

UNITED STATES OF AMERICA  
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 REPLY TO GENERAL COUNSEL'S ANSWERING  
BRIEF AND ANSWERING GENERAL COUNSEL'S CROSS-EXCEPTION  
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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## PRELIMINARY STATEMENT

Counsel for the General Counsel, in her Answering Brief, spends nearly twenty pages obfuscating this case with distinguishable case law, ignoring the plain facts and misreading the applicable case law. **First**, despite Counsel for the General Counsel’s urging, the activities for which Charging Party was disciplined are not protected by the Act in the first instance, and therefore the Board lacks jurisdiction over Laborers’ International Union of North America, Local Union No. 91 (“Local 91” or the “Union”) internal union discipline of Charging Party. *See Office and Professional Employees International Union, Local 521, AFL-CIO (Sandia Corp. d/b/a Sandia National Laboratories)*, 331 NLRB No. 193 (2000) (“[W]e shall no longer proscribe intraunion discipline under Section 8(b)(1)(A) which involves a purely intraunion dispute, and does not interfere with the employee-employer relationship, or contravene a policy of the National Labor Relations Act”). **Second**, no rational person who has read the hearing transcript can dispute that ALJ Amchan abused his discretion by curtailing Local 91’s attempts to elicit testimony concerning the nature and context of Charging Party’s Facebook posts.

The Board should deny the General Counsel’s Cross-Exception contending that ALJ Amchan should have awarded consequential damages, as such award is unavailable under current Board precedent (*see, e.g., The H.O.P.E. Program*, 362 NLRB No. 128, at fn. 1 (2015) (rejecting request for consequential damages on basis of longstanding Board precedent)). Further, consequential damages are particularly unwarranted in this case, because even if the Board affirms the ALJ’s decision (it should not), Charging Party is employed full-time as a firefighter for the City of Niagara Falls and the possibility of actual consequential damages is nonexistent. Finally, because Local 91 operates a nonexclusive referral hall, Charging Party had full freedom to solicit work independently. Accordingly, Charging Party had a duty to mitigate any possible damages – consequential or otherwise. *See, e.g., Arlington Hotel Co., Inc.*, 287 NLRB No. 87 (1987).

## POINT I

### **THE ACTIVITIES FOR WHICH CHARGING PARTY WAS DISCIPLINED WERE NOT PROTECTED & THE CASES CITED BY COUNSEL FOR THE GENERAL COUNSEL ARE DISTINGUISHABLE**

In her Answering Brief, Counsel for the General Counsel appears to argue, *inter alia*, that union discipline of a member who criticizes union leadership constitutes a violation of Section 8(b)(1)(A) of the Act, citing several cases. *See* General Counsel’s Answering Brief at 10. However, the instant case is distinguishable from case law cited by Counsel for the General Counsel and thus not susceptible to her arguments.

As an initial matter, all of the cases cited by Counsel for the General Council concern the discipline of union members who challenged union leadership *internally* – i.e., at union meetings or in face-to-face encounters – and who were disciplined explicitly *because* they challenged the union leadership or the union’s policies. *See International Brotherhood of Teamsters, Local 657 (Texia Productions, Inc.)*, 342 NLRB 637 (2004) (finding a violation of 8(b)(1)(A) where member was disciplined for engaging in dissident union activity); *Longshoreman Local 20 (Ryan-Walsh Stevedoring Co.)*, 323 NLRB 1115 (1997) (finding violation of 8(b)(1)(A) where member was disciplined for “expressing views in opposition to those of Union Officers” at a union membership meeting); *Laborers Local 836 (Corbet Const.)*, 307 NLRB 801 (1992) (finding violation of 8(b)(1)(A) where member was disciplined for being critical of union leadership in union meetings); *Plasterers Local 121*, 264 NLRB 192 (1982) (finding violation of 8(b)(1)(A) where member was disciplined for criticizing union leadership in face-to-face conversations). In each of the above-cited cases, the Board found 8(b)(1)(A) violations because the respondent unions disciplined members precisely *because of* the members’ internal opposition to union leadership or policies.

The facts of the instant case are completely distinguishable from the pattern reflected in these cases.

Unlike the cases cited by Counsel for the General Counsel, Charging Party *was not disciplined for being critical of Local 91*. Rather, he was disciplined for making public Facebook comments addressed to “everyone who [was] voting in the democratic primary” (GC Exhibit 4; *see also* T at 98, 99; GC Exhibits 4-6)<sup>1</sup>, which were aimed to persuade the *public* that a Mayoral Candidate was engaged in a quid pro quo with Local 91 and by implication was breaking the law. The Charging party was not disciplined for criticizing Business Manager Richard Paladino, but for intentionally and recklessly denigrating Local 91 – of which he is a member – in the public’s eye. T at 238-240. Moreover – and perhaps most importantly – Charging Party did not make his Facebook comments for the purpose of aiding fellow employees or for any reason related to employment. Rather, Charging Party made the Facebook comments in the context of the Niagara Falls 2015 Mayoral election, for the purpose of smearing the candidate he opposed.<sup>2</sup> He did not address union members – but all members voting in the democratic primaries. GC Exhibit 4. *See also* T-98, 99; GC Exhibits 4-6.

Thus, this is not a classic case of a union seeking to quash dissenting voices (as described in the cases cited by Counsel for the General Counsel), but rather a union permissibly disciplining a member who has decided to recklessly smear the union in a public forum for his own political reasons. Put otherwise, Local 91 did not seek to discipline Charging Party for his dissident or critical views of the Union, but for his wanton portrayal to the public that Local 91 engaged in

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

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

criminal activity by bribing a politician. Indeed, Union President Grace confirmed that the Local 91 trial board did not consider Charging Party's general criticism of Business Manager Palladino as a factor in rendering a decision on the charges. T at 239. Rather, as explained above, the trial board found Charging Party guilty based on his reckless, unfounded and false accusations of criminal activity on the part of the Union, in a public forum on Facebook. T at 240.

Consequently, the cases cited by Counsel for the General Counsel are distinguishable, and *Sandia Corp.*, 331 NLRB 1417 (2000) applies – though not for the reasons argued by Counsel for the General Counsel.<sup>3</sup> Rather, as explained in Local 91's Brief in Support of its Exceptions to the Administrative Law Judge's Decision<sup>4</sup>, the Board in *Sandia Corp.* declined to find a violation of the Act where the union disciplined union officers for, *inter alia*, publicly "slandering" the union's president. *Sandia Corp.*, 331 NLRB No. 193 at \*2. While the Board acknowledged that the right to concerted opposition to the policy of union officials is protected by Section 7, it found that such a right is only protected if "the activity bears some relation to the employees' interests as employees." *Id.* at \*13. *See also 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"). Here, as in *Sandia Corp.*, Charging Party's activities were not in any way related to employees'

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<sup>3</sup> Counsel for the General Counsel contends that *Sandia Corp.* supports an 8(b)(1)(A) violation here, because, she further contends, removing Charging Party from Local 91's out-of-work list impacts his employment. Such contentions fly in the face of the facts, for at least two reasons. First, Local 91 runs a non-exclusive referral hall – *not* an exclusive hiring hall. *See, e.g., Teamsters Local 460 (Superior Asphalt)*, 300 NLRB No. 43 (1990) (holding that no duty of fair representation attaches to a union's operation of a nonexclusive hiring hall). While the Board has found 8(b)(1)(A) violations where a union operating a nonexclusive hiring hall discriminates against members based on their exercise of Section 7 activity (*In re Local Union 370, United Broth. Of Carpenters & Joiners of America, AFL-CIO*, 332 NLRB No. 25, at \*177 (2000)), such cases are inapposite here, because Local 91 did not issue discipline in response to protected activity. Second, because Local 91 operates a nonexclusive hiring hall, all Local 91 members, including Charging Party, may solicit work independently – i.e., Charging Party does not have to go through Local 91's hiring hall to obtain work. Accordingly, the removal of Charging Party from the out-of-work list does not impact Charging Party's employment in the least, and, because Charging Party's removal was not based on protected activity, is not subject to the Board's jurisdiction.

<sup>4</sup> Throughout this Reply Brief, the following reference shall be used: L91 Brief at \_\_\_ for Local 91's Brief in Support of its Exceptions to the Administrative Law Judge's Decision at page(s).

interests as employees. Rather, Charging Party’s Facebook comments addressed democratic primary voters and sought to persuade them that Local 91 – and candidate Glenn Choolokian – was corrupt and engaged in illegally bribing a politician. Such activities are a far cry from the “dissident activity” portrayed in the authorities cited by Counsel for the General Counsel. *See supra* at 3, and General Counsel’s Answering Brief at 10.

Counsel for the General Counsel makes much of the fact that a union member made unsolicited responses to Charging Party’s Facebook posts – but such responses are unavailing. *See* General Counsel’s Answering Brief, at 4-5. They do nothing to alter the activities for which Charging Party was actually disciplined – i.e., his public allegations that Local 91 was corrupt and criminal. Indeed, according to the uncontroverted testimony of Local 91 President William Grace, Charging Party was not disciplined for his criticism of the union or any dissident views: he was disciplined because of Charging Party’s “accusations that [Local 91 was] bribing a politician. The accusations that [Local 91 was] breaking the law.” T at 240. And, when questioned under oath as to whether the Local 91 trial board considered “the fact that [Charging Party] was critical of [Local 91 Business Manager] Palladino [ ] in considering its decision[ ],” President Grace testified, “No.” T at 238 - 239.

Consequently, the activities forming the basis of the internal union discipline of Charging Party were not protected by the Act, as they had no bearing on or relationship to “employees’ interests as employees.” *Sandia Corp.*, 331 NLRB at \*13. *See also Pacific Maritime Association*, 358 NLRB No. 133 at \*\*12 (2012).<sup>5</sup> Because the activities forming the basis of Charging Party’s discipline are not protected by the Act, the Board lacks jurisdiction in this matter. Accordingly,

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<sup>5</sup> *See also Steelworkers Local 9292 (Allied Signal Technical Services Corp.)*, 336 NLRB 52 (2001) (No 8(b)(1)(A) violation where union had legitimate interest in maintaining solidarity and loyalty among its members); *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118 (2000) (same).

the Board should grant Local 91's First Exception, reverse the ALJ's Decision and dismiss the Complaint.

## POINT II

### **A RATIONAL READING OF THE HEARING TRANSCRIPT DEMONSTRATES THAT THE ALJ ABUSED HIS DISCRETION BY CURTAILING LOCAL 91 FROM ELICITING TESTIMONY REGARDING THE NATURE AND CONTEXT OF CHARGING PARTY'S FACEBOOK POSTS**

As explained in Local 91's Brief in Support of its Exceptions to the Administrative Law Judge's Decision, during the hearing before the ALJ, Counsel for Local 91 raised the argument that, even if Charging Party's Facebook posts were protected (they are not), the posts were maliciously untruthful and thus lost the protection of the Act. T at 20. Despite repeated attempts to elicit testimony regarding the malicious and untruthful nature of Charging Party's Facebook posts with respect to the Union, the ALJ did not allow Local 91 to develop a complete record. *See* L91 Brief at 8-11. 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>6</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. L91 Brief at 8-11. Accordingly, 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

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<sup>6</sup> Throughout this Reply Brief, the following reference will be used: ALJD at \_\_\_ for the Administrative Law Judge's Decision at page(s).

Party's Facebook posts were not malicious or untrue precisely because he precluded Local 91's counsel from eliciting testimony that might show otherwise.

Despite the support of myriad examples culled from the hearing transcript (L91 Brief at 8-11), Counsel for the General Counsel contends that Local 91's Second Exception requesting to reopen the record is "baseless." General Counsel's Answering Brief at 10. However, for anyone conducting even a cursory review of the hearing transcript, General Counsel's defense is absurd. Indeed, Local 91 identified at least twenty instances where the ALJ refused to permit the Union's counsel to question witnesses about the audience and nature of Charging Party's Facebook posts, and/or the context in which the posts were made. *See* L91 Brief at 8-11. Instead of addressing head-on what Local 91 views to be abuses of discretion, Counsel for the General Counsel spends her Brief insisting that ALJ Amchan's findings with respect to the "malicious and knowingly untrue" nature of Charging Party's Facebook posts are fully supported by the record. *See* General Counsel's Answering Brief at 17. However, putting aside the ALJ's erroneous decision that Charging Party's activity was protected (*see supra* Point I), Local 91 *agrees* that the record supports the ALJ's finding that the Facebook posts were not malicious or untrue. Local 91's complaint, rather, is that by curtailing Local 91's counsel from eliciting testimony regarding the nature and context of the posts, the ALJ essentially created a record supporting his Decision.

As summarized in Local 91's initial Brief, the ALJ repeatedly shut down the Union's counsel's attempts to elicit testimony – specifically blocking counsel's attempts to test whether the Charging Party's testimony was truthful.<sup>7</sup> The ALJ routinely sustained objections made by Counsel for the General Counsel, who, more often than not, could not even state the basis for her

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<sup>7</sup> *See, e.g.*, 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.").

objections. Indeed, it is likely that more resources were spent *preventing* Local 91's counsel from eliciting testimony than would have been spent on creating a full, complete and impartial record. Counsel for the General Counsel complains that Local 91 fails to identify the evidence it was prevented from eliciting – but her complaint underscores the very impartiality of the record by which Local 91 is troubled. As the Union's counsel demonstrated throughout the hearing, he was attempting to elicit testimony demonstrating that Charging Party (1) was lying and knew his statements about the union were false (*see, e.g.*, T at 20-21, 28-30, 76, 132-144, 168-171); (2) was familiar with Local 91's past history regarding criminal activity (*see, e.g.*, T at 180-188, 228-230); and (3) made his Facebook posts for the purpose of smearing a political candidate he was actively campaigning against, *not* for any purpose protected by Section 7 (*see, e.g.*, T at 86, 102-111). Any one of these lines of questioning, had Local 91's counsel been permitted to pursue them, would have produced testimony relevant to the case and, in particular, relevant to Local 91's defense. Instead, the ALJ repeatedly blocked Local 91's counsel from exploring any of these avenues during the hearing. Indeed, the ALJ would not even permit Local 91's counsel to be heard outside of the presence of the Charging Party as to what testimony he was seeking to elicit or why. *See, e.g.*, T at 110-111, 117, 177, 212. Given these circumstances, and assuming *arguendo* that the Complaint is not dismissed in its entirety, a rational review of the hearing transcript requires that the record be reopened.

Accordingly, if the Union's First Exception is denied, Local 91 requests that the Board grant its Second Exception, vacate the ALJ's Decision and remand the case 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.

### POINT III

#### CONSEQUENTIAL DAMAGES ARE UNAVAILABLE AND UNWARRANTED

With respect to Counsel for the General Counsel's Cross-Exception requesting an award on consequential damages, such an award is unwarranted for at least three reasons:

**First**, as explained above, because Charging Party was not disciplined for any activity protected by the Act, the Board has no jurisdiction over his Complaint.

**Second**, even if the Board affirms the ALJ's finding that the activity for which Charging Party was discipline was protected, the ALJ abused his discretion in denying Local 91 an opportunity to elicit testimony and the case should be remanded for further proceedings.

**Third**, if the Board affirms the ALJ's Decision in its entirety, an award of consequential damages are unwarranted in this case, as Charging Party is employed as a full-time fire fighter for the City of Niagara Falls, making \$85,000 a year. T at 79. Accordingly, the likelihood that Charging Party has suffered any consequential damages is non-existent. Further, because Local 91 operates a nonexclusive referral hall, Charging Party, like all Local 91 members, had full freedom to solicit work independently and was not required to obtain work through the hall. Accordingly, Charging Party had a duty to mitigate any possible damages – consequential or otherwise. *See, e.g., Arlington Hotel Co., Inc.*, 287 NLRB No. 87 (1987) (“Because the obligation to exercise reasonable diligence in seeking substantially equivalent employment is founded on the healthy public policy of promoting production and employment, a discriminate is not entitled to sit idle, awaiting reimbursement for lost wages”). Finally, and most importantly, Board precedent does not presently provide for consequential damages. *See, e.g., Guy Brewer 43, Inc.*, 363 NLRB No. 173, fn. 2 (2016) (rejecting request for consequential damages on basis of longstanding Board

precedent). Accordingly, for all of the above reasons, consequential damages are unavailable and unwarranted in this case.

### **CONCLUSION**

For the reasons articulated above, Local 91 hereby requests that the Board grant its First Exception to the Administrative Law Judge, reverse the ALJ's Decision and dismiss the Complaint. Alternatively, if the Board denies Local 91's First Exception, we request that the Board grant its Second Exception, vacate the ALJ's Decision and remand to the ALJ for the purpose of creating a full and complete record. Finally, Local 91 requests that the Board deny Counsel for the General Counsel's Exception requesting an award of consequential damages.

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