UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 91 (SCRUFARI CONSTRUCTION CO., INC.)

Cases 03-CB-196682
03-CB-201412

and

RONALD J. MANTELL, an Individual

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……..……iii
I. PRELIMINARY STATEMENT 1
II. STATEMENT OF THE CASE 1
III. STATEMENT OF FACTS 3
A. Events leading to the Board Decision involving Frank Mantell 3
B. Respondent's referral procedure 4
C. Ronald Mantell's referral history 5
D. Mantell's November 2016 conversation with Palladino 6
E. Mantell's February 2017 job 7
F. Respondent's March 2017 internal union charges against Mantell 7
G. Palladino's Spring 2017 remarks to members about the NLRB 9
H. Mantell's June 26, 2017 investigation of referrals from the out-of-work list 10
I. Neri's June 27, 2017 refusal to show Mantell the out-of-work list 11
J. Respondent's July 2017 change in its practice of updating the out-of-work list 11
IV. ARGUMENT 12
A. Respondent's refusal to refer Mantell violated the Act 12
B. Respondent's threat to Mantell violated the Act 16
C. Respondent's internal charges and penalties against Mantell violated the Act 16
D. Respondent's refusal to show Mantell the out-of-work list and its changed practice of updating the out-of-work list violated the Act 23
E. Respondent's affirmative defenses are without merit 25
a. All unlawful conduct occurred within the Section 10(b) period 25
b. The Act applies to Respondent's conduct 27
c. Respondent's discipline of Mantell was unlawfully motivated 27
V. CONCLUSION 28
VI. PROPOSED REMEDY 28
VII. PROPOSED CONCLUSIONS OF LAW 34
VIII. PROPOSED ORDER 35

IX. PROPOSED NOTICE TO MEMBERS.. 36

TABLE OF AUTHORITIES

Federal Cases

BRC Injected Rubber Products, 311 NLRB 66 (1993) 32
Broadway Volkswagen, 342 NLRB 1244 (2004) 25-26
Camaco Lorain Mfg. Plant, 356 NLRB 1182 (2011) 13, 17
Carpenters Local 537 (E.I. Du Pont), 303 NLRB 419, 420 (1991) 12, 23
Carpenters Local 60 v. NLRB, 365 U.S. 651 (1961) 30
Carpenters Local 626 (Strawbridge & Clothier), 310 NLRB 500 (1993) 12
Carpenters Local Union 370 (Eastern Contractors Assn.), 332 NLRB 174 (2000) 24
Case Farms of North Carolina, 353 NLRB 257 (2008) 13-14, 18, 20
Chinese American Planning Council, 307 NLRB 410 (1992), *review denied mem.* 990 F.2d 624 (2d Cir. 1993) 26
Deena Artware, Inc., 112 NLRB 371 (1955), *enforced*, 228 F.2d 871 (6th Cir. 1955) 32
Desks, Inc., 295 NLRB 1 (1989) 26
F.W. Woolworth Co., 90 NLRB 289 (1950) 30
Fluor Daniel, Inc., 304 NLRB 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992) 14
GATX Logistics, Inc., 323 NLRB 328 (1997) 21
Golub Bros. Concessions, 140 NLRB 120 (1962) 13
Grand Central Partnership, 327 NLRB 966 (1999) 20
Graves Trucking, 246 NLRB 344 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982) .. 29
Greater Oklahoma Packing Co. v. NLRB, 790 F.3d 816 (8th Cir. 2015) 32
Inter-Disciplinary Advantage, Inc., 349 NLRB 480 (2007) 21
International Brotherhood of Teamsters, Local 391, 357 NLRB 2330 (2012) 16
Iron Workers, Local 433 (The Associated General Contractors of California, Inc.), 228 NLRB 1420 (1977) 24
Ironworkers Local 340 (Consumers Energy Co.), 347 NLRB 578 (2006) 13
Isis Plumbing & Heating Co., 138 NLRB 716 (1962), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963) 30
Kentucky River Medical Center, 356 NLRB 6 (2010) 30
King Soopers, Inc., 364 NLRB No. 93 (2016) 28
Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors Inc. and Various Other Employers), 365 NLRB No. 28.(2017) 2, 3, 4, 17, 22-23
Landgraf v. USI Film Products, 511 U.S. 244 (1994) 34
La-Z-Boy Tennessee, 233 NLRB 1255 (1977) 26
Leach Corp., 312 NLRB 990 (1993) 26
Lee Brass Co., 316 NLRB 1122 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996) 34
Local No. 121, Plasterers, 264 NLRB 192 (1982) 13
Naomi Knitting Plant, 328 NLRB 1279 (1999) 18
New York Typographical Union Local No. 6, 213 NLRB 925 (1974) 16

NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969) 29, 31
NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) 30
NLRB v. Marine & Shipbuilding Workers Local 22, 391 U.S. 418 (1968) 16
NLRB v. Seven-Up Bottling of Miami, Inc., 344 U.S. 344 (1953) 30
Nortech Waste, 336 NLRB 554 (2001)..... 32, 33
Office Employees Local 251 (Sandia National Laboratories), 331 NLRB 1417 (2000). 17, 27
Operating Engineers Local 513 (Long Construction), 145 NLRB 554 (1963)..... 29, 33
Pacific Beach Hotel, 361 NLRB No. 65 (2014) 30, 32
Pappas v. Watson Wyatt & Co., 2007 WL 4178507 (D. Conn. 2007) 34
Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) 29, 30, 33
Pilliod of Mississippi, Inc., 275 NLRB 799 (1985) 33
Plasterers Local 121, 264 NLRB 192 (1982)..... 23
Proulx v. Citibank, 681 F. Supp. 199 (S.D.N.Y. 1988), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988)..... 34
Radio Officers' Union of Commercial Telegraphers Union v. NLRB, 347 U.S. 17 (1954) 29
Robert Orr/Sysco Food Services, 343 NLRB 1183 (2004), *enfd. mem.* 184 Fed. Appx. 476 (6th Cir. 2006) 18
Roman Iron Works, 292 NLRB 1292 (1989)..... 31
Service Employees Local 254 (Brandeis University), 332 NLRB 1118 (2000) 17
Service Employees Local 87 (Pacific Telephone), 279 NLRB 168 (1986) 33
SFO Good-Nite Inn, LLC, 352 NLRB 268 (2008)..... 17-18, 22
Sheet Metal Workers Local 16 (Parker Sheet Metal), 275 NLRB 867 (1985)..... 24
State Plaza Hotel, 347 NLRB 755 (2006) 14
Superior Micro Film, 201 NLRB 555 (1973)..... 12
Teamsters Local 17 (Universal Studios), 251 NLRB 1248 (1980) 24
Teamsters Local 460 (Superior Asphalt), 300 NLRB 441 (1990)..... 12
The Colonial Press, Inc., 204 NLRB 852 (1973) 12
Tolly's Market Inc. – Ben Franklin, 183 NLRB 379 (1970) 12-13
Tortillas Don Chavas, 361 NLRB No. 10 (2014)..... 29, 30, 32
United Rentals, 350 NLRB 951 (2007) 18
Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943)..... 30
*Wright Line*251 NLRB 1083 (1980). *enfd.* 662 F.2d 899 (1st Cir. 1981). *cert. denied* 455 U.S. 989 (1982) 13, 17, 18, 22

Federal Statutes

Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3) 34
National Labor Relations Act, 29 U.S.C.A. § 158(b)(1)(A)…….....passim

Law Review Articles

CATHERINE H. HELM, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599 (1985)……..….28

I. PRELIMINARY STATEMENT

This case involves blatant retaliation by Respondent against Ronald Mantell because of his brother Frank Mantell's protected concerted activities as well his own conduct in voting against Respondent's fine and suspension of his brother Frank Mantell. Respondent's retaliation includes refusing to refer Mantell from its out-of-work list, threatening Mantell with internal union charges if Mantell filed charges with the Board, filing internal union charges against Mantell, and suspending and fining Mantell as a result of those charges. Respondent further discriminated against Mantell by refusing to show him the out-of-work list and changing the frequency with which it made an updated list available to members, because of Mantell's protected activity. Thus, Counsel for the General Counsel respectfully requests that Administrative Law Judge David I. Goldman, who heard this matter on October 11 and 12, 2017, find that Respondent's discriminatory conduct violated Section 8(b)(1)(A) of the Act and issue a decision and recommended order granting the relief sought herein.

II. STATEMENT OF THE CASE

An Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 03-CB-196682 and 03-CB-201412 (Consolidated Complaint) issued on August 23, 2017. (GC Ex. 1(l).)[1] The Consolidated Complaint is based on the charges filed in Cases 03-CB-196682 and 03-CB-201412 filed by Ronald Mantell. (GC Ex. 1(e), 1(g).) Laborers' International Union of North America, Local Union No. 91 (Respondent) filed its answer to the Consolidated Complaint on September 6, 2017. (GC Ex. 1(n).)

[1] General Counsel's exhibits will be referred to as "GC Ex. __." Respondent's exhibits will be referred to as "R Ex. __." References to the transcript will appear as "Tr. __."

An amendment to the Consolidated Complaint issued on September 25, 2017. (GC Ex. 1(o).) Respondent filed an amended answer in response to the Amendment to Consolidated Complaint on October 9, 2017 (Amended Answer). (GC Ex. 1(r).) The Consolidated Complaint, as amended, was further amended at the hearing. (Tr. 9-10.) Respondent amended its Amended Answer at the hearing. (Tr. 10.)

The Consolidated Complaint, as amended, alleges that Respondent discriminated against Charging Party Ronald Mantell because Mantell's brother Frank Mantell engaged in protected concerted activity, as detailed in National Labor Relations Board (Board or NLRB) decision dated February 7, 2017 (Board Decision).[2] Respondent's discriminatory conduct against Ronald Mantell[3], in violation of Section 8(b)(1)(A) of the National Labor Relations Act (Act), is: (i) in operation of Respondent's non-exclusive hiring hall, by Respondent's business manager Richard Palladino, refusing to refer Mantell from Respondent's out-of-work list; (ii) by Palladino, threatening Mantell with internal union charges if Mantell filed charges with the Board; (iii) by Palladino, filing internal union charges against Mantell; and (iv) fining and suspending Mantell as a member in good standing.

The Consolidated Complaint, as amended, further alleges that Respondent violated Section 8(b)(1)(A) of the Act by, (i) by Respondent's employee Mario Neri, refusing to allow Mantell to see Respondent's out-of-work list; and (ii) changing its practice by posting its out-of-work list weekly instead of daily because Mantell engaged in protected concerted activity by investigating the referral of two individuals below him on Respondent's out-of-work list.

[2] The Board Decision, *Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors Inc. and Various Other Employers)*, is reported at 365 NLRB No. 28.

[3] All further references to the surname Mantell will mean Ronald Mantell unless the first name Frank is used.

Respondent, in its Amended Answer, admits: (i) the commerce facts on which the Board's jurisdiction herein is founded; (ii) that Respondent is a labor organization within the meaning of the Act; (iii) the agency status of all alleged agents of Respondent; (iv) that Respondent is the non-exclusive source of referrals of employees for employment with the relevant employers; and (v) that the Board Decision was issued and the grounds on which the Board found a violation against Respondent. Respondent otherwise denies the remaining allegations of the complaint.

III. STATEMENT OF FACTS

A. Events leading to the Board Decision involving Frank Mantell

In late August 2015, Ronald Mantell's brother Frank Mantell posted comments on Facebook critical of Respondent and its business manager Richard Palladino. *See Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors, Inc. and Various Other Employers)*, 365 NLRB No. 28, slip op. at 4 (2017). In early September 2015, Palladino filed internal union charges against Frank Mantell over the Facebook posts. *Id.* Respondent's executive board held a trial on Frank Mantell's charges on October 5, 2015, found him guilty, fined him $5,000 and suspended his membership for 24 months. *Id.* That decision was ratified at Respondent's monthly membership meeting in October 2015,[4] and Respondent removed Frank Mantell from the hiring hall's out-of-work list the next day. *Id.* Frank Mantell appealed the decision against him to the International Union. *Id.*

[4] At this membership meeting, four members, including Ronald Mantell, voted against the fine and suspension of Frank Mantell; the names of those four members were recorded in the meeting minutes. (GC Ex. 14.) All officers of Respondent, including Palladino, were present at this meeting and were aware which of the four members voted against the fine and suspension. (Id.)

On November 12, 2015, Frank Mantell filed Board charges against Respondent over his removal from Respondent's out-of-work list. *Id.*

On November 19, 2015, the International Union notified Respondent that the decision against Frank Mantell was stayed until the International Union reviewed the appeal. *Id.* On December 4, 2015, the International Union informed Respondent that it had dismissed the charges against Frank Mantell. *Id.*

The General Counsel issued a complaint on Frank Mantell's charge on March 30, 2016. The hearing on the charge was held on June 29, 2016. On September 7, 2016, the Administrative Law Judge issued a decision finding that Frank Mantell's criticisms of Respondent and Palladino on Facebook were protected concerted activity, and that Respondent had violated Section 8(b)(1)(A) of the Act by removing Frank Mantell from the out-of-work list. *Id.* at 5. The Board affirmed the judge's decision on February 7, 2017. *Id.* at 1-2.

B. Respondent's referral procedure

Respondent operates a non-exclusive hiring hall, wherein Respondent refers applicants to jobs off of an out-of-work list. Respondent's employee Mario Neri has been the dispatcher since 1998 and administers the out-of-work list. (Tr. 209-10.) Palladino, as Respondent's business manager for about the last ten years, is the primary individual who chooses which members to refer off of Respondent's out-of-work list in response to contractor calls for laborers. (Tr. 226-27, 295.) Generally, Palladino refers members according to their numerical order on the out-of-work list. However, Palladino, in accord with Respondent's Referral Procedure, refers members out of their numerical order on the list (1) if Palladino selects a member to serve on a job as a steward or a foreman, (2) if the member is requested by a contractor by name, (3) if a member needs additional hours of work to qualify for Federal, State, or union trust fund benefits

(including supplemental pay), or (4) in certain picket line situations. (Tr. 234-37; R Ex. 1, Amended Job Referral Rules, pp. 4-5.)

Respondent's Amended Job Referral Rules contain the following provision in section 3, Registration of Availability for Referral, paragraph C:

> Only applicants who are not currently employed at the trade may register their availability for referral. Applicants who, after registering their availability for referral, on their own, obtain one or more jobs at the trade in the aggregate lasting five (5) working days or more of employment, must advise Local 91 immediately. Those applicants will then be removed from the out-of-work list. Failure to advise Local 91 of such employment as required herein will result in the applicant being removed from the out-of-work list.

(R Ex. 1, Amended Job Referral Rules, p. 4.)

C. Ronald Mantell's referral history

Ronald Mantell has been a member of Respondent since 1990, and throughout most of that time received steady employment through Respondent's non-exclusive hiring hall. (Tr. 23, 25; GC Ex. 2.) For instance, in the ten fiscal years from 2006 to 2015, Mantell averaged 1,065.675 pension-credited hours.[5] (See GC Ex. 2.)

Mantell's number of referrals from Respondent's hiring hall changed drastically during fiscal year 2016. Through November 2015, Mantell worked 734.25 hours; for the remainder of that fiscal year (though May 2016), he worked only 7 hours. Specifically, in February 2016, Mantell worked a 7-hour job that he secured on his own, without referral from Respondent. (Tr. 32-33, 35; GC Ex. 2; GC Ex. 3.) Mantell's last referral from Respondent was for a job in November 2015, after which he signed up on Respondent's out-of-work sign-in list. (Tr. 26.) Since November 2015 – the same month that Mantell's brother Frank filed his Board charge against Respondent – Respondent's referrals of Mantell have dropped to zero. (Id.) Since that

[5] Respondent's fiscal year runs from June 1 to May 31. (Tr. 27-28.)

time, in addition to the 7-hour job mentioned above, Mantell has worked just one 6-hour job under Respondent's jurisdiction, a February 2017 job that he secured without referral from Respondent. (Tr. 46-47; GC Ex. 2; GC Ex. 5.) Nothing changed with regard to Mantell's specialized skills from before November 2015 to after November 2015. (Tr. 148-49.)

D. Mantell's November 2016 conversation with Palladino

In early November 2016, Mantell, who at this point had not been referred out by Respondent for a year, went to the union hall to investigate getting his benefits under supplemental (or sub) pay. (Tr. 36.) He was told by a Respondent employee in the benefits office that he did not qualify for supplemental pay because he did not have sufficient work hours, but that even a one-day, two-hour job would suffice for him to get the benefits. (Tr. 36-38.)

Mantell then spoke to business manager Palladino, explained that he was number two on the out-of-work referral list and that he needed just an hour or two of work to qualify for his supplemental pay. (Tr. 38.) Unprompted, Palladino, ridiculed Mantell about his brother Frank. (Id.) Mantell responded that he was Ron Mantell, not Frank Mantell. (Id.) Palladino told Mantell that he should find his own work and that it was not Palladino's job to find a job for him. (Tr. 38-39.) Palladino went on to say that he knew that Mantell was planning on calling the NLRB and that if he did so Palladino would bring him up on union charges. (Tr. 39.)

Mantell later called International Union representative Chris Sabatoni to discuss this conversation. (Tr. 40.) He told Sabatoni that he believed that he was being punished and that Respondent's failure to refer him out for work was because of his brother Frank's falling out with Palladino. (Id.)

E. Mantell's February 2017 job

On his own, Mantell secured a one-day, six-hour job with Scrufari Construction Company that occurred on February 1, 2017.[6] (Tr. 46-47.) Mantell's duty on this job was caulking concrete saw cuts. (Tr. 47.) Based on Mantell's 27-year experience as a laborer, including serving as steward on many jobs and knowledge of the collective-bargaining agreement, he concluded that caulking concrete saw cuts was not work that fell within Respondent's jurisdiction.[7] (Id.) Consequently, he understood that a steward from Respondent did not need to be present on the job. (Tr. 49-50.)

F. Respondent's March 2017 internal union charges against Mantell

On March 3 – about one month after the Board Decision finding that Respondent had violated the Act in its treatment of Frank Mantell – Palladino filed internal union charges against Mantell for working without a steward on the one-day February 1 Scrufari Construction job, noting that Respondent "has always had a Steward for Scrufari for the past two years." (GC Ex. 7.) The charges were based on an alleged violation of the collective-bargaining agreement and Respondent's constitution. (Id.) The provisions in the collective-bargaining agreement that Mantell was alleged to have violated are contained in Article VI, Conditions of Employment, Section 4, which provides in pertinent part:

> (a) LABORERS' JOB STEWARD: It is agreed that the first man on any job being started shall be sent by the Business Manager as the Job Steward.
> (b) New employees reporting for work shall report to the Job Steward during the first day. The Job Steward shall be required on the job whenever work being performed on said job is considered Laborers' work as set forth in this Agreement. …

[6] All further dates are 2017 unless stated otherwise.
[7] Indeed, Article IX of the collective-bargaining agreement, Jurisdiction of Work, does not list caulking as one of the areas of work over which Respondent has jurisdiction. (GC Ex. 4, pp. 36-41.)

(GC Ex. 4 at pp. 27-28.) The provisions in Respondent's constitution that Mantell was alleged to have violated were Article III, Membership, Section 3, Obligations of Members, paragraphs (a), (b), and (c). (GC Ex. 7.) Those paragraphs provide that members are obligated:

> (a) To recognize that the International Union Constitution, the Uniform Local Union Constitution and the Uniform District Constitution, constitute the organic law of the Organization;
> (b) To observe, conform and comply with all of the terms and provisions of said Constitutions and all of the rules, regulations, policies, practices and lawful orders and decisions adopted and promulgated in the furtherance and administration of the provisions of said Constitutions;
> (c) To recognize and respect the right of the Union to adopt and enforce reasonable rules as to the responsibility of every member toward the Organization as an institution and to refrain from conduct that would interfere with the performance of its lawful and contractual obligations.

(R Ex. 5, pp. 78-79.)

On April 8, a hearing was held before Respondent's trial board on the charges against Mantell. (Tr. 62; GC Ex. 9.) According to Respondent's minutes of that hearing, Palladino again stated that "Local 91 has always had a Steward for Scurfari for the past two years," and stated that "there is nothing wrong with soliciting your own work, but Brother Mantell never consulted with Bus. Mgr. Palladino nor gave the Local the courtesy of notification of his work on that job." (GC Ex. 9) Mantell read a statement in his defense and provided a copy of that statement to the members of the trial board. (Tr. 66-67; GC Ex. 10.) According to the minutes of the hearing, Mantell expressed that he "believes he is being punished for his last name and the issues between the Local and his brother." (GC Ex. 9.)

Following the hearing, the trial board deliberated briefly and found Mantell guilty of the charges against him, for violating both the collective-bargaining agreement and the constitution. (Tr. 67; GC Ex. 9.) The trial board voted to suspend Mantell as a member in good standing for six months and fine him $500. (Tr. 67; GC Ex. 9.) The trial board verbally informed Mantell of

its verdict immediately following the hearing, and confirmed that verdict in writing to him by a letter dated that day. (Tr. 67-68; GC Ex. 11.) In that letter, Respondent's recording secretary informed Mantell that the basis of the verdict against him was for "a violation of the Local Union Agreement Article 6, Conditions of Employment, Section 4, Laborers Job Steward (A), working without a shop steward." (GC Ex. 11.) Respondent's constitution was not mentioned. (Id.)

On April 26, Mantell sent an appeal of the verdict against him to the International Union. (Tr. 68-69; GC Ex. 12.) That appeal suspended the levied suspension and fine until the International rendered a verdict on the appeal. (Tr. 71, 120-21.)

Despite the fact that sometimes members obtain their own work without informing Respondent, Respondent has not disciplined any member for working without a steward from January 2010 to the present.[8] (Tr. 204-05, 256.) Respondent's witness William Grace testified that, during the 13 years he has been on Respondent's executive board and attended all disciplinary hearings, no member has been disciplined for working without a steward. (Tr. 293.) Indeed, within the memory of Respondent's witness Mario Neri, no member has been disciplined by Respondent for working without a steward for the last 20 years. (Tr. 257-58.)

G. Palladino's Spring 2017 remarks to members about the NLRB

Robert Connolly is a retired laborer and member of Respondent who was Respondent's business manager from 2002 to 2009, immediately prior to Palladino. (Tr. 155-56.) Connolly continues to regularly attend Respondent's monthly membership meetings, and attended those meetings in March, April, and May. (Tr. 158-59.) During one of those three meetings, Palladino, while providing his regular business manager's report to the membership, raised the

[8] All such records were subpoenaed by the General Counsel. (Tr. 204.) Respondent counsel at the hearing stated that Respondent possessed no records that were responsive to that part of the subpoena. (Tr. 205.)

subject of Frank Mantell and then warned the members against going to the NLRB. (Tr. 158-60.) He stated that any member who went to the NLRB has another thing coming, and that they should not think they could get free legal advice from going the NLRB. (Tr. 160.) He further told members that if any member went to the NLRB, Respondent was going to come after the member and the member would need to get his/her own lawyer, which the member would pay for, and so the members should think twice about filing NLRB charges against Respondent. (Id.) Palladino's remarks stuck out vividly in Connolly's memory because "it was a bold statement," "something that really shouldn't be said," and something that Connolly, as a former business manager, would never have said. (Tr. 178.)

H. Mantell's June 26, 2017 investigation of referrals from the out-of-work list

On June 26, Mantell went to the union hall to check the out-of-work list. (Tr. 73.) He spoke to Neri and asked to see the list. (Tr. 73-74.) Neri was in the process of updating the list, but showed Mantell a copy of the June 21 list and let him keep that copy. (Tr. 74; GC Ex. 13.) Neri told Mantell that two members had been referred out that day, James Spotted-Elk and Karl Walker. (Tr. 74) Both members were lower than Mantell on the out-of-work list, but Neri said that each had been referred as stewards, which means they can be referred out of their numerical order on the list. (Tr. 74; GC Ex. 13.) Neri told Mantell that Spotted-Elk had been referred out to Thomas Johnson, a contractor. (Tr. 75.)

Following this conversation, Mantell took it upon himself to investigate whether Spotted-Elk was actually serving as a steward. (Tr. 75, 142.) Mantell went to the Thomas Johnson job site and asked member-employees that he knew whether Spotted-Elk was the steward on that job. (Id.)

I. Neri's June 27, 2017 refusal to show Mantell the out-of-work list

The following day, June 27, Mantell again went to the union hall in order to check the out-of-work list and to see copies of two of Respondent's collective-bargaining agreements. (Tr. 78-79.) Mantell again spoke to Neri. (Tr. 79.) When Mantell asked to see the out-of-work list, Neri told him that after what had happened the day before, Palladino had instructed Neri not to show Mantell the out-of-work list. (Tr. 79-80.) Mantell objected, and related that in 2015 he had spoken to Sabatoni with the International about Respondent refusing to show Mantell the out-of-work list, and that Sabatoni at that time had called Palladino, after which Mantell was allowed to view the list. (Tr. 80.) Neri responded that he was just doing what he was told by Palladino, who said Mantell was not allowed to see the list. (Id.) Neri told Mantell that he also couldn't see copies of the collective-bargaining agreements. (Tr. 80-81.) Neri said that if Mantell wanted to see the out-of-work list or the collective-bargaining agreements, Mantell would have to go to the Department of Labor. (Tr. 81.)

J. Respondent's July 2017 change in its practice of updating the out-of-work list

Prior to about July, Respondent kept its out-of-work list behind a set of glass windows bordering an office at the union hall. (Tr. 71-72, 136, 224) In order for members to see the list, they needed to ask Respondent staff behind the glass windows to show it to them. (Tr. 72, 83, 136, 224.) The list was updated daily, so long as there was some change from the day before. (Tr. 72-73, 144-45, 241.) Members therefore were able to view the day-by-day changes to the list. (Tr. 72-73.) During the period after Respondent's last referral of Mantell in November 2015, Mantell would go to the union hall on average about twice a week to view the out-of-work list. (Tr. 72.)

In about July, shortly after Mantell's June 26 policing of the referrals from the list and Neri's June 27 refusal to show Mantell the list, Respondent changed its practices with regard to allowing members to see the list. (Tr. 83.) Now, the list is posted on the glass windows so that members can view it without asking. (Tr. 83, 225) However, the list is only posted once a week, even if the list is updated during the course of the week. (Tr. 83, 241-44.) As such, members cannot see the day-to-day changes to the list throughout the week and are thus less able to police Respondent's referrals from the list. (Tr. 84, 247-48.) Neri testified that this change was due to members coming in and asking about changes in the list from day to day: "'Let me see the list today. Let me see the list tomorrow. Who went to work? What did they go to work for?'" (Tr. 244-45.)

IV. ARGUMENT

A. Respondent's refusal to refer Mantell violated the Act

Respondent operates a non-exclusive hiring hall. Although a union owes no duty of fair representation to an employee-member in its operation of a non-exclusive hiring hall, *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 441, 442 (1990), it is still unlawful for a union to fail to refer an employee-member for work if it is in retaliation for that employee-member's protected activity. *Carpenters Local 537 (E.I Dupont)*, 303 NLRB 419, 420 (1991); *Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500, 500 fn. 2 (1993).

In addition, the Board has found it unlawful to retaliate against an individual for a family member's protected activity. *See The Colonial Press, Inc.*, 204 NLRB 852, 858 (1973) (employee's layoff unlawful where motivated by her husband's union activity); *Superior Micro Film*, 201 NLRB 555, 555 fn. 2 (1973) (employee's discharge unlawful where the true cause of his discharge was his wife's suspected union activity); *Tolly's Market Inc. – Ben Franklin*, 183

NLRB 379, 379 fn. 1 (1970) (employee's discharge unlawful where it was due to her mother marrying a union organizer); *Golub Bros. Concessions*, 140 NLRB 120, 120 (1962) (employee's discharge unlawful where discharge was due to her husband's union activity). It is already established in the Board Decision that Frank Mantell's Facebook postings at issue were protected activity and that Respondent retaliated against Frank Mantell for the Facebook postings. It is undisputed that Respondent knew that Ronald and Frank Mantell are brothers, and record evidence establishes that Respondent knew Ronald Mantell voted against Respondent fining and suspending his brother for engaging in protected concerted activities.

In determining whether a union's failure to refer an employee-member was unlawful, the Board applies the analytical framework set forth in *Wright Line.*[9] *See Ironworkers Local 340 (Consumers Energy Co.),* 347 NLRB 578, 579 (2006); *Local No. 121, Plasterers*, 264 NLRB 192, 193 (1982). To establish a prima facie case under *Wright Line,* the General Counsel must establish that the employee-member's protected concerted activity was a substantial or motivating factor in a respondent's adverse employment action. *Ironworkers Local 340*, supra. This *Wright Line* burden is satisfied by showing that (1) the employee-member was engaged in protected activity, (2) the respondent had knowledge of the protected activity, and (3) the respondent bore animus toward the employee-member's protected activity. *See Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011). If the General Counsel makes the required initial showing, the burden then shifts to the respondent to prove that it would have taken the same action even in the absence of the employee-member's protected activity. *Id.*

It is well established that a respondent's discriminatory motive may be demonstrated by circumstantial evidence based on the record as a whole. *Case Farms of North Carolina*, 353

[9] 251 NLRB 1083 (1980). *enfd.* 662 F.2d 899 (1st Cir. 1981). *cert. denied* 455 U.S. 989 (1982).

NLRB 257, 260 (2008) (citing, e.g., *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992)). "The Board frequently finds that the timing factor supports an inference of animus and discriminatory motivation." *Id.* (citing, e.g., *State Plaza Hotel*, 347 NLRB 755, 755 (2006)).

Record testimony and evidence establish that Frank Mantell's protected activity was a substantial and motivating factor in Respondent's refusal to refer his brother Ronald Mantell, including showing that Respondent bore animus against Ronald Mantell because of Frank Mantell's protected activity. The Board Decision establishes that Frank Mantell engaged in protected activity and that that Respondent was aware of that activity. Palladino's animus towards members' protected activity is amply demonstrated his unlawful reaction to Frank Mantell's protected activity and in the remarks testified to by witness Robert Connolly in which Palladino raised the subject of Frank Mantell and then threatened members with reprisal if any of them filed an NLRB charge.

Further, the timing of Respondent's refusal to refer Ronald Mantell supports the inference that it bore animus against Ronald Mantell because of Frank Mantell's protected activity: November 2015 was both when Frank Mantell filed his Board charge against Respondent and when Respondent stopped referring Ronald Mantell. The difference between Ronald Mantell's referrals before and after November 2015 could not be more stark: after averaging over 1,000 work hours per year for the 10 fiscal years from 2006 to 2015, his referrals after Frank Mantell filed his Board charge fell to zero, and have remained at zero ever since.

Respondent failed to rebut the General Counsel's prima facie case. Explanations offered by Respondent witnesses Neri and Palladino regarding Respondent's failure to refer Mantell out after November 2015 are unconvincing in light of Mantell's prior, consistent referrals.

Neri suggested that Mantell has not been referred out since November 2015 because Mantell lacks sufficient specialized skills or certifications. (Tr. 232, 254-55) However, Mantell's skills and certifications prior to November 2015, when Respondent regularly referred him, are identical to what he has had following November 2015. So this purported justification fails.

Neri and Palladino both claimed that Mantell was not being referred out because contractors had not been calling and asking for Mantell by name. (Tr. 259, 305.) However, as Palladino testified, a contractor's request for a member by name is not the only way members get hired; members also get referred when their number comes up on the out-of-work list. (Tr. 305.) Indeed, that is surely the purpose of Respondent's numerical out-of-work list. This claim also fails to account for the night-and-day difference in Mantell's referrals from before and after November 2015.

Neri further claimed that in 2013 Mantell told Neri that he did not want one-day jobs. (Tr. 248-49.) Neri also claimed that Mantell told him in June 2017 that he did not want to take busting jobs. (Tr. 271-72.) First, Mantell credibly testified that he never told Neri or Palladino that he would not take one-day jobs and busting jobs, and that since 2013 he has worked one-day jobs. (Tr. 133-34, 308-309.) Second, even if Neri is to be credited that Mantell had limited the type of jobs he was willing to take in 2013, it does not account for the fact that Mantell was still regularly referred out between 2013 and November 2015. Therefore, these claims fail to explain the difference between Mantell's referrals from before and after November 2015.

Neri and Palladino suggested that the fact that Mantell was not referred out because the past two years were weak for Respondent's referrals. (Tr. 270, 305-06.) However, Neri testified that the difference between 2015's and 2016's man-hours is 300,000 to 255,000, a difference of

15%. (Tr. 273.) This factor cannot explain the night-and-day difference in Mantell's referrals from before to after November 2015.

In sum, the evidence shows that Frank Mantell's protected activity was a substantial and motivating factor in Respondent's refusal to refer his brother Ronald Mantell after November 2015. Respondent has failed to carry its burden of showing that it would not have referred Ronald Mantell after November 2015 even absent Frank Mantell's protected activity. Respondent's refusal to refer Ronald Mantell therefore violated Section 8(b)(1)(A) of the Act.

B. Respondent's threat to Mantell violated the Act

"Any coercion used to discourage, retard, or defeat" access to Board processes "is beyond the legitimate interest of a labor organization." *NLRB v. Marine & Shipbuilding Workers Local 22*, 391 U.S. 418, 424 (1968). Accordingly, union threats against employees for filing Board charges are unlawful under Section 8(b)(1)(A) of the Act. *International Brotherhood of Teamsters, Local 391*, 357 NLRB 2330, 2330 (2012).

In this case, Palladino's threat against Mantell could not have been stated more plainly: Palladino told Mantell that if he filed an NLRB charge against Respondent, Palladino would file internal union charges againsthim. Such a threat violates Section 8(b)(1)(A) of the Act. *See New York Typographical Union Local No. 6*, 213 NLRB 925, 927 (1974) (statement by a union representative that he could bring charges against an employee for his having filed unfair labor practice charges against the union violates Section 8(b)(1)(A)).

C. Respondent's internal charges and penalties against Mantell violated the Act

In union discipline cases, Section 8(b)(1)(A) proscribes union conduct against union members that (1) impacts on the employment relationship, (2) impairs access to the Board's processes, (3) pertains to unacceptable methods of union coercion, such as physical violence in

organizational or strike contexts, or (4) otherwise impairs policies imbedded in the Act. *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1418 (2000). "If a union's discipline is found to be within the scope of Section 8(b)(1)(A), the Board then weighs the Section 7 rights of the union member against the legitimate interests of the union to determine whether the discipline violates the Act." *Laborers' International Union of North America, Local Union No. 91*, 365 NLRB No. 28, slip op. at 1 (citing *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118, 1122 (2000)).

In this case it is alleged that Palladino filed the internal union charges against Ronald Mantell, and Respondent suspended and fined him, in retaliation for Frank Mantell's protected activity. Such conduct impairs the policies imbedded in the Act.

This allegation, involving discerning Respondent's motive, is properly analyzed under *Wright Line*. To establish a prima facie case under *Wright Line*, the General Counsel must here establish that Frank Mantell's protected activity was a substantial or motivating factor in Respondent's discipline of Ronald Mantell, which burden is satisfied by showing that (1) Frank Mantell was engaged in protected activity, (2) Respondent had knowledge of the protected activity, and (3) Respondent bore animus toward Ronald Mantell because of Frank Mantell's protected activity. *See Camaco Lorain Mfg. Plant*, 356 NLRB at 1185. If the General Counsel makes this required initial showing, the burden then shifts to Respondent to prove that it would have taken the same action even in the absence of Frank Mantell's protected activity. *See Id.* "If, however, the evidence establishes that the reasons given for [Respondent's] action are pretextual – that is, either false or not in fact relied upon – [Respondent] fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to

perform the second part of the *Wright Line* analysis." *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 269 (2008) (citing *United Rentals*, 350 NLRB 951, 951-52 (2007)).

As noted above, a respondent's discriminatory motive may be demonstrated by circumstantial evidence based on the record as a whole. *Case Farms of North Carolina*, 353 NLRB at 260. In cases involving discipline, "'[t]o support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the [respondent], disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union [or other protected concerted] activity.'" *Id.* (quoting *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), *enfd. mem.* 184 Fed. Appx. 476 (6th Cir. 2006)).

The Board "'does not find that the timing factor necessarily favors a respondent whenever the discipline is imposed … immediately following the alleged infraction. A[] [respondent] might wait for a pretextual opportunity to discipline a[] [member] for engaging in protected activity.'" *Case Farms of North Carolina*, 353 NLRB at 261 (quoting *Naomi Knitting Plant*, 328 NLRB 1279, 1282 fn. 18 (1999)). "The Board evaluates all the circumstances of a particular case to determine whether the timing of the respondent's actions suggests that it seized an opportunity to mask its true motivation." *Id.*

Again, it is already established in the Board Decision that Frank Mantell had engaged in protected activity, that Respondent was aware of that activity, and that Respondent bore animus towards Frank Mantell's protected activity. Again, it is undisputed that Respondent was aware that Ronald Mantell is Frank Mantell's brother. Again, Palladino's animus towards members' protected activity is further demonstrated by the remarks testified to by witness Robert Connolly

in which Palladino raised the subject of Frank Mantell and then threatened members with reprisal if any of them filed an NLRB charge. Palladino's animus is also demonstrated by Palladino's refusal, discussed above, to refer out Ronald Mantell because of Frank Mantell's protected activity.

It is noted that Palladino's March 3 filing of the union charges against Ronald Mantell occurred about a month after Respondent received the adverse ruling in the February 7 Board Decision involving his brother Frank, which served as a fresh reminder of Palladino's animus against Frank. Even if that connection were not so plain, it is no defense that Respondent's March/April 2017 discipline of Ronald Mantell did not occur close in time to Frank Mantell's protected activity, either in his August 2015 Facebook posts or his November 2015 filing of the Board charge. This is because the circumstances of the case show that Respondent merely waited for the first pretextual opportunity to discipline Ronald Mantell for his brother's protected activity. Further, this discipline was merely a continuation of Palladino's campaign against the Mantell brothers, which began with the internal charges filed against Frank and continued through the lengthy period of refusing to refer Ronald despite his pleas for work and the blatant threat of reprisal against Ronald if he filed a Board charge.

Note that following Frank Mantell's November 2015 filing his Board charge against Respondent, Ronald Mantell had only worked under Respondent's jurisdiction twice: two one-day jobs in February 2016 and February 2017. This afforded Respondent only two opportunities to locate a purported basis for disciplining Ronald Mantell, yet this was still enough for Respondent to locate a pretext to punish him.

As noted above, Respondent's discriminatory motive for its discipline of Ronald Mantell may be inferred from circumstantial evidence, including inconsistencies between Respondent's

proffered reasons for that discipline and its other actions, disparate treatment of certain members compared to other members with similar work records or offenses, and deviations from past practice. *Case Farms of North Carolina*, 353 NLRB at 260. All of these factors support the inference that Respondent's discipline of Ronald Mantell was a pretext to mask its unlawful motive.

First, as noted above, Respondent has no record of having disciplined a single member for working without a steward, aside from Mantell, since at least January 2010; Grace testified that no such discipline occurred in his 13 years on the executive board; and Neri does not recall any such discipline for the last 20 years. This lack of discipline is despite the fact, as Neri testified, it sometimes happens that members will find their own work without notifying Respondent. It simply strains credulity that since that time, over the course of at least 13 years, or as long as 20 years, there has been not a single other instance, on even a one-day job, where a member has worked without a steward. Yet this rule, if it exists, is one for which Respondent has not brought a member up on charges prior to Mantell. This fact alone supports the inference that Respondent acted on a pretext to hide an unlawful motive. *See Grand Central Partnership*, 327 NLRB 966, 974-75 (1999) (failure of a respondent to show that it has treated individuals in the past in a similar manner for engaging in similar misconduct to that of an alleged discriminatee has been held to be an important defect in the respondent meeting its *Wright Line* burden).

It is further noted that Respondent's explanations for the basis of Mantell's discipline have shifted over time. According to Respondent's minutes of Mantell's disciplinary hearing, he was found guilty of violations of both the collective-bargaining agreement and the constitution. In its letter informing Mantell of his conviction, only the violation of the collective-bargaining

agreement is mentioned. And in Respondent's affirmative defense in its Amended Answer, it is asserted only that Mantell violated the constitution. Such shifting explanations further support an inference that the purported basis of the discipline was a pretext designed to disguise an unlawful motive. *See Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 (2007); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997).

It is notable that the collective-bargaining agreement, of course, is binding on Respondent and the employer. And that agreement places the responsibility on the business manager, not the members, for ensuring that a steward is the first laborer on all jobs where laborer's work is being performed. It is therefore odd that Respondent would discipline a member for violation of this, or any, provision of the collective-bargaining agreement. There is also no evidence that the business manager was disciplined by the Union as a result of this incident. Further, Respondent has not shown any written basis for the member's obligation to inform Respondent if he/she is working on a job without a steward present. Indeed, in Respondent's minutes to Mantell's disciplinary hearing, Palladino characterized this notification as a mere "courtesy." (GC Ex. 9.) This further supports an inference that the grounds for Respondent's discipline of Mantell were pretextual.

In Neri's testimony, he suggested that the member's obligation to inform Respondent if the member is working any job that he/she has obtained themselves – which obligation Mantell supposedly violated – is found in Respondent's Amended Job Referral Rules, section 3, paragraph C. (Tr. 233.) But this provision only applies to members who, "on their own, obtain one or more jobs at the trade in the aggregate lasting five (5) working days or more of employment." Clearly this provision does not pertain to Mantell's one-day job at Scrufari

Construction in February, and cannot have been the basis for his discipline. This is yet one more instance of Respondent's shifting explanations of the basis for Mantell's discipline.

It is also noted that the only language in the charged provisions of Respondent's constitution remotely applicable to Mantell's purported violation is paragraph (c), which provides that members are obligated "[t]o recognize and respect the right of the Union to adopt and enforce reasonable rules as to the responsibility of every member toward the Organization as an institution and to refrain from conduct that would interfere with the performance of [Respondent's] lawful and contractual obligations." Again, in the absence of a regularly-enforced rule obligating members to inform Respondent if they are working a job without a steward, and where a member providing such notification is only a "courtesy," it is hard to see how Mantell's conduct could have violated this provision of the constitution. Rather, this basis for Mantell's discipline seems to have been a make-weight, which only supports the inference that the basis was pretextual.

Thus, the evidence shows that Frank Mantell's protected activity was a substantial and motivating factor in Respondent's discipline of Ronald Mantell. Further, the evidence shows that the reasons Respondent has given for its discipline were pretextual – that is, not in fact relied upon. Thus, Respondent fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis. *SFO Good-Nite Inn*, 352 NLRB at 269.

As the above discussion also shows, Respondent's discipline of Mantell in retaliation for his brother's protected activity impairs the policies imbedded in the Act, and thus brings that discipline within the scope of Section 8(b)(1)(A). Next, Mantell's Section 7 rights must be weighed against "the legitimate interests of the union to determine whether the discipline

violates the Act." *Laborers' International Union of North America, Local Union No. 91*, 365 NLRB No. 28, slip op. at 1.

Even assuming Respondent has a legitimate interest in ensuring that no member works without a steward, under the facts of this case it is of limited weight. It is first noted that, even though Mantell was disciplined based on a mere one-day, six-hour job, no records exist of any other member being disciplined for infraction of this policy since at least January 2010, no member has been disciplined for this infraction for at least 13 years, and Neri recalls no such discipline for 20 years. As noted above, it strains credulity that there has been no other instance since that time of a member working a job without a steward, especially in light of the fact (as Neri testified) that it sometimes happens that members find their own work without informing Respondent. This complete lack of other instances of discipline based on this rule, if it exists, indicates that Respondent has not been scrupulous in enforcing the rule. Further, Palladino made clear in his letter charging Mantell and at the hearing on Mantell's charges that this steward policy had only applied to Scrufari Construction for the two years prior to March 2017, surely not a sign that Respondent was overly concerned with a steward being on the job in every single instance. Simply put, Respondent's clearly attenuated interest here cannot be said to outweigh Mantell's vitally important Section 7 right to be free from retaliation for his brother's protected activity. Consequently, Respondent's March/April 2017 discipline of Mantell violated Section 8(b)(1)(A) of the Act.

D. Respondent's refusal to show Mantell the out-of-work list and its changed practice of updating the out-of-work list violated the Act

A union operating a non-exclusive hiring hall violates the Act when it retaliates against a member for his protected activity by refusing to assist him in obtaining jobs. *Carpenters Local 537 (E.I. Du Pont)*, 303 NLRB at 420 (citing, e.g., *Plasterers Local 121*, 264 NLRB 192 (1982)).

Specifically, it is "'when a union operating a nonexclusive referral system ignores one of its members *because* he or she engaged in activities protected by Section 7 of the Act that there is the "prohibited" interference with Section 7 rights within the meaning of Section 8(b)(1)(A) of the Act.'" *Carpenters Local Union 370 (Eastern Contractors Assn.)*, 332 NLRB 174, 175 (2000) (quoting *Teamsters Local 17 (Universal Studios)*, 251 NLRB 1248(1980)) (emphasis in *Eastern Contractors*).

As described above, on June 26 Mantell learned from Neri that Respondent had referred out two members who were below Mantell on the out-of-work list. Neri told Mantell that the two members were referred out as stewards, meaning they could be drawn out of numerical order from the list. Mantell then went to the jobsite of one of those members to investigate whether, in fact, that member was serving as a steward on the job.

Mantell's investigation into whether a union is following its referral procedures is protected activity. *See Sheet Metal Workers Local 16 (Parker Sheet Metal)*, 275 NLRB 867, 867 (1985) (union member was engaging in protected activity when he contacted the international union to protest the local's refusal to refer him from the local's nonexclusive hiring hall; the local then refused to refer the member explicitly because the latter had called the international union, thereby violating Section 8(b)(1)(A)); *Iron Workers, Local 433 (The Associated General Contractors of California, Inc.)*, 228 NLRB 1420 (1977) (hiring hall applicants' protesting violations of a union's contractual hiring hall procedures found to be protected activity).

As described above, Neri told Mantell the next day, June 27, that because of what Mantell had done the previous day, Palladino had instructed Neri not to show Mantell the out-of-work list, and in fact Neri refused to show Mantell the list. This refusal to assist Mantell in

obtaining work, explicitly because of Mantell's protected activity the previous day, violated Section 8(b)(1)(A) of the Act.

Similarly, Respondent's changed practice of making an updated out-of-work list available for members' viewing, from showing them a list updated whenever it changed from the day before to posting an updated list only once a week, was simply one more way of limiting Mantell's access to the list. As Mantell testified, when the list is only updated weekly members' ability to see, as the week progresses, which members are being referred – and hence whether Respondent is following its referral procedures – is limited. And Neri testified that the change was due to members' attempts to follow day-to-day changes in the list, surely a veiled reference to Mantell's policing of the list. The timing of this change in Respondent's procedure, coming shortly after Mantell investigated Respondent's referrals and Neri's subsequent denial, on Palladino's instructions, of Mantell's request to see the out-of-work list, clearly suggests that it was motivated by a desire to limit Mantell's ability to determine whether Respondent is following its referral procedure, which is protected activity. Consequently, this changed practice violated Section 8(b)(1)(A) of the Act.

E. Respondent's affirmative defenses are without merit

a. All unlawful conduct occurred within the Section 10(b) period

Respondent asserts an affirmative defense that the allegations of the Consolidated Complaint, as amended, are barred by the statute of limitations. This defense is without merit.

Section 10(b) of the Act provides that "[n]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." It is well established that the Section 10(b) period begins only when a party has "clear and unequivocal" notice of a violation of the Act. *See, e.g., Broadway Volkswagen,* 342 NLRB 1244,

1246 (2004); *Leach Corp.*, 312 NLRB 990, 991 (1993); *Desks, Inc.*, 295 NLRB 1, 11 (1989). Further, the burden of showing that a complaint is time-barred is on the party raising Section 10(b) as an affirmative defense. *Broadway Volkswagen*, supra (citing *Chinese American Planning Council*, 307 NLRB 410 (1992), *review denied mem.* 990 F.2d 624 (2d Cir. 1993)). This burden is met by showing the charging party had actual or constructive knowledge of the alleged unfair labor practice more than six months prior to the filing of the charge. *Id.*

The charge in Case 03-CB-196682, alleging Respondent's unlawful refusal to refer Mantell, Respondent's threat against Mantell about going to the NLRB, and the internal union charges against Mantell, was filed and served on Respondent on April 12, 2017. Therefore, the Section 10(b) period began to run on October 12, 2016.

Although Respondent's refusal to refer Mantell began in November 2015, Mantell did not receive notice of its unlawful nature until his conversation with Palladino in early November 2016, when Palladino connected the fact that Mantell was not being referred for work to Mantell's brother Frank. The Section 10(b) period did not start until Mantell received this notice in early November 2016, and thus his April 12, 2017 charge was timely. Respondent has not met its burden of showing otherwise.

In addition, Respondent's refusal to refer Mantell for unlawful reasons, beginning in November 2015, constitutes a continuing violation of the Act, continuing to the present and thus within the Section 10(b) period. *See La-Z-Boy Tennessee*, 233 NLRB 1255, 1255 fn. 1, 1257-58 (1977).

The conduct alleged in Case 03-CB-196682 regarding Palladino's threat to Mantell of filing internal union charges against Mantell if Mantell went to the NLRB also occurred in early

November 2016, in the same conversation where Palladino connected his refusal to refer Mantell to Mantell's brother, and thus occurred within the Section 10(b) period.

The remaining allegation in Case 03-CB-196682, regarding Respondent's internal union charges against Mantell, involves conduct that occurred in March and April 2017 and thus was clearly within the Section 10(b) period.

The amended charge in Case 03-CB-201412, alleging Respondent's refusal to show Mantell the out-of-work list and its changed practice of updating the out-of-work list, was filed and served on Respondent on August 16, 2017. The alleged conduct occurred in June and July 2017, and thus was clearly within the Section 10(b) period.

b. The Act applies to Respondent's conduct

Respondent has raised as an affirmative defense that the actions of Respondent and Mantell under consideration here are "an entirely internal union matter," and as such the LMRDA, not the Act, applies. This defense is also without merit, and is belied by the discussion above, showing that all Respondent conduct alleged in the Consolidated Complaint, as amended, falls squarely within the purview of the Act. In particular, while the Board only proscribes internal union discipline in limited circumstances, one of those circumstances, the impairment of policies imbedded in the Act, is plainly implicated here. *Sandia National Laboratories*, 331 NLRB at 1418.

c. Respondent's discipline of Mantell was unlawfully motivated

Respondent has raised as an affirmative defense that Mantell violated Respondent's constitution and his obligations as a member, and thus was properly penalized by Respondent. This final defense, too, is without merit.

As the discussion above regarding Respondent's discipline of Mantell makes plain, that discipline was unlawfully motivated. Mantell's purported violations of the collective-bargaining agreement and/or constitution were a mere pretext seized on by Respondent to mask its true motive, which was to punish Mantell because of his brother's protected activity. Such unlawfully motivated discipline impairs the policies imbedded in the Act, and thus violates Section 8(b)(1)(A) of the Act.

V. CONCLUSION

The evidence establishes that Respondent discriminated against Mantell for his brother's protected activity and his own protected activity, a violation of Section 8(b)(1)(A) of the Act. Accordingly, Counsel for the General Counsel respectfully requests the relief set forth below.

VI. PROPOSED REMEDY

The General Counsel respectfully requests that the Administrative Law Judge issue an order requiring Respondent to fully remedy its unlawful discrimination against Ronald Mantell through a make whole remedy, including payment of search-for-work and interim employment expenses, regardless of whether such expenses exceed any interim earnings. *See, e.g., King Soopers, Inc.*, 364 NLRB No. 93 (2016) (incorporating search-for-work and interim employment expenses in calculation of make-whole remedy). Such a remedy would also include consequential economic harm.

Under the Board's present remedial approach, some economic harm flowing from a respondent's unfair labor practices are not adequately remedied. *See* CATHERINE H. HELM, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (noting that a traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard,

broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *See, e.g.*, *Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of making the employees whole, and restoring the economic status quo that would have obtained but for the company's [unlawful act]").

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539

(1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See Tortillas Don Chavas, supra*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act's make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress"). Compensation for employees' consequential economic harm would further the Board's charge to "adapt [its] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly," provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for a respondent's unlawful actions. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.[10] Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).[11]

[10] However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any unlawful conduct by the employer.

[11] Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (considering an award of front pay but refraining from such an order because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.[12] In *Nortech Waste*, supra, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, as in *Nortech Waste*, where there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee's consequential medical expenses)); *Lee Brass Co.*, 316

[12] This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).[13] Therefore, General Counsel respectfully requests that the ALJ issue a recommended order fully addressing the unfair labor practices alleged in the Complaint, including consequential economic harm incurred as a result of those practices.

VII. PROPOSED CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent violated Section 8(b)(1)(A) of the Act by engaging in the following conduct:

   (a) Refusing to refer Ronald J. Mantell from its out-of-work referral list because his brother, Frank Mantell, engaged in protected concerted activity.

   (b) Threatening Ronald J. Mantell with internal union charges if the employee-member filed charges with the National Labor Relations Board.

   (c) Filing internal union charges against Ronald J. Mantell because his brother, Frank Mantell, engaged in protected concerted activity.

   (d) Fining Ronald J. Mantell and suspending him as a member in good standing because his brother, Frank Mantell, engaged in protected concerted activity.

[13] The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.'" *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. 2007) ("[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages" for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

(e) Refusing to allow Ronald J. Mantell to view Respondent's out-of-work list because he engaged in protected concerted activity.

(f) Changing its practice by posting its updated out-of-work list weekly instead of daily because Ronald J. Mantell engaged in protected concerted activity.

3. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VIII. PROPOSED ORDER

Respondent, Laborers' International Union of North America, Local Union No. 91, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against Ronald J. Mantell by refusing to refer him to work, filing internal union charges against him, and fining and suspending him in reprisal for his brother participating in protected concerted activity.

(b) Threatening employee-members with internal union charges for filing charges with the National Labor Relations Board.

(c) Refusing to allow members and users from viewing the out-of-work list because they participate in protected concerted activity.

(d) Changing the manner in which it allows members and users from viewing the out-of-work list because they participate in protected concerted activity.

(e) 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) Notify Ronald J. Mantell, in writing, that Respondent will not coerce or restrain him in the exercise of his rights under the Act, and that it will make employment referrals available to him in his rightful order of priority without regard to his or any other member's exercise of such rights.

(b) Make Ronald J. Mantell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

(c) Within 14 days after service by the Region, remove from its files any reference to Ronald J. Mantell's fine and suspension, and, within 3 days notify him in writing that this has been done and that his suspension will not be used against him in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its hiring hall in Niagara Falls, New York copies of the attached notice to members. Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IX. PROPOSED NOTICE TO MEMBERS

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union;
- Choose a representative to bargain with your employer 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 do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to refer any of you from our out-of-work referral list in retaliation for activity protected by Section 7 of the Act.

WE WILL NOT threaten any of you with internal union charges for filing charges with the National Labor Relations Board.

WE WILL NOT file internal charges, fine or suspend you in retaliation for activity protected by Section 7 of the Act.

WE WILL NOT refuse to allow you to view the out-of-work list because you engaged in protected concerted activity by investigating referrals from our hiring hall.

WE WILL NOT change the manner in which we allow members and users of our hiring hall to view the out-of-work list because they engaged in protected concerted activity.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL notify Ronald J. Mantell, in writing, that we will make employment referrals available to him in his rightful order of priority, without regard to his or any other member's exercise of Section 7 rights.

WE WILL make Ronald J. Mantell whole for any loss of earnings and other benefits suffered as a result of our discrimination against him.

WE WILL remove from our files any reference to Ronald J. Mantell's fine and suspension, and **WE WILL** notify him in writing that this has been done and that his suspension will not be used against him in any way.

WE WILL restore the manner in which we presented the referral list to members and users of the hiring hall for their viewing.

WE WILL permit members and users of our hiring hall to view the current out-of-work list upon request, and **WE WILL** permit members and users of our hiring hall to take notes regarding referrals from the out-of-work list.

WE WILL upon request, show Ronald Mantell the out-of-work lists for the period during which we refused to allow him to view the out-of-work list because he engaged in protected activity, and **WE WILL** permit him to take notes of the information appearing on those lists if he so chooses.

DATED at Buffalo, New York this 30th day of November, 2017.

__/s/_____
ERIC D. DURYEA

__/s/_____
JESSE S. FEUERSTEIN

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STATEMENT OF SERVICE

I hereby certify that on November 30, 2017, I electronically filed the General Counsel's Brief to the Administrative Law Judge in Case Nos. 03-CB-196682 and 03-CB-201412 using the NLRB E-Filing System. I hereby certify that I provided a copy of the same document via electronic mail (email) to Robert L. Boreanaz (rboreanaz@lglaw.com), counsel for Respondent, and to Ronald J. Mantell (ronmantell71@gmail.com), Charging Party.

DATED at Buffalo, New York this 30th day of November, 2017.

Respectfully submitted,

__/s/_____

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