

BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION THREE

LABORERS INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL UNION NO. 91,

Petitioner,

and

Case 03-CB-163940

FRANK S. MANTELL

Charging Party.

**LABORERS INTERNATIONAL UNION OF NORTH AMERICA,  
LOCAL UNION NO. 91's BRIEF IN SUPPORT OF ITS EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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## STATEMENT OF THE CASE

The underlying case in this matter concerns internal union discipline imposed on a union member for making statements on Facebook which are not protected by the Act. More specifically, Charging Party Frank S. Martell made a series of statements and comments on various Facebook pages criticizing Glenn Choolokian, a mayoral candidate running in the 2015 democratic primary in Niagara Falls, New York. The Facebook posts were directed to “everyone who [was] voting in the democratic primary,” and did not concern collective bargaining or terms and conditions of employment. Charging Party, in the course of making the aforementioned statements and comments, accused Petitioner Laborers’ International Union of North America, Local Union No. 91 (“Local 91” or the “Union”) of giving Choolokian a journeyman’s book as a “gift” and of generally being corrupt. When Local 91 Business Manager Richard Palladino learned of Charging Party’s false Facebook posts, he filed internal union charges against Charged Party.

The reason the internal union charges were filed – though the Administrative Law Judge (“ALJ”) did not allow counsel for Local 91 to fully develop the record on this subject – was that historically previous Local 91 administrations had in fact been involved in various illegal activities (had in fact been under federal indictment), and Business Manager Palladino and other current Union Officers had spent a considerable amount of effort to “right the ship,” improving both the legal operation of the Union and its reputation in the community. Further, Charging Party’s statements on Facebook that Local 91 gave Choolokian the journeyman’s book as a “gift” and that the Local 91 was “corrupt” were both maliciously false – however, this is another area where the ALJ prevented Local 91’s counsel from developing a full and complete record. Indeed, the ALJ repeatedly blocked the Unions’ counsel’s attempts to elicit testimony concerning the nature of Charging Party’s Facebook posts and the context in which they were made.

Following a hearing, Administrative Law Judge Arthur Amchan erroneously found that the Union violated 8(b)(1)(A), having ignored the context in which Charging Party's Facebook posts were made and preventing the Union's counsel from developing a complete record. Local 91 contends that (1) the ALJ's decision was erroneous as a matter of law, as Charging Party's Facebook posts were not protected by the Act under current Board precedent; and (2) the ALJ's finding that Charging Party's Facebook posts were not "maliciously and knowingly untrue" was erroneously based on an incomplete record.

Local 91 requests that the Board grant Exception No. 1, reverse the ALJ's Decision and dismiss the complaint. If the Board does not dismiss the complaint pursuant to Exception No.1, Local 91 requests that the Board grant Exception No. 2 and remand the case to the ALJ for a hearing for the purpose of developing a complete record on the nature of Charging Party's Facebook posts and the context in which they were made.

### **STATEMENT OF FACTS**

Frank Mantell ("Charging Party") has been a member of Laborers' International Union of America, Local Union No. 91 ("Local 91" or the "Union") since 1994. T at 31.:<sup>1</sup> Beginning in or about August 2015 (T at 196), Charging Party began posting statements on the social media website "Facebook" criticizing Mayoral challenger Glenn Choolokian's receipt of a Local 91 journeyman's book from the Union. More specifically, Charging Party posted the comments in a Facebook "group" called "Niagara Falls Uncensored." T at 45. The Niagara Falls Uncensored group included between 3,000 and 4,000 members and was geared toward people who are "from Niagara Falls or had some type of interest in Niagara Falls." T at 90, 91. Charging Party did not

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<sup>1</sup> Throughout Brief, the following reference will be used: T at \_\_\_ for the Transcript at page(s).

personally know all the members of the group. T at 90. Charging Party also posted similar statements on the Vince Anello Show Online Radio Show Facebook page. GC Exhibit 5.

Despite his testimony to the contrary (T at 80, 85), Charging Party was an active supporter of incumbent Mayor Paul Dyster during the 2015 election season. *See, e.g.*, T at 104; GC Exhibit 4 at p. 1.<sup>2</sup>

Charging Party admitted that there was no way for him to know who was viewing his Facebook posts at any given time and that he did not know who had “liked” his Facebook posts. T at 95, 96. The posts were not directed towards Local 91 members specifically, but were posted in a public forum in the context of political discussions in the midst of the 2015 Niagara Falls Mayoral election cycle and were directed to “everyone who [was] voting in the democratic primary.” GC Exhibit 4. *See also* T at 98, 99; GC Exhibits 4-6. Indeed, Charging Party’s initial Facebook post bemoaned the propriety of Glenn Choolokian, as a mayoral candidate, accepting a journeyman’s book from Local 91:

I want to ask everyone who is voting in the democratic primary why councilman and mayoral candidate Choolokian received and accepted a journeyman union book thru Laborers local 91 when there are between 30 and 40 apprentices that have to work 4000 hours and take approximately 20 classes to obtain that same journeyman book?

GC Exhibit 4. The comments that followed alleged that Local 91 had presented Choolokian with the journeyman’s book as a “gift,” implying that Local 91 was illegally bribing a politician:

Sorry Pete Morreale, I am not running for mayor and receiving gifts from our union.

(GC Exhibit 4).

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<sup>2</sup> “Tammy Serpa Highway: Is it fair? No. Is it standard? Sure it is. Will it ever stop? No, sadly, it will not. Frank Mantell: It has with our current mayor for the last 8 years.”

Sam, is that all u have, ask him directly? I am asking you why your mayoral candidate accepts “gifts” from local 91. So he can be a puppet is my guess.

(GC Exhibit 5).

...

I find it very status quo that the Reporter or should I say the Rag, has not contacted me about Choolokian accepting the journeyman union book “gift” from my business agent, Dick Pallidino...

(GC Exhibit 6).

Conspicuously, Charging Party refrained from responding to comments made by Local 91 members, but did respond to non-members, including Vince Anello (a former mayor of Niagara Falls) and Sam Archie (Glenn Choolokian’s campaign manager). GC Exhibit 5. *See also* GC Exhibits 4 and 6; T at 56. In short, Charging Party did not direct his comments to Local 91 members, but rather to citizens eligible to vote in the Niagara Falls democratic primary. GC Exhibits 4-6; T at 114-129.

When Business Manager Richard Palladino learned of Charging Parties’ false allegations of bribery by Mantell, he filed internal union charges against Charging Party, alleging violations of the Local 91 Constitution. *See* GC Exhibits 2-3. More specifically, Palladino was concerned that Charging Party’s Facebook posts accusing the union of illegal activities adversely affected Palladino’s reputation as business manager and the reputation of the union, and damaged his ability to lead the union. *Id.* These concerns were based on Local 91’s checkered past, including the federal indictment of former union officials, prior to Palladino’s tenure as Business Manager. *See* GC Exhibit 3; T at 179, 184. *See also* T at 220 – 226.

In early September 2015, Local 91 provided Charging Party notice of the charges and scheduled a hearing, which was held on October 5, 2016. GC Exhibits 2 and 9. Following the hearing, the trial board entered deliberations, unanimously found Charging Party guilty and voted

(again, unanimously) to suspend and fine Charging Party. GC Exhibit 9. The executive board presented the proposed discipline at the next Local 91 regular membership meeting, held on October 12, 2015. T at 63. The Local 91 members voted on whether to uphold the proposed discipline, which included a 24-month suspension, a \$5,000 fine and removal from the out-of-work list. T at 63, 64. At least two-thirds of the members at the meeting voted to impose the proposed discipline against Charging Party. *Id.*

In or about November 2015, Charging Party filed an appeal of Local 91's decision with the Laborers' International Union of America (the "International") (GC Exhibit 11) and simultaneously filed an unfair labor practice charge with Region 3 of the NLRB (GC Exhibit 1(a)). By letter dated December 4, 2015 the International dismissed Local 91's charges against Charging Party. GC Exhibit 12. A hearing was held in the instant case before Administrative Law Judge Arthur Amchan on June 29, 2016. ALJ Amchan issued his Decision in the case on September 7, 2016.

## **ARGUMENT**

### **POINT I**

#### **CHARGING PARTY'S FACEBOOK POSTS ARE UNPROTECTED AS A MATTER OF LAW**

Based on the afordescribed facts, current Board precedent required the ALJ to find that Charging Party's Facebook posts were *not* protected under the Act. Specifically, for over 15 years, the Board has explicitly declined to proscribe intraunion discipline against union members under Section 8(b)(1)(A) of the Act when the matter involves a purely intraunion dispute and the intraunion discipline imposed does not interfere with the employee-employer relationship or contravene a policy of the Act. *See Office and Professional Employees International Union, Local*

521, *AFL-CIO (Sandia Corp. d/b/a Sandia National Laboratories)*, 331 NLRB No. 193 (2000). Further, where a union member alleges he was disciplined by the union in violation of 8(b)(1)(A), the Board must first determine whether the activity for which the discipline is sought or imposed is protected activity under Section 7 of the Act. See *Pacific Maritime Association*, 358 NLRB No. 133 at \*\*12 (2012) (“First it must be established that the employee’s intraunion activity is protected by Section 7”).

In order to receive the protection of Section 7, “the employee’s intraunion activity must bear some relation to collective bargaining or other mutual aid or protection, i.e., ‘the activity bears some relation to the employees’ interests *as employees*’ not merely intraunion interests.” *Id.* (emphasis added).

Here, the ALJ’s finding that Section 8(b)(1)(A) was violated contravenes the clear holdings in both *Sandia Corp.*, 331 NLRB No. 193 (2002) and *Pacific Maritime Association*, 358 NLRB No. 133 at \*\*12 (2012). The facts of *Sandia Corp.* are particularly pertinent here, as the union in *Sandia Corp.* permanently suspended union officers for, *inter alia*, “slandering” the union’s president. *Sandia Corp.*, 331 NLRB No. 193 at \*2. Put otherwise, the union in *Sandia Corp.* forever banished a union officer from membership because she publicly accused the union’s president of improprieties. The Board declined to find any violation of the Act and dismissed the complaint. The Board did acknowledge that the right to concertedly oppose the policy of union officials is protected by Section 7, but only if “the activity bears some relation to the employees’ interests as employees.” *Id.* at \*13. Thus, the Board in *Sandia Corp.* found that maligning a union officer – the same activity Charging Party engaged in here – does not bear any relation to employees’ interests as employees and that such activities are not protected by Section 7 of the Act. On the basis of *Sandia Corp.* and its progeny, then, the Board lacks jurisdiction over Local

91's internal union discipline of Charging Party in this case. To the extent Charging Party's allegations form the basis for a complaint under the Labor Management Reporting and Disclosure Act ("LMRDA"), the proper forum for his complaint is federal district court. However, based on the the Board's precedent, he has no claim under the NLRA, and the ALJ should have dismissed the complaint.

The ALJ's decision fails to take heed of the *Sandia Corp.* decision. Here, as in *Sandia Corp.*, Charging Party made slanderous statements about Local 91's leadership. More specifically, Charging Party posted statements on Facebook which, *inter alia*, accused Local 91's leadership of bribing a politician and general corruption. Such statements were made in the context of a discussion related to the then-ongoing 2015 democratic primary race for Mayor of Niagara Falls, New York. As such, they had no bearing on "employees' interests as employees," and were not related to collective bargaining or other mutual aid or protection. *Sandia Corp.* at \*13. Because Charging Party's activity, as a matter of Board law, does not bear any relation to collective bargaining or other mutual aid or protection, the ALJ should have found that Charging Party's Facebook posts were not protected by the Act. For these reasons Local 91 requests that the Board grant Exception No. 1, reverse the ALJ's decision and dismiss the complaint.

## POINT II

### **THE ALJ THWARTED CHARGED PARTY'S ATTEMPTS TO ELICIT TESTIMONY REGARDING THE MALICIOUS AND UNTRUTHFUL NATURE OF CHARGING PARTY'S FACEBOOK POSTS**

During the hearing before the ALJ, Counsel for Local 91 raised the argument that, even if Charging Party's Facebook posts were, somehow, protected, they were maliciously untruthful and thus lost the protection of the Act. T at 20. Despite Local 91's counsel's repeated attempts to

elicit testimony regarding the malicious and untruthful nature of Charging Party's Facebook posts with respect to the Union – when questioning the Charging Party *and* the Union's witness – the ALJ did not allow him to do so. Notwithstanding the ALJ's unwillingness to hear testimony regarding the nature and context in which Charging Party's Facebook posts were made, the ALJ found that “nothing [Charging Party] said in his Facebook posts was maliciously and knowingly untrue.” ALJD at 3.<sup>3</sup> Thus, the ALJ not only prevented Local 91's counsel from making a complete record of facts relevant to the case, but then went on to make a critical finding of fact based on the resulting incomplete record. Put otherwise, the ALJ abused his discretion by fettering the Union's counsel such that the resulting record reflected the ALJ's own preconceptions about the case he was assigned to decide impartially. Consequently, the ALJ could find that Charging Party's Facebook posts were not malicious or untrue precisely because he precluded Local 91's counsel from eliciting testimony that might show otherwise. Indeed, the transcript is riddled with exchanges between the attorneys and the ALJ regarding the relevancy of potential testimony. In almost every case, the ALJ refuses to allow Local 91's counsel to elicit testimony regarding the nature of Charging Party's Facebook posts or the context in which they were made:

- T at 20, 21. (Counsel for Local 91 states that the Union should be allowed to develop a record reflecting whether or not Charging Party's Facebook posts are malicious or knowingly false. The ALJ responds that he “feel[s] it all comes down to what your client knew and what the motivation for what they did...And if I'm wrong and I rule against you, then you could file exceptions and the Board will bounce it back to me in two years.”).
- T at 28-30. (Counsel for Local 91 states, at length, the Union's concern regarding the malicious and untruthful nature of Charging Party's Facebook posts and the context in which they were made. The ALJ states that he will “see what the evidence shows.”)

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<sup>3</sup> Throughout these Exceptions, the following reference will be used: ALJD at \_\_\_ for the Administrative Law Judge's Decision at page(s).

- T at 76. (Counsel for Local 91: “Are you saying I can’t ask the questions as to whether or not his – and test whether or not his testimony is accurate, or whether it’s genuinely held or whether you should listen to it or not?” ALJ: “I don’t think it’s relevant.”)
- T at 86. (Counsel for Local 91 attempts to cross-examine Charging Party with respect to the political nature of his Facebook posts. ALJ sustains objections)
- T at 87. (ALJ states that “all that’s relevant” is that Charging Party made public Facebook posts critical of the Union.)
- T at 99-101. (Counsel for Local 91 attempts to cross-examine Charging Party regarding the nature and context of his Facebook posts. ALJ sustains objection to line of questioning.)
- T at 102-103. (Counsel for Local 91 again attempts to cross-examine Charging Party regarding the nature and context of his Facebook posts, particularly with respect to the political nature of the posts and the audience Charging Party is addressing in the posts. ALJ sustains objection to line of questioning).
- T at 105. (ALJ continues to block Counsel for Local 91’s attempts to cross-examine Charging Party regarding nature and context of Facebook posts.)
- T at 110-111. (ALJ continues to block Counsel for Local 91’s attempts to cross-examine Charging Party regarding nature and context of Facebook posts. ALJ rejects Counsel’s request to be heard outside the presence of the witness.)
- T at 117. (ALJ again refuses a request from Counsel for Local 91’s to be heard outside the presence of witness.)
- T at 142-144. (ALJ sustains objection, blocking Counsel for Local 91’s attempt to cross-examine Charging Party with respect to the nature of the Facebook posts. Counsel explains that it is the Union’s position, in part, that Charging Party knowingly made false statements in his posts. In response, the ALJ stated, *inter alia*, “I really think we’re wasting a lot of time. I mean one question is whether the transcript is accurate, but beyond that I mean I know what happened here.”)
- T at 168-171. (ALJ sustains objection to line of questioning by Counsel for Local 91 aimed at demonstrating that Charged Party’s testimony before the ALJ contradicted earlier testimony. When asked whether the ALJ found it relevant that Charging Party “lied,” the ALJ stated, “Actually, I don’t think it’s relevant. I don’t think it’s relevant.”)
- T at 177. (ALJ: “I do think a lot of the stuff you’re asking is irrelevant. I mean I’ve voiced my opinion what I think this case is about, which is pretty simple.”)

- T at 180-188. (ALJ sustains objections to Counsel for Local 91’s questions regarding Charging Party’s knowledge of the former Business Manager’s indictment, blocking Union from eliciting testimony regarding the context in which the Facebook posts were made by Charging Party.)
- T at 205-206. (ALJ: “The only thing that matters in the case is why your client removed him from the out of work list, period.”)
- T at 212. (Counsel for Local 91: “Your Honor, given the rulings of Your Honor, and the scope of the cross examination and the clear indication of what Your Honor finds relevant, I have no further questions.”)
- T at 215. (ALJ finds that Charging Party’s evasiveness is “immaterial.”)
- T at 228-230. (ALJ sustains objections to Counsel for Local 91’s direct examination of Union President William Grace regarding the corruption of Local 91’s former administration.)
- T at 233. (ALJ sustains objections to Counsel for Local 91’s direct examination of Union President William Grace regarding the internal union hearing on the charges preferred against Charging Party).
- T at 235-237. (ALJ sustains objections to Counsel for Local 91’s direct examination of Union President William Grace regarding the Union’s experience with handling criticism from members.)

Based on the transcript, it is clear that the ALJ showed up to the hearing with his own preconceptions about the case before him and that he was, at best, reluctant to hear any evidence that contradicted his perception of the case. As noted above, and as supported by the hearing transcript, the ALJ repeatedly sustained objections to Counsel for Local 91’s attempts to elicit testimony concerning the nature and context of Charging Party’s Facebook posts (often without any rationale). Having sculpted a record devoid of such evidence, the ALJ, in his decision, found that “nothing [the Charging Party] said in his Facebook posts was maliciously and knowingly untrue.” ALJD at 3. Had he not foreclosed Local 91’s attempts to elicit testimony to the contrary, the ALJ may have found otherwise.

Consequently, if the Board does not reverse the ALJ's decision based on the Union's Exception No. 1, it should remand the case back to the ALJ for the purpose of developing a full and complete record on the nature of Charging Party's Facebook posts and the context and background in which they were made.

### **CONCLUSION**

For the reasons articulated above, Local 91 hereby requests that the Board grant its exceptions.

Dated: October 5, 2016  
Buffalo, New York

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