

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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

and

**Cases 03-CB-196682
03-CB-201412**

RONALD J. MANTELL, an Individual

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.46(a) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Brief in support of Exceptions to the Decision of Administrative Law Judge David I. Goldman (ALJ), dated December 11, 2017, in the above-captioned cases. Other than what is excepted to herein, it is respectfully submitted that in all respects the ALJ's findings are appropriate, proper, and fully supported by the credible record.

I. PRELIMINARY STATEMENT

The General Counsel submits this brief excepting to certain findings and conclusions by Administrative Law Judge David I. Goldman ("ALJ"), who heard this matter on October 11 and 12, 2017.¹

The Consolidated Complaint, as amended, alleges that Laborers' International Union of North America, Local No. 91 ("Respondent" or "Union") discriminated against Ronald Mantell ("Mantell") because Mantell's brother, Frank Mantell, engaged in protected concerted activity. That activity and Respondent's unlawful retaliation against Mantell's brother is detailed in a

¹ All dates hereafter are in 2017 unless otherwise indicated.

National Labor Relations Board (“Board” or “NLRB”) decision dated February 7.² The crux of this case is that Respondent’s animus toward Mantell’s brother’s protected concerted activity also extended to Mantell and that Respondent retaliated against Mantell because of his brother’s protected concerted activity and his own. In particular, the Consolidated Complaint alleges that Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (Act), by (1) refusing to refer Mantell from its out-of-work list; (2) threatening Mantell with internal union charges; (3) filing internal union charges against Mantell, and fining and suspending him as a result of these charges; and (4) refusing to show Mantell the out-of-work list and changing its practice for posting the list.

In his decision dated December 11, the ALJ agreed that Respondent violated the Act with respect to some, but not all, of these allegations. Specifically, he concluded that Respondent violated the Act by threatening Mantell with internal union charges and refusing to show him the out-of-work list. However, the ALJ concluded, erroneously, that Respondent did not violate Section 8(b)(1)(A) by refusing to refer Mantell, filing internal union charges against him which led to his fine and suspension, or changing its practice for posting the list. In analyzing these issues, the ALJ failed to consider relevant evidence, made erroneous factual findings, and misapplied precedent. Had he analyzed the record in accord with precedent, he would have concluded that Respondent violated the Act in each respect alleged. Accordingly, the General Counsel asks the Board to reverse certain findings and conclusions in the ALJ’s decision as set forth below.

² *Laborers Local 91 (Council of Utility Contractors, Inc.)*, 365 NLRB No. 28 (2017).

II. FACTS

A. Overview of Respondent's Operations

Respondent operates a non-exclusive hiring hall, through which it refers members to jobs off an out-of-work list. Because the hall is non-exclusive, members may also secure work independent of the hall.

Richard Palladino, Respondent's business manager, is primarily responsible for selecting which member to refer from the list in response to a contractor's request. (Tr. 214:16-25; 226:24-227:22; 252:17-22; 253:19-254:18.) Respondent's employee Mario Neri otherwise administers the list. (Tr. 209:23-210:12.) Generally, Palladino refers members according to their order on the list. He may, however, refer members out of order under Respondent's Referral Procedure. Specifically, he may select a member out of order to serve as a steward or foremen; if a contractor requests a member by name; if the member needs additional hours to qualify for federal, state, or union benefits; or if a picket line situation requires it. (Tr. 234:9-237:22; R. Ex. 1 at pp. 4-5.) As a result, Palladino wields significant power and discretion in determining who is referred and when.

B. The Board's Decision Involving Mantell's Brother

Relevant here is a prior case before the Board – one that evidences the power Palladino wields in referring members and his willingness to use it for unlawful retaliatory purposes.³ In that case, the Board held that Respondent, through Palladino, violated Section 8(b)(1)(A) of the Act by retaliating against Mantell's brother, Frank Mantell, for his protected concerted activities. Specifically, the Board found that, in late August 2015, Frank Mantell posted comments on Facebook critical of Respondent and Palladino. It further found that Respondent, via Palladino,

³ The facts and holdings of that case are set forth in full in *Laborers Local 91 (Council of Utility Contractors, Inc.)*, 365 NLRB No. 28 (2017).

retaliated against Frank Mantell for those Facebook posts by filing internal union charges against him and removing him from the out-of-work list.

The timeline of that case involving Mantell's brother is critical to understanding the timeline of events relevant to Mantell's charges in this case. As relevant here, Mantell's brother filed his charge on November 12, 2015. As will be discussed further below, this is the month that Mantell saw his formerly regular referrals through Respondent's hiring hall evaporate. A complaint issued based on the charge Mantell's brother filed, and the matter proceeded to hearing. On September 7, 2016, an ALJ issued a decision in that case, finding that the Facebook posts criticizing Respondent and Palladino were protected concerted activity and that Respondent had violated Section 8(b)(1)(A) of the Act by filing charges against Mantell's brother and removing him from the out-of-work list in retaliation for the posts. On February 7, the Board affirmed the decision in favor of Mantell's brother. A month later, Respondent, by Palladino, brought internal union charges against Mantell.

C. Mantell's Referral History

Before his brother filed charges with the NLRB, Mantell had a steady referral history through Respondent. He had been a member of the Union since 1990, and throughout most of that time received steady employment through Respondent's non-exclusive hiring hall. (Tr. 23:16-21; 25:7-26:5; GC Ex. 2.) Respondent's fiscal year runs from June 1 to May 31. In the ten fiscal years from 2006 to 2015, Mantell averaged 1,065.675 pension-credited hours. (See GC Ex. 2.) This changed in November 2015, around the same time his brother filed a charge against Respondent. Since the start of the 2015 fiscal year in June and until November 2015, Mantell had worked 734.25 hours. After November 2015 and through the following May, he worked only 7 hours, which he secured for himself. (Tr. 32:24-33:14; 35:13-25; GC Ex. 2; GC Ex. 3.)

Despite Mantell's previously consistent referral history, his referrals through the hall after November 2015 fell to zero and have remained at zero to the present date. Notably, nothing is different about Mantell's qualifications before November 2015 verses after. (Tr. 148:21-49:8.)

Because of this dramatic change in his referral pattern, Mantell asked Palladino about getting work through the hall in early November 2016. Mantell explained that he was second on the out-of-work list and needed just an hour or two to qualify for supplemental pay. (Tr. 36:10-39:25.) Unprompted, Palladino ridiculed Mantell about his brother. Mantell responded that he was Ron Mantell, not Frank Mantell. Palladino told Mantell that he should find his own work and that it was not his job to find a job for him. Palladino went on to say that he knew Mantell planned to call the NLRB and that he would file union charges against him if he did.

D. Mantell's February 2017 Job and March 2017 Internal Union Charges

Still receiving no referrals through the hall, Mantell independently secured a one-day, six-hour job with Scrufari Construction Company that he worked on February 1. (Tr. 46:16-47:3.) The job was for caulking concrete saw cuts, which Mantell believed fell outside Respondent's jurisdiction and therefore did not require a steward. (Tr. 47:4-50:25.)

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 that one-day job. (GC Ex. 7.) The charges were based on an alleged violation of the collective-bargaining agreement and Respondent's constitution,⁴ and were nearly unprecedented. Although members sometimes obtain their own work without informing Respondent, Respondent has not in recent memory disciplined any member for

⁴ The Union held a hearing on the charges and voted to suspend Mantell as a member in good standing for six months and to fine him \$500. His suspension and fine are temporarily suspended pending the result of his appeal to the International.

working without a steward. Indeed, Respondent's witness William Grace conceded 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. 292:19-293:11.) Likewise, Respondent's witness Mario Neri could not recall a member being disciplined by Respondent for working without a steward for the last 20 years. (Tr. 257:12-258:5.)

E. Respondent's Change in Policy for Posting the Out-of-Work List

Suspicious that he had not received a single referral since November 2015, Mantell kept a close eye on the out-of-work list, visiting the hall at least once or twice a week to review the list and his status on it. (Tr. 72:6-23.) On June 26, he went to the union hall with that intention. (Tr. 73:10-16.) Neri was in the process of updating the list, but showed Mantell a copy of the June 21 list. (Tr. 74:2-5; GC Ex. 13.) Neri told Mantell that two members had been referred out that day. (Tr. 74:2-14.) Both members were lower than Mantell on the list, but Neri said that each had been referred as stewards out of order. (Tr. 74:2-14; GC Ex. 13.)

Mantell went to the job site to investigate whether the referrals were actually for stewards. (Tr. 75:6-11.) The next day, Neri refused to show Mantell the out-of-work list, stating that it was "because of what happened yesterday." (Tr. 79:19-80:8.) The ALJ in this case rightfully concluded that this action was in retaliation for Mantell's policing activity and violated the Act. However, that same day, Respondent also changed its policy for posting the out-of-work list. (78:21-84:9.) Respondent had previously kept the list behind the glass of the front office desk and permitted members to view it on request as it was updated daily. After Mantell's investigation of referrals, Respondent decided that the list would be posted on a bulletin board and only updated for members weekly (although it would still be maintained daily). Not only did this change happen just a day after Mantell investigated referrals, but at the hearing, Neri

explained the decision as being motivated by the need to curb members' inquiries about the list more generally. He complained members were increasingly asking, "Let me see the list today. Let me see the list tomorrow. Who went to work? What did they go to work for?" (Tr. 244:1-245:4.) Clearly then, Respondent's desire to curb the protected concerted activities of members motivated the change, and Mantell's protected concerted activity was the last straw.

III. ARGUMENT

A. The ALJ Erred in Concluding the Union Did Not Refuse to Refer Mantell in Retaliation for His Brother's Protected Concerted Activity (Exception 1).

The ALJ erroneously concluded that the General Counsel had not sustained its burden of showing that the Union refused to refer Mantell in retaliation for his brother's protected concerted activity. First and foremost, the ALJ applied the wrong standard, failing to apply the *Wright Line* standard that the Board has previously applied in cases involving the same allegation. Had the ALJ applied this standard, even he admits the General Counsel would have sustained its burden. Instead, he applied the heightened burden of proof articulated in *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), which has never before been applied in this context and is inappropriate for it. Second, even if the ALJ did not err in applying *FES*, he wrongfully determined that the General Counsel had not sustained its burden. The record evidence amply supports the conclusion that Respondent violated the Act by retaliating against Mantell for his brother's protected concerted activity under that standard as well.

1. The ALJ Wrongfully Failed to Apply the *Wright Line* Standard.

The ALJ's error is straightforward. For the first time and contrary to precedent, he imposed a heightened burden on the General Counsel in a case alleging that a union violated Section 8(b)(1)(A) by refusing to refer a member in retaliation for protected concerted activity.

As the General Counsel set forth in the post-hearing brief, the appropriate standard of

review in such cases is that which the Board set-forth in *Wright Line*.⁵ The Board has uniformly applied it in cases with the identical allegation at issue here – that a union refused to refer a member through its non-exclusive hiring hall in retaliation for protected concerted activity. See, e.g., *Electrical Workers Local 429*, 347 NLRB 513, 515 (2006); *Ironworkers Local 340 (Consumers Energy Co.)*, 347 NLRB 578, 579 (2006); *Local No. 121, Plasterers*, 264 NLRB 192, 193 (1982). The *Wright Line* standard requires the General Counsel to show (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. When the General Counsel establishes this *prima facie* case, the burden shifts to respondent to show that it regardless would have taken the adverse action at issue.

However, instead of applying *Wright Line*, the ALJ imposed a heightened burden of proof on the General Counsel in this case. Contrary to precedent, he analogized a union’s refusal to refer a member to an employer’s refusal to hire and applied the modified *Wright Line* standard set forth in *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000). This approach is simply inconsistent with how the Board has traditionally viewed refusal to refer cases.⁶ The Board has only applied *FES* in cases involving an employer-respondent’s allegedly unlawful refusal to hire. *FES* itself is a salting case, and therefore involves a set of circumstances and considerations quite different from those at issue in refusal to refer matters. It imposes a higher standard of proof on the General Counsel than exists under a typical *Wright Line* analysis. Under *FES*, the General Counsel has the burden of showing, in addition to the existence of union activity, the

⁵ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

⁶ In footnote 10 of his decision, the ALJ indicated that the General Counsel analogized this case to a refusal to hire matter by citing *La-Z-Boy Tennessee*, 233 NLRB 1255, 1255, 1257-58 fn.1 (1977). This is simply not the case. The General Counsel cited *La-Z-Boy Tennessee* for the narrow purpose of defining a continuing violation.

respondent's knowledge of that activity, and animus toward it:

(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

FES, 331 NLRB at 12 (footnote omitted). Only after the General Counsel has sustained this significantly higher burden than contemplated under *Wright Line* does the burden shift to the respondent to show it would not have hired the applicants even absent their union activity.

The *FES* standard of proof is patently inappropriate for cases involving a union's refusal to refer a member in violation of Section 8(b)(1)(A). If applied in this context, it would require the General Counsel to divine information about the existence, requirements, and rationales for particular referrals that is uniquely within the purview and knowledge of the union as the broker of referrals. Whereas an employer is likely to advertise positions publicly or speak directly with candidates when hiring, a union with a potential referral has a monopoly on relevant information. Indeed, as evidenced at trial, such information may be in the mind of one union representative alone and thus unknowable to the General Counsel.⁷ For this reason, the original *Wright Line* standard rightfully shifts the burden to the respondent-union to marshal evidence regarding its referral practices rather than asking the General Counsel to divine such evidence in addition to

⁷ For example, contractors asking for members by name will call Respondent to make the request, such that there is no written record of the request. (Tr. 227:7-22; 237:10-22.) Neri testified that Palladino alone made the decision about who to refer as a steward. (Tr. 214:24-215:1.) Although denying initially that it had documents pertaining to members' steward status, it became clear at hearing that some documentation existed that had not been disclosed but was responsive to the General Counsel's subpoena. (Tr. 204:14-16; 205:25- 206:1; 238:14-239:17.) While this information does not fill in the details of referrals (which only Palladino would know), the failure to disclose supports an adverse inference with respect to steward referrals.

sustaining its well-established burden of proof under *Wright Line*.

2. The General Counsel Sustained its Burden Under *Wright Line* that the Union Refused to Refer Mantell in Retaliation for His Brother's Protected Concerted Activity

Had the ALJ applied the original – and appropriate – *Wright Line* standard in this case, the General Counsel would have sustained its burden. The ALJ noted as much in his decision.⁸ (ALJD 7:4-11.) To that end, the Board's decision in *Laborers Union Local 91*, 365 NLRB No. 28 (2017) establishes that Mantell's brother engaged in protected concerted activity of which Respondent was aware and against which it harbored animus. Further, the Board held in that case that Respondent unlawfully removed Mantell's brother from the referral list in retaliation for that protected concerted activity. As the ALJ acknowledged, the unlawful retaliation against Mantell's brother supports the inference that the Union failed to refer Mantell for the same reason.⁹ The fact that Mantell's referrals dropped to zero after November 2015, the same month that his brother filed charges with the NLRB, provides further compelling evidence in support of this conclusion.¹⁰ Mantell credibly testified that he had regularly received referrals from the hall

⁸ “Under the three-prong discharge/discipline *Wright Line* framework, the General Counsel would likely be able to satisfy its initial burden of proof and shift the burden to the Respondent to prove that it would have taken the same referral actions in the absence of protected activity.”

⁹ The ALJ agreed with the General Counsel that a union violates the Act when it retaliates against a member for the protected concerted activities of his relative. *See, e.g., Tasty Baking Co.*, 330 NLRB 560 (2000); *Am. Ambulette Corp.*, 312 NLRB 1166, 1169-70 (1993); *Thorgren Tool & Molding*, 312 NLRB 628, 631 (1993); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-89 (7th Cir. 1987) (“[T]o retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations.”) (citing cases), *enfg. Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986).

¹⁰ The Board has long recognized that unexplained timing can be indicative of animus in discrimination cases. *Elec. Data Sys.*, 305 NLRB 219, 220 (1991); *N. Ca. Prisoner Legal Servs.*, 351 NLRB 464, 468 (2007). Indeed, the Board has pointed out that the General Counsel can sustain this initial burden under *Wright Line* through circumstantial evidence such as timing, something readily established here. *See, e.g., Elec. Workers Local 429*, 347 NLRB at 517 (holding union's failure to refer through non-exclusive hiring hall was motivated by section 7 activity based on timing and pretextual nature of explanation).

prior to November 2015 and the record evidence shows he worked an average of 1,000 hours over a 10 year period prior to that date. However, after November 2015, he received zero referrals from the hall and worked only 7 hours as a laborer on a job he secured for himself. Under *Wright-Line*, this evidence alone satisfies the General Counsel's burden.¹¹

In addition, however, Palladino all but admitted the reason for the sea change in Mantell's referrals during a November 2016 conversation with Mantell.¹² In that conversation, Mantell confronted Palladino about his lack of work and told Palladino that he was second on the out-of-work list. Mantell testified that Palladino then "began to ridicule me about my Brother Frankie." Mantell responded, "I'm Ron Mantell, not Frank Mantell. I'm coming here to ask you for a job." (Tr. 36:10-15; 38:17-39:3). The evolution of this conversation is tantamount to an acknowledgement of a link between Mantell's lack of referrals and Palladino's animus toward the protected concerted activities of Mantell's brother.

Given the timing of Mantell's loss of referrals and clear animus that Palladino harbored, the General Counsel established its *prima facie* case under *Wright Line*. At that point, the ALJ should have shifted the burden to Respondent to show that it would have taken the same action regardless. However, the ALJ asked nothing of Respondent in response to this evidence.

¹¹ Strangely, the ALJ discounted the full two-year period during which Mantell received no referrals from the union despite having regularly received referrals prior to November 2015. (ALJD 8:27-28.) It is the General Counsel's position that Mantell lacked clear and unequivocal notice of the unlawful motive underlying Respondent's failure to refer him until his November 2016 conversation with Palladino, such that all unlawful refusals to refer Mantell during the two-year period constitute timely violations of the Act. The ALJ did not address this argument. However, even under a continuing violation theory in which timely violations commenced six months prior to the filing of this charge, the entire two-year period of Respondent's unlawful refusal to refer Mantell provides a compelling background and goes a long way to explaining the unlawful conduct that occurred during this period. Certainly, two years of failing to refer Mantell – when nothing else demonstrably changed – supports a strong inference of unlawfulness. Respondent's liability relative to any particular referral during the 10(b) period is rightfully reserved for the compliance stage.

¹²The ALJ credited Mantell's version of the conversation with respect to other issues.

Instead, he erroneously kept the burden squarely on the General Counsel.

Had the ALJ shifted the burden as precedent requires, the record evidence could not have supported the ALJ's conclusion that Respondent acted lawfully. Respondent put forth only shifting and pretextual explanations for why Mantell suddenly stopped getting referrals in November 2015. Respondent supported none of these explanations with documentary evidence or specifics. For example, it contended that Mantell refused one-day and busting jobs, representations Mantell flatly denied and of which Respondent provided no evidence (for example, the notes that it ostensibly kept in its computer system to that effect¹³). Indeed, even if credited, the conversation in which Mantell allegedly requested no one-day jobs occurred in 2013, two full years before his referrals dropped to zero. This explanation therefore does nothing to explain the timing of the sea change in Mantell's referral pattern. It also defies logic considering the November 2016 conversation between Mantell and Palladino in which Mantell demanded to know why he had received no referrals and Palladino, first, tiraded against Mantell's brother and then said only that contractors had not been calling for him. (Tr. 38:17-39:3.)

Perhaps in recognition that this explanation does not account for the evaporation of Mantell's referrals, Respondent offered other, shifting explanations. For example, at one point in the hearing, Respondent contended that Mantell lacked the skills necessary for available jobs. However, the undisputed evidence is that Mantell's skills were the same prior to November 2015 as they were after November 2015, when the sea change in his referral pattern occurred. (Tr. 148:21-149:8.) Respondent also maintained that it sent out stewards ahead of Mantell, as permitted under the hall's referral rules, a practice uniquely within Palladino's knowledge and

¹³ (Tr. 249:17-250:7.)

discretion and which was, of course, also the practice prior to November 2015. Respondent even went so far as to maintain that Mantell had failed to renew his place on the 90-day list despite testimony from Respondent's own witnesses that Mantell was in the hall once or twice a week checking his place on the list and was second on the list during the November 2016 conversation with Palladino. Respondent's shifting defenses,¹⁴ conclusory assertions about *possible* reasons for Mantell's loss of referrals, and lack of evidence or specifics to support any one of its proffered reasons fall far short of sustaining its *Wright Line* burden.

Moreover, even if one of Respondent's reasons holds superficial appeal, none rebuts the showing that Mantell received referrals prior to November 2015 but not one thereafter. Each of the factors Respondent cites would have been the same throughout the period in question. The only logical explanation, supported by timing, the collateral estoppel effect of the prior case involving Mantell's brother, and Palladino's own words, is that the Union stopped referring Mantell because of his brother's protected concerted activity. Respondent has offered nothing but pretextual explanations to rebut this showing or to establish that it would not have referred Mantell regardless. Accordingly, the ALJ erred in finding that Respondent acted lawfully here.

3. Even if the ALJ Properly Applied *FES*, He Wrongfully Concluded the General Counsel Failed to Sustain its Burden

Assuming *arguendo* that the ALJ properly applied the standard in *FES* to this case, he still erred in concluding that the General Counsel did not satisfy this heightened burden of proof.

As discussed above, under *FES*, the General Counsel must show:

- (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct;
- (2) that the applicants

¹⁴ The Board has held that when a respondent provides inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that those reasons are pretexts designed to mask an unlawful motive. *See, e.g., GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997); *Mt. Clemens Gen. Hosp.*, 344 NLRB 540 (2005); *Holsum De Puerto Rico, Inc.*, 344 NLRB 694 (2005).

had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

FES, 331 NLRB at 12 (footnote omitted). First, it is undisputed on the record that Respondent made referrals during the period in question. Moreover, Mantell credibly testified that he had always received referrals from the Union throughout his 27 years as a member and that these referrals stopped abruptly in November 2015. He was aware referrals were still being made during this timeframe because Palladino told him as much and Mantell even went to a job site to “police” two referrals allegedly made of stewards. (Tr. 75:6-11.) The General Counsel therefore has satisfied the initial element of *FES* that the Union was making referrals.

Second, the record is equally clear that Mantell had the experience and training necessary to do the work in question. His skills were the same prior to November 2015 as after, such that it defies logic that he would be qualified for referrals one day but not the next. (Tr. 148:21-149:8.)

Third, the record supports the conclusion that animus motivated the Union’s failure to refer Mantell for these jobs. The Board’s decision in the related case involving Mantell’s brother establishes the existence of protected concerted activity, the Union’s knowledge thereof, and animus toward it. The Board concluded that Respondent removed Mantell’s brother from the referral list in retaliation for those activities. The timing of the sea change in Mantell’s referral pattern from Respondent – from an average of 1,000 hours per year over 10 years to zero thereafter – occurring the exact month his brother filed NLRB charges amply supports a connection to the animus Respondent harbored toward Mantell’s brother. Likewise, as discussed above, Palladino’s own words to Mantell demonstrate Respondent’s motive.

Accordingly, even if the *FES* standard applies here, which it ought not, the General

Counsel has sustained its burden. The ALJ should then have called upon Respondent to show that it would have made the same decision about referring Mantell regardless. As discussed previously, the ALJ asked nothing of Respondent to that effect and, indeed, Respondent offered nothing more than shifting defenses and conclusory assertions about *possible* reasons for Mantell's lack of referrals. The ALJ therefore erred in concluding Respondent acted lawfully.

B. The ALJ Erred in Concluding that Respondent Acted Lawfully in Bringing Internal Union Charges Against Mantell, Including the Subsequent Discipline (Exception 2).

The ALJ erred in concluding that Respondent's conduct in bringing internal union discipline against Mantell fell beyond the ambit of Section 8(b)(1)(A). (ALJD 12:9-11.) While it is true the Act does not "broadly deputize the Board to adjudicate internal disputes between labor organizations' officers and members,"¹⁵ there are exceptions to that principle, which are applicable here.

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 Nat'l Labs.)*, 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 Local 91 (Council of Utility Contractors, Inc.)*, 365 NLRB No. 28, slip op. at 1 (citation omitted).

Here, the charge and discipline Respondent meted out to Mantell impaired policies

¹⁵ (ALJD 12:18-20.)

imbedded in the Act in the most fundamental way: by impairing Mantell's access to the Board's processes. Specifically, the evidence demonstrates that Palladino filed internal union charges against Mantell in retaliation for his brother's protected concerted activity and, more specifically, immediately following the issuance of an adverse Board decision in the case involving Mantell's brother. The ALJ credited testimony that Palladino made threats aimed at discouraging Board charges. (ALJD 9:39-11:10.) Making good on his threats, Palladino filed internal union charges against Mantell on March 3, just a month after Respondent received the adverse ruling in the February 7 Board decision involving Mantell's brother. This decision served as a reminder of Mantell's brother's resort to the Board's processes and invigorated Palladino's animus toward Mantell. Such retaliation falls squarely within the exceptions articulated in *Sandia*.

Against that backdrop, the matter is properly analyzed under *Wright Line*. As discussed previously, the prior Board decision supports much of the General Counsel's initial burden here. It demonstrates that Mantell's brother was engaged in protected activity, that Respondent was aware of this and harbored animus toward it. Further, the ALJ credited testimony that Palladino harbored animus toward members who would resort to the Board's processes, finding that Palladino violated the Act by threatening members who would seek redress with the Board about union matters. The timing of events supports the conclusion that this animus was connected to Palladino's decision to bring charges against Mantell. About a month after the Board's adverse decision issued, Palladino found a pretextual opportunity to punish Mantell for his brother's perceived sins.¹⁶ This charge was a continuation of Palladino's campaign against the brothers,

¹⁶ "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." *Case Farms of N. Ca.*, 353 NLRB 257, 261 (2008). The Board "does not find that the timing factor necessarily favors a respondent whenever the discipline is not imposed ...

which began with the internal charges filed against Mantell's brother and continued through the lengthy period of refusing to refer Mantell despite his pleas for work and the blatant threat of reprisal against him if he filed a Board charge.

Shifting the burden to Respondent as required under *Wright Line*, no record evidence exists that Respondent would have taken this action in the absence of the Board's adverse decision. The un-contradicted evidence is that it has been 20 years since Respondent last brought charges against a member for failing to report work to the union and working without a steward.¹⁷ (Tr. 257:15-22.) This policy was not one that Respondent had policed or enforced previously, until Palladino found it to be a convenient pretext for retaliating against Mantell for his brother's charge against Respondent and the resulting adverse decision.

The evidence shows that Respondent took this action to punish Mantell for his brother's resort to the Board's processes – a policy that could not be more fundamentally imbedded in the Act. Respondent did not sustain its burden of showing to the contrary. Thus, the ALJ erred in concluding that the internal union charge and subsequent discipline fell beyond *Sandia's* scope and did not violate the Act.

C. The ALJ Erred in Concluding that the Union Did Not Violate the Act by Changing its Policy About Access to the Out-of-Work List (Exception 3).

The ALJ wrongfully concluded that Respondent acted lawfully when it changed its policy for updating and posting the out-of-work list. The record evidence supports the conclusion that Respondent violated Section 8(b)(1)(A) of the Act because it took these actions in retaliation for Mantell's investigation regarding the referral of two individuals off the out-of-work list and in

immediately following the alleged infraction. A[] [respondent] might wait for a pretextual opportunity to discipline a[] [member] for engaging in protected activity.” *Id.*

¹⁷ *Grand Central P'ship*, 327 NLRB 966, 974-75 (1999) (respondent's failure to show it has treated others similarly for same misconduct is an important defect in meeting its burden).

response to other members' efforts to police the list.

Generally, members do not have a right to demand to see the out-of-work list in the context of non-exclusive hiring halls.. Board precedent is clear, however, that a union operating a non-exclusive hall nonetheless violates the Act when it refuses to allow a member to see its out-of-work list when the refusal is in retaliation for protected concerted activity. *Carpenters Local 537 (E.I. Du Pont)*, 303 NLRB 419, 420 (1991) (citations omitted); *Carpenters Local Union 370 (Eastern Contractors Assn.)*, 332 NLRB 174, 175 (2000) (citations and quotations omitted).

The General Counsel sustained its burden of showing that Respondent's changed practice in posting the out-of-work list was in retaliation for Mantell's protected concerted activity. Applying *Wright Line*, the ALJ correctly found that about June 27, Respondent refused to allow Mantell to view the out-of-work list in retaliation for policing the referrals of two members as stewards the day prior, emphasizing the timing of the refusal as indicative of animus. (ALJD 17:41-48.) He found, however, that Respondent did not unlawfully change its policy on posting the out-of-work list. (ALJD 18:1-6.) The record evidence is uncontroverted that, prior to June 26, Respondent had a policy of updating the list daily, keeping the updated list behind the glass at the front office desk, and making the updated version available to members upon request. The undisputed evidence also shows that, about June 27, the same time that Respondent refused to let Mantell view the list in retaliation for his protected concerted activity, it changed the policy such that it would only make a list updated weekly available to members and would post that list on the bulletin board. (Tr. 73:10-73:16; 73:25-74:14; 75:6-11; 78:21-79:4; 83:17-25.) As Mantell explained, this change makes it more difficult to police the list because a member cannot know who has come on or off the list during the week. (Tr. 84:4-9.)

Under *Wright Line*, this change in policy clearly violates the Act. With regard to the allegation that Respondent unlawfully denied Mantell access to the list, the ALJ found that Mantell policed referrals on June 26 based on the list, that Respondent was aware of Mantell's protected concerted activity, that it harbored animus toward it, and denied him access based on that animus. In light of these findings and timing, it defies logic that the change occurred for any reason other than to limit Mantell's (and other members') ability to police the list.

The ALJ should then have shifted the burden to Respondent to show that it would have made the change regardless. Although the ALJ credited Palladino's explanation for why this change occurred, the explanation does not adequately explain the timing of the change. Second, the explanation the ALJ accepted is facially problematic. The ALJ credited testimony that Respondent changed the policy because the number of members seeking to look at the list had become burdensome. Put another way, Respondent changed the policy in response to the protected concerted activity of its members generally. Members were taking pictures of the list, asking who went to work on which job, and calling other members about this information. (Tr. 244:11-245:4; 247:14-16.)¹⁸ Mantell even investigated referrals from the list. This "burden" that Respondent sought to alleviate is the protected concerted activities of members.

This explanation cannot satisfy Respondent's burden of explaining that it would have made the change anyway considering that the explanation itself constitutes a violation of Section 8(b)(1)(A) as it shows the existence of members, including Mantell, engaged in policing the list,

¹⁸ Specifically, Neri testified, "Well, we never posted it [on the bulletin board] before. I always had it behind the computer. . . . Just recently, there's been all this barrage of taking pictures of it, being a little abnormal from the normal practice. As I said, I've been there doing it since '98. Never, have we had this flurry of, 'Let me see the list today. Let me see the list tomorrow. Who went to work? What did they go to work for?' And why did I know they were calling up other members? Because the members would call me and ask me, why did I move on the list? I says, well, how did you know? And they said, well, we got told." (Tr. 244:11-247:16.)

Respondent's knowledge of it, animus toward it, and change in policy because of it. The ALJ therefore erred in concluding that the policy change did not violate the Act.

IV. CONCLUSION

The General Counsel respectfully submits that, for the reasons set forth above, Respondent violated Section 8(b)(1)(A) of the Act as alleged. Thus, the General Counsel requests that the Board reverse and modify the ALJ's findings of fact, analysis and conclusions of law to the contrary, as reflected in the Exceptions.

DATED at Buffalo, New York, this 8th day of January, 2018.

Respectfully submitted,

/s/

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