.2d 985 (7th Cir. 1986)	17
<i>NLRB v. Local 46, Metallic Lathers Union</i> , 149 F.3d 93 (2d Cir. 1998).....	21
<i>NLRB v. Local 485, International Union of Electrical, Radio & Machine Workers</i> , 454 F.2d 17 (2d Cir. 1972).....	24

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (2014).....	4
<i>NLRB v. Teamsters General Local Union No. 200</i> , 723 F.3d 778 (7th Cir. 2013)	22
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983).....	22
<i>Noel Canning v. NLRB</i> , 705 F.3d 490 (D.C. Cir. 2013).....	4
<i>O.K. Machine & Tool Corp.</i> , 279 NLRB 474 (1986)	30
<i>Operative Plasterers Local No. 121</i> , 264 NLRB 192 (1982)	24
<i>Ready Mixed Concrete Co. v. NLRB</i> , 81 F.3d 1546 (10th Cir. 1996)	23
<i>Schwartz v. Brotherhood of Maintenance of Way Employees</i> , 264 F.3d 1181 (10th Cir. 2001)	33
<i>Teamsters Local Union No. 435 v. NLRB</i> , 92 F.3d 1063 (10th Cir. 1996)	16,17
<i>Teamsters Local Union No. 519</i> , 276 NLRB 898 (1985)	17
<i>Town & Country Supermarkets</i> , 340 NLRB 1410 (2004)	22
<i>United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 32</i> , 346 NLRB 1095 (2006)	17

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>United States v. Porter</i> , 405 F.3d 1136 (10th Cir. 2005)	26
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	14, 23
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967).....	16,32
<i>Wright Line, Inc.</i> , 251 NLRB 1083 (1980) <i>enforced on other grounds</i> , 662 F.2d. 889 (1st Cir. 1981).....	22,23

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	13,16,17,21,23,24
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	12,21
Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A))	2,12,16,17,20,25,32,34
Section 8(b)(2) (29 U.S.C. § 158(b)(2))	3,12,20,21,32
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2,23

STATEMENT OF PRIOR OR RELATED APPEALS

This matter was previously before the Court in *International Union of Operating Engineers, Local 627 v. NLRB*, Case Nos. 13-9547 & 13-9564, which the Court vacated and remanded to the Board on July 2, 2014, for further proceedings consistent with the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

GLOSSARY

- “2014 D&O” Decision and Order of the Board in *International Union of Operating Engineers, Local 627*, 361 NLRB No. 93 (2014)
- “the Act” National Labor Relations Act, 29 U.S.C. § 151 et seq., as amended
- “the Board” National Labor Relations Board
- “Br.” Company’s opening brief
- “D&O” Decision and Order of the Board in *International Union of Operating Engineers, Local 627*, 359 NLRB No. 91 (2013)
- “EEOC” Equal Employment Opportunity Commission
- “GCX” General Counsel’s exhibits
- “JX” Joint Exhibits
- “OWL” Out-of-Work List maintained by the Union
- “Tr.” Transcript of the hearing
- “the Union” International Union of Operating Engineers, Local 627

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Nos. 14-9605 & 14-9613

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before this Court on the petition of the International Union of Operating Engineers, Local 627 (“the Union”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, the

Board's Decision and Order, issued on November 5, 2014, and reported at 361 NLRB No. 93. (2014 D&O 1-3.)¹

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) ("the Act"), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices were committed in Oklahoma. The Board's Order is final with respect to all parties. The Union's petition for review, filed on November 20, 2014, and the Board's cross-application for enforcement, filed on December 8, 2014, are both timely, as the Act does not impose a time limit for seeking review or enforcement of Board orders.

STATEMENT OF THE ISSUES

1. Does substantial evidence support the Board's finding that the Union violated Section 8(b)(1)(A) of the Act, by arbitrarily and discriminatorily denying

¹ Record references are to the original record filed with this Court. "2014 D&O" refers to the Board's 2014 Decision and Order, contained in Volume III of the record. "D&O" refers to the Board's 2013 Decision and Order, described below (p. __), and contained in Volume III of the record. "Tr." refers to the transcript of the hearing before the administrative law judge, contained in Volume I. "JX" refers to joint exhibits and "GCX" refers to exhibits introduced by the Board's General Counsel, contained in Volume II. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Stacy Loerwald's request to examine the Union's exclusive hiring hall out-of-work referral list?

2. Does substantial evidence support the Board's findings that the Union, by removing Loerwald from the out-of-work referral list and refusing to permit her to re-register for the list, unlawfully discriminated against her and breached its duty of fair representation, in violation of Section 8(b)(1)(A) and (2) of the Act?

3. Does substantial evidence support the Board's finding that the Union breached its duty of fair representation, in violation of Section 8(b)(1)(A) of the Act, by arbitrarily and discriminatorily refusing to stamp Loerwald's work-search book for the Oklahoma Employment Security Commission?

CONCISE STATEMENT OF THE CASE

I. RELEVANT PROCEDURAL HISTORY

Upon unfair-labor-practice charges filed by Stacy Loerwald, the Board's General Counsel issued a complaint alleging that the Union committed several violations of Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)). (D&O 3.) After conducting a hearing, an administrative law judge issued a decision finding that the Union violated the Act by denying Loerwald's requests to examine the Union's exclusive hiring hall out-of-work referral list ("OWL"), removing her from the OWL, refusing to allow her to re-register on the OWL, and refusing to stamp her Oklahoma Employment Security Commission's work-search

book. (D&O 13.) After the Union filed exceptions to the judge's decision, on April 17, 2013, the Board (Chairman Pearce, Members Griffin and Block) issued its decision affirming the judge's rulings, findings, and conclusions, and adopting the judge's recommended Order as modified. 359 NLRB No. 91. The Union petitioned this Court for review of that Order (10th Cir. Case No. 13-9547), and the Board filed a cross-application seeking enforcement of that Order (10th Cir. Case No. 13-9564), which were consolidated. After briefing but before argument, the Court put this case into abeyance pending the Supreme Court's decision reviewing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held that three recess appointments to the Board in January 2012 were invalid including the appointments of Members Griffin and Block. Subsequently, the Court granted the parties' requests to vacate the Board's 2013 Decision and Order and remand the case to the Board for further proceedings consistent with *Noel Canning*. (2014 D&O 1.) On November 5, 2014, the Board (Chairman Pearce and Members Miscimarra (concurring) and Hirozawa) issued the Decision and Order now before the Court, which incorporates by reference the prior 2013 Decision and Order and cites additional supporting precedent. (2014 D&O 1-3.)

II. THE BOARD'S FINDINGS OF FACT

A. The Union Operates an Exclusive Hiring Hall and Maintains an Out-Of-Work Referral List To Track Nonworking Members and Refer Them to Jobs for Which They Qualify

The Union represents approximately 1,200 employee-members, primarily in the construction industry, from district offices in Tulsa, Oklahoma and Oklahoma City, Oklahoma. (D&O 3; Tr. 24, 202, 247, JX 1.) It operates an exclusive hiring hall, which employers who have signed collective-bargaining agreements with the Union must utilize to hire employees. (D&O 3; Tr. 15-16.) Likewise, the hiring hall provides the exclusive means by which employees must seek employment with those signatory employers. (D&O 3; GCX 1(n), ¶ 5(a)(1).)

To operate its hiring hall, the Union maintains the OWL to track which members need work and to determine who should be referred to new jobs. (D&O 3; Tr. 20-22, 202-03.) Members' OWL registration forms detail their contact information, qualifications, and the date their last job ended. (D&O 3; Tr. 20-21, 181-82, GCX 2, 9.) An employee remains on the OWL until she accepts a job. (D&O 3; Tr. 189.)

The Union's business agents control and update the OWL. (D&O 4; Tr. 205.) When a signatory employer contacts a business agent to seek new employees, the employer describes the position and any qualification requirements. (D&O 4; Tr. 177.) The business agent then reviews the OWL and offers the job to

the first qualified member on the list. (D&O 4; Tr. 178.) If the member accepts the job, the business agent dispatches the employee to the jobsite. (D&O 4; Tr. 34-35.) Once an employee is physically at the jobsite, the employer has the option to terminate the employee. (D&O 4; Tr. 35.)

The Union's "Out of Work Procedures," which govern the OWL, state the following:

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.

. . .

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.

(D&O 4; GCX 9). The Union never provided Loerwald with a copy of these procedures until its attorney, James Thomas, sent a copy to Loerwald's attorney, Barrett Bowers, on November 7, and she was not otherwise familiar with them.

(D&O 10 & n.21; Tr. 67-68.) Likewise, Jan Coleman, the Union's business agent from 2008 until August 2011, had never read the OWL procedures prior to the hearing, though he was generally familiar with the rules, nor did he give a copy of it to members or see it posted at the union hall. (D&O 4, 10; Tr. 174, 195-96.)

The Union's bylaws include additional requirements for the OWL. (D&O 4; JTX1.) For instance, the OWL "shall be posted at Local 627's office; and job referrals shall, in compliance with the law, be made on a non-discriminatory basis." (D&O 4; JX 1.)

B. Loerwald Files an EEOC Charge Against the Union, Becomes Frustrated By Several Failed Job Prospects, and Substitutes a Fax Number for Her Phone Number

In early 2011, Loerwald, a member of the Union who utilized the hiring hall, filed a charge against the Union with the Equal Employment Opportunity Commission ("EEOC"). (D&O 4-5; Tr. 19-20.) In early October 2011, she, along with two other union members, filed a lawsuit alleging that the Union discriminated against them. (D&O 5 & n.7; Tr. 20, 125.)

Loerwald was laid off from a job in late July 2011. (D&O 5; Tr. 54.) In September, she spoke with Alan Farris, the Union's business agent for the Oklahoma City District, and Perry Morgan, the Union's business agent for the Tulsa District, about getting a job with union signatory Deep South Rigging. (D&O 5; Tr. 27-30.) Based on Morgan's representation that she had passed a background check for the job, Loerwald moved near the jobsite. (D&O 5; Tr. 29-30.) Morgan later told her she did not pass the background check so she did not get the job. (D&O 5; Tr. 27-30.)

Also during this time, Farris told Loerwald about an oiler position with Northwest Crane and explained that Loerwald was the first oiler on the OWL.

(D&O 5; Tr. 30-31.) Nevertheless, Loerwald was not selected for the job.

(D&O 5; Tr. 31.) Farris later told her that, at Northwest Crane's request, the Union referred her and four other individuals for jobs but that Northwest Crane only selected three of them, not including Loerwald. (D&O 5; Tr. 32.) Loerwald believed this violated the OWL procedures, which require the Union to send the qualified employee highest on the OWL, and only permit employers to reject an employee once the employee physically reports to work. (D&O 5 & n.9; Tr. 34-35.) Loerwald learned that at least two of the three individuals who got the job were below her on the OWL and should not have been hired before her. (D&O 5; Tr. 54-55.)

Frustrated by these experiences, on October 14, Loerwald went to the union hall and instructed Union Secretary Rhea Ellen Bobo to remove her phone number from the OWL. (D&O 5; Tr. 36, GCX 3, p.3.) Loerwald did so hoping that the Union would communicate future job offers in writing. (D&O 5; Tr. 45.) Bobo responded by asking Loerwald "How are they going to contact you for work purposes? Do you got another one?" (D&O 5; Tr. 44, GCX 3, p.3.) Loerwald said that she had a fax number on file. (D&O 5; Tr. 44, GCX 3, p.3.) Bobo did

not tell Loerwald that this would take her out of compliance with the OWL procedures. (D&O 5; Tr. 68, GCX 3.)

After talking with Bobo, Loerwald spoke with Farris about the Northwest Crane job. (D&O 5; Tr. 46-50, GCX 3.) During that conversation, he acknowledged that, although a number of people had refused three jobs or more, he had not yet moved them to the bottom of the OWL, as was required by the OWL procedures and the Union's bylaws. (D&O 5; Tr. 49, GCX 3, p. 30.)

On October 17, Bowers sent a letter to the Union, through Thomas, in which he explained that, although Loerwald had filed a discrimination suit against the Union, Loerwald and the Union needed to continue to communicate about future employment opportunities. (D&O 5; GCX 5.) He informed the Union that Loerwald only wanted the Union to communicate with her when it had a "bona fide job offer," at which time it could reach her through email or a fax number that Bowers provided. (D&O 5-6; Tr. 56, GCX 5.)

C. The Union Refuses Loerwald's Numerous Requests To See the OWL

During visits to the union hall between October 2011 and January 2012, Loerwald repeatedly asked to see the OWL. The Union denied each request. On October 20, she asked Farris if she could see the OWL, and he flipped to the page with Loerwald's name on it and held it out to her, but would not let go of it and prevented her from examining its other pages. (D&O 6; Tr. 56-57, 61-62.)

On November 2, she asked Business Manager Michael Stark if she could see the OWL. (D&O 6; Tr. 63-65.) Stark told her it was not union policy to show employee-members the list and that the Union “doesn’t stand for” harassment of business agents. (D&O 6; Tr. 64-65, GCX 8, pp. 2-3.) After arguing about whether she was skipped over on the OWL and about the Deep South job, Stark told her that “You’re on the [OWL] and that’s all I need to tell you. Go talk to your attorney about it.” (D&O 6; Tr. 65, GCX 8, pp. 4-8.)

Business Agent Farris refused Loerwald’s subsequent requests to see the OWL. On November 23, Farris told Loerwald he could not print the OWL until after Thanksgiving, yet when Loerwald returned on November 30, and asked to see the OWL to see whether the Union had, in fact, removed her name, Farris refused. (D&O 6; Tr. 78-81.) The Union also denied her requests to see the OWL on December 5 and 14, and January 17. (D&O 6-7; Tr. 78-88, 101-02, 105-06, GCX 15, 16, 17, 18.) On January 4, 2012, Bobo provided her with a copy of the OWL, but almost all of the information on the list, including the names of other members, was redacted. (D&O 7; Tr. 90-94, GCX 19.)

D. The Union Notifies Loerwald That It Removed Her From the OWL and She Responds By Providing Her Attorney’s Phone Number and Eventually Her Own Phone Number

On November 7, Bowers received two letters from Thomas stating that the Union had removed Loerwald from the OWL. (D&O 6; Tr. 66, GCX 9, 10.) In

the first letter, Thomas stated that Loerwald was in violation of the Union's OWL procedures and that Loerwald was harassing the Union's business agents in an attempt to gain evidence for her discrimination lawsuit. (D&O 6; GCX 10.) He also alleged that she demanded that union agents perform "special tasks" for her, including allowing her to inspect the OWL. (D&O 6; GCX 10.) In the second letter, Thomas stated Loerwald was removed pursuant to provisions in the OWL, a copy of which he provided, though he did not specify what provisions he was referring to. (D&O 6; GCX 9.) The Union had never previously given Loerwald a copy of those procedures. (D&O 10; Tr. 67.)

The following day, Bowers responded by stating that Loerwald was in compliance with the OWL procedures and that the Union could contact her through his phone number, and asked that the Union place her back on the OWL. (D&O 6; GCX 11.) He also stated that the Union was violating the OWL procedures because the business agents refused to allow Loerwald access to the OWL. (D&O 6; GCX 11.)

In a letter dated November 18, Bowers provided Thomas with Loerwald's direct phone number and, once again, asked that she be reinstated to her original position on the OWL. (D&O 6; GCX 14.) The Union refused to do so. (D&O 6; Tr. 78.)

E. The Union Refuses To Stamp Loerwald's Oklahoma Employment Security Commission's Work-Search Book

During this time period, Loerwald received unemployment insurance benefits from the state of Oklahoma. To remain eligible for benefits, Loerwald was required to contact the hiring hall each week and to get the Union to stamp her work-search book to verify that she had "checked in." (D&O 4; Tr. 78-79, GCX 23.) Bobo stamped Loerwald's book when Loerwald visited the union hall in November and December. (D&O 6-7; Tr. 78-79, 87-89.) When Loerwald checked in on January 10, 2012, however, Bobo refused, explaining that Stark had instructed her not to stamp the book because Loerwald was not registered on the OWL. (D&O 7; Tr. 100-01, GCX 21.) Bobo again refused to stamp Loerwald's book on January 17. (D&O 7; Tr. 101-03; GCX 22.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board found, in agreement with the administrative law judge, that the Union breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act by arbitrarily and discriminatorily denying Loerwald's request to examine the exclusive hiring hall OWL. (D&O 1, 13.) The Board also agreed that the Union violated Section 8(b)(1)(A) and (2) of the Act by arbitrarily and discriminatorily removing Loerwald from the OWL, refusing to permit her to re-register for the OWL, and causing employers to discriminate against her in violation of Section 8(a)(3) of the Act. (D&O 1, 13.) Finally, the Board found that

the Union violated Section 8(b)(1)(A) of the Act by arbitrarily and discriminatorily refusing to stamp Loerwald's work-search book. (D&O 1, 13.)

The Board's Order requires the Union to cease and desist from engaging in the unfair labor practices found, and from, in any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (2014 D&O 1.) Affirmatively, the Board's Order requires the Union to: (a) grant Loerwald's requests to examine the OWL, including previous versions if they are retrievable; (b) restore her to the OWL in her rightful order of priority; (c) make her whole for any loss of earnings and other benefits she suffered; (d) compensate her for any adverse income tax consequences of receiving any backpay in a lump sum; (e) remove from its files any reference to her removal from the OWL; (f) preserve and provide the Regional Director records necessary to analyze the amount of backpay due under the terms of the Order; and (g) post a remedial notice at its office and hiring halls in Oklahoma City and Tulsa and to distribute it electronically if it customarily communicates with members by such means. (2014 D&O 1-2.)

STANDARD OF REVIEW

This Court has stated that it "will grant enforcement of an NLRB order when the agency has correctly applied the law and its findings are supported by substantial evidence in the record as a whole." *NLRB v. Interstate Builders, Inc.*,

351 F.3d 1020, 1027 (10th Cir. 2003) (internal citation omitted). “Substantial evidence” consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1027-28; *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). In determining whether substantial evidence exists, a court may not displace the Board’s choice between fairly conflicting views of the evidence, even if “an appellate panel may have decided the matter differently.” *Interstate Builders*, 351 F.3d at 1028 (internal citation omitted).

SUMMARY OF ARGUMENT

When a union runs an exclusive hiring hall, it exercises a great deal of authority over its members, who are obligated to seek employment with participating employers through the hiring hall. In wielding this authority, a union owes a duty to fairly represent its members and to avoid engaging in discriminatory or arbitrary conduct. The failure to do so violates the Act.

Substantial evidence supports the Board’s findings that the Union violated its duty to fairly represent its members by denying Loerwald her well-established right to review the OWL so that she could determine whether her referral rights were being protected. The Union argues that she had no right to review the OWL after her name was removed. But some of her requests came before the Union removed her name from the OWL, and once the Union removed her name her requests were reasonably directed to determine whether the removal was arbitrary.

Moreover, that removal was itself unlawful and therefore cannot supply a defense to this violation.

Substantial evidence also supports the Board's findings that the Union violated the Act by removing Loerwald from the OWL and refusing to allow her to re-register. Utilizing the Board's *Wright Line* framework, the Board reasonably determined that Loerwald's protected activity—criticizing the union business agents and filing and maintaining an EEOC charge and lawsuit—motivated the Union to remove her from the OWL and not allow her to re-register. The Board also found that the Union's treatment of Loerwald was arbitrary and thus in violation of its duty of fair representation. In reaching both of these findings, the Board rejected the Union's argument that Loerwald had effectively removed herself from the OWL by not providing a working phone number in violation of the OWL procedures. The Board found that the Union had never notified Loerwald of the OWL procedures and that, in any event, she sufficiently complied with those procedures by providing the Union with her attorney's phone number and, shortly thereafter, her own.

Substantial evidence also supports the Board's finding that the Union violated the Act by refusing to stamp Loerwald's unemployment book and thereby certify that she was registered with the hiring hall. Because the Union's decision to remove Loerwald from the OWL was unlawful, its refusal to stamp her book

was a continuation of the Union's breach of its duty of fair representation. The Union's failure to challenge this finding in its brief waives any defense and warrants summary enforcement of that portion of the Board's Order.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION REPEATEDLY VIOLATED THE ACT BY REFUSING LOERWALD'S REQUESTS TO SEE THE OWL

A. A Union's Duty of Fair Representation to its Members Extends to its Operation of a Hiring Hall

Section 7 of the Act (29 U.S.C. § 157) grants employees the right "to form, join, or assist labor organizations" and "to refrain from any or all such activities" Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) makes it an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7"

In addition to these protections under the Act, the Supreme Court has held that a union has "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," commonly referred to as the duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); accord *Teamsters Local Union No. 435 v. NLRB*, 92 F.3d 1063, 1068 (10th Cir. 1996). A union breaches this duty "when its conduct toward a member of the

bargaining unit is arbitrary, discriminatory, or in bad faith.” *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998); *Teamsters Local Union No. 435*, 92 F.3d at 1070. And although this duty is judicially created, conduct that constitutes a breach may also restrain employees in the exercise of their Section 7 rights and therefore violate Section 8(b)(1)(A) of the Act. *See Breininger v. Sheet Metal Workers Int’l Ass’n Local Union No. 6*, 493 U.S. 67, 73-74 (1989); *Teamsters Local Union No. 435*, 92 F.3d at 1068-69. The protections of Section 8(b)(1)(A), and the union’s duty of fair representation, apply to “exclusive hiring hall arrangements, under which workers can obtain jobs only through union referrals.” *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988); *accord Breininger*, 493 U.S. at 87-88 & n.11.

It is well established that a union’s duty of fair representation encompasses the obligation to provide members access to its job referral lists so that they can determine whether their rights are being protected. *See NLRB v. Carpenters Local 608*, 811 F.2d 149, 152 (2d Cir. 1987); *NLRB v. Local 139, Int’l Union of Operating Eng’rs*, 796 F.2d 985, 993 (7th Cir. 1986); *Teamsters Local Union No. 519*, 276 NLRB 898, 901-02 (1985). By refusing to provide such information, a union breaches its duty and violates Section 8(b)(1)(A) of the Act. *See, e.g., United Ass’n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the United States & Canada, Local 32*, 346 NLRB 1095, 1096 (2006). In some

cases, the Board has imposed a heightened standard, requiring the union to permit a member access to its referral records upon a “reasonable belief” that the union treated the member unfairly. *Int’l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 197*, 318 NLRB 205, 205 (1995).

B. The Union Unlawfully Refused Loerwald’s Requests To See the OWL

Substantial evidence supports the Board’s finding (D&O 7-9) that, even applying this heightened standard, Loerwald reasonably believed that the Union was treating her unfairly with respect to its operation of the OWL, thus the Union violated the Act by repeatedly denying her requests to review the OWL. First, Loerwald reasonably believed that the Union was not properly administering the OWL. Despite being told that she was the first qualified oiler on the OWL, she was not properly referred to the Northwest Crane job. She also learned that Business Agent Morgan was not following the requirement that, if a member refused a job on three occasions, he was to be moved to the bottom of the OWL. Loerwald conveyed her concerns to union officials when she repeatedly asked to see the OWL, including on November 2, when she told Stark that she believed she had been improperly skipped, and on November 30, when she asked Farris to see the OWL in order to determine whether she had been removed. Moreover, the Union’s repeated refusal to allow her to examine the OWL reasonably caused her to believe it was not being properly administered.

Between October 20, 2011 and January 17, 2012, the Union unlawfully refused her requests to review the OWL on eight separate occasions. (D&O 6-8.) On the few occasions it did not outright refuse, it concealed the relevant information. For example, on October 20, Business Agent Farris let her see the page on which her name appeared, but did not allow her to review the entire list. And on January 4, Union Secretary Bobo let her see a copy of the list, but almost all of the information, including member names, was redacted, rendering it essentially useless.

In its brief, the Union does not deny that it refused Loerwald's requests. Instead, it weakly claims (Br. 14) that Business Manager Stark cannot be blamed for not showing her the OWL, because the business agents have the list. But when Loerwald asked Stark if she could see the list on November 2, he did not refer her to the business agents. Instead, he told Loerwald that it was not the Union's policy to show members the OWL every day and that the Union "doesn't stand for" harassment of the business agents. (D&O 6; GCX 8, pp. 2-3.) After they argued about whether she was skipped on the list and about what Morgan had told her about the Deep South job, he told her in no uncertain terms that "You're on the out-of-work list, and that's all I need to tell you. Go talk to your attorney about it." (D&O 8; GCX 8, p.7.) Loerwald directed all of her other requests to Business Agent Farris, who denied each of those requests.

The Union also attempts to excuse its refusals by arguing (Br. 14) that, once Loerwald was off the OWL, she no longer had any reason to review the OWL. But Loerwald maintained that she was improperly removed from the OWL, thus, as found by the Board (D&O 8), her request was “reasonably directed towards ascertaining whether” the Union was treating her fairly. *See Carpenters Local 608*, 811 F.2d at 152. Furthermore, Loerwald first asked to see the OWL on October 20, then again on November 2, before she was removed from the OWL on November 7. Finally, as will be discussed below, the Union acted unlawfully by removing her from the OWL in the first place, and thus cannot use her removal to justify its unlawful refusal to allow her to review the OWL.

In short, the Union provides no legitimate argument justifying its refusal to provide Loerwald access to the OWL. Substantial evidence thus supports the Board’s findings that the Union breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE UNION VIOLATED THE ACT BY ARBITRARILY AND DISCRIMINATORILY REMOVING LOERWALD FROM THE OWL AND REFUSING TO ALLOW HER TO RE-REGISTER

The Board found (D&O 9-13) that the Union violated Section 8(b)(1)(A) and (2) of the Act by removing Loerwald from the OWL and refusing to allow her to re-register. In reaching this determination, the Board found (D&O 1 n.2) both that the Union had a discriminatory motivation and that it acted arbitrarily in

violation of the duty of fair representation that it owed to Loerwald. Substantial evidence supports both of these findings.

A. The Union’s Decisions To Remove Loerwald From the OWL and Refuse To Allow Her To Re-Register Were Unlawfully Motivated

1. A union violates the Act when it retaliates against a member for engaging in protected activity

As discussed above (p. 16), Section 8(b)(1)(A) makes it an unfair labor practice for a union to “restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7 of the Act.” Section 8(b)(2) makes it unlawful for a union “to cause or attempt to cause an employer to discriminate against an employee in violation of” Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)).² A union violates these sections when it takes an adverse action against an individual in retaliation for engaging in protected activity.

In applying these provisions, an inquiry into the union’s motive is essential.

Local 357, Int’l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 675 (1961). To analyze

² Section 8(a)(3) of the Act (29 U.S.C. 158(a)(3)) provides, in relevant part, “[i]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment to discourage or encourage membership in any labor organization” As the Board explained (D&O 9), Section 8(b)(2) does not require an overt demand by a union to discriminate. Rather, a union may discriminatorily refuse to refer an employee to work by simply failing to do so, without making any demand of the employer. *See Local Union 675, International Brotherhood of Electrical Workers*, 223 NLRB 1499 (1976), *enforced mem.*, 556 F.2d 574 (4th Cir. 1977); *accord NLRB v. Local 46, Metallic Lathers Union*, 149 F.3d 93, 99 n.3 (2d Cir. 1998).

motive, the Board applies the burden-shifting framework set out in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d. 889 (1st Cir. 1981). *See also NLRB v. Transp. Mgt. Corp.*, 462 U.S. 393, 398 (1983) (approving *Wright Line* framework). Although *Wright Line* typically applies to cases brought against employers, it is equally applicable to cases where a union's motivation is at issue. *See, e.g., NLRB v. Teamsters Gen. Local Union No. 200*, 723 F.3d 778, 786 (7th Cir. 2013); *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004).

Under *Wright Line*, the General Counsel must show that an employee engaged in protected activity, that the union had knowledge of that activity, and that the protected conduct was a substantial or motivating factor in the adverse action taken by the union. *MJ Metal Prods, Inc. v. NLRB*, 267 F.3d 1059, 1065 (10th Cir. 2001); *accord Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 2 (2011). The Board may infer unlawful motive from circumstantial evidence, such as the timing of the adverse action relative to the protected activity, the commission of other unfair labor practices, and the inability of the proffered justification to withstand scrutiny. *See NLRB v. Link Belt Co.*, 311 U.S. 584, 602 (1941); *MJ Metal Prods, Inc.*, 267 F.3d at 1065. If the General Counsel satisfies that burden, the Board will find a violation of the Act unless the union shows, by a preponderance of the evidence, that it would have taken the same action even in

the absence of the protected activity. *Id.* The Board’s motive findings must be upheld so long as they are supported by substantial evidence, no matter that the reviewing court could justifiably make different findings were it to consider the matter de novo. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); accord *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1551 (10th Cir. 1996).

2. The Union discriminated against Loerwald

Applying the *Wright Line* framework here, the Board reasonably found (D&O 1 n.2, 9-11) that Loerwald engaged in protected activity, that the Union had knowledge of that activity, and that the Union’s hostility towards this activity was a motivating factor in its decisions to remove Loerwald from the OWL and refuse to allow her to re-register. Further, the Board found (D&O 11-12) that the Union failed to show that it would have taken these actions absent her protected activity.

a. Loerwald engaged in protected activity

There is no dispute that Loerwald engaged in protected concerted activity when she and two other union members filed an EEOC charge, and later a discrimination lawsuit, against the Union. This conduct is protected by Section 7 of the Act, which “protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 & n.15 (1978)

(citing, e.g., *King Soopers, Inc.*, 222 NLRB 1011 (1976) (filing complaint with EEOC is protected under the Act)). Loerwald also engaged in protected activity by expressing her belief that the Union was not properly running the hiring hall or administering the OWL. D&O 10 (citing *International Brotherhood of Teamsters, Local 657*, 342 NLRB 637, 645 (2004) (criticizing manner in which union official operated hiring hall is protected activity); *Operative Plasterers Local No. 121*, 264 NLRB 192, 197 (1982) (same)); *see also NLRB v. Local 485, Int'l Union of Elec., Radio & Mach. Workers*, 454 F.2d 17, 21 (2d Cir. 1972) (criticizing union leadership is protected by Section 7). The Board found (D&O 10), and in its brief the Union does not contest, that the Union certainly had knowledge of these actions. (D&O 10.)

b. Loerwald's protected activity motivated the Union to remove her from the OWL and refuse her requests to re-register

The Board's finding that Loerwald's protected activity was a motivating factor in the Union's decision to remove her from the OWL, and to refuse to allow her to re-register, is also well supported. The Union held "significant animus" (D&O 10) against Loerwald based on her protected activity. It manifested this animus in its November 7 letter (GCX 10) informing her attorney that the Union had removed her from the OWL and claimed that she had engaged in "harassing" conduct in connection with her EEOC complaint.

The Board's motive finding was also supported by the timing of the Union's decision to remove her name from the OWL. The Union's timing was "highly suspect" because although Loerwald had asked to have her personal phone number removed in mid-October, the Union only removed her from the OWL on November 7, "on the heels of" her complaints about the hiring hall to Stark and Farris in late October and early November. (D&O 10.) The Board explained (D&O 10) that the Union's decision to remove her name from the OWL was "directly tied to the business agents' complaints that she was 'harassing' them to see the OWL (which was protected concerted activity) in a 'futile effort' to gain evidence for her discrimination lawsuit (also protected concerted activity)." In fact, the Union's letters notifying Loerwald's attorney that she was removed from the OWL are captioned with her EEOC case name and number. (D&O 6; GCX 9, 10, 12.) There was thus no doubt to the Board (D&O 10) that the Union held "significant animus" against Loerwald.

Moreover, the Union failed to notify Loerwald that she was required to maintain a working personal phone number in order to remain on the OWL. *See NLRB v. Int'l Bhd. of Elec. Workers, Local 11*, 772 F.2d 571, 574, 576 (9th Cir. 1985) (holding failure to give notice of hiring hall procedures to employment applicants constituted violation of Section 8(b)(1)(A) and (2)); *see also Boilermakers Local No. 374*, 852 F.2d at 1358 (holding duty of fair

representation requires the union to inform workers of hiring hall rules). Indeed, the Board (D&O 10) credited Loerwald's testimony that she was unaware of the OWL procedures until the Union sent her attorney a copy with the November 7 OWL-removal letter. The Union has not challenged this credibility determination in its brief and has thus waived any such argument. *See United States v. Porter*, 405 F.3d 1136, 1144 (10th Cir. 2005) ("issues not raised in the opening brief are deemed abandoned or waived").

The Union's unlawful motive was further revealed by its refusal to return Loerwald's name to the OWL after her attorney, on November 8 (GCX 11), informed the Union that it could communicate with Loerwald through his phone number. The OWL procedures (GCX 9) merely required that members "maintain a working telephone number where an applicant can be notified of work opportunities" There was no requirement that a member maintain on file a personal phone number, and indeed it was common practice for the Union to leave messages at third-party phone numbers and to email members. (D&O 10 & n.22.) The Union persisted in this unlawful conduct even after November 18 (GCX 14), when Loerwald's attorney gave the Union her direct phone number, thus curing

any deficiencies with the asserted policy that required a working personal phone number.³ (D&O 4; GCX 9, 11, 14).

Finally, evidence of the Union's disparate treatment of Loerwald supported the Board's motive determination. Although the Union had noted on the OWL that member Justin Weant should have been removed for failing to maintain a working phone number, it failed to do so between October 2011 and March 2012. (D&O 10; Tr. 257-259.) While the Union could not offer him jobs while it lacked contact information, it allowed him to remain on the list and made efforts to contact Weant to update records.

The Union contends (Br. 8-9) that the Board's disparate treatment finding was incorrect because there was no evidence that other employees were permitted to "unilaterally implement an in-writing-only policy." But as discussed, the Board's disparate treatment finding was based on the Union's favorable treatment of Weant, who the Union kept on the OWL for approximately 5 months without a working phone number. The Union claims (Br. 12-13) that it left Weant on the OWL only because the secretary was slow in taking him off, but this stands in

³ The Union insists (Br. 4) that Loerwald did not provide a working phone number until the following summer and merely hoped that she could "get rich from not working." But the record establishes that, after Loerwald's attorney informed the Union's counsel on November 8, that it could contact her through his phone number, he furnished the Union with her direct phone number on November 18, 2011. (D&O 6; GCX 11, 14.) And the insulting claim that she hoped to "get rich" is not only devoid of record support but flatly contradicted by Loerwald's repeated efforts to secure employment through the hiring hall.

stark contrast to its removal of Loerwald from the OWL as soon as the Union's attorney deemed her out of compliance, which, as discussed above, occurred "on the heels of" her complaints about the hiring hall. (D&O 10-11 & n.24.)

Likewise, the Union's generous treatment of Weant occurred at the same time as Loerwald was promptly removed from the OWL, undercutting the Union's argument (Br. 13-14) that it removed Loerwald from the OWL in a newfound attempt to follow the OWL procedures "generally and across the board"

c. The Union failed to establish that it would have taken these actions absent Loerwald's protected activity

The timing of the Union's actions, as well as the evidence of the Union's animus against Loerwald's protected activity and disparate treatment of Loerwald, provides substantial evidence supporting the Board's finding (D&O 11) that the Union was unlawfully motivated when it removed her from the OWL and refused to allow her to re-register. The burden then shifted to the Union to establish that it would have taken these same actions even absent Loerwald's protected activity. The Union attempted to meet this burden by arguing that Loerwald ran afoul of the hiring hall procedures by not maintaining a working phone number, and instead insisted on communicating by writing, but as we now show, the Board (D&O 11-12) reasonably rejected these arguments.

Although the Union repeatedly asserts (Br. 9, 11) that Loerwald attempted to "unilaterally implement an in-writing only policy," and that the administrative law

judge “ruled that all correspondence about the OWL should have been through the lawyers,” neither is true. Bowers, Loerwald’s attorney, told Thomas, the Union’s attorney, that the Union should contact Loerwald through his phone number.

(GCX 11.) The judge never made the “extraordinary conclusion that all contact must be through the lawyers.” (Br. 11.) Rather, she found (D&O 11) that Loerwald’s decision to use Bowers’s phone number was not inconsistent with the OWL procedures which, as described above (pp. 25-26), did not require her to maintain a personal phone number on file.

Moreover, any objection that the Union now claims that it had to communicating with Loerwald through her attorney is undermined by the fact that the Union chose to convey important information to Loerwald through her attorney. This is how it notified Loerwald that the Union had removed her from the OWL and provided her with a copy of the OWL procedures. (GCX 9, 10.) And during Loerwald’s January 4 visit to the union hall, Farris stated that he would contact her through her attorney about a possible job. (D&O 11; GCX 19, p. 4.) Consistent with this, on November 8 (GCX 11), Bowers asked the Union to restore Loerwald to the OWL, and on November 18 (GCX 13), reiterated that request and provided the Union with Loerwald’s phone number. This led the Board to reasonably find (D&O 11) that the Union’s requirement that “Loerwald use some

particular yet undisclosed method of communicating her desire to be placed back on the OWL points to pretext.”

The Union also insists (Br. 9-10), that Loerwald never provided her phone number or attempted to re-register. But Loerwald made her desire to be returned to the OWL “abundantly clear” during her numerous visits to the union hall, leading the Board to find that the Union’s argument was “highly disingenuous.” (D&O 11.). And though the Union attempts to cavalierly dismiss Bowers’ November letters as “feeble attempt[s]” to re-register, which “did not come to the attention of the Union,” there is no record support for this assertion. Thomas never denied receiving these letters and agency principles establish that a client/principal is deemed to know what its attorney/agent does. (GCX 5, 9-14.) *See Grason Elec. Co.*, 296 NLRB 872, 885 & n.32 (1989) (“It is a well-established principle of agency law that attributes to a client the knowledge obtained by the client’s attorney.”) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962)), *rev’d on other grounds*, 951 F.2d 1100 (9th Cir. 1991); *see also O.K. Mach. & Tool Corp.*, 279 NLRB 474, 478 (1986).

Likewise, the Board rejected (D&O 11) the Union’s contention that, as a result of its efforts to more strictly comply with the OWL procedures than it had in the past, it would no longer afford Loerwald special treatment. There was no evidence that Loerwald had ever received special treatment. And the Union never

provided Loerwald with the OWL procedures until it sent a copy to Bowers after the close of business on November 7, the same day that it notified Bowers that it removed Loerwald from the OWL. (D&O 10 & n.21; GCX 9, 10.) In any event, as discussed above, the Board found that Loerwald promptly cured any asserted violation by providing a working phone number on November 8. (D&O 10 & n.21; GCX 11.)

The Union also quibbles with the judge's recitation of the facts but fails to establish that any of the Board's findings were not supported by substantial evidence. The Union suggests (Br. 7) that "[t]he ALJ seems to blame the Union that Loerwald did not get" the Deep South Rigging job, and that the judge found that the Union told her she had passed the background check. In fact, the judge merely recounted that, "according to Loerwald," Business Agent Perry Morgan told her she had passed, and noted that the Union disputed this assertion but found it unnecessary to resolve this dispute. (D&O 5 & n.8.) Likewise, the judge recited Loerwald's testimony about not getting the Northwest Crane job, but did not, as the Union suggests (Br. 9), rely on this matter as evidence of discrimination by the Union. Instead, these failed job prospects prompted Loerwald to try and have the Union convey job information in writing by fax or email, rather than by phone, and provided support for her "reasonable belief" (see above, p. 18) that the Union was treating her unfairly, thus warranting her requests to see the OWL.

Finally, despite never giving Loerwald the OWL rules until November, the Union insists (Br. 14) that Loerwald knew that, by removing her phone number, she was removing herself from the OWL and that, when she did so, the Union pointed out that there would be no way to contact her. In fact, Union Secretary Bobo simply asked how the Union would contact her, and Loerwald responded that she had provided a fax number. (D&O 5; GCX 3, p. 3.) This did not, as the Union suggests (Br. 10), put Loerwald on notice that she was out of compliance with the OWL procedures. And while the Union insists (Br. 10) that it “uniformly” told others that they needed to have a phone number, as discussed above, the Union routinely allowed employees to provide the numbers of third parties and communicated with members by email. Accordingly, the Union cannot reasonably claim that she knew she would be removed from the OWL.

B. By Removing Loerwald from the OWL, and Refusing To Allow her To Re-Register, the Union Also Violated Its Duty of Fair Representation

As discussed above (pp. 15-16), a union breaches its duty of fair representation, in violation of 8(b)(1)(A) and (2) of the Act, when its conduct toward a member of the bargaining unit is “arbitrary, discriminatory, or in bad faith.” *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); accord *Airline Pilots Ass’n v. O’Neill*, 499 U.S. 65, 67, 77 (1991) (holding that standard announced in *Vaca* applies to all union conduct including its operation of an exclusive hiring hall);

Schwartz v. Bhd. of Maint. of Way Employees, 264 F.3d 1181, 1185 (10th Cir. 2001). “No specific intent to discriminate on the basis of union membership or activity is required; a union commits an unfair labor practice if it administers the exclusive hall arbitrarily or without reference to objective criteria and thereby affects the employment status of those it is expected to represent.” *Boilermakers Local No. 374*, 852 F.2d at 1358; *Lucas v. NLRB*, 333 F.3d 927, 934 (9th Cir. 2003). A union breaches this duty by arbitrarily refusing to permit individuals to register for its hiring hall and by failing to inform workers of relevant rules. *Id.* (internal citations omitted).

In its brief, the Union offers no specific challenge to the Board’s findings (D&O 12-13) that the Union violated its duty of fair representation by removing Loerwald from the OWL and refusing to allow her to re-register. As discussed above (pp. 26-27), it has thus waived any such argument. Accordingly, assuming the Court, like the Board, rejects the Union’s defenses for its removal of Loerwald from the OPL, the Board is entitled to summary enforcement of its finding that the Union breached its duty of fair representation.

In any event, the Board explained (D&O 12 & n.27) that the same facts that support the conclusion that the Union acted with discriminatory intent support the conclusion that the Union acted arbitrarily in derogation of its duty of fair representation. The Union permitted at least one member—Justin Weant—to

remain on the list for months during this same time period despite the fact that he had no phone number on file. By contrast, soon after she removed her personal number from the OWL, and “on the heels of” her complaints about the hiring hall, the Union decided that she was out of compliance with the OWL rules and immediately removed her from the OWL. Also, the Union permitted others to provide phone numbers of third parties, yet refused to allow Loerwald to use her attorney’s phone number as a valid way to contact her, then did not allow her to re-register for the OWL even after she provided her own phone number to the Union. The Board’s finding (D&O 13) that the Union’s treatment of Loerwald was arbitrary, and thus in breach of the duty of fair representation that it owed to her, was reasonable and supported by substantial evidence.

III. THE UNION VIOLATED THE ACT BY REFUSING TO STAMP LOERWALD’S UNEMPLOYMENT BOOK

Beginning in January 2012, the Union refused to stamp Loerwald’s unemployment work-search book, which she had to maintain to remain eligible for unemployment benefits. At the time, the Union stated that it could not stamp the book because Loerwald was not registered on the OWL. Because it was unlawful for the Union to remove her from the OWL and prevent her from re-registering, the Board reasonably concluded (D&O 13) that the Union’s refusal to stamp the book was a continuation of the Union’s breach of its duty of fair representation in violation of Section 8(b)(1)(A) of the Act. The Union failed to challenge this

finding in its opening brief. Accordingly, as discussed above (pp. 26-27), it has waived any such challenge. Provided that the Court agrees that the Union violated the Act by removing Loerwald from the OWL, the Board is entitled to summary enforcement of that portion of the Board's Order finding that the Union also violated the Act by refusing to stamp her work-search book.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Union's petition for review and enforcing the Board's Order in full.

ORAL ARGUMENT STATEMENT

The Board believes that this case involves the application of well-settled legal principles to largely undisputed facts and, therefore, that oral argument would not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests to participate.

s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

s/ Jeffrey W. Burritt
JEFFREY W. BURRITT
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
(202) 273-2948
(202) 273-2989

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
March 2015

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627	*	
	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 14-9605
	*	14-9613
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	17-CB-072671
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 8,525 words of proportionally-spaced, 14-point type, and the word-processing system used was Microsoft Word 2007.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 12th day of March, 2015

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 627**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

*
*
*
* **Nos. 14-9605**
* **14-9613**
*
* **Board Case No.**
* **17-CB-072671**
*
*

ADDITIONAL CERTIFICATIONS REQUIRED BY CIRCUIT RULES

1. I certify that there are no required privacy redactions.

2. I certify that the hard copies submitted to the court are exact copies of the electronic version.

3. I certify that the electronic submission was scanned for viruses with Symantec Endpoint Protection, version 12.1.2015.2015, last updated on March 11, 2015.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 12th day of March, 2015

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627	*	
	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 14-9605
	*	14-9613
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	17-CB-072671
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 12th day of March, 2015