

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**INTERNATIONAL LONGSHOREMEN'S  
ASSOCIATION, LOCAL 28 (CERES GULF INC.)**

**and**

**Cases 16-CB-181716  
16-CB-194603**

**DONNA MARIE MATA, an Individual**

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TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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## GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

### **I. INTRODUCTION**

The original Complaint in this case issued on November 30, 2016 and the original hearing was held in 2017. The original judge discredited the Charging Party's testimony and issued a decision on June 13, 2017, in which he recommended that the Complaint be dismissed. On February 20, 2018, in *International Longshoremen's Association, Local 28*, 366 NLRB No. 20 (2018), the Board overturned the judge's credibility resolutions, vacated the judge's decision, and remanded the case for a rehearing before a second judge. The Board stated that the judge "erred by relying in part on improper bases in making his credibility determinations."

A second trial was held before the second judge, Administrative Law Judge Sharon Steckler (the judge hereafter), who issued her decision in this case on October 23, 2018. The judge recommended that the Complaint be dismissed, but in reaching that decision, the judge made critical errors in her factual findings and in her legal analysis.

This case is about whether a Union, through arbitrary actions and discriminatory motivation, failed to enroll an employee in training necessary for her to obtain regular work. A finding that the Union either acted arbitrarily or discriminatorily is sufficient to establish a violation. The record here shows that Union acted unlawfully in both respects. With respect to whether the Union arbitrarily failed to enroll the employee, the important facts begin with the Union's training enrollment system, the design of which will tend to create arbitrary outcomes. The Union's system for enrolling employees in training is not found in its rules or described in writing anywhere.

The Union's unwritten system involves monthly oral announcements at the hiring hall, by a union official/gatekeeper, of training opportunities. Employees make oral requests to the

gatekeeper for enrollment in training courses. The system has no formal process in deciding which requesting employees should be enrolled in courses.

At times, employees are not enrolled because their requests are deemed late for that month's classes, or the employee is told the class is full. At other times, the union official gatekeeper enrolls the employee despite his not having made a timely request.

According to the Union, it keeps no records of employee requests for training, nor does the Union keep records of the attendance of casual employees at the hiring hall. Thus, where a casual employee arrives at the hall and makes an oral request to be enrolled in training, but is not enrolled in that training, there is no record that the employee was even present on the day that the training was announced, let alone that the employee made a request. Nor will the Union gatekeeper give the denied employee preference to enroll in the same training when it is offered in the future.

The employee at issue here, Donna Marie Mata, made repeated requests to the union gatekeeper for enrollment in training over a period of years, including numerous requests from March 1 – June 30, 2016. The Union offered no records to dispute Mata's testimony, but only countered it with the testimony of the union gatekeeper and another union official who described Mata's attendance at the hall as sporadic and claimed that when she made requests to be enrolled in training, those requests were untimely. Although the gatekeeper claimed that at times he jotted down names of training requesters, no examples of such notes were presented.

The Union claims that its training official's system was not arbitrary, despite the fact that the gatekeeper admitted that at times he enrolled Mata in courses despite her not having made timely requests. Moreover, although the Union claims that its system prohibited it from honoring requests for enrollment that Mata made from March 1, 2016 to June 30, 2016, , the sham and

arbitrary nature of the system and was revealed when, after Mata raised claims of sexual harassment, the Union was suddenly able to enroll her in two, long-sought courses.

The judge did not address whether the Union's system of enrolling employees in training courses was itself problematic, nor did the judge address whether it was arbitrarily operated. Moreover, the judge did not even address whether Mata had made requests to be enrolled in courses in April, May, and June 2016, or whether the Union's failure to enroll Mata in the requested courses during that period was arbitrary.

As argued in this brief, the record demonstrates that the Union operates its system of enrolling employees in training courses arbitrarily, that Mata made repeated requests for training from March – June 2016, and that Respondent's failure to enroll Mata in training was arbitrary.

With respect to whether the Union's failure to enroll Mata in training courses was discriminatory, the question is whether the Union gatekeeper, Harris, failed to enroll Mata in training courses because of her gender. Evidence that the Union was discriminatorily motivated included the background fact that only a small percentage of employees hired through the hall were female and the critical fact that Harris had, on numerous occasions in 2014 and 2015, treated situations in which Mata came to him to request training as opportunities to make unwanted sexual advances upon her.

The judge denied record evidence as to the workforce gender imbalance while "presum[ing]" truth to Mata's claims of unwanted touching. Despite that the judge "gave the benefit of the doubt" to Mata's testimony that Harris had touched Mata in unwanted, sexual ways at times prior to March 2016, the judge reasoned that these incidents were a nonfactor in the motivation analysis because Harris had stopped engaging in such conduct prior to March 2016 (JD slip op at 13, 15). In reaching this conclusion, the judge rejected the General Counsel's application

of the *Wright Line* test as an appropriate analytical framework for assessing gender-based motivation in a duty of fair representation case. As described below, the *Wright Line* test is applicable to class-based motivation cases and the judge erred by rejecting the application of this test. The General Counsel presented evidence of a prima facie case under that test and Respondent failed to rebut it.

## **II. FACTS**

### **A. Local 28 and its Procedures**

Local 28 (the Union) is one of a group of local Longshoremen chapters that is party to a collective bargaining agreement with a group of employers who are represented jointly by the West Gulf Maritime Association (WGMA). (JT Exh. 2). By the terms of the CBA, each local is the exclusive representative of employees within its contractually defined work jurisdiction. (R. Exh. 22). Employer signatories must go through the Union to staff certain positions and employees seeking to work in those positions must pass through the Union's hiring hall (the hall). (R. Exh. 4).

The Union's elected officials include: President Larry Sopchak; Business Agent and Treasurer Jesse San Miguel, Jr.; Executive Board Member Jesse San Miguel Sr.<sup>1</sup>; Business Agent and Financial Secretary Tim Harris; Assistant Vice-President A.L. Williams; and Vice-President B.R. Williams. (Tr. 42-43; 342).

Work falling under the Union's jurisdiction includes moving cargo after it is unloaded from ships in the Port of Houston. (Tr. 27; 379-380, 424). This, in turn, includes transportation, maintenance and repair, warehousing, and other tasks related to moving cargo. (Tr. 27; 379-380, 424). Some of the work involves the operation of vehicles and other machines as well as manual

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<sup>1</sup> The San Miguels are related, but not by blood, to Charging Party Mata. Jesse San Miguel, Sr. is Mata's uncle and Jr. is her cousin (Tr. 75).

tasks such as checking inventory, tying and bracing down cargo, and cleaning. (Tr. 27; 379-380, 424). Machines operated by Union members include trucks, forklifts, heavy lift/top loader, and RoRo. Forklifts are used to move cargo. (Tr. 32; 316). Heavy lift machines carry much heavier cargo on and off trucks. (Tr. 33; 316). RoRo is a driving job where the operator drives vehicles from ship to land or from land to ship. (Tr. 33).

An employer desiring such a warehouse worker for the day, contacts the Union, which will send, in accordance with hall procedures, either a worker with “seniority” or a “casual” worker. (R. Exh. 4; JD slip op. at 3). A worker with seniority is one who has worked at least 1000 hours out of the local in the previous year, a casual worker is one who has fewer than 1000 hours in the previous year. (Tr. 374, 376; JD slip op. at 3). An employer desiring that a particular employee be assigned on a more permanent basis may enter into a relationship with that employee, whereby the employee is known as either a “dedicated” or a “regular.” (Tr. 328).

A majority of the individuals seeking employment through the hall are men. (Tr. 411). Of the approximately 560 casuals seeking employment through the hall, only eight to ten percent are women. (Tr. 411). These facts were established through Respondent’s testimony, and Respondent was the best and only source of this information. The judge erred where she found that the proportion of female employees was not established by the record. (Exception 12; JD slip op. at 14, LL. 47-48).

Workers with seniority and casual workers alike report to the hall on days when they desire work and hope to be selected. (Tr. 276). Dedicated and regular workers report to the hall when required to work by their employer. (Tr. 276). When workers with seniority, dedicated, and regular workers arrive at the hall, they sign-in by scanning their badges. (Tr. 330; JD slip op. at 3). This sign-in process creates a digital record. (Tr. 330). Unlike other types of workers,

casual workers do not sign in. (JD slip op. at 3). If a casual worker does not obtain work on a day in which he signs in, the hall has no record of the casuals' appearance at the hall. (Tr. 398, LL. 23 – Tr. 97, LL. 17; R. Exh. 24).

By union rules, workers with seniority are given priority in job selection. (R. Exh. 4; JD slip op. at 3). The worker who has the most consecutive 1000-hour years is the most senior and has the first selection rights for jobs for which he is qualified. (JD slip op. at 3; Tr. 374, 376). Jobs are first assigned in order of seniority to those with seniority who were at the hall before 6:00 a.m. If there are more jobs than there are employees with seniority, union officials pick casuals from the “Red Line,” where casuals stand hoping to be selected for a job. (JD slip op. at 3; Tr. 30-31).

The selection process for casual workers is generally performed by either business agent, Tim Harris or San Miguel, Jr. (JD slip op. at 3; Tr. 30-31). The process for these assignments is not clear and is, at times, a source of consternation for passed over casuals.

Because the distribution of work through the hall favors those with seniority, it is critical for employees to work as many hours as possible when work is available. Mata was qualified for driving jobs, but not for certain “dirty” jobs. As discussed below, she attempted to gain such qualifications in order to increase her hours and become an employee with seniority.

For a worker to qualify for any job, he must take and pass certain training classes. (JD slip op. at 3; Tr. 33-34). The training is administered by the WGMA. (JD slip op. at 3; Jt. Exh. 1; Tr. 36-37). The WGMA regularly schedules training classes at its facility and provides that “[a]ll classes are open to all qualified union workers.” (R. Exh. 3, at 4). Although the classes are open to all workers, there is limited availability and workers must seek enrollment in these classes first through a local union. (Tr. 36-37).

The process of enrollment for prospective trainees at Local 28 is complex and not transparent. Business Agent Tim Harris is the Union's Training Director. (Tr. 310; JD slip op. at 3-4). As such, he communicates with the employers about the need for qualified workers, with the WGMA about the availability of classes, and with the workers about their desires for enrollment. (Tr. 310; JD slip op. at 3-4). Harris is at the hall every day of the week from about 5:30 a.m. to about 3:00 p.m. and maintains an office at the hall that he does not share with anyone else. (Tr. 306-307).

Harris uses an informal, undocumented, and largely unexplained system for enrolling union workers in WGMA training courses. Harris' system involves his oral announcement of upcoming classes, which he generally does on the morning of the last Monday of the month (JD slip op. at 3; Tr. 311). Workers who want to enroll in classes simply tell him and Harris "usually" makes a note of the request, either on a "sign-in sheet...scratch pad or a notepad." (JD slip op. at 4). According to Harris, he makes the training announcement on the last Monday of the month and workers may then request the training through Harris, another business agent, or any other staff member. (Tr. 313).

The judge credited Harris's testimony that requests for training could be made through other union officials. (JD slip op. at 3). However, that was not the case at the relevant times, as is clear from the testimony of San Miguel Jr., where he discussed a proposed deal whereby Mata *would no longer be required to go through* Harris. (Tr. 455) The judge erred where she found that, during the relevant times, anyone but Harris could enroll employees in training. (Exception 15).

Not all requests for enrollment can be granted because, at times, demand for classes exceeds WGMA class capacity. In such situations, Harris must choose which of the workers to

enroll. In deciding which employees he will enroll, Harris testified that he gives preference to two types of workers – dedicated and regulars – but he provided no explanation as to how he would resolve a choice between two qualified casuals. (Tr. 325; 327). Although it is uncertain what criteria Harris uses in such situations, it is clear that he does not factor in whether the same worker has been passed over for an opportunity in the past. In fact, Harris does not retain the lists that he makes each month or, in any way, create a record of those who have been passed over. (JD slip op. at 4; Tr. 325-326).

Although the judge credited some of Harris’s testimony on his method of administering training, the record shows, and the judge acknowledged, that his testimony was inconsistent regarding the key aspect of training administration – whether or not he kept a simple written list to document requests for training. (JD slip op. at 4, LL. 1-14). Where credibility determinations of administrative law judge rest on analysis of testimony, rather than on demeanor, those credibility determinations deserve less than usual deference on review of National Labor Relations Board decision. *Consolidation Coal Co. v. NLRB*, 669 F.2d 482, 488 (1982), citing *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 501 (2d Cir. 1967). During the instant hearing, Harris testified that he keeps a “scratch pad” or a “notepad.” (Tr. 312:20-21). Harris also testified that he keeps a “documented file” that is recorded by email, yet Respondent failed to produce any records proving as much. (Tr. 321:1-2). Further, as noted by the judge, Harris’s testimony at the previous hearing was the complete opposite – that he did not keep a list of people who requested training. (Tr. 321-322). It is prejudicial to credit Harris’s inconsistent and contradictory testimony – whether or not he, as the sole training gatekeeper, recorded training requests – on this critical fact, the determination of which materially affects the complaint allegations. (Exception 1).

## **B. Mata's History with Local 28**

Donna Mata, who holds a Commercial Drivers' License (CDL) has been a union member and a casual worker, on and off, at the hall since 2001. (Tr. 27, JD slip op. at 4). When she has worked out of the hall, she has primarily driven trucks, but she has also operated machines such as forklifts and RoRos and performed manual work such as checking inventory, tying and bracing down cargo, and cleaning. (Tr. 27, JD slip op. at 4).

In 2007, Mata took a job driving trucks for a private contractor in Iraq. (Tr. 28, JD slip op. at 5). From 2007-2011, Mata returned from Iraq about every four months for ten-to-fourteen week stretches, on which occasions she sought work at the hall. (Tr. 28, 99, JD slip op. at 5). During these stints at home, Mata inquired about obtaining jobs and about obtaining certifications for jobs. (JD slip op. at 4).

To make her inquiries, Mata spoke primarily with Business Agent and Financial Secretary Tim Harris. Mata had worked with Harris in the past and knew Harris independent of work because he was a longtime friend of her husband. (Tr. 46, JD slip op. at 6).

Although she knew Harris personally and had worked through the hall in the past, Mata was unsuccessful at obtaining either jobs or certifications on her stints at home. (Tr. 28-29, 100, JD slip op. at 5-6). Records show that Mata only completed two courses during that time (Lashing on January 1, 2008 and Hazmat on April 1, 2010). Although she was qualified to drive yard tractors and forklifts until those certifications expired in April 2010, she did not obtain any work through the hall during those years. (See R. Exhs. 2 and 6, respectively).

The judge did not explicitly find, but rather presumed, that Harris "engaged in unwanted touching [of Mata] over the years." (JD Slip op at 13). Harris's advances towards Mata included both verbal solicitations and unwanted touching. (JD slip op. at 6).

Harris began making these advances in 2010, during one of Mata's stints back home. At that time, Harris visited the Mata residence. (Tr. 48-53). On this occasion, Harris made a sexual advance on Mata, groping her breasts and telling her that her husband would not find out. Mata rebuked this advance. At the time, she considered it an isolated incident. (Tr. 52 L. 23 – Tr. 53 L. 2).

Mata initially reported the assault back in 2010 to Jesse San Miguel, Sr., but she was too scared to file an official report or tell anyone else, because she feared being "blackballed" - that she would not get jobs if she told anyone (Tr. 52-53, 74, JD slip op. at 5-6).

Mata returned to work and lived in Houston again in 2011. From 2011 to 2012, Mata drove trucks for a private company that was not under contract with the Union. (Tr. 29, JD slip op. at 5). In 2013 and 2014, Mata returned to the hall sporadically to seek work and training but was unsuccessful. (Tr. 29, JD slip op. at 5).

### **C. Mata's Return in Earnest to the Hall in 2015**

In 2015, Mata decided to return to the hall on a more regular basis. After a nearly eight-year hiatus, Mata worked her first job at the hall on May 15, 2015. (R. Exh. 6). Since that time, she has been regularly visiting the hall in hopes of finding work on the morning Red Line. (Tr. 29, JD slip op. at 5).

When Mata returned to the hall in earnest, her basic certifications had expired and she needed to take a general Longshoremen class and a HazMat class in order to qualify for any work. (R. Exh. 2). To qualify for the jobs that she had once performed, she would also need to complete classes and to be recertified in yard truck and forklift operations. Additionally, because more certifications would make any day on the Red Line more likely to result in a job, Mata wanted to obtain certifications in Heavy Lift and RoRo operations. (Tr. 34, JD slip op. at 5-6).

On days when Harris announced training opportunities, Mata asked him to enroll her in these courses. (JD slip op. at 6).

Mata spoke to Harris in his office about enrolling in these courses. According to Harris, although Mata was late in making the request for the yard truck certification, he put her on a request for stand-by. (Tr. 348, LL 2-8; R. Exh. 13; JD slip op. at 4). Harris also enrolled Mata in the general courses. She completed the general courses and the yard truck courses in June 2017. (R. Exh. 2). Although he was willing to bend his unwritten rules of enrollment request procedures to oblige Mata's request to be enrolled in the truck qualifying classes, Harris was unwilling to make similar compromises in order for Mata to be enrolled in forklift, heavy lift or RoRo courses, which he considered "dirty" work.

Consistent with Harris' actions of helping Mata get into the yard truck class, but not into the other classes, Mata testified that she met with Harris around this time and that he told her that he wanted her driving a truck because the other jobs involved dirty, physical work, that did not pay as well. (Tr. 43-44). When Mata insisted that she wanted the certifications regardless, Harris attempted to steer the conversation toward her husband and family. (Tr. 50-51).

At the conclusion of the meeting, Harris used the opportunity of having Mata alone in his office as a chance to get close to her, touch her body and to attempt to initiate a sexual relationship. Mata rebuked his unwanted touching and advances. She did not report the conduct because she feared that she would be blackballed in the industry. (Tr. 52-53, JD slip op. at 7).

The judge erred in discrediting Mata's testimony that Harris told Mata that he did not want her doing "dirty" work during these same encounters where she was sexually harassed, especially given that she peculiarly gave Mata "the benefit of the doubt" that Harris had sexually assaulted her during these encounters. (Exception 2).

Over the next several months, Mata continued to seek out the training when it was offered. She met on two other occasions in 2015 to discuss her training requests with Harris in his office. On some occasions, Harris told her that he would take care of it. On most other occasions, Harris tried to turn the conversation to Mata's husband. (Tr. 49-51). When Mata followed up with Harris, he consistently told her that the classes had been full or that he would take care of her next time. (Tr. 51). Each of these meetings ended with Harris soliciting sex from Mata and grabbing at her body. (Tr. 51, 100, 132, JD slip op. at 7). Mata did not tell anyone about these incidents because of her fear of being blackballed. (Tr. 52-53, 74, JD slip op. at 7). The judge erred by not explicitly crediting Mata as to these occurrences. JD slip op. at 13, LL. 40-50; 15, LL. 1-2; Exception 3)

**D. March through June 30, 2016; Mata's Efforts to become Certified in Forklift, Heavy Lift, Top Loader, and RoRo jobs.**

By March 2016, Mata had still not been able to enroll in forklift, RoRo, or heavy lift/top loader jobs. (R. Exh. 2). Mata testified that from March through June 30, 2016, she continued to make repeated requests to be enrolled in these courses. (Tr. 34). The judge did not make a finding as to whether Mata made repeated requests to be enrolled in the courses during that time period. (Exceptions 4 and 5).

The judge focused only on the month of March and she only drew two conclusions as to Mata's requests during that month. (JD slip op. at 15). First, the judge found that it was "inherently improbable that Mata requested training 6 times in March 2016." (JD slip op. at 13). The judge agreed that Mata did make some requests that month, but found that Mata "may have made requests at a time when the training calendar was not available or already filled for the month." Id. This finding is contrary to the record testimony that Mata made timely requests (Exception 6) and rests on an implied assumption that Harris could not have honored a purported

untimely request (Exception 7).

With respect to April, May, and June 2016, the judge did not address Mata's contention that she made repeated requests for training during those months (Exception 5). A review of the record makes clear that Mata indeed made many requests for training during those months.

Mata testified that between March 2016 and June 30, 2016, she asked Harris, the only person who had the power to grant training, to be placed on the certification lists, as soon as Harris would make the training announcement. (Tr. 34). According to Mata, she was checking in at the hall for work nearly every day during this period and she also knew to be there for the training announcements. (Tr. 41, JD slip op. at 6-7).

Frustrated by the lack of work and her unfulfilled requests for training, Mata requested to be enrolled in these classes for these jobs at least twice per week. (Tr. 41, JD slip op. at 6-7). Mata asked Tim Harris, while she was at the hall, to be placed on the list for the training. (Tr. 41, JD slip op. at 6-7). Harris denied Mata the opportunity to be placed on a training list, telling her that "the list is full," she needed to wait until the next month, or "we'll see if there's any room." (Tr. 42, JD slip op. at 7). When Harris prohibited Mata from being placed on a training list, Mata asked other union representatives, but those representatives always sent Mata back to Harris, because he is the person who maintains the training lists. (Tr. 42). Mata testified that because she was being stonewalled by Harris, she attempted to circumvent Harris by speaking to union officials A.L. Williams, B.R. Williams, Larry Sopchak, and Jesse San Miguel, Jr. (Tr. 42; JD slip op. at 6). Each time, she was told that the only way to get the classes was to go through Harris. (Tr. 42).

Respondent called neither A.L. nor B.R. Williams to rebut these assertions. Nor did Sopchak, who did testify, deny that Mata had asked him for assistance getting training during

this period. In light of the failure of these witnesses to testify to the contrary, the judge erred by failing to credit Mata's testimony in this regard. (Exception 16)

There were ample opportunities for the classes Mata sought. (GC Exh. 2). The certification classes that Mata sought were offered every month from February 2016 to August 2016. (GC Exh. 2; Tr. 38-41). There were 25 certification classes held in the classifications Mata sought (Forklift, Heavy Lift, Top Loader, and RoRo) during this time period: 5 in February, 6 in March, 5 in April, 4 in May, and 5 in June. (GC Exh. 2).

#### **E. Mata Reports Harris' Sexual Assault and Discrimination against Her.**

On June 30, 2016,<sup>2</sup> after having lunch with San Miguel, Jr.'s wife, Mata told San Miguel, Jr. about her Harris' conduct in groping her and her frustration about being denied training. (Tr. 74, JD slip op. at 7). San Miguel, Jr. called Union President Larry Sopchak, who set up a meeting that was held on July 1, 2016 at the hall where Mata repeated her concerns to Sopchak and San Miguel, Jr. (Tr. 75-76, 156-157, JD slip op. at 7-8). On July 6, 2016, a second meeting was held, this time with Mata, Sopchak, San Miguel, Jr., B.R. Williams, and attorney Eric Nelson. (Tr. 76, 156-157, JD slip op. at 7-8). Nelson told Mata that that the Union would investigate. (Tr. 77, 79, JD slip op. at 8).

According to San Miguel and Sopchak, they told her during these meetings that going forward, she would no longer be required to get training through Harris. Although Mata had been trying for months to be enrolled in classes, the Union was suddenly able to accommodate Mata, calling her on July 7 to tell her that she could attend forklift training the next day. (Tr. 452, JD slip op. at 8). The Union provided no explanation as to whether there just happened to

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<sup>2</sup> Charging Party Mata was understandably confused about the dates of some of these events. The timeline here synthesizes the testimony and documentary evidence. (R. Exh. 21).

be room for workers in that class or if it used some criteria to choose enrollment for Mata while passing over other workers who had voiced their desire to enroll to Harris after the Monday announcement. Unfortunately, Mata was unavailable to attend on such short notice. (Tr. 452, JD slip op. at 8).

### **III. THE JUDGE'S DECISION**

The judge's decision issued on October 23, 2018. The judge dismissed both the allegation that the Union unlawfully denied Mata training and the allegation that the Union unlawfully attempted to coerce Mata into withdrawing her charge. Regarding the allegation that the Union unlawfully denied Mata training, it appears that the judge based her conclusion both on credibility and on an application of the law. Regarding credibility, the judge found it "inherently improbable" that Mata requested training as many times as she claimed in March 2016. (JD 13:22-30). Again, the judge failed to address Mata's claim that she also made repeated requests for training in April, May, and June 2016. The judge presumed that Harris engaged in sexual assaults against Mata. (JD 13:44, 48-50, 15:1-3).

The judge failed to address whether, regardless of motivation, the training system itself and its application to Mata were arbitrary. (Exception 8).

The judge appropriately states the standards for finding a violation of the duty of fair representation when she states that a union violates its duty of fair representation owed to employees it represents when it engages in conduct affecting those employees' employment conditions and the union's conduct is arbitrary, discriminatory or undertaken in bad faith. *Vaca v. Sipes*, 336 U.S. 171 (1967). She then correctly states that to show that the bargaining agent violated the Act "requires credible proof that demonstrates, with reasonable preciseness, that a statutory bargaining agent has crossed the line of rationality and acted to the detriment of a member or

members of the bargaining unit for reasons that are ‘arbitrary, discriminatory or in bad faith.’” *Int’l Brotherhood of Teamsters, Local 101, AFL-CIO (Allied Signal Corp.)*, 308 NLRB 140, 143-144 (1992), citing *Vaca v. Sipes*, 336 U.S. at 190. The judge noted that sex has long been held as an irrelevant, invidious and unfair consideration in operation of a hiring hall, citing, e.g., *In re Pacific Maritime Ass’n*, 209 NLRB 519 (1974); *In re Olympic S.S. Co.*, 233 NLRB 1178 (1977) (sex-based seniority system).

The judge further found that, although the sexual assaults occurred, they were too remote to influence Harris’s conduct and that Mata did not actually request training as frequently as she claimed. The judge stated that Mata received some dedicated jobs after March 2016.

The judge erroneously concluded that the Union was not unlawfully motivated under *Wright Line* because there is no protected status for females. (JD 15:27-32). Instead, the judge considered whether there was evidence of discrimination *after* June 30, 2016, applying *Wright Line* to the protected activity of complaint filing; the judge found no animus against Mata and no violation under *Wright Line*. The judge cited *Golleher v. Aerospace District Lodge 837, IAM*, 122 F.Supp.2d 1053 (E.D.Mo. 2000) to state that Title VII complaints cannot be enforced through the Board.

#### **IV. ARGUMENT**

##### **A. The Duty of Fair Representation**

The duty of fair representation “is a federal obligation which has been judicially fashioned from national labor statutes.” *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1251, (2d Cir. 1970), cert. denied, 401 U.S. 1009 (1971). There is no explicit statutory requirement of “fair representation.” Rather, the duty of fair representation was judicially developed as a necessary corollary to the status of exclusive representative provided for by Section 9(a) of the National Labor Relations

Act and Section 2, Ninth, of the Railway Labor Act. See *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act*, 7th Edition, Chapter 25. These statutory mandates that the majority representative be the “exclusive representative of all the employees” in the bargaining unit are the bases upon which the federal common law duty of fair representation evolved. *Id.*

Employees of employers within the jurisdiction of the NLRA may raise claims of breach of the duty of fair representation either through Section 8(b)(1)(A) charges with the NLRB or through original actions in the federal courts. *Syres v. Oil Workers*, 350 U.S. 892 (1955). *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944). Employees whose employers are not covered by the NLRA may likewise bring claims of breach through other agencies or directly through the courts. No matter in which forum the claim arises, the duty owed is the same and is ultimately defined by the Supreme Court of the United States. See *The Supreme Court and the Duty of Fair Representation*, 27 Harv. C.R.-C.L. L. Rev. 127 (1992).

Where unions are the exclusive representatives of employees, they owe the duty of fair representation to employees whenever their actions may impact employees’ terms and conditions of work. The duty applies to the operation of a hiring hall. See, e.g., *Electrical Workers IBEW Local 367 (Penn-Del-Jersey Chapter NECA)*, 230 NLRB 86, 89-90, 93-94 (1977) (same), *enforced mem.*, 578 F.2d 1375 (3d Cir. 1978). A union owes a duty of fair representation to all hiring hall applicants. See *Miranda Fuel Co.*, 140 NLRB 181, 184–185 (1962) (noting that unions are agents “of all the employees, charged with the responsibility of representing their interests fairly and impartially” and that referrals under an exclusive hiring hall must be free from arbitrary,

unfair, or disparate considerations (quoting *The Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944))).

The duty of fair representation governs a union's actions as they pertain to the administration of training. See, e.g., *Electrical Workers IBEW Local 211 (Atlantic Division NECA)*, 280 NLRB 85, 85, 105-07 (1986) (union violated Section 8(b)(1)(A) and (2) by denying nonmembers the opportunity to take journeyman examination necessary to obtain priority referrals from exclusive hiring hall), *enfd.* 821 F.2d 206 (3d Cir. 1987). Indeed, in many cases - as in this case - access to training and certifications is as important to an employee's livelihood as is access to the work itself.

In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court defined breach of the duty of fair representation as occurring when a union's actions are arbitrary, discriminatory, or in bad faith. In the case at hand, the General Counsel alleges that the Union's actions, in failing to enroll Mata, were both arbitrary and discriminatory, but not in bad faith.

### **B. Arbitrary Prong**

The Complaint alleges that, "since about March 1, 2016, Respondent prohibited the Charging Party from being added to certification training lists and from receiving certification training" and that by those actions, "Respondent has failed to represent the Charging Party for reasons that are arbitrary, discriminatory or in bad faith and has breached the fiduciary duty it owes to the Charging Party." (Complaint paragraphs 9, 10, and 13). Thus, included in the Complaint allegations is the theory that Respondent's conduct was arbitrary. The arbitrary prong of the duty of fair representation is separate and distinct from the discriminatory prong. See *Crider v. Spectrulite Consortium*, 130 F.3d 1238, 1243 (7th Cir. 1997)("Arbitrary,' 'discriminatory,' and

‘bad faith’ are three separate parts of the fair representation test, and each must be analyzed individually”).

The arbitrary prong of the duty of fair representation does not hinge on motivation. A union’s administration of its hiring hall may breach the arbitrary prong of the duty where “it administers the exclusive hall arbitrarily or without reference to objective criteria and thereby affects the employment status of those it is expected to represent.” *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988) (enforcing Board order finding that a union’s arbitrary conduct in the operation of an exclusive hiring hall violated the duty of fair representation). The D.C. and Ninth Circuits have stated that a union’s duty of fair representation is subject to a heightened standard in the context of an exclusive hiring hall because of the control the union holds over workers’ livelihoods. See, e.g., *Jacoby v. NLRB*, 325 F.3d 301, 308–309 (D.C. Cir. 2003) (holding that, in the context of an exclusive hiring hall, a union must act in accordance with objective and consistent criteria in addition to the three-pronged *Vaca* standard for duty of fair representation, but agreeing with the Board that one isolated negligent referral did not breach this heightened duty); *Lucas v. NLRB*, 333 F.3d 927, 935 (9th Cir. 2003) (holding that, because of the union’s increased control over workers’ access to employment opportunities “in administering a hiring hall, a union has a heightened duty of fair dealing that requires it to operate by reference to objective criteria”). The Board has subsequently applied this heightened standard in hiring hall cases alleging negligent departure from referral standards without explicitly adopting it. See, e.g., *Electrical Workers Local 48*, 342 NLRB at 105, n.3, 108–109 (declining to decide which standard should apply because the union’s gross negligence in operating its hiring hall violated its duty of fair representation under either the traditional or heightened standard).

In this case, the General Counsel provided evidence and arguments that Respondent acted arbitrarily in administering training, but the judge ignored those arguments. As discussed herein, regardless of motivation, Respondent's system for enrolling employees in training courses was itself an arbitrary one and its application of that system to Mata was arbitrary.

*1. The Training Administration System is Arbitrary*

The training enrollment system is problematic in three ways. First, the system is unwritten and involves no records. Such recordless systems of decision making by unions are not unlawful per se, but the Board has recognized that such systems are subject to abuse as they can be used to "disguise favoritism." *Morrison- Knudson Co.*, 291 NLRB 250 (1988) (lack of written records in system of referral requests suspicious even if not unlawful).

Second, there are no objective criteria for making decisions as to who to enroll in situations of limited availability. Other than a preference for dedicated and regular employees in such situations, no objective criteria for selection were explained at trial. The most natural criteria, whether a worker had requested the same training in the past, was ruled out. If Harris kept a list at all, it was jotted down somewhere and not retained or used to track repeat requests for training. As a result, employees like Mata who were passed over repeatedly, would be owed no explanation.

The third problem is that, even by the accounts of the Union witnesses, the system is not administered in accordance with any objective criteria. According to Harris, he makes the training announcement on the last Monday of the month and workers may then request the training through Harris, another business agent, or any other staff member. (Tr. 313). Conversely, Mata testified that after many initial denials from Harris, she had asked other staff members to enroll her in classes, but that on each occasion, they all told her that she could only go through Harris. (Exceptions 15 and 16) In his testimony, San Miguel, Jr. did not deny telling Mata this and, in

fact, essentially corroborated her testimony when he testified about a deal that he allegedly proposed to Mata. San Miguel, Jr. testified that in December 2016, he offered Mata a deal which involved her being allowed to talk to him instead of Harris to obtain training. He testified:

“she didn’t have to -- in order to get training, she can come to me anytime, you know, and *that was the deal...*

Look, we [are] guaranteeing about Mr. Harris. You won’t have to -- you don’t have to deal with him. You can either come to myself or A.L. and that would be determined toward your training *from here on out.*

This would hardly have been a “deal” if, as Harris testified, under the system, any employee could make a training request through *any* official. (Tr. 455)

Another inconsistency is the degree of unrequested help that the Union will provide. On one occasion, in June 2015, when Mata requested yard truck training after the class had been filled, “Harris took it upon himself to arrange for [Mata] to be on the stand-by list.” (R. Brf. to ALJ at 17). By “taking it upon himself” Harris apparently broke with procedure on that occasion. Harris failed to break with procedure in Mata’s favor at other times, for instance, he never thought “to take it upon himself” to enroll Mata in a class that she had requested too late in the month prior.

More glaringly, the whole system was shown to be a farce after Mata’s meeting with Union officials on July 1, 2016. Suddenly, the system which had shut Mata out of training for months, allowed for Mata to be enrolled in a forklift course in July and in all three of the courses that she desired in August. This sudden enrollment was not the result of any identified objective criteria, but rather was a demonstration that there are no hard and fast rules or objective criteria for enrolling employees in training; members can be enrolled in any class at any time at the whim of the administering officials.

For these reasons, the judge erred by failing to find that Respondent’s enrollment system was arbitrary. (Exception 8).

2. *The training system was arbitrarily applied to Mata*

Regardless of whether such an unwritten, unrecorded, and fluid system could be administered in a non-arbitrary manner, it was not so administered with respect to Mata. Mata requested over and over again to be enrolled in courses. If the classes had been full at the time of the request, Harris could have enrolled her in the next months' courses, but he chose not to do so. Only after filing a charge were these courses made available to Mata. An employee should not need to file a charge with the NLRB in order to be enrolled in a training course.

For these reasons, the judge erred by failing to find that Respondent's enrollment system was arbitrary as applied to Mata. (Exception 9).

**C. Discriminatory Prong**

Since *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, (1944), the Supreme Court has recognized that labor unions may not discriminate against represented employees based on invidious considerations such as race. Such discrimination was later held to violate the second prong of the tripartite duty of fair representation standard announced in *Vaca v. Sipes*, 386 U.S. at 190. The Board and the courts have long recognized that, like race, sex and gender are invidious considerations and that unions violate the duty of fair representation where their actions are motivated by employees' gender. See, e.g., *Bell & Howell Co.*, 230 NLRB 420 (1977), *enfd.* 598 F.2d 136 (D.C. Cir. 1978), *cert. denied*, 442 U.S. 942, 101 LRRM 2556 (1979); *Handy Andy, Inc.*, 228 NLRB 447 (1977); and *Local 106, Glass Bottle Blowers Association (Owens-Illinois)*, 210 NLRB 943, 944 (1974), *enfd.* 520 F.2d 693, 89 3020 (6th Cir. 1975).

1. *Sources of Authority for discriminatory prong cases*

The discriminatory prong of the duty of fair representation overlaps to a large degree with

union focused provisions of Title VII. Specifically, that statute makes it unlawful for an employer to “exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–2(c)(1). *Wells v. Chrysler Group, LLC*, 559 Fed.Appx. 512, 514 (6th Cir. 2014)(“a claim that the duty of fair representation was breached on account of discrimination and a claim of discrimination in failing to fairly represent the employee are essentially the same”). Employees commonly bring actions in federal court in which they allege that unions, through discriminatory conduct, have violated both the duty of fair representation and Title VII<sup>3</sup>. Because such cases involve essentially the same legal theories as those presented in the case herein, they are a source of persuasive authority.

To the extent that the ALJ rejected the General Counsel’s citation to Title VII and federal court duty of fair representation cases as persuasive authority, the ruling was in error. (JD slip op. at 15, LL 31-31; Exception 13).

## 2. *Appropriate Analytical Framework*

The judge also erred when she failed to apply the *Wright Line* test in evaluating Respondent’s conduct herein. Where a respondent’s motivation is central to a theory of violation and where the motivation is disputed, courts and other reviewing bodies have developed analytical frameworks to assist in their analysis. These frameworks generally involve burden shifting.

In Title VII cases where discriminatory motivation is at issue, the courts use the *McDonnell Douglas* burden-shifting test. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The

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<sup>3</sup> The main difference in the theories of violation is that Title VII includes affirmative obligations. See Jill Maxwell, *Unifying Title VII and Labor Law to Expand Working Class Women's Access to Non-Traditional Occupations*, 11 Geo. J. Gender & L. 681, 693 (2010).

courts apply that standard in cases involving both unions and employers. See *Wells v. Chrysler Group, LLC*, 559 Fed.Appx. 512 (6th Cir. 2014).

The Board developed a similar test, known as the *Wright Line* test, as a means for analyzing motivation. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* on other grounds 662 F.2d 899 (1<sup>st</sup> Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); See *FES*, 331 NLRB 9, at FN 23 (2000), *supp.* 333 NLRB 66 (2001), *enfd.* 301 F.3d 83 (3d Cir.2002)(Contrasting *Wright Line* with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).<sup>4</sup>

Like the courts' use of the *McDonnell Douglas* burden-shifting test, the Board uses the *Wright Line* test in assessing the motivation of both unions and employers. *Teamsters "General" Union No. 200 (Bechtel Construction Co.)*, 357 NLRB No. 192, slip op. at 8-9 (2011)("The *Wright Line* analysis is applicable to alleged violations of Section 8(a)(3) and (b)(1)(A)"), *enfd.* 723 F.3d 778 (7th Cir. 2013); *Security, Police & Fire Professionals of America (SPFPA) Local 444 (Security Support Services, LLC)*, 360 NLRB No. 57, slip op. at 6-7 (2014)(unlawful cause of discharge); *Plasterers Local 121*, 264 NLRB 192 (1982)(failure to refer); *Int'l Heat & Frost Insulators & Asbestos Workers, Local #67 (Johns-Manville Corp.)*, Case 12-CB-2315, Advice Memorandum dated 1981, 1981 WL 25930, at \*2 (July 29, 1981)("where the violation in a hiring hall case turns on motive, the application of *Wright Line* is logical and reasonable").

The judge declined to analyze the discriminatory prong under *Wright Line* because *Wright Line* is typically used to assess an actor's reaction to an employee's protected activity rather than his class or status. It is true that the common application of the *Wright Line* test involves discrimination against an employee for something that the employee did, however, the *Wright Line*

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<sup>4</sup> For lengthy discussion, see Kelly Robert Dahl, Price Waterhouse, Wright Line, and Proving A "Mixed Motive" Case Under Title VII, 69 Neb. L. Rev. 869, 896 (1990).

test has been used where the discrimination is at issue is about *who* an employee is rather than what the employee did.<sup>5</sup> Moreover, there is no reason why the *Wright Line* test would be less useful in analyzing discrimination claims based on gender than it would be in analyzing discrimination claims based on activity.

Where the judge rejected the *Wright Line* test as the appropriate framework for analyzing the discrimination allegation, the judge erred. (Exception 10)

### 3. *Application of the Wright Line test*

In the case at hand, the General Counsel alleges that Respondent's agent Harris failed to enroll Mata in training and that he was unlawfully motivated in doing so by Mata's gender. Under the *Wright Line* framework, the General Counsel must prove by a preponderance of the evidence that a discriminatory motivation was a substantial or motivating factor in an adverse employment action. The elements required to support such a showing are protected activity or protected status on the part of the charging party, respondent knowledge of that activity, and animus against that protected status or activity on the part of the respondent. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007). If the General Counsel makes the required initial showings, the burden then shifts to the respondent to prove, as an affirmative defense, that it would have taken the same action even in the absence of the activity or status. *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). The first two elements are easily met here. Mata, as a woman, belongs to a protected

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<sup>5</sup> For example, the *Wright Line* test has been used by the Board where the unlawful motivation at issue involves an employee's status as a family member of a union adherent. See *Harbor Cruises*, 319 NLRB 822, 841-42, (November 30, 1995) (son of union adherent); *Thorgren Tool & Molding, Inc.*, 312 NLRB 628, 630-631 (1993) (husband and son-in-law); *Kenrich Petrochems., Inc. v. NLRB*, 907 F.2d 400, 402-404, 406 (3d Cir.) (en banc) cert. denied, 498 U.S. 981 (1990) (supervisor whose family members were engaged in union activities); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-1089 (7th Cir. 1987) (same). Similarly, the Board has applied the *Wright Line* test in situations where the protected activity of employees is not at issue, but where the employer takes action against a class of employees for discriminatory reasons. See *Voith Indus. Servs., Inc.*, 363 NLRB No. 116 (Feb. 17, 2016) (employees of predecessor) and *Planned Building Services, Inc.*, 347 NLRB 670 (2006) (same).

class and the Union was clearly aware of this fact. The questions of whether Mata was subjected to adverse action by the Union and whether that action was discriminatorily motivated are the critical issues in Mata's prima facie case.

To establish that Mata suffered an adverse action, the General Counsel must only show that Mata requested, but did not receive, enrollment in training courses during the relevant period. Here, because some courses were offered to her after she filed the charge, the relevant period requests here are those that Mata made from March 1 – June 30, 2016.

Respondent offers two arguments as to why this did not cause Mata to suffer an adverse employment action. First, it argues that Mata could have obtained the same training on her own and without the assistance of the Union. Second, Respondent argues that Mata did not make any training requests.

With regard to the first defense, that argument is analogous to an employer reducing an employee's hours but arguing that the employee could have picked up hours somewhere else and so did not suffer. This "availability of self-help" argument fails.

The second defense is one that the judge failed to adequately address. At issue is whether Mata made repeated requests to obtain training from March 1 – June 30, 2016. The judge focused only on the month of March, writing that Mata, "testified more about March 2016 only than the entire period afterwards." (JD slip op. at 15, L. 9). Whatever the focus of Mata's testimony had been, she clearly testified that she made repeated requests during this time. ((Tr. 41:2-6) "Q: During this time period, March 2016 to August 2016, you testified that you were at the Hall almost every day or every day, and how often -- when did you request training? A: I would always request training at least twice a week minimum. I usually asked more than twice.") Thus, the judge erred by failing to address whether Mata indeed made multiple requests during April, May and June

2016. The judge found that it was “inherently improbable that Mata requested training 6 times in March 2016.” (JD slip op. at 13). The judge appeared to agree that Mata did make some requests that month, but found that she “may have made requests at a time when the training calendar was not available or already filled for the month.” *Id.* Whatever Respondent’s defense as to why those requests were not honored, the record clearly shows that Mata made repeated requests for training from March 1 – June 30, 2016.

Three sources of evidence demonstrate that Mata’s gender was a factor in Respondent’s failure to enroll her in training. First, is the fact that the Union official who acted as the training gatekeeper made sexual advances on Mata, including unwanted touching, on multiple occasions *when Mata asked him to enroll her in training*. That Harris made these advances and that Mata rebuffed him is evidence sufficient to satisfy the causal element. See, e.g., *Briggs v. Waters*, 484 F. Supp. 2d 466, 477 (E.D. Va. 2007); *Hairston v. Department of Veterans Affairs*, EEOC DOC 05881012, 1990 WL 711604, at \*4 (Jan. 19, 1990). Incredibly, the judge credited Mata’s testimony that Harris *had* sexually harassed Mata in the past but failed to find that Counsel for the General Counsel had made out of a *prima facie* case of discrimination. (Exception 11)<sup>6</sup>

The second source of evidence are Harris’s words to Mata on occasions when she requested training. Harris told Mata that the training courses in which she wanted certification were “dirty, physical” jobs that Harris did not want her to do. (Tr. 43-44). For the reasons discussed previously, the judge’s credibility determination that Harris did not make these comments should be overturned. (Exception 2)

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<sup>6</sup> The judge inexplicably stated that *Mata* did not avail herself of the collective bargaining agreement’s procedures to report sex discrimination or harassment through WGMA while also acknowledging that it is the *local union’s* obligation to report such allegations to WGMA. (JD 7; fn. 7). Mata did what any logical person would do and reported the allegations and had two in-person meetings with several union officials. It was the Union’s obligation to report to WGMA and follow the contract procedures, and they failed to do so.

Third, the statistical imbalance of members of the hall cannot be ignored. Such statistical evidence has probative value in assessing discriminatory motive. See *Teamsters v. United States*, 431 U.S. 324, 339–340, fn. 20 (1977)(Title VII), cited by *United Rubber Workers Local 665 (General Tire & Rubber Co.)*, Case No. Case 26-CB-2943, Advice Memoranda dated September 14, 1992 (1992 WL 695747 (N.L.R.B.G.C.) (arguing that racial discrimination in 8(b)(1)(A) cases can be established by showing statistical imbalances). The judge summarily dismissed the argument, stating that “General Counsel makes much of the lack of documentation of requests for training; however, General Counsel never presented the number of women working through the Union in the first place.” (Tr. 14:46-48). As noted above, contrary to the judge’s finding, the General Counsel did establish on the record the percentage range of women working through the Union. Although a majority of the individuals seeking employment through the hall are men, of the approximately 560 casuals seeking employment through the hall, only eight to ten percent are women. (Tr. 411). This was Respondent’s testimony, and Respondent was the best and only source of this information. (Exception 12; Exception 13)

Thus, where Mata was a member of a protected class, where Respondent was aware of that fact, and where Mata made repeated requests for enrollment but was denied, where the gatekeeper had previously touched Mata in unwanted ways when she made training requests, where the gatekeeper tried to dissuade Mata from taking on “dirty jobs”, and where Respondent’s members are overwhelmingly male, the General Counsel established a prima facie case.

The burden then shifts to Respondent to rebut the prima facie case by offering a non-discriminatory reason for its failure to enroll Mata in the courses. Respondent claims that to the extent that Mata made requests, those requests were untimely. However, this defense fails first

based on Mata's testimony that she made timely requests and second because there was never anything stopping Respondent from enrolling Mata in training courses.

As discussed in the section of this brief addressing the arbitrary prong, Harris's system did not require steadfast observation of rigid rules. On one occasion, in June 2015, when Mata requested yard truck training after the class had been filled, "Harris took it upon himself to arrange for [Mata] to be on the stand-by list." (R. Brf. to ALJ at 17). By "taking it upon himself" Harris apparently broke with procedure on that occasion. Harris failed to break with procedure in Mata's favor at other times. For instance, he never thought "to take it upon himself" to enroll Mata in a class that she had requested too late in the month prior. As noted above, the Respondent's system was shown to be a farce after Mata's meeting with Union officials on July 1, 2016. Suddenly, the system which had shut Mata out of training for months, allowed for Mata to be enrolled in a forklift course in July and in all three of the courses that she desired in August. This sudden enrollment was not the result of any identified objective criteria, but rather was a demonstration that there are no hard and fast rules or objective criteria for enrolling employees in training; members can be enrolled in any class at any time at the whim of the administering officials.

If Mata's requests in March were made late, Harris could have enrolled Mata in a course in April. If Mata's repeated requests in March, April, and May were untimely, there was nothing stopping Harris from enrolling Mata in a June course. As such, Respondent's defense fails.

For these reasons, the judge erred by not finding that the Union's failure to enroll Mata in training was discriminatorily motivated. (Exception 14).

## **V. CONCLUSION**

The judge erroneously dismissed Mata's status as not protected and misidentified Respondent's breach of its duty of fair representation as a Title VII issue, and expressly failed to

acknowledge that both the duty of fair representation and *Wright Line* apply here. Applying both the standard under the Respondent's duty of fair representation, and *Wright Line*, the evidence shows a violation. For the foregoing reasons, Counsel for the General Counsel respectfully requests that the Board grant the General Counsel's exceptions and order any appropriate relief.

**DATED** at Houston, Texas this 4<sup>th</sup> day of December, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision and Brief in Support of Exceptions have been served this 4<sup>th</sup> day of December, 2018 on the following:

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