Keller Construction, Inc. *and* Scott William Hammock

Laborers International Union of North America, Local 397 (Keller Construction, Inc.) *and* Scott William Hammock. Cases 14–CA–122352 and 14–CB–116188

July 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On June 10, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondents filed exceptions and supporting briefs, and the General Counsel filed an answering brief. In addition, the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

We adopt the judge's findings, for the reasons stated in his decision, that Respondent Laborers Local 397 violated Section 8(b)(1)(A) and (2) by requesting that Respondent Keller Construction lay off Scott Hammock,[3] and that Keller Construction violated Section 8(a)(3) and (1) by acquiescing in Local 397's request. For the reasons discussed below, we also adopt the judge's finding that Local 397 did not violate Section 8(b)(2) by failing to assist GRP Mechanical in its efforts to hire Hammock for work in Skiatook, Oklahoma. Contrary to the judge, however, we further find that Local 397's failure to assist GRP Mechanical in hiring Hammock for work outside Local 397's jurisdiction did not violate Section 8(b)(1)(A).

Facts

Respondent Laborers Local 397 operates a hiring hall which refers laborers to work for various employers throughout Southern Illinois. GRP Mechanical, an industrial piping and construction contractor based in Bethalto, Illinois, is signatory to a multiemployer agreement that Local 397 negotiated with the Southern Illinois Builders Association (SIBA). The SIBA contract provides guidelines with which signatory employers must comply when hiring laborers in Local 397's geographical jurisdiction. One such guideline prohibits signatory employers from transferring "key employees" from one local union's geographical jurisdiction to another local's geographic jurisdiction.

From September 2013 to March 2014, GRP Mechanical's vice president of pipeline services and fabrication, Richard Torres, managed a pipeline project in Skiatook, Oklahoma. On about September 30, 2013, after Local 397 caused Keller Construction to lay off Scott Hammock, Torres called Local 397 to hire Hammock for the pipeline project. Local 397's vice president and field representative, William Traylor, answered the call. Torres told Traylor that GRP Mechanical had a project and needed a laborer, but he did not disclose the project's location, and he did not request Hammock by name. Per Local 397's practice, Traylor asked if Torres would rehire the most recently referred laborer, Carey Carveiro. Torres responded that Carveiro did not have the skill set needed for the project. Torres mentioned that he heard Hammock was unemployed, and stated he "would like to have Scott." Traylor asked how Torres learned of Hammock's availability, and Torres responded that a superintendent at Keller Construction told him that Hammock was available. Traylor said, "Well, that is just not going to happen." Despite Traylor's statement, Torres continued to request that Local 397 refer Hammock to GRP Mechanical. Traylor responded to these continuing requests by inquiring about Torres' reasons for not wanting

[1] The Respondents have 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to conform to our findings below, to include the Board's standard remedial language for the violations found, and in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall substitute new notices to conform to the Order as modified.

[3] In adopting this finding, we note that the record supports the finding of a violation under the duty-of-fair representation framework as well as the framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 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). Further, we observe, as did the judge, that no party objected to the admission of out-of-court statements made by Keller Construction Superintendent Gary Marco. Thus, we need not pass on the judge's discussion of whether they constitute hearsay under Federal Rules of Evidence 801 or 807.

In adopting the judge's finding that Local 397 requested Hammock's layoff, Chairman Pearce does not rely on Hammock's testimony about his conversations with Keller Construction Superintendent Gary Marco. Instead, he finds that the circumstances of Hammock's layoff, fully discussed in the judge's decision, support a reasonable inference that Local 397 made the request. See generally *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499, 499 (1993) ("direct evidence of an express demand by the [u]nion is not necessary where the evidence supports a reasonable inference of a union request").

to rehire Carveiro. Torres reiterated that GRP Mechanical would not rehire Carveiro. Torres then disclosed that GRP Mechanical's project was not located in Local 397's geographic jurisdiction.

Thereafter, Traylor informed Local 397's business manager, Steve Tyler, about his conversation with Torres. Tyler called Torres and told him that Local 397 could not send Hammock to work for GRP Mechanical.

The record shows that Torres, rather than requesting a referral from Local 397, should have contacted Tulsa-based Local 107 to establish a referral arrangement allowing GRP Mechanical to hire laborers from other jurisdictions. Torres admitted that he knew of this procedure, but provided no explanation for why he attempted to circumvent it by requesting a referral from Local 397. For their parts, Traylor and Tyler testified that they also knew of the proper procedure for hiring workers from other jurisdictions. There is no record evidence that they had ever previously circumvented this procedure by referring individuals to work solely within another local's jurisdiction. Nor is there direct record evidence that they ever assisted an employer in clearing Local 397's members for work solely within another local's jurisdiction.[4]

Nonetheless after Torres' initial attempt to secure Hammock's services failed, he circumvented proper procedure by staffing the Oklahoma project with laborers from Local 338 without first clearing them through Local 107. Sometime later, after his Oklahoma client complained about his staff, Torres replaced the entire crew. This time, Torres executed a contract with Local 107 to provide laborers for the Company's project in Oklahoma. The agreement allowed GRP Mechanical to hire key employees from other jurisdictions. Before the Company resumed work in Oklahoma around January 2014, and without Local 397's assistance, Torres contacted Hammock directly and hired him as a key employee pursuant to that agreement. Hammock worked for GRP Mechanical in Oklahoma until March 2014.

Analysis

The judge found that Local 397 violated Section 8(b)(1)(A), but not Section 8(b)(2), by failing to assist Torres in his efforts to hire Hammock for work in Oklahoma. In finding the 8(b)(1)(A) violation, the judge, without identifying any specific evidence in support, inferred that "on some occasions" Local 397 has assisted employers in hiring laborers for work performed in the jurisdiction of other locals, and that Traylor and Tyler withheld such assistance here because Hammock and his wife had engaged in dissident union activity. In a footnote, the judge dismissed the 8(b)(2) allegation, however, stating only that he did not "see how [Local 397] caused GRP to discriminate against Hammock."

At bottom, the allegations regarding Hammock's work for GRP Mechanical rests not on Local 397's failure to refer Hammock for work in Oklahoma (Local 397 did not possess such authority), but on Local 397's allegedly discriminatory failure to offer assistance to Torres in securing a referral for Hammock from Local 107. Contrary to the judge, we find that Local 397 did not violate Section 8(b)(1)(A) by failing to offer such assistance. Keller Construction Owner Dale Keller, Local 397 Business Manager Steve Tyler, and Assistant Business Manager for the Southwest Laborers District Council Tanif Crotts testified that (a) an employer operating in Local 397's jurisdiction has, on occasion, requested assistance from a laborer's "home local" to help with the hiring of a laborer in the jurisdiction of another local; (b) employers have called Local 397 for such assistance; and (c) locals in other jurisdictions try to direct and guide employers in such matters. Nothing about their testimony, however, demonstrates that Local 397 has ever actually assisted any employer in hiring laborers for work in any location outside of its geographic jurisdiction. Without more, we are unwilling to infer that it has provided such assistance in the past. See *Boilermakers Local 40 (Babcock & Wilcox)*, 248 NLRB 1058, 1059 (1980) (rejecting the judge's inference when evidence failed to support it). Given the lack of evidence that Local 397 had offered employers such assistance in similar circumstances, we shall dismiss the 8(b)(1)(A) allegation.

We agree with the judge, however, that Local 397's failure to offer assistance did not violate Section 8(b)(2). "A labor organization violates Section 8(b)(2) of the Act by causing or attempting to cause an employer to discriminate against an employee because the employee has engaged in activities protected by Section 7 of the Act." *Operating Engineers Local 12 (Kiewit Industrial)*, 337 NLRB 544, 545 (2002). Where, as here, the parties do not have an exclusive hiring arrangement that covers the work at issue, the General Counsel must demonstrate a causal connection between the labor organization's conduct and the employer's discrimination. See generally *Crouse Nuclear Energy Services*, 240 NLRB 390, 397 (1979) ("the absence of an exclusive hiring hall necessitates other proof of a causation nature in order for the General Counsel to establish that [a union] has violated

[4] According to the record, on one occasion, Torres contacted Tyler for assistance in staffing a project that came within the jurisdiction of both Local 397 and Local 338, which is based in Wood River, Illinois. Tyler offered to contact Local 338's business agent, which he did, and worked out an oral agreement that allowed members of both locals to share work on that project. That situation is different from the situation presented in this case because Local 397 did not have joint jurisdiction over the project in Oklahoma.

Section 8(b)(2) by attempting to cause or causing [an employer] to discriminate against [the charging party]"). Here, the record fails to show any conduct by Local 397 that is violative of Section 8(b)(2), as there is no evidence that Local 397 directly prevented Torres from hiring Hammock, or that it prevented Torres from following proper procedure by contacting Local 107 to clear Hammock for work in that jurisdiction. Cf. *Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500 (1993) (finding unlawful, in nonexclusive hiring hall context, union's efforts to force employer to change its procedure of transferring employees in order to retaliate against certain union members). Moreover, Local 397's agents said nothing to Torres that could reasonably be understood by him as a request to refrain from hiring Hammock through the proper channels. Cf. *Operating Engineers Local 12 (Kiewit Industrial)*, supra at 545 (union representative's comments to employer about charging party did not "rise to the level of an implied union request that [the employer] discriminate against [the charging party] by seeking to cause [a violation of Section 8(a)(3)]").[5] For the foregoing reasons, we adopt the judge's dismissal of the allegation that Local 397 violated Section 8(b)(2) by causing or attempting to cause GRP Mechanical to discriminate against Hammock.

AMENDED REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and take certain affirmative action designed to effectuate the purposes of the Act.

Having discriminatorily laid off Scott Hammock, Keller Construction must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily under *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Employer shall be jointly and severally liable for backpay.

Local 397, having caused Keller Construction to discriminate against Scott Hammock, is required, jointly and severally with Keller Construction, to make Hammock whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of the unlawful layoff to the date Local 397 requests Hammock's reemployment, less any net interim earnings, as prescribed in *F. W. Woolworth*, supra, plus interest as computed in *New Horizons* and *Kentucky River Medical Center*. *USF Red Star*, 330 NLRB 53, 67 (1999).

ORDER

A. The National Labor Relations Board orders that the Respondent, Keller Construction, Inc., Glen Carbon, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against employees at the request of a labor organization which is retaliating against employees for their dissident union activity or the dissident union activity of others.

(b) In any like or related manner interfering with, 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) Within 14 days from the date of this Order, offer Scott William Hammock full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Scott William Hammock whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the amended remedy section of this decision.

(c) Compensate Scott William Hammock for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff, and within 3 days thereafter, notify Scott William Hammock in writing that this has been done and that the layoff will not be used against him in any way.

(e) 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 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.

(f) Within 14 days after service by the Region, post at its Glen Carbon, Illinois facility copies of the attached

[5] As recounted above, at one point during the Torres-Traylor phone call, Traylor stated, in response to an inquiry about hiring Hammock, "Well, that is just not going to happen." This comment occurred in the context of a conversation where Traylor was–both before and after the comment in question–trying to convince Torres to follow Local 397's established practice of rehiring the laborer most recently referred, in this case, Carveiro. Viewed in context, this comment is insufficient to establish that Local 397 was trying to encourage Torres to discriminate against Hammock. Indeed, given that GRP Mechanical never attempted to hire Hammock through proper channels, this comment certainly provides no basis to speculate that—had such an attempt been made—Local 397 would have stood in the way.

notice marked "Appendix A."[6] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by an authorized representative of Keller Construction, Inc., shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees 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 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 13, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 14 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.

B. The National Labor Relations Board orders that the Respondent, Laborers International Union of North America, Local 397, Edwardsville, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Keller Construction, Inc., to lay off an employee due to the dissident union activity of that employee or any other employee.

(b) 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) Within 14 days from the date of this Order, notify Keller Construction, Inc., that it has no objection to the reinstatement of Scott William Hammock.

(b) Make Scott William Hammock whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the amended remedy section of this decision.

(c) Compensate Scott William Hammock for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, make available to the Board or its agents for examination and copying, all hiring hall records, dispatch lists, referral cards, and other documents necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of this Order, notify Scott William Hammock in writing that it has no objection to his reinstatement to his former position and that it has told Keller Construction, Inc., that it has no such objection.

(f) Within 14 days from the date of this Order, remove from its files, and ask the Employer to remove from its files, any reference to the unlawful actions taken against Scott William Hammock, and within 3 days thereafter, notify him in writing that this has been done and that those actions will not be used against him in any way.

(g) Within 14 days after service by the Region, post at its offices copies of the attached notice marked "Appendix B."[7] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the an authorized representative of Laborers International Union of North America, Local 397, 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 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 14 signed copies of the notice in sufficient number for posting by Keller Construction, Inc., at its Glen Carbon, Illinois facility, if it wishes, in all places where notices to employees are customarily posted.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Laborers International Union of North America, Local 397 has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[6] 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."

[7] See fn. 6, supra.

APPENDIX A

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

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 with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay you off or otherwise discriminate against any of you for engaging in dissident union activity or for the dissident union activity of others.

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

WE WILL, within 14 days from the date of the Board's Order, offer Scott William Hammock full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Scott William Hammock whole for any loss of earnings and other benefits resulting from his layoff, less any net interim earnings, plus interest.

WE WILL make Scott William Hammock whole for any adverse tax consequences of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating his backpay to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff, and WE WILL, within 3 days thereafter, notify Scott William Hammock in writing that this has been done and that the layoff will not be used against him in any way.

KELLER CONSTRUCTION, INC.

The Board's decision can be found at www.nlrb.gov/case/14–CA–122352 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

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

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 with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT cause or attempt to cause Keller Construction, Inc., to lay you off for engaging in dissident union activity or for the dissident union activity of others.

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

WE WILL, within 14 days from the date of the Board's Order, notify Keller Construction, Inc., that we have no objection to the reinstatement of Scott William Hammock to his former position.

WE WILL make Scott William Hammock whole for any loss of earnings and other benefits resulting from his layoff, less any net interim earnings, plus interest.

WE WILL compensate Scott William Hammock for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of the Board's Order, notify Scott William Hammock in writing that we have no objection to his reinstatement to his former position and that we have told Keller Construction, Inc., that we have no such objection.

WE WILL, within 14 days from the date of the Board's Order, remove from our files, and ask the Employer to remove from its files, any reference to the unlawful layoff of Scott William Hammock, and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use the layoff against him in any way.

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 397

The Board's decision can be found at www.nlrb.gov/case/14–CB–116188 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Rochelle K. Balentine and *Lynn Zuch, Esqs.*, for the General Counsel.

David J. Gerber, Esq. (Keller Construction, Inc.), of Glen Carbon, Illinois, for Respondent Keller Construction.

Daniel M. McLaughlin, Esq. (Spector, Wolfe, McLaughlin & O'Mara, LLC.), of Kirkwood, Missouri, for Respondent LIUNA Local 397.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in St. Louis, Missouri, on April 15–16, 2014. The Charging Party, William Scott Hammock (Scott Hammock), filed charge 14–CA–116188 against Laborers International Union of North America (LIUNA) Local 397 on November 1, 2013, and an amended charge in this case on February 19, 2014. He filed charge 14–CA–122352 against Keller Construction, Inc. on February 11, 2014. The General Counsel issued a consolidated complaint on February 27, 2014.

The General Counsel alleges that on or about August 13, 2013, Respondent LIUNA Local 397 requested that Keller Construction lay off the Charging Party William Scott Hammock because Hammock engaged in dissident union activity. Hammock ran for vice president of Local 397 against the incumbent William Trayler on June 13, 2013, and lost. On August 13, Keller permanently laid Hammock off after he had worked continuously (when there was work) for it since about 2002. The General Counsel alleges that the Union violated Section 8(b)(1)(A) and (2) in seeking and causing Keller to lay off Hammock. The General Counsel alleges that Keller violated Section 8(a)(3) and (1) in terminating Hammock's employment. The General Counsel seeks an order holding Keller Construction and Local 397 jointly and severally liable for any loss of earnings or other benefits as a result of the layoff, as well as requiring Keller to reinstate Scott Hammock.

The General Counsel also alleges that on or about September 30, 2013, Respondent Union violated Section 8(b)(1)(A) and (2) in refusing to refer Hammock to GRP Mechanical, an employer which requested permission to send Hammock to Oklahoma for work.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Keller Construction and Local 397, I make the following

FINDINGS OF FACT

I. JURISDICTION

Keller Construction, Inc. performs a variety of construction tasks in the State of Illinois. Its principal place of business is in Glen Carbon, Illinois. Keller purchases and receives goods valued in excess of $50,000 from outside of Illinois at its Illinois facilities. Keller admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. All parties agree that the Union, LIUNA Local 397 is a labor organization within the meaning of Section 2(5) of the Act.

GRP Mechanical Company has offices in Bethalto, Illinois and performs work in Illinois, Kansas, and Oklahoma. In the period ending January 31, 2014, GRP performed services valued in excess of $50,000 outside of Illinois. GRP is also an employer engaged in commerce within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Charging Party, Scott Hammock, was the recording secretary, of LIUNA Local 179 from about 1993 to about 2002 or 2003. In 2002 or 2003 he was defeated in an election for that office by William Traylor, now vice president and field representative of Local 397. In about 2004 or 2005, Local 179 merged with Local 397.

In the spring of 2013, one of Hammock's brother-in-laws, Mike Jones, decided to run against the incumbent business manager of Local 397, Steve Tyler. Scott Hammock ran on Jones' "ticket" against the Union's vice president, William Traylor. The Tyler-Traylor "ticket" won the election on June 13, 2013, by a margin of about 75 to 25 percent.

On July 5, 2013, Donna Hammock, a member of Local 397, who is also Scott's wife and the sister of Mike Jones, sent a 16-page handwritten letter to the International Union in Washington. This letter complained bitterly about what Mrs. Hammock considered to be unfair treatment by Local 397 and specifically by Tyler and Traylor. This letter was received by the Interna-

[1] Tr. 208, line 12 incorrectly renders the name of Carey Carveiro as Carey Caldieraro. Tr. 328, line 18–19: the word "about" is omitted.

tional on July 9 and referred to Local 397 and a regional LIUNA office on July 22.

Scott Hammock was one of a number of "key employees" of Keller Construction. That means that when a job he was on finished, he was not sent back to the union hall. He was either sent to another Keller job or waited for Keller to get work for him. Although he sometimes did not have work, he worked a number of winters when other Local 397 members did not.

On August 13, 2013, Hammock was working for Keller at the American Steel project. After lunch that day, the Keller foreman at American Steel informed Hammock that he was being permanently laid off. Hammock had worked for Keller Construction continuously since 2002. He had never been laid off and sent back to the Union's hiring hall previously. When Hammock signed the Union's referral list at the union hall on August 16, it was the first time he had done so since 2002.

A number of Keller employees continued working regularly for Keller after Scott Hammock was laid off (GC Exh 6). For example, Hammock worked 72 regular hours for Keller in August. Michael Cerentano worked 144 regular hours; Johnny Cox 152; Jason Govreau 152; Matt Troeckler 131; Alex Naylor 112; Timothy Moody 144; David May 144; and Kirk Maedge 132. In September 2013 Cerentano worked 128 regular hours for Keller; Cox 128, Govreau 128, Kenny Jones (another of Hammock's brother-in-laws) 136, Kirk Maedge 140; David May 128; Timothy Moody, 136; Alex Naylor 136, and Matt Troeckler 126. A number of these employees performed the same type of work that Scott Hammock performed. Among these are Mike Cerentano, Tim Moody, and Alex Naylor. None of these three were a "key employee" of Keller, but instead were referred to Keller from Local 397's hiring hall.[2]

A number of Keller employees worked a significant number of hours through the end of December 2013. There is absolutely no credible evidence as to why Scott Hammock was laid off on August 13 or who made this decision—with one exception which I will discuss in detail below. Even assuming that Keller had to lay off some employee or employees, there is no credible evidence as to why Hammock was laid off as opposed to another employee, particularly one who was not a "key employee." At page 9 of its brief, Respondent Keller states, "ultimately, the Charging Party was laid off at the direction of the Employer's general superintendent for lack of work," citing Aaron Suess' testimony at Tr. 314–315. The record simply does not support this assertion.

Owner Dale Keller testified at Tr. 375–376 and 396 that he did not make the decision to lay off Scott Hammock and did not know who did (Tr. 407). He testified that he did not talk to any of his superintendents about this decision (Tr. 396). Aaron Suess, a superintendent, the only management representative to testify other than Dale Keller, did not claim to have had any involvement in the decision to lay off Scott Hammock. Suess also did not testify as to who else made this decision. Finally, if General Superintendent Thomas Caldieraro made the decision to lay off Hammock, it defies credulity that Dale Keller would not know that. If he did not know who made the decision in August, one would expect he would conduct an investigation on this issue in preparation for this hearing.

Moreover, if Thomas Caldieraro is the person who decided to lay off Scott Hammock, one would expect Caldieraro to explain under oath that he made this decision and explain the reasons why he laid off Hammock as opposed to somebody else. I infer from the fact that Caldieraro did not testify, that either he was not the decisionmaker or that his testimony as to why he made the decision to lay off Hammock would be adverse to Respondent Keller.

I discredit Dale Keller's testimony that he did not tell Gary Marco that the Union forced him to lay off Scott Hammock. If he did not use those precise words, I find that he said something to Marco conveying the same meaning. Moreover, I see no reason to credit the self-serving testimony of any of either of Respondents' witnesses—particularly in the absence of any testimony from Keller Construction as to who decided to lay off Scott Hammock and why.

The Out-of-Court Statements of Keller Superintendent Gary Marco

October 2013

Gary Marco in 2013 was a semi-retired project superintendent for Keller Construction. It appears that Marco worked whenever he saw fit. Respondent Keller in its answer to the complaint in this case admitted that Marco was a supervisor of Keller within the meaning of Section 2(11) of the Act and an agent of Keller within the meaning of Section 2(13) of the Act. Marco was not called by any party to testify in this case.[3]

Scott Hammock testified, without contradiction, to conversations with Marco. On or about October 4, 2013, Hammock encountered Marco at a bar. Marco told Hammock that "after what happened to you, I hate unions." Hammock asked Marco what he meant. Marco responded, "Keller didn't want to lay you off. No one at Keller wanted to lay you off."

Hammock told Marco that when he went to the Union's hiring hall to sign up for referral jobs, "they acted like they were expecting me to be there." Marco replied, "Now you got it." "What those guys did to you was like Mafia." Marco continued to tell Hammock that he told Hammock's brother-in-law, Kenny Jones, what happened.[4] Then Marco told Hammock that

[2] Troeckler was a key Keller employee, as was Hammock.

[3] Respondent Local 397 argues that I should draw an adverse inference against the General Counsel for its failure to subpoena Gary Marco and present his testimony at the hearing. Respondent does not cite any cases in support of this contention. If an adverse inference were to be drawn against any party due to Marco's absence from the witness stand, it would be Keller Construction. However, I do not draw an adverse inference against any party due to the fact that Gary Marco did not testify. As explained below, the testimony of Scott Hammock and Kenny Jones as to what Marco told them is the most credible evidence in the case as to why Scott Hammock's employment with Keller Construction ended on August 13, 2013. This constitutes my "valid reason for bypassing the adverse inference rule," *Metro-West Ambulance Service*, 360 NLRB 1029, 1031 fn. 13 (2014), with regard to Marco.

[4] Kenny Jones' testimony that Marco told him that Hammock's layoff had everything to do with the union hall, Tr. 173, is also uncontradicted.

Dale Keller called Marco and told him not to be talking about this or he would be in deep trouble. Marco concluded by saying, "Just know that it wasn't Keller that wanted you laid off." (Tr. 41–42.)

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Between late January and late March 2014, Scott Hammock worked for GRP Mechanical at a site near Tulsa, Oklahoma. He was back in Illinois for a short period in early February and ran into Gary Marco again at a Sears store. Marco told Hammock that he had talked to "your investigator lady," by which I understand to be an agent of the NLRB. Marco then said to Hammock, "Dale [Keller] is just sick about this and didn't want this to happen." Hammock then asked Marco why Dale Keller did not just say what really happened. Marco responded, "He just can't, Scotty. He will have to close his doors." (Tr. 68.)

On cross-examination, Local 397's attorney asked Hammock:

> Back to your conversation with Gary Marco, did he ever tell you who told him at Keller Construction, that Local 397 told them to get rid of you?

Hammock replied:"Gary said Dale Keller told him." [Tr. 97.]

The Probative Value of Gary Marco's Out-of-Court Statements

Before turning to the issue of whether Marco's statements constitute hearsay evidence, the first thing to note is that neither Keller nor the Union objected to the admissibility of Scott Hammock's testimony about his conversations with Gary Marco. Assuming that Marco's statements are hearsay, they are admissible, if for no other reason, due to the lack of objection by either Keller or the Union's counsel, *Alvin J. Bart & Co.*, 236 NLRB 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979). In *Alvin J. Bart* the Board explicitly rejected a per se rule excluding hearsay evidence from its proceedings. In *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980), the Board noted that it "jealously guards its discretion to rely on hearsay testimony in the proper circumstance."[5] As discussed below, I conclude this is just such a circumstance.

Are the Statements Hearsay?

Respondent Keller Construction admitted that Gary Marco was a statutory supervisor and agent of Keller. However, I conclude that his statements do not fall under the standards of Rule 801(d)(2) of the Federal Rules of Evidence (FRE) that render some statements made by a party's agent to be nonhearsay. It is not clear that Marco made these statements within the scope of his agency relationship with Keller. The statements were made off of worktime, not on Keller's premises and certainly were not authorized by Keller. These statements, however, may not constitute hearsay under FRE rule 807. That rule does not exclude otherwise hearsay statements, not specifically covered under Rule 803 or 804 if (1) the statement has the equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; and (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice. Rule 807(b) allows admission of such statements only when an adverse party is given reasonable notice of the intent to offer the statement so that a party has a fair opportunity to meet it.

Most courts treat the notice requirement flexibly so long as the opponent is given a fair opportunity to prepare to contest the use of the evidence, *U.S. v. Panzardi-Lespier*, 918 F.2d 313, 3127 (lst Cir. 1990); *U.S. v. Calkins*, 906 F.2d 1240, 1245–1246 (8th Cir. 1990). In any event, I need not decide whether Marco's statements are hearsay evidence, although I believe this to be a very close question. Assuming the statements to constitute hearsay, I rely on them in finding that both the Union and Keller Construction violated the Act with regard to Hammock's layoff.

Assuming the Marco Statements to be Hearsay, I Rely on Them for the Proposition That Keller Construction Laid Off Scott Hammock at the Behest of the Union

I conclude that this is a proper circumstance in which to rely on Marco's statements in determining the principal issue in this case. In addition to Marco's position as supervisor and agent of Keller, I find these statements conclusive of the fact that the Union pressured Keller to lay off Scott Hammock. I do so because there is absolutely no other explanation for the layoff in this record.[6] There is no evidence as to who decided to layoff Hammock or why. In the absence of such evidence, I find Gary Marco's out-of-court statements dispositive.

Complaint Paragraph 8: The Union's Alleged Refusal to Refer Scott Hammock for Employment with GRP Mechanical

GRP Mechanical is based in Bethalto, Illinois, and performs a lot of work related to oil and gas pipelines. In September 2013, GRP was about to begin a job in Skiatook, Oklahoma, near Tulsa. On September 30, 2013, Richard Torres, GRP's vice president of pipeline services and fabrication called the Local 397 union hall. Torres spoke with both Business Manager Steve Tyler and Field Representative William Traylor. Torres asked both for permission to take Scott Hammock to the

[5] Also see *Midland Hilton & Towers*, 324 NLRB 1141 fn. 1 (1997).

[6] There is considerable evidence in this record regarding Hammock's hesitancy to turn in his company truck, in the June to July 1, 2013 timeframe, all of which is irrelevant. There is no evidence that this truck incident had anything to do with Keller's decision to lay Hammock off. Moreover, I do not find the testimony of Respondent Keller Construction on this matter to be credible. It is clear that Hammock was getting conflicting instructions from two supervisors, Gary Marco and Aaron Suess, as to whether he had to surrender the truck to Suess. I do not credit Dale Keller's testimony at Tr. 366 to the extent that he suggested that he told Gary Marco that Hammock needed to surrender his truck.

Dale Keller testified that there may have been a little resistance to surrendering the truck from Marco, which supports Hammock's testimony. Then he testified that "I believe I even had to make a call to Gary and say, Gary I want the truck back at the yard." I find that he made no such call. I also find that Scott Hammock was never insubordinate with regard to giving up the truck and that up to the day he returned it he was complying with the directions of his supervisor, Keller's superintendent Gary Marco, who wanted the truck to remain on his project.

GRP project in Oklahoma. Torres testified that both refused to do so.

The testimony of Torres, on the one hand, and Tyler and Traylor on the other, about these conversations differs in some respects. It is most difficult to resolve these differences because while Tyler and Traylor are not disinterested witnesses, neither is Torres. Therefore, I credit Torres' testimony only where it is not contradicted by that of Tyler and Traylor.

Scott Hammock worked for GRP on a construction project in 1998, but had not worked for Torres prior to late January 2014. However, Torres was familiar with Hammock in the employment context because both had worked at an ethanol plant in Illinois at the same time during the winters of 2008, 2009, and 2010.[7] Hammock was working for Keller and Torres was the site director for a company named Abener. I therefore credit Torres' testimony that he was familiar with Hammock's work and viewed his work ethic and performance very favorably. However, Torres is also very close friends with Kenny Jones, a Local 397 member, who is also the brother of Scott Hammock's wife Donna. He has gone on an annual fishing trip with Jones on which Scott Hammock was also present. Thus, I believe that Torres was most likely very interested in assisting Scott Hammock due to his friendship with members of Hammock's family.

Torres called Traylor on or about September 30, 2013, and told him he had a project for which he needed a laborer. Traylor suggested Carey Carveiro,[8] who had worked for GRP previously. Torres told Traylor that Carveiro did not have the skills he needed and that he wanted Scott Hammock, instead. Torres testified that Traylor refused this request and suggested other laborers. Torres testified that he told Traylor that the job for which he was seeking help was in Oklahoma after Traylor offered him the services of Carveiro. He further testified that 30 minutes later, Business Manager Steve Tyler called Torres and stated that if Hammock had solicited work from Torres he could be brought up on internal union charges. Tyler stated further, according to Torres, that if Torres solicited Hammock, GRP could be brought up on charges. Tyler denies threatening to file charges against either. However, he concedes that he told Torres that he could not send Hammock to GRP (Tr. 468, L. 22). He also concedes that he did not tell Torres that he could or should contact the Oklahoma LIUNA local to have Hammock cleared for work in Oklahoma (Tr. 483).

Torres hired several laborers from LIUNA Local 338 in Wood River, Illinois, for the Oklahoma project in the fall of 2013 to perform concrete work at a pipeline pumping station. When he had to replace them in January, he hired Scott Hammock with the approval of LIUNA Local 107 in Tulsa.[9]

I credit the testimony of Steve Tyler and William Traylor with regard to the required procedure for taking a LIUNA member to work in a jurisdiction of another local. An employer wishing to do so must clear the employee with the local with jurisdiction over the worksite, not the local to which the employee belongs. Thus, in this case Torres should have called Local 107 in Tulsa, not Local 397. However, neither Tyler nor Traylor advised Torres that he needed to call the LIUNA local in Oklahoma. Also, LIUNA locals do on occasion assist employers in taking one of their members into the jurisdiction of another local. Dale Keller testified that he has asked for this sort of assistance from the member's local (Tr. 386, 401). Local 397 Business Manager Steve Tyler also testified that contractors have called him for assistance in taking one of his members into another jurisdiction, Tr. 420–421. He did not testify as to how he responded to such requests. However, Tanif Crotts, Assistant Business Manager of the Southwest Laborers District Council in Tulsa, a witness called by Local 397, testified that his organization does try to assist employers who want to take his members into other LIUNA jurisdictions (Tr. 501).

It is clear then that neither Tyler nor Traylor advised Torres to call Local 107 or offered him any assistance in getting Hammock cleared by Local 107. I discredit William Traylor's testimony at transcript 541 that he heard Steve Tyler tell Torres that "you are going to have to contact Oklahoma." Neither Tyler nor Torres testified to Tyler offering such advice. Indeed, Tyler testified to the contrary (Tr. 483).

Analysis

When a labor organization attempts to cause an employer to discriminate against an employee due to the protected activity, including the union dissident activity of that employee, or another person, that union violates Section 8(b)(1)(A) and (2) of the Act. When the employer discriminates on the basis of the union's discriminatory activity, the employer violates Section 8(a)(3) and (1) of the Act. In such cases the employer and the labor organization are jointly and severally liable for remedying the discrimination, *USF Red Star, Inc.*, 330 NLRB 53 (1999).[10] In this case I infer that the Union caused Keller Construction to lay off Scott Hammock. I do on the basis of the out-of-court statements of Gary Marco and the absence of any other explanation for the layoff.

The Union contends that it had no motive to retaliate against Scott Hammock because his dissident activity was inconsequential, i.e., running for a largely ceremonial union office. However, had the Jones-Hammock ticket been elected in June 2013, Mike Jones, as business manager, could have attempted to replace William Traylor as field representative, his paying

[7] At the ethanol plant, Torres was a superintendent for another company. He has been employed by GRP since about 2011.

[8] Tr. 208, line 12 incorrectly renders this employee's name incorrectly as Carey Caldieraro.

[9] Although not particularly relevant to this case, I do not credit the testimony of the Oklahoma LIUNA representatives to the extent they suggested that Torres misled them in January 2014, into believing that Hammock was already a GRP employee. I credit Torres' testimony that the Oklahoma LIUNA representatives were more than happy to let him bring Scott Hammock to Oklahoma because he was hiring four to five Local 107 laborers for the project, as well indicating a desire to employ additional Local 107 members in the future. See GC Exh. 5, Tr. 507–508, 514–515.

I regard the efforts by Local 397 to prove that GRP hired Hammock for the Oklahoma project by misrepresenting his prior work experience to be further evidence of its animus towards him stemming from his candidacy for office and his wife's letter to the International Union.

[10] As in this case, the dissident activity of the discriminatee in *Red Star* was running for union office.

job (Tr. 533).[11] Moreover, in a conversation with Traylor in April 2013, Hammock mentioned that one of the reasons he was running against Traylor was that he believed that the Local (Tyler and Traylor) had not treated his wife fairly. This statement, in conjunction with the letter Mrs. Hammock sent to the International Union in July, which from the Union's perspective can only be characterized as vitriolic, gave the Local sufficient motive to retaliate against Scott Hammock, if it was so inclined.

Mrs. Hammock's letter was forwarded to the Union on or about July 22, 2013, just several weeks before Keller laid off her husband. It is black letter law that discrimination predicated on the protected activity of others, such as family members, is as much a violation of the Act as discrimination against the employee who engaged in union or other protected activity, *Golub Bros. Concessions*, 140 NLRB 120 (1962); *Tolly's Market, Inc.*, 183 NLRB 379 fn. 1 (1970); *PJAX*, 307 NLRB 1201, 1203–1205 (1992) enfd. 993 F.2d 878 (3d Cir. 1993). Regardless of whether the Union was motivated to retaliate by Scott Hammock's dissident activity or that of his wife, or both, I find that Local 397 violated Section 8(b)(1)(A) and (2) of the Act.

Keller Construction violated Section 8(a)(3) and (1) cooperating with the Union in its retaliation against the Charging Party. There is simply no credible alternative explanation for the layoff in this record.[12]

I also find that the Respondent Union violated Section 8(b)(1)(A) as alleged in complaint paragraph 8.[13] Although, Local 397 does not generally refer employees to jobs outside of its jurisdiction, I infer that at least on some occasions, it has assisted employers to taking its members into the jurisdiction of other locals. I have found that it did not offer such assistance to GRP Mechanical's Richard Torres and further infer that it failed to do so due to its animus towards Scott Hammock. In turn I find that this animus was due to the dissident union activity of Scott Hammock and/or his wife.

CONCLUSIONS OF LAW

1. Respondent LIUNA Local 397 violated Section 8(b)(1)(A) and (2) of the Act in requesting Keller Construction to lay off Scott Hammock on or before August 13, 2013.

2. Respondent LIUNA Local 397 violated Section 8(b)(1)(A) in failing to assist GRP Mechanical in employing Scott Hammock in Oklahoma.

3. Respondent Keller Construction, Inc., violated Section 8(a)(3) and (1) in laying off Scott Hammock at the Union's request.

Both Respondents are liable for the discriminatory layoff of Scott Hammock. Keller Construction must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent LIUNA Local 397 is jointly and severally liable for Scott Hammock's loss of earnings and other benefits.

Respondents shall either independently or jointly shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondents shall also compensate Scott Hammock for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012).

[Recommended Order omitted from publication.]

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[11] The fact that the Union did not seek to retaliate against Mike Jones does not prove that it did not retaliate against Hammock, his brother-in-law and fellow dissident, *Volair Contractors*, 341 NLRB 676 fn. 17 (2004). For one thing it may have been harder to get Jones' employer at the wastewater facility to assist in retaliation for a variety of reasons.

[12] Without citing any cases, Respondent Keller contends that the complaint should be dismissed because Hammock did not exhaust his remedies under the collective-bargaining agreement. What an odd result it would be for the Charging Party to be precluded from availing himself of the Board's processes when it was his union that was primarily responsible for his termination in the first place. I suspect Respondent Keller did not cite any cases because Board case law is precisely the opposite, *Iron Workers Local 433*, 266 NLRB 154 fn. 1 (1983); *Warehouse Employees Local 20408 (Dubovsky & Sons)*, 296 NLRB 396, 408–410 (1989).

[13] I do not find an 8(b)(2) violation with regard to complaint par. 8. I do not see how the Union caused GRP to discriminate against Hammock. I would note that Hammock would not be entitled to any additional remedy for the violations alleged in complaint par. 8 in addition to those due him for the conduct alleged in par. 7.