UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

RICKIE J. VANCE

Charging Party,

and

CASE NO. 25-CB-150584

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 181
(MAXIM CRANE WORKS, LP)

Respondent.

RESPONDENT'S, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION 181, BRIEF IN SUPPORT OF ADMINISTRATIVE LAW JUDGE GOLDMAN'S DECISION AND IN OPPOSITION TO CHARGING PARTY'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS

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Comes now the Respondent, International Union of Operating Engineers, Local Union 181, by its Counsel, Charles L. Berger of the firm of Berger and Berger, LLP, and hereby respectfully submits it's Brief in Support of Administrative Law Judge David I. Goldman's Decision, and in Opposition to Charging Party's Exceptions and Brief in Support of Exceptions.

I. INTRODUCTION

The Respondent Union, International Union of Operating Engineers, Local 181 (hereinafter referred to as "Union"), respectfully submits that Administrative Law Judge David I. Goldman (hereinafter referred to as

"Judge"), correctly decided this matter after conducting a hearing on January 28, 2016, observing the "demeanor of the witnesses" in making credibility determinations related thereto and the exhibits received in evidence. The General Counsel presented no evidence to support the Charging Party's allegations of an Unfair Labor Practice. The Judge correctly credited the Union's testimony over that of the Charging Party and made an independent analysis based upon the exhibits entered into evidence at the hearing and his review of the law. While the Charging Party, in its Exceptions and Brief in Support thereof, makes the bold assertion that the Charging Party was denied his entitlement to see the Out of Work List, General Counsel provides no probative evidence for the claim. Judge Goldman found, based upon evidence in the record of the hearing, that the Charging Party was never denied the opportunity to view the Out of Work List and thus no Unfair Labor Practice existed. The Charging Party, by and through General Counsel, failed to prove that the Union committed an Unfair Labor Practice. The Union respectfully requests that the Board deny the Exceptions and affirm the decision of Judge Goldman.

II. STANDARD OF REVIEW

The National Labor Relations Board (hereinafter referred to as "Board") reviews the decisions made by the Administrative Law Judge's on a *de novo* basis. While the Board is not bound by the determinations of the Judge, the

Board has long recognized that in matters related to credibility of witnesses that great deference to the findings of the Judge should be followed by the Board because the Judge was present to make such conclusions after observing their demeanor and testimony:

> Accordingly, in all cases which come before us for decision, we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings. Nevertheless, as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor. Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect. *Standard Dry Wall Products*, 91 NLRB 544, 544-45 (1950).

In the present case, the Judge credited the testimony of the Union over the testimony of the Charging Party in several key areas that were involved in the Judge's decision. The Union respectfully requests the Board to give strong deference to these credibility determinations since the Judge was present to hear and consider the testimony of each witness. Further, on each critical issue, the Judge in his decision points to the record and the factual basis for the lack of evidence on each of the critical facts that needed to be proven by the General Counsel to sustain its case under the allegations of the Complaint. The General Counsel wholly failed to prove the allegations in the Complaint resulting in the dismissal decision by the Judge.

III. ARGUMENT

The General Counsel's Exceptions filed in response to the Judge's decision make statements not based upon the facts in the case. The Exception No. 1 states that Rickie Vance was refused to view the Out of Work List on or about March 17, 2015. The overwhelming evidence in the case, and only credible evidence in the case as found by the Judge, made it very clear that Rickie Vance was never refused the opportunity to view the Out of Work List on or about March 17, 2015. The Exception No. 2 was not based upon the record as Rickie Vance was never refused the opportunity to view the Out of Work List, but failed to follow the procedures that had been put in place by the Board and the Union for his effort to view the list at some point after May 28, 2015 (Respondent's Exhibit No. 3). General Counsel's Exception No. 3 seeks relief without evidence to sustain said exception.

At no time did the General Counsel ever amend the Complaint to make any allegation for anything occurring other than on March 17, 2015. Based upon the complete failure of the General Counsel's case, the Judge did not even need to reach those issues for the Exception No. 2 as sought by the General Counsel.

A. **The General Counsel's Exceptions and Brief in Support thereof contain misstatements of facts throughout without any statement of probative evidence to support its Exceptions to the well-reasoned, factual findings, and decision of Administrative Law Judge, David I. Goldman.**

The General Counsel's Exceptions and Brief in Support thereof fail in any manner to show that the factual findings of the Judge were incorrect or not based upon the credible evidence as presented at the hearing before the Judge. The Respondent Union adopts, in support of the Judge's decision and in opposition to the General Counsel's Exceptions and Brief in Support thereof, the factual findings of the Judge as the Judge is the finder of facts and accurately presented those facts in the decision (Decision, pp. 3-7).

The burden at the trial rested squarely upon General Counsel to demonstrate the occurrence of an Unfair Labor Practice under Section 8 of the National Labor Relations Act [*Northern Wire Corp. v. NLRB*, 887 F.3d 1313, 1318 (7th Cir. 1989)]; [*NLRB v. Jakel Motors, Inc.*, 875 F.2d 644, 646 (7th Cir. 1989)]. The General Counsel was required to prove its allegations in the Complaint issued by the General Counsel in Paragraphs 5(c) and 6, wherein they read as follows:

> 5(c) Since about March 17, 2015, Respondent has refused to provide Rickie Vance with hiring hall information maintained by Respondent in order to determine whether he had been treated fairly regarding job referrals.

6. By the conduct described above in paragraph 5(c), Respondent has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8 (b)(1)(A) of the Act.

The General Counsel simply failed to bring any credible evidence of such violation. The misstatements in the General Counsel's Brief are done to provide substantiation to General Counsel's argument. However, since no evidence is contained in the record to support said statements, the arguments of General Counsel fail. The misstatements occur wherein General Counsel states the following:

> "Ask to see the Respondent's Out of Work List because he had not received a job referral in about six months"

(General Counsel's Brief, p. 9, ll. 1-2).

General Counsel makes this statement without any reference to the record in the case and against the clear evidence in the record as pointed out by the Judge at Footnote No. 2 on Page 4 of the decision wherein the Judge set out those exact factual findings as to why Mr. Vance's claim had no support wherein the decision states as follows:

> "[Footnote] [2]Vance also testified that the Union did not "start calling me [for jobs] until they had notice that I had filed [unfair labor practice] charges. However, on cross-examination he nonchalantly admitted that it was "possible" that this was inaccurate, admitted that he told the Board agent, as reflected in his affidavit, that he turned down job offers because he wanted longer jobs, he remembered receiving a message for work on

> October 1, 2014, and did not remember eight other jobs for which the Union's records convincingly demonstrated he received calls (for multiple calls for each job in most instances) between September 9, 2014, and March 19, 2015. My resolution of this case does not turn on Vance's credibility, but his testimony about not being called for six months was thoroughly discredited."

(Decision, p. 4, FN 2).

The General Counsel then carelessly makes reference to the record that the Business Manager, Howard Hughes, told Rickie Vance that he was tired of his "God-damned bullshit". The record, based upon the tapes that were admitted, showed that Howard Hughes stated he was tired of his "bullshit" and never used any reference to God in vain (Respondent's Exhibit No. 11). The General Counsel offers no support of the record for any of his factual allegations in his Brief. All of said allegations were a general allegation and reference to pages in the record without any analysis of the clear and undisputed evidence that demonstrated the Charging Party's failure to understand the facts or the truth.

The General Counsel simply failed to prove the essential elements of the Complaint with any probative evidence and therefore the General Counsel's case failed and the Complaint's dismissal should be upheld.

B. The Judge correctly found that the Respondent did not refuse to allow Rickie Vance the opportunity to view the Out of Work List.

General Counsel argues that the Respondent Union refused Mr. Vance the opportunity to view the Out of Work List. This argument is unsupported by

the evidence in the record. The General Counsel's reliance upon *Hoisting Portable Engineers, Local 302*, 144 NLRB 1449 (1963), offers no support to the facts presented. The Respondent Union does not dispute what the law states and requires, but did dispute that any of the facts established that the Union had violated any prior holdings of the Board or the cases relied upon by the General Counsel, since there was simply no evidence that the Charging Party had been denied the opportunity to view the Out of Work List.

The Union does not dispute, nor did it dispute, that is has an obligation to provide to referral applicants the opportunity to review a referral record within reasonable rules established by the Union. The General Counsel's reliance upon *Bartenders and Beverage Dispensary Union* (Nevada Resort Association) 261 NLRB 420, and all other references therein, are of no comfort or support since the General Counsel never established that the Union refused to provide the Charging Party, Rickie Vance, the opportunity to see the Out of Work List. Rickie Vance refused the opportunity on repeated occasions and during multiple telephone conversations as reflected in the record of this case (Respondent's Exhibit No. 11).

The General Counsel's general recitation of the law is of no support to an attempt to have the Board rule differently than the Judge when the facts establish that none of those cases provide relief where the General Counsel failed to provide evidence of a violation of the opportunity to view the lists and the duty of fair representation.

On Page 13 of the General Counsel's Brief, General Counsel once again reiterates an unproven fact. This repeated pattern throughout the General Counsel's Brief of making generalized statements without any factual basis shows both a lack of careful review of the record and the total lack of any probative evidence for the various inaccuracies. There were no facts that sustained the claim that Rickie Vance had been unable to find work for six months. The statement made by Rickie Vance, the Charging Party, is the foundation for the General Counsel's case and it failed totally when the record of evidence through testimony and exhibits established that Rickie Vance had numerous job opportunities but failed to act and had actually worked in that six month period (Respondent's Exhibit No. 7).

The General Counsel then repeats himself by making references to a claim that Business Manager Howard Hughes told the Charging Party that he was tired of his "God-damned bullshit" which has been proven to be not accurate or correct based upon the evidence in the record reflected in the discussions between Todd Smart, the Charging Party, and Howard Hughes (Respondent's Exhibit No. 11).

The General Counsel further goes on to make another unsubstantiated factual assertion in his Brief, on Page 16, Line 3, when he stated that Business Manager Howard Hughes refused Charging Party the opportunity to see the Out of Work List. There is no evidence in the record that Business Manager Howard Hughes ever refused Rickie Vance the opportunity to see the Out of Work List. General Counsel also names the incorrect city for where Mr. Hughes

requested Mr. Vance to view the Out of Work List as it is not "Hendersonville", Kentucky, but "Henderson" Kentucky, and was within twelve (12) to thirteen (13) miles to the District Two Office in Evansville, Indiana. The record also demonstrates that Rickie Vance worked out of District One which is located in Henderson, Kentucky, as much as he worked out of District Two (Respondent's Exhibit No. 7). Charging Party was never presented with a great burden to view the list. General Counsel failed to show any burden of having to drive to Evansville, Indiana. The General Counsel then makes unsubstantiated arguments that the decision to come to Henderson, Kentucky, was arbitrary and disingenuous without any factual basis to support same in the record of the hearing, since Charging Party had worked out of District One, Henderson, Kentucky, about the same as out of District Two, Evansville, Indiana (Respondent's Exhibit No. 7).

The foundation upon which the General Counsel bases its case was that Rickie Vance had not received any calls in over six months and therefore he should have the right to view the Out of Work List. Rickie Vance testified that he was wrong in earlier testimony as he admitted he had received referrals and that he had in fact received *numerous* referrals, and had turned down many jobs since this had occurred on and after March of 2015 (Tr. pp. 89, 90). Further, the General Counsel repeats the unsupported claim that Mr. Hughes refused to allow Rickie Vance to see the Out of Work List, when in fact the testimony of the Charging Party was quite clearly to the contrary wherein at Page 96, Lines 17-25, he stated as follows:

Q. But Mr. Hughes told you you could see it [Out of Work List] in Henderson, correct?
A. Yes.
Q. And you made the decision not to go to Henderson to see the list, correct?
A. Yes.
Q. And you never asked to have a copy of it at that time, did you?
A. No.

(Tr. p. 96, ll. 17-25).

The decision of the Judge to dismiss the Complaint was correct. General Counsel failed to prove any of the essential allegations of the Complaint. The General Counsel was unable to meet its burden that an Unfair Labor Practice was committed by the Union. The General Counsel was required to prove that on or about March 17, 2015, that the Union refused Rickie Vance hiring hall information maintained by them so that he could be treated fairly regarding job referrals [Complaint Paragraph 5(c)]. The fact is that he was given the opportunity to see the hiring hall's Out of Work List on March 17, 2015. The burden rests clearly upon the General Counsel to meet that burden under the National Labor Relations Act. [*Northern Wire Corp. v. NLRB*, 887 F3d. 1313, 1318 (7th Cir. 1989)]; [(*NLRB v. Jackel Motors, Inc.*, 875 F2d. 644, 646 (7th Cir. 1989)]. General Counsel failed to prove those essential allegations.

The evidence in this case established that Mr. Rickie Vance was never denied access to the Out of Work List when he made his Complaint and filed his charge against the Union. He was told to go to Henderson, Kentucky, to view the list. Mr. Rickie Vance never missed any work as result of any

manipulation or violations of the referral rules of the Respondent Union. The Respondent Union operated a hiring hall that complied with all of its rules and regulations with no discriminations against Mr. Vance or any other individual. No evidence was offered by the General Counsel of ongoing disputes or complaints of manipulation of the hiring hall and denial of access to the hiring hall.

C. The Union dealt fairly with employee's request for information.

The evidence in this case established that the Union operated its hiring hall in a fair manner. The Charging Party, Rickie Vance, received fair representation. At no time did the General Counsel produce any evidence that there was a failure to fairly represent Rickie Vance by the way the Union operated its hiring hall. As the Judge found, the Union did not refuse Rickie Vance the opportunity to view the Out of Work List by having him go to Henderson, Kentucky, which was approximately ten (10) more minutes in his drive. The actions in the Union involving Rickie Vance were never motivated by discrimination or bad faith and there was no evidence to support same.

General Counsel's attempt to use an uncharged act as a basis for it to prevail on the underlying Unfair Labor Practice Complaint is without precedent. The General Counsel never amended its Complaint in this matter and the evidence was that it was clearly the result of a failure to follow the rules that have been established by the Union's attorney with the discussions by mail with the Board's Investigative Agent, Rebekah Ramirez, for the General Counsel's office. The decision of the Judge was that no violation of the duty of

fair representation occurred nor was proven by the General Counsel. The Judge's comments at Footnote No. 4 on Page 8 of his decision point to the weakness and lack of any basis in the General Counsel's case wherein the Judge states as follows:

> "[Footnote] [4]Some courts have applied a "heightened" standard of fair representation to unions in the operation of exclusive hiring halls. See, e.g., *Jacoby v. NLRB*, 325 F. 3d 301 (D.C. Cir. 2003). *Lucas v. NLRB*, 333 F. 3d 927, 934-935 (9th Cir. 2003). In addition to the arbitrary, discriminatory, and bad-faith standard, under this "heightened standard, a breach of the duty of fair representation will be found where a union operates a hiring hall "without reference to objective criteria and thereby affects the employment status the employment status of those it is expected to represent" (*Boilermakers, Local No. 374 v. NLRB*, 852 F. 2d 1353, 1353 (D.C. Cir. 1988), cited in *Jacoby*, supra at 308). See also, *Lucas v. NLRB*, 333 F. 3d 927, 934-935 (9th Cir. 2003). Although my analysis follows the Supreme-Court and Board accepted duty-of-fair-representation standard set forth above. I note that application of a heightened standard would make no difference to the outcome here. There is no effect on Vance's employment status alleged much less found, and no failure to operate without reference to objective criteria.

(Decision, p. 8, FN 4).

The General Counsel's argument that the assertion of confidential information, was not valid based upon its reliance upon *Bartenders and Beverage Dispensers Union, Local 165*, supra, fails to state all of the facts. There were drug test results and other personal information that are on those lists. The Judge found that those concerns met the concern for the Union and fair representation to all members and not just Rickie Vance. The General Counsel once again resorts to making unsubstantiated statements in its Brief

without the support of proven facts or law as a basis to set aside the decision of the Judge.

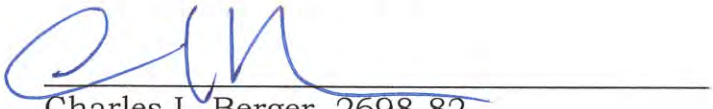
The well-reasoned, well supported, and documented decision of the Judge thoroughly reviewed the record to provide the decision of dismissal of the Complaint. General Counsel's Brief is merely a regurgitation of its original arguments by using facts that were shown to be unproven. The General Counsel fails to provide any factual basis to support its Exception No. 3, which is an attempt to have the whole decision overturned with no foundation offered in its Exceptions or it's Brief.

VI. CONCLUSION

The Respondent, International Union of Operating Engineers, Local Union 181, by Counsel, Charles L. Berger of the firm of Berger and Berger, LLP, respectfully requests that the decision of the Administrative Law Judge David I. Goldman be upheld by the National Labor Relations Board as his legal determinations were clear and correct interpretations of the law and the facts presented before him. The Union requests that the Board affirm the Judge's decision to dismiss the General Counsel's Complaint.

Signed in Evansville, Indiana, this 8th day of September, 2016.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing pleading pursuant to the National Labor Relation Boards e-filing system and have done so in PDF format with the required signature by the undersigned Counsel and that a copy of the Motion has been served by depositing the same Post-Hearing Brief to the United States First Class Mail, postage prepaid, this 8th day of September, 2016, to all parties as listed herein.

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