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 and 16-CB-194603**

DONNA MARIE MATA, an individual

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 28'S POST-HEARING BRIEF

Respectfully submitted,

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The April 10-11, 2018 Hearing Transcript is referred to as TR p.#, l.#.

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International Longshoremen's Association Local 28's (Respondent) Exhibits are referred to as RESP Ex. #.

When specific page or paragraph numbers within exhibits are referred to, they are designated p. # or ¶ # respectively.

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Discrimination, whether based on gender, race, religion, national origin, disability, or any other protected status is, without question, a significant cultural problem requiring redress. One need only review the news of the day to recognize this. However, this case is not about the larger cultural problem of discrimination. This case presents the narrow question of whether Donna Mata ("Mata") individually was subjected to gender discrimination by International Longshoreman's Association, Local 28 ("ILA Local 28"). More specifically, was Mata denied training opportunities by ILA Local 28 because of her gender.[1]

As was recognized in the General Counsel's opening statement, "this is an unusual case for the National Labor Relations Board."[2] It is "atypical."[3] While Title VII does, in fact, address discrimination by a labor organization, this matter is before the National Labor Relations Board ("NLRB") under a theory of breach of the duty of representation.[4] One should consider why this "unusual" and "atypical" matter is before this tribunal at all.

The reason, it appears, is an assumption just as damaging as the alleged discriminatory animus ILA Local 28 is alleged to have exhibited. The General Counsel stated:

> The work of longshoremen has historically been male-dominated, and the culture of sexes in this industry is so implicitly biased, so ingrained, that women who do this work rarely, if ever, speak out against the status quo.[5]

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[1] Whether ILA Local 28 improperly sought to have Mata withdraw her complaint of gender discrimination is, of course, also at issue.
[2] TR p. 13, l. 14-15.
[3] TR p. 14, l. 13-15.
[4] TR p. 14, l. 3-15; See 42 U.S.C. § 2000e-2(c).
[5] TR p. 14, l. 16-19.

In other words, it is assumed that because men predominate in an industry, any action viewed as adverse by a female must have a discriminatory basis. This is itself a discriminatory assumption. It assumes men and industries in which they predominate are, by nature, discriminatory. Such an assumption has no place in the determination of, much less the presentation of, this matter. Rather, what must be determined is simply, did ILA Local 28 deny Mata training opportunities because she is a woman; no more and no less. Broad unrelated statistics, anecdotal assertions, and the fact that few women utilize ILA Local 28's hiring hall are not evidence of gender discrimination by ILA Local 28.

I.

The Claims

In case 16-CB-181716, ILA Local 28 is alleged to have:

> From about March 1, 2016 to about August 1, 2016, [Local 28] prohibited [Mata] from being added to certification training lists; and
>
> From about March 1, 2016 to about August 1, 2016, [Local 28] prohibited [Mata] from receiving certification training.[6]

ILA Local 28 is asserted to have engaged in this conduct because Mata is a woman.[7]

In case 16-CB-194603 it is alleged that ILA Local 28:

> Since about December 1, 2016, [ILA Local 28], by J.P. San Miguel, Jr., solicited [Mata] to withdraw her unfair labor practice charge in Case 16-CB-181716.[8]

[6] GC Ex. 1(h) ¶¶ 9-10; TR p. 170, l 14-p. 172, l. 3.
[7] GC Ex. 1(h) ¶ 12.
[8] GC Ex. 1(h) ¶ 11.

These allegations serve as the basis of a claim that ILA Local 28 failed to properly represent Mata, thereby violating the rights assured her under Sections 7 and 8(b)(1)(A) of the National Labor Relations Act.[9]

II.

The Issues

There are two issues.

First, did ILA Local 28 deny Mata training and certification opportunities due to her gender in violation of 29 U.S.C. § 158(b)(1)(A).

Second, did ILA Local 28 attempt to coerce Mata into withdrawing her discrimination charge against it in Case Number 16-CB-181716 in violation of 29 U.S.C. § 158(b)(1)(A).

III.

The Legal Standard Required to Establish the Claims

The General Counsel acknowledges that "the bar to finding a union has breached its duty of fair representation is admittedly high."[10] The claims against ILA Local 28 must be establish by a preponderance of the credible evidence.[11]

To properly conclude ILA Local 28's conduct breached its duty of fair representation, it must be determined that its conduct was arbitrary, discriminatory, or in bad faith. The *Wright Line* framework guides this analysis.[12] The *Wright Line*

[9] GC Ex. 1(h) ¶¶ 13-14. The National Labor Relations Act sections are codified at 29 U.S.C. § 157 and 29 U.S.C. § 158(b)(1)(A) respectively.
[10] TR p. 15, l. 17-18.
[11] 22 C.F.R. § 1423.18; *Aerospace Indus. Dist. Lodge 751*, 270 N.L.R.B. 1059 (1984).
[12] *NLRB v. Teamsters Gen. Local Union No. 200*, 723 F.3d 778, 786 (7th Cir. 2013) (citing *Wright Line, A Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1087 (1980)).

framework applies to claims under Sections 7 and 8(b)(1)(A) of the National Labor Relations Act.[13]

The initial burden imposed on the Board is establishing a *prima facie* showing sufficient to support the inference that gender was a "motivating factor" in ILA Local 28's alleged adverse action.[14] If this burden is met, the burden shifts to ILA Local 28 which must establish, by a preponderance of the evidence, that the same outcome would have occurred regardless of gender.[15]

IV.

Summary of the Argument

Neither a *prima facie* case of discrimination nor, assuming such a case could be made, a claim that Mata was treated differently than any other individual due to gender is shown.

The West Gulf Maritime Association training program was handled in a regular, routine manner by ILA Local 28, West Gulf Maritime Association ("WGMA"), and Tri-Kin Enterprises ("Tri-Kin"). The process for securing spots in available classes was in place for a long period and was followed. The process required regular, non-sporadic attendance at ILA Local 28 by applicants due to the nature of the program. Individuals who sporadically appeared at ILA Local 28 were unable to obtain spots because of the timing of the classes and because those who were regularly present had previously

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[13] *Aerospace Indus. Dist.*, 270 N.L.R.B. at 1066; Section 8(b)(1)(A) is codified at 29 U.S.C. § 158(b)(1)(A); *Plasters Local 21*, 264 N.L.R.B. 192 (1982) and *Teamsters "General" Local Union No. 200*, 357 N.L.R.B. 192 (2011). Section 7 is codified at 29 U.S.C. § 157.

[14] *NLRB*, 723 F.3d at 787 (applying framework to alleged discrimination because of union member's political activity); *Aerospace Indus. Dist.*, 270 N.L.R.B. 1059, 1066 (1984) (applying framework to alleged refusal to file a grievance because of non-union status).

[15] *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400 (1983), *abrogated in part on other grounds by Dir., Office of Workers' Comp. Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *NLRB*, 723 F.3d at 788.

secured spots in them. When Mata returned regularly to ILA Local 28 in 2015, she obtained training almost immediately. When she later sought training, she failed to utilize the established practice for securing training class placement. Rather, Mata sought placement after classes were complete or full and failed to follow the regular process of making herself available at the end of the month. This does not show gender bias but rather, it shows an individual who failed to avail herself of a procedure established to permit the regular and orderly placement of individuals in training classes.

The assertion that ILA Local 28 improperly sought to coerce Mata into withdrawing her charge has no evidentiary support. Rather, the interactions Mata and Jessie San Miguel, Jr. ("San Miguel, Jr.") had arose from Mata's involvement of San Miguel, Jr. in the matter, San Miguel, Jr.'s relationship with Mata, and Mata's misleading San Miguel, Jr. into believing she intended to withdraw the charge. No evidence suggests ILA Local 28 directed or encouraged San Miguel, Jr. to secure withdrawal of the charge.

V.

ARGUMENT

A. The West Gulf Maritime Association Training Program

WGMA coordinates training through outside venders.[16] Tri-Kin was the outside vender, performing training for longshore students for WGMA for 37 years, ending in December 2017.[17] In December of each year, Patrick Mckinney ("Mckinney"), Tri-Kin's president, prepared monthly calendars containing course dates for the following year.[18] These calendars were subject to modification if WGMA determined additional classes

[16] TR p. 237, l. 6-9.
[17] TR p. 419, l. 4-17.
[18] TR p. 419, l. 4-6; p. 421, l. 8-9.

were needed or if courses were not needed.[19] McKinney also developed the sign-up sheet format utilized by the various longshoremen locals and WGMA for training classes.[20]

ILA Local 28's procedure for obtaining places in these classes was the same prior to and after May 2015.[21] Tim Harris ("Harris"), an ILA Local 28's Business Agent, its Financial Secretary and a contract committeeman, is responsible for this procedure.[22] Harris has coordinated training with the WGMA on behalf of ILA Local 28 since 2005.[23] ILA Local 28, through Harris, collects names of individuals currently working in the industry in need of training who express interest and turns that information into the WGMA.[24] Typically, a general announcement is made on the last Monday of the month about training for the following month.[25] At that point, the names of those who express interest are collected for that month.[26] No list is prepared prior to that time.[27] The timing is to ensure the class scheduling has not changed and to avoid scheduling difficulties if classes were canceled or individuals were unable to attend after collection of the names.[28] Harris informed individuals if classes were full and those individuals were required to approach him again at a later date if they maintained interest in taking the class.[29] Even so, if an individual desired to stand-by for a class in the event a spot opened, that option was available.[30] Harris transmits ILA Local 28's lists to the WGMA the week prior to the

[19] TR p. 420, l. 6-p. 421, l. 4.
[20] TR p. 421, l. 13-p. 422, l. 9.
[21] TR p. 202, l. 8-l. 22.
[22] TR p. 306, l. 1-4; TR p. 310, l. 7-10.
[23] TR p. 310, l. 11-19.
[24] TR p. 311, l. 3-p. 313, l. 3.
[25] TR p. 311, l. 19-24; TR p. 360, l. 22-p. 361, l. 1; TR p. 401, l. 14-22; TR p. 403, l. 7-14.
[26] TR p. 361, l. 2-8.
[27] TR p. 362, l. 7-12.
[28] TR p. 319, l. 13-p. 320, l. 7.
[29] TR p. 325, l. 3-p. 326, l. 6; TR p. 362, l. 13-24.
[30] TR p. 325, l. 8-18.

next month's first class.[31] Neither Harris nor ILA Local 28 determine who is in a class, that is determined by WGMA.[32]

ILA Local 28 was not the only longshoremen local which had students trained through the WGMA by Tri-Kin. Some sixteen individual locals participated in the process.[33] The spots in classes were allocated among these locals.[34]

Tri-Kin was provided with the class attendee list by WGMA.[35] Judith Brown ("Brown"), WGMA's Training Director/Manager, provided the list to Tri-Kin after receiving lists of interested persons from the various locals.[36] Brown reviewed these lists and vetted the individuals, determining whether they were qualified prior to inclusion on the final list.[37] For example, individuals were required to obtain General Longshoremen and HazMat certifications prior to seeking additional certifications.[38] It was Brown who made the determination of attendees.[39] The final attendee list was generally provided to Tri-Kin between three days prior to and the morning of the various classes.[40] The initial portion of training was class-room followed by hands on training.[41] The hands on portion of the classes was scheduled during the class room portion, with the input of the class attendee.[42] If an individual failed the hands-on portion of the class they were prohibited

[31] TR p. 366, l. 2-13; TR p. 367, l. 3-8.
[32] TR p. 313, l. 14-16.
[33] TR p. 426, l. 18-p. 427, l. 1.
[34] TR p. 427, l. 2-8.
[35] TR p. 424, l. 5-11.
[36] TR p. 424, l. 12-20; TR p. 237, l. 6-9.
[37] TR p. 312, l. 22-p. 313, l. 7.TR p. 424, l. 20-p. 425, l. 5.
[38] TR p. 262, l. 2-p. 263, l. 5.
[39] TR p. 425, l. 6-19.
[40] TR p. 425, l. 25-p. 426, l. 5.
[41] TR p. 428, l. 18-p. 429, l. 6.
[42] TR p. 429, l. 7-p. 430, l. 7.

from attending again for 60 days.[43] If an individual failed to appear, they were prohibited from attending again for 150 days.[44]

B. Mata's Work History and Involvement with ILA Local 28 from 2007 through July 2015

Mata was dispatched for work through ILA Local 28 approximately 60 times between March 10 and November 9, 2007.[45] At the time, Mata was certified through ILA Local 28 in Yard Tractor and Forklift, obtaining these certifications on April 1, 2007.[46] Powered Industrial Truck ("PIT") certifications lasted for three years.[47] Thus, these certifications expired on April 1, 2010.[48] Even though she appears to have obtained regular work and been certified, Mata accepted employment in Iraq from November 2007 to November 2010.[49] Mata testified that every four months she returned from Iraq for 10 days, 10 days, and 14 days respectively.[50] During these periods, Mata claim she "was going to ILA Local 28 on those days to see if I needed any certifications or the certifications that I had, and get a job on those days that I was there."[51]

Mata initially claimed to have gone to ILA Local 28 each day she was back from Iraq.[52] Mata modified this when asked if she suffered from jet lag on her return.[53] Mata testified she requested ILA Local 28 arrange for her to attend a class so she could work on her next return.[54] Despite Mata's claims to the contrary, she maintained certifications

[43] TR p. 431, l. 6-13.
[44] TR p. 431, l. 14-16; TR 74. L. 17-25; p. 75, l. 6-7.
[45] RESP Ex. 7.
[46] TR p. 116, l. 19-21; RESP Ex. 2.
[47] TR p. 423, l. 17-p. 424, l. 4.
[48] RESP Ex. 2; TR p. 423, l. 1-21.
[49] TR p. 98, l. 18-p. 99, l. 1.
[50] TR p. 99, l. 6-18.
[51] TR p. 28, l. 21-p. 29, l. 1.
[52] TR p. 256, l. 10-16.
[53] TR p. 256, l. 17-19.
[54] TR p. 114, l. 8-14.

until April 1, 2010 and obtained certification in HazMat on April 1, 2010 through ILA Local 28.[55] HazMat certification is required in order to take any other certification classes.[56]

On the conclusion of her Iraq employment, Mata claims she again approached ILA Local 28 in an effort to obtain employment. However, Mata accepted employment with a private trucking entity soon after her return.[57] Mata was employed by this entity by the end of 2010.[58] Mata maintained employment with private trucking entities through March 2015.[59] During that period, Mata did not work due to injury from December 2011 to the beginning of 2013.[60] Mata testified that occasionally, "every couple of months," she went to ILA Local 28 in an effort to obtain work.[61] Typically, Mata would go to ILA Local 28 only one day and, at times, two days consecutively.[62] Mata concedes her efforts were "sporadic" between her return from Iraq and March 2015."[63] It was not until April to May 2015 that Mata made herself available for employment through ILA Local 28 on a regular basis.[64] Mata's first day of employment through Local 28 in 2015 was May 14.[65] Mata obtained job certifications in June and July 2015.[66]

[55] RESP Ex. 2.
[56] TR p. 262, l. 25-p. 263, l. 5; RESP Ex. 3 (p. 4).
[57] TR p. 101, l. 14-17.
[58] TR p. 102, l. 9-13.
[59] TR p. 104, l. 2-23.
[60] TR p. 105, l. 23-p. 106, l. 2.
[61] TR p. 109, l. 8-19.
[62] TR p. 109, l. 21-p. 110, l. 2.
[63] TR p. 110, l. 3-6.
[64] TR p. 135, l. 4-18.
[65] TR p. 133, l. 23-p. 134, l. 1.
[66] RESP Ex. 2.

C. Mata's Assault Allegations are Questionable

Mata asserts she was repeatedly assaulted by Harris between 2010 and 2015.[67] Harris denies this.[68] Harris knows Mata both through her marriage to the brother of Harris' classmate and as an individual utilizing ILA Local 28's hiring hall.[69] Mata describes the assault as Harris closing his office door behind them, and after conversation, "grab[bing] on me and grab my breast and tell me, 'Don't worry, Mario will never know,' ..., and he would just be feeling on me and, ..., grabbing on me, and I would push him away, and I would say, 'no, not in a million years,' and I would just, like I said, push him away and I would just walk – pretty much just walk out as fast as I could out of the office, ..."[70] Mata asserted this same exchange occurred each time she returned to ILA Local 28 during a five year period, always in Harris' office.[71] This includes during each of the sporadic visits she made to ILA Local 28 during her Iraq employment and during her sporadic visits subsequent to her return.[72] Like much of Mata's testimony however, she also contradicted this testimony asserting the alleged assault occurred only "on some of those occasions."[73] The final occurrence, Mata testified, occurred just prior to Easter 2015; April 5, 2015.[74]

Between 2010 and 2014 Mata initially asserted she was in Harris's office about four times each year seeking certifications, although she later amended this to once or twice per year.[75] Mata testified she did not come into ILA Local 28 at all during the entirety of

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[67] TR p. 131, l. 4-7.
[68] TR p. 340, l. 16-25.
[69] TR p. 307, l. 25-p. 308, l. 11.
[70] TR p. 51, l. 14-21.
[71] TR p. 50, l. 2-p. 52, l. 6; TR p. 132, l. 3-6; TR p. 157, l. 4-19.
[72] TR p. 132, l. 7-15.
[73] TR p. 100, l. 12.
[74] TR p. 131, l. 8-23. During the latter part of 2016 or early 2017, Mata pressed criminal charges against Harris based on her allegations of assault. The charges were dismissed. TR p. 341, l. 8-p. 342, l. 1.
[75] TR p. 48, l. 12-25; TR p. 257, l. 1-3.

her injury, December 2011 through early 2013.[76] Mata testified she was in Harris' office only one time in 2015.[77] Thus, based on Mata's calculations, she returned to Harris' office seven times between 2010 and 2015.

While Harris cannot prove a negative, the evidence suggests the alleged assaults are unlikely to have occurred as described by Mata. Mata alleges the identical assault occurred multiple times over a four-year period but is inconsistent regarding how many times she was in Harris' office during that period. It is also notable that Mata alleges the final occurrence was just prior to her regular return to ILA Local 28 in 2015 and her successful securing of employment and training. This does not fit the pattern Mata urged both before and after her return in 2015. Mata's testimony appears to have been tailored.

D. No Credible Evidence Supports Mata's Claim of Denial of Training Opportunities Based on Gender

Mata attributes, at least in part, her inability to obtain desired training classes as retaliation for her rejection of Harris' alleged advances.[78] However, given Mata's sporadic presence at ILA Local 28 between 2007 and 2015, it would have been virtually impossible to place her in training classes because the process typically takes a month to complete.[79] This is supported by the fact that once Mata began attending ILA Local 28 regularly in March or April 2015, she obtained employment in May and attended training classes, as she admits, through Harris, in June and July 2015.[80] This was also just after Mata claims she was last assaulted by Harris in his office. Additionally, Harris noted that even if a sporadic individual sought training, an attempt would be made to get them into the basic

[76] TR p. 29, l. 4-5; TR p. 106, l. 8-11.
[77] TR p. 48. L. 10-11.
[78] TR p. 132, l. 23-p. 124, l. 1.
[79] TR p. 345, l. 3-p. 346, l. 22.
[80] TR p. 136, l. 15-21; TR p. 139, l. 6-22; TR p. 136, l. 23-p. 124, l. 4; TR p. 139, l. 6-22; RESP Ex. 2.

classes of Longshoremen and HazMat.[81] Mata, during her Iraq employment obtained HazMat certification.[82] Thus, Mata's supposition of retaliation is unsupported. Rather, it is countered by the facts.

Mata's claim that she was denied training, whether based on gender or generally are also countered by the facts. When Mata initially returned regularly to ILA Local 28, she quickly obtained her basic training classes.[83] While the Yard Tractor class was full, Mata successfully attended the class as a stand-by.[84] Harris submitted his lists on June 3, 2015.[85] The Yard Tractor class was scheduled on June 11, 2015.[86] Harris sent an e-mail requesting stand-by status for that class for Mata on June 5, 2015.[87] Harris recalls only a few times Mata sought him out for training placement.[88] One such event occurred after the October 2015 membership meeting on October 7, 2015.[89] By the evening of October 7, 2015, most of the October classes had already occurred.[90] Harris told Mata the classes were capped by that point and she should approach him the next month.[91] Harris does not recall Mata doing so.[92] On another occasion Mata inquired the day of the class and was told she could try to attend by stand-by as she had in June 2015.[93]

Mata implies that Harris selectively choose individuals for training by calling them in and informing them they have training that day.[94] However, Harris testified that he

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[81] TR p. 346, l. 14-18.
[82] RESP Ex. 2.
[83] TR p. 348, l. 22-p. 349, l. 8; RESP Ex. 2.
[84] TR p. 349, l. 4-8; RESP Ex. 12 (p. 3-4).
[85] RESP Ex. 13; TR p. 364, l. 22-p. 365, l. 2.
[86] RESP Ex. 13.
[87] RESP Ex. 13.
[88] TR p. 413, l. 22-p. 414, l. 9.
[89] TR p. 355, l. 8-p. 356, l. 4.
[90] RESP Ex. 18.
[91] TR p. 356, l. 5-11.
[92] TR p. 360, l. 11-15.
[93] TR p. 356, l. 12-p. 357, l. 2.
[94] TR p. 44, l. 13-p. 45, l. 4.

would inform individuals if they have training via text, phone, or, if they were in the hiring hall, in person, even on the day of the class.[95]

Put simply, Mata offers nothing supporting her claim that her gender was a motivating factor in her alleged denial of training opportunities. Rather, the evidence establishes a regular, routine, process for referring individuals to WGMA for training by ILA Local 28. Mata sought to support her allegations by offering unsupported claims that women were routinely denied access to training lists by Harris, yet fails to offer substantiating evidence. Mata also attempts to portray Harris as seeking to limit her to truck driving jobs for what she perceives to be stereotypical reasons. However, the evidence demonstrates that Mata simply failed to avail herself of the routine procedure for securing training opportunities by approaching Harris sporadically. Mata was successful in obtaining stand-by status on her regular return to ILA Local 28 in 2015 and appears to have assumed this would occur each time she presented herself for training. The fact that this was not availing subsequently is not evidence of gender discrimination. Mata may have had difficulty obtaining training she claims to have desired, yet she wholly fails to demonstrate that the cause of this was her gender. Moreover, even if Mata made such a demonstration, the evidence establishes that Mata was dealt with in the same manner as other individuals who sporadically presented themselves to ILA Local 28 generally and those who failed to follow the established procedure for obtaining referral to WGMA's training classes.

[95] TR p. 369, l. 20-p. 370, l. 7.

E. ILA Local 28's Response to Mata's Allegations was Neither Lacking nor Negligent

Contrary to her testimony, even after returning in 2015, Mata's actual presence at ILA Local 28's hiring hall was sporadic.[96] Often Mata was only available for late jobs.[97] As a dedicated worker, Mata need not come to the hall except on Monday as the job might last through the week.[98] Jessie San Miguel, Jr. ("San Miguel, Jr."), who was at the hiring hall each day from 4:00 a.m. until 5:00 p.m., would call Mata by phone about jobs telling her to go straight to the job site if she was available.[99] San Miguel, Jr's text to Mata on September 26, 2016 is an example of this.[100]

Mata first brought her complaints concerning lack of training access to ILA Local 28's attention on June 30, 2016.[101] This occurred during a conversation with Jesse San Miguel, Jr., ("San Miguel, Jr.") her older cousin.[102] Mata testified that during this conversation she mentioned only her allegations concerning Harris' alleged assault.[103] Mata did not tell San Miguel, Jr. she felt she was denied training opportunities due to her gender.[104]

While it was claimed that ILA Local 28 took no action, Mata testified that San Miguel, Jr. immediately requested permission to inform the Local.[105] According to Mata, San Miguel, Jr. then contacted Larry Sopchak, ILA Local 28's president.[106] Sopchak and

[96] TR p. 34, l. 21-p. 35, l. 9 (Mata claimed to be at the hiring hall "just about every day" from approximately 5:30 a.m. until 2:30 to 4:00 p.m.); TR p. 413, l. 6-21; TR p. 458, l. 6-16.
[97] TR p. 458, l. 8-13.
[98] TR p. 413, l. 14-17.
[99] TR p. 444, l. 3-7; TR p. 458, l. 12-25.
[100] TR p. 459, l. 13-16; GC Ex. 4.
[101] TR p. 45, l. 23-p. 48, l. 7; p. 170, l. 14-p. 171, l. 3; TR p. 446, l. 8-13.
[102] TR p. 74, l. 17-25; TR445, l. 21-p. 446, l. 1.
[103] TR p. 75, l. 20-22; TR p. 446, l. 17-19.
[104] TR p. 171, l. 4-9; TR p. 446, l. 17-19.
[105] TR p. 15, l. 8-10; TR 75, l. 23-p. 76, l. 2; TR p. 171, l. 17-23.
[106] TR p. 171, l. 24-p. 172, l. 3TR p. 469, l. 11-13.

San Miguel, Jr. testified that B.R. Williams was the individual San Miguel, Jr. first contacted.[107] Sopchak recalls being informed of the matter on the morning of June 30, 2016.[108] Mata could not meet on June 30, 2016 so a meeting concerning the matter was held on the afternoon of July 1, 2016 at which Mata, Sopchak, A.L. Williams, and San Miguel, Jr. attended.[109] Due to the seriousness of the allegations, Sopchak took contemporaneous notes concerning the matter.[110] It was at this meeting that Mata initially raised her claim concerning lack of training.[111] It was also at this meeting that Sopchak specifically informed Mata he would arrange for her to make a complaint through the WGMA sexual harassment facilitator program.[112] Mata declined the offer.[113] Mata denies knowledge of the WGMA's sexual harassment policy or remedy[114] ILA Local 28 was not required to report the matter under the WGMA sexual harassment program.[115] Ultimately, it is the complainant's choice as to whether they participate in the program or not.[116] This program is managed by and undertaken under the auspices of the WGMA.[117]

Subsequently, on July 6, 2016, a second meeting occurred involving Mata, Eric Nelson, Sopchak, and B.R. Williams.[118] After introductions, Sopchak and Williams left the meeting.[119] During the second meeting, Mata again raised her claims concerning

[107] TR p. 451, l. 15-17; TR p. 468, l. 17-p. 469, l. 5.
[108] TR p. 468, l. 17-p.469, l. 5.
[109] TR p. 76, l. 3-9; TR p. 172, l. 172, l. 16-21; TR p. 470, l. 17-23.
[110] RESP Ex. 21.
[111] TR p. 76, l. 13-21; TR p. 172, l. 10-15; TR p. 271, l. 15-19.
[112] TR p. 472, l. 2-18; TR p. 476, l. 4-20; RESP Ex. 21.
[113] TR p. 472, l. 16-18,
[114] TR p. 281, l. 15-282, l. 13. Mata admits seeing a poster with some information concerning sexual harassment in ILA Local 28's hiring hall but asserts she did not review it in detail and that it only appeared on the day or day after her first meeting concerning Harris. TR p. 283, l. 9-p. 286, l. 23.
[115] TR p. 472, l. 19-24.
[116] TR p. 472, l. 25-p. 473, l. 12.
[117] TR p. 226, l. 11-p. 227, l. 18; TR p. 229, l. 25-p. 231, l. 18; RESP Ex. 22 (pp.8-11.
[118] TR p. 76, l. 22-25; TR p. 173, l. 7-8; TR p. 477, l. 7-8.
[119] TR p. 777, l. 9-23.

Harris and lack of training.[120] Mata concedes that the July 2016 training classes were likely full by the time she raised her concerns about Harris and training with ILA Local 28.[121] Even so, just after the meeting, San Miguel, Jr. informed Mata that a spot in the July 8, 2016 Forklift class was available.[122] Mata testified that San Miguel, Jr. informed her of training placement "the day after her meeting with Eric Nelson."[123] Mata declined the opportunity.[124] As a result, the first opportunity to get Mata into the desired classes was in August 2016.[125]

It was also decided that Mata need not go through Harris for ILA Local 28 business. Rather, A.L. Williams or San Miguel, Jr. would be available to her.[126]

These meetings occurred within a week in July 2016.[127] Mata claims that after the second meeting, nothing occurred, resulting in her approaching the EEOC and the NLRB.[128] Mata dates her initial visit to the NLRB as August 1, 2016.[129] Mata asserts it was only after that date that she was informed she was placed in training classes.[130] Mata also testified San Miguel, Jr called her, informing her that Sopchak placed her in the August 2016 RoRo, Forklift, and Heavy Lift classes "a couple of days" prior to them.[131] As the RoRo class was scheduled for 7:30 a.m., August 2, 2016, a couple of days places the

[120] TR p. 77, l. 1-3; TR p. 173, l. 9-16.
[121] TR p. 177, l. 16-23; RESP Ex. 9 (p. 6-July 2016 calendar).
[122] TR p. 477, l. 24-p. 478, l. 15.
[123] TR p. 270, l. 24-p. 271, l. 7.
[124] TR p. 478, l. 14-15.
[125] TR p. 177, l. 24-p. 178, l. 3; RESP Ex. 9 (p.7-August 2016 calendar).
[126] TR p. 450, l. 8-25.
[127] TR p. 77, l. 4-10; TR p. 155, l. 25-p. 156, l. 24.
[128] TR p. 77, l. 20.
[129] TR p. 78, l. 6-8.
[130] TR p. 81, l. 13-19.
[131] TR p. 164, l. 16-23.

notification prior to August 1, 2016, whether she learned of it the day after her meeting with Nelson, or in a later phone call from San Miguel, Jr..[132]

If Mata's testimony is credited, that she was on the jobsite when she received the call from San Miguel, Jr., then it occurred on July 25, 2016, the last date of employment prior to August 2, 2016.[133] Alternatively, Mata is referring only to notification concerning the Ro-Ro hands-on portion.[134] Even here, however, confusion exists. Mata testified she received a phone call from San Miguel, Jr. at 5:00 a.m. on August 16, 2016 concerning the rescheduled hands-on classes.[135] Mata was not at work at that time.[136] Additionally, this testimony fails to align with McKinney and San Miguel, Jr.'s e-mail correspondence.[137] McKinney sent an e-mail offering August 17, 2016 hands-on classes for Mata at 6:38 a.m., August 17, 2016, copying San Miguel, Jr.[138] San Miguel, Jr. replied at 6:45 a.m. indicating he spoke to Mata at 5:00 a.m. and she was occupied for the day.[139] This raises several questions about Mata's testimony. First, how did Mata receive a call at 5:00 a.m., August 16, 2016 about classes that were not offered until 6:38 a.m., August 17, 2016. Second, assuming Mata received the call at 5:00 a.m., August 17, 2016, how did San Miguel, Jr. inform her at 5:00 a.m. about classes which were not announced until 6:38 a.m. Third, did the 5:00 a.m. phone call even involve class attendance; San Miguel, Jr. may have contacted Mata about work which she declined because she was otherwise occupied and conveyed this knowledge when receiving McKinney's e-mail. Most likely, Mata is

[132] RESP. Ex. 9 (p. 7-August 2016 calendar).
[133] RESP ex. 6 (p. 2); RESP ex. 7 (p.4). Mata does not recall working on August 1, 2016. TR p. 267, l. 23-p. 268, l. 3.
[134] TR p. 271, l. 12-25.
[135] TR p. 273, l. 8-22.
[136] TR p. 272, l. 19-22.
[137] RESP. ex. 10 (p. 2).
[138] RESP Ex. 10 (p.2).
[139] RESP Ex. 10 (p.2).

conflating an offer of a Forklift class on July 8, 2016 which she declined or a phone call regarding the RoRo hands on class in September 2016. Mata was working between July 5 and 8, 2016.[140] Mata was also working on August 29. 2016 when McKinney sent an e-mail offering dates for the rescheduled RoRo hands-on class.[141] Regardless, Mata's attempt to convey that ILA Local 28 secured training placement only after she signed her charge is not supported by any evidence other than Mata's vague, ambiguous, and contradictory offerings. In fact, to the contrary, the evidence supports the conclusion that Mata knew in advance of August 1, 2016 that she was scheduled for classes on August 2 and 4, 2016. What cannot be doubted is that ILA Local 28 actively addressed Mata's claims.

Mata takes issue with the handling of her hands-on training as well. It is undisputed Mata completed the class-room portions of RoRo (August 2, 2016), Heavy Lift (August 4, 2016), and Fork-Lift (August 4, 2016).[142] Mata admits to being ill at the RoRo hands-on class (August 8, 2016).[143] Mata claims she ate a bad taco and that the class was delayed because another participant damaged the equipment.[144] While she claimed to be fine, McKinney determined she should not take the hands-on portion of the class that day.[145] Mata also asserts McKinney prevented her from taking the hands-on portion of Forklift two days later (August 10, 2016) due the heat affecting him.[146] Mata felt the conditions were fine.[147] Mata claims McKinney canceled her attendance at the August 11,

[140] RESP Ex. 7 (p. 4).
[141] RESP Ex. 6 (p. 3); RESP Ex. 7 (p. 7); RESP Ex. 10 (p. 3).
[142] TR p. 83, l. 1-6; RESP Ex. 2.
[143] TR p. 83, l. 23-25; RESP Ex. 2.
[144] TR p. 84, l. 1-8, l. 11-17.
[145] TR p. 85, l. 1-12.-
[146] TR p. 85, l. 18- p. 86, l. 7; TR p. 430, l. 15-22; RESP Ex. 2.
[147] TR p. 86. l. 8-11; RESP Ex. 2.

2016 next day's Heavy Lift (August 11, 2016) hands-on course that day as well.[148] Mata attributes the rescheduling of these classes to ILA Local 28.[149] However, an e-mail from McKinney to Brown, among others including San Miguel, Jr., states:

> Ms. Mata is sick again today vomiting. She said the heat was getting to her. I have sent her home. Request she is completely well before coming to any hands on training. I can reschedule at that time. Pat.[150]

McKinney's recollection of the events differs from Mata's. In addition to the e-mail referenced *supra*, McKinney denies telling Mata either that the heat was getting to him or that he was rescheduling the hands-on portions of the courses as a result.[151] McKinney testified Mata was in fact, ill on both August 8 and 10, 2016.[152] McKinney felt it appropriate to reschedule Mata to help ensure she passed the courses, avoiding a delay in retaking the classes and to protect other participants.[153]

McKinney, whose company is no longer involved in WGMA training of longshore personnel, testified that no one with ILA Local 28 asked him to prevent Mata from completing a course at any time.[154] In sum, while Mata attributed nefarious intent into her inability to complete the hands-on portion of her classes in August 2016, the simple facts of the matter was that, once again, the normal, routine, and regular process was followed by all parties.

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[148] TR p. 86, l. 12-22.
[149] TR p. 196, l. 10-17.
[150] RESP ex. 10 (p.1).
[151] TR p. 434, l. 17-p. 435, l. 3.
[152] TR p. 430, l. 19-22; TR p. 434, l. 13-16.
[153] TR p. 430, l. 23-p. 431, l. 13
[154] TR p. 237, l. 15-18; TR p. 238, l. 12-24; TR p. 419, l. 10-19; TR p. 436, l. 14-21.

F. No Credible Evidence Supports the Claim that Jessie San Miguel, Jr. Improperly Sought to Secure the Withdrawal of her Charge on Behalf of ILA Local 28

San Miguel, Jr. has been Business Agent/Treasurer for ILA Local 28 since 2011.[155] Mata testified she talked to San Miguel Jr. concerning work and it was in that context that she initially told him about her allegations concerning Harris' conduct.[156] Mata was at San Miguel, Jr.'s home, invited by his wife for lunch.[157] Mata had known San Miguel, Jr. since she was a child, San Miguel, Jr. being her older cousin.[158] Because San Miguel, Jr. had a relationship with Mata, Sopchak requested San Miguel, Jr. be the individual communicating with Mata concerning her claims.[159] San Miguel, Jr. accepted this role.[160]

During their discussions Mata claims, prior to filing the charge, she told San Miguel, Jr. she intended to discuss the matter with the EEOC and the NLRB.[161] San Miguel, Jr. does not recall Mata telling him she was going to the NRLB specifically.[162] San Miguel, Jr. believed Mata was dealing with the EEOC.[163] These discussions occurred in the latter part of July 2016.[164] Mata was clear she did not tell San Miguel, Jr. or anyone with ILA Local 28 she was going to or had filed a charge with the NLRB.[165] San Miguel, Jr. and Mata later discussed Mata's approaching the NLRB via text and in person on August 3, 2016 when San Miguel, Jr. inquired whether Mata had gotten "the information straight at the NLRB.".[166] It is apparent that San Miguel, Jr.'s involvement with Mata

[155] TR p. 443, l. 12-20.
[156] TR p. 75. l. 8-19.
[157] TR p. 75, l. 8-19.
[158] TR p. 75, l. 4-5.
[159] TR p. 469, l. 22- p. 270, l. 10.
[160] TR p. 470, l. 10; TR p. 479, l. 6-19; TR p. 452, l. 20-p. 452, l. 1.
[161] TR p. 79, l. 4-16; TR p. 446, l. 22-p. 447, l. 3.
[162] TR p. 447, l. 11-13.
[163] TR p. 448, l. 11-23.
[164] TR p 448, l.24-p. 449, l. 5.
[165] TR p. 153, l. 18-p. 154, l. 16; TR p. 181, l. 23-p. 182, l. 5.
[166] TR p. 80, l. 21-p. 81, 10; TR p. 273, l. 9-17; GC Ex. 4.

during this period arose from his relationship with Mata and her involvement of him in the matter.

In December 2016 settlement discussions were underway between ILA Local 28 and the NLRB. ILA Local 28 discussed the settlement offer after a social gathering on the first Tuesday of December 2016 [December 6, 2016].[167] There had been no prior meetings concerning Mata's charge.[168] While both denying and admitting knowledge of the settlement discussions, Mata expressly referenced being informed of the status of these discussions on December 12, 2016.[169]

Sopchak believes he may have become aware of Mata's NLRB charge on August 5, 2016.[170] However, it may have been later as the affidavit of service is dated August 9, 2016.[171] San Miguel, Jr. and Mata had no discussions concerning the NLRB or her charge between August 3 and December 7, 2016.[172] The fact that no communication or local meetings occurred concerning the charge during this period, despite Sopchak's apparent knowledge of the charge, indicates there was no effort to coerce Mata into withdrawing it. It was not until December 6, 2016 that San Miguel, Jr. knew that Mata filed a charge against ILA Local 28.[173] A formal complaint was filed and served on November 30, 2016.[174] The timing of service, ILA Local 28's discussion concerning settlement, and San Miguel, Jr.'s knowledge corresponds with the December 7, 2016 text which Mata points

[167] TR p. 484, l. 1-p. 485, l. 6.
[168] TR p. 485, l. 8-13.
[169] TR p. 187, l. 4-p. 188, l. 8.
[170] TR p. 481, l. 21-p. 482, l. 3.
[171] GC Ex. 1(b).
[172] TR p. 188, l. 10-190, l. 14.
[173] TR p. 454, l. 8-11.
[174] GC Exs. 1(c), (d).

to as evidence that ILA Local 28 sought to improperly compel her to withdraw her charge.[175]

San Miguel, Jr. testified he spoke to Mata about the matter after learning of it in December 2016 and Mata indicated she would drop the charge.[176] San Miguel, Jr was concerned that his father's name (Jessie San Miguel, Sr.) was named in the complaint, and believed the issue regarding dealing with Harris concerning training had been resolved.[177] Mata indicated she did not want anything bad to happen to anyone and was not interested in money, wanting only to prevent other women from going through anything like what she alleged to have experienced.[178] San Miguel, Jr. broached the subject again, inquiring whether Mata had withdrawn the charge as she indicated as ILA Local 28's response date to the complaint was approaching.[179]

Based on conversations San Miguel, Jr. and Mata had, ILA Local 28 was under the impression Mata was withdrawing the charge but that it was ultimately her decision.[180] While San Miguel, Jr. communicated with Mata concerning the matter, ILA Local 28 was under the express understanding that it was not to be involved in it.[181] No ILA Local 28 officer discussed seeking to have Mata withdraw the charge.[182] No one directed San Miguel, Jr. to obtain the withdrawal of Mata's charge.[183]

After reviewing her prior testimony, Mata admitted that in December 2016, she told San Miguel, Jr. she was considering withdrawing or not pursuing the charge.[184]

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[175] GC Ex. 4.
[176] TR p. 454, l. 24-p. 455, l. 25.
[177] See GC Ex. 1(c), TR p. 455, l. 2-25.
[178] TR p. 455, l. 2-25.
[179] TR p. 456, l. 15-p. 457, l. 4.
[180] TR p. 482, l. 4-25.
[181] TR p. 483, l. 2-15.
[182] TR p. 483, l. 21-25.
[183] TR p. 453, l. 15-p. 454, l. 7.
[184] TR p. 288, l. 12-p. 290, l. 7.

Despite this, Mata insists she only told San Miguel, Jr. this because "I got tired of him asking me about the charges."[185] Of course, there was no discussion concerning the matter for some four months at that time.[186] Later in her testimony, Mata was not sure how to respond, asserting she did not recall, did recall, and/or offering what she would have told San Miguel, Jr.[187] Regardless, Mata lied to San Miguel about her intentions, willfully leading him to believe she was withdrawing the charge.[188] While Mata insists San Miguel, Jr. was under direction to obtain the withdrawal, she admits nothing was offered in exchange.[189]

Mata points to an alleged February 2007 event when she alleges San Miguel, Jr. took a job ticket from her and told her to go to the NLRB to withdraw her charge as further evidence of ILA Local 28's alleged effort to obtain the withdrawal of her charge.[190] San Miguel, Jr. does not recall taking a work ticket from Mata.[191]

Mata, who consistently told San Miguel, Jr. she was dropping the charge, testified that in response to San Miguel, Jr.'s inquiry as to whether she had spoken to the NLRB, replied, "I have made calls, but I haven't gotten through" and "[I] have to make an appointment."[192] In the affidavit Mata supplied to the NLRB, she describes these events as:

> I kept telling him I had not gotten ahold of the NLRB. He told me you need to get this settled. He said, even if you have to go in person. And he said, "Well why don't you turn in the ticket. You need to give up the job and go now, to the NLRB office, and talk to them. Jessie was trying to get me to go

[185] TR p. 290, l. 7-8.
[186] TR p. 188, l. 10-190, l. 14.
[187] TR p. 291, l. 3-p.292, l. 22.
[188] TR p. 290, l. 8-10; TR p. 293, l. 22-25.
[189] TR p. 295, l. 1-3.
[190] TR p. p. 94, l. 1-22.
[191] TR p. 444, l. 16-24.
[192] TR p. 191, l. 3- p. 192, l. 4.

> to the NLRB office to drop the charges, but instead I went and told them Jessie was trying to get me to drop the charges.[193]

While San Miguel, Jr. does not date the event, this comports with San Miguel, Jr.'s testimony concerning it. San Miguel, Jr. testified Mata informed him she was having difficulty contacting the NLRB.[194] As a result, he suggested she go to the NLRB office and wait until she was seen.[195]

This exchange suggests that San Miguel, Jr. was still operating under Mata's subterfuge that she intended to drop the charge against ILA Local 28. In fact, the exchange establishes that Mata was affirmatively continuing the subterfuge by indicating she was trying to contact the NLRB rather than simply telling San Miguel, Jr. she was not dropping the charge. Mata later proved capable of doing so. San Miguel, Jr. received a phone call from Mata in which she expressed she was not withdrawing the charge and was seeking criminal charges against Harris based on her allegations of assault.[196] In any event, the exchange evidences only a continuation of the communications Mata and San Miguel, Jr. had concerning the matter beginning in June 2016. The exchange does not evidence an effort by ILA Local 28 to coerce Mata into withdrawing the charge.

There is a lack of credible evidence supporting the claim that ILA Local 28 sought to improperly compel Mata to withdraw the charge in case number 16-CB-181716. Rather, Mata involved San Miguel, Jr. in the matter in June 2016; San Miguel, Jr. was involved in assisting her through August 3, 2016; no communication occurred until after San Miguel, Jr. learned of settlement discussions in December 2016; Mata misled San Miguel, Jr. into believing she intended to drop her charge; and San Miguel, Jr. operated under

[193] TR p. 192, l. 5-24.
[194] TR p. 449, l. 14-l. 22.
[195] TR p. 449, l. 14-l.22.
[196] TR p. 457, l. 5-17.

this assumption until Mata finally told him the truth. There was simply no scheme to get Mata to withdraw her charge. Instead, as Sopchak testified, over his objection, ILA Local 28 "wanted to go forward with this case."[197]

G. Mata's Performance as a Witness

Mata's testimony further demonstrates the lack of a basis for her claims. One of the final statements Mata offered was an admission that she lied to San Miguel, Jr.[198] Mata's testimony is replete with obfuscation and tortured justification necessitated by the need to fit a narrative within conflicting evidence and her own testimony. Simple inquiries resulted in convoluted explanations; one example being Mata's deflection of responsibility for being terminated by a private trucking entity.[199] A second example is Mata's assertion that only on the day or day after the initial July 2016 meeting concerning Harris' conduct was a poster concerning sexual harassment placed in ILA Local 28's hiring hall.[200] Mata claims to specifically recall the event, allegedly having witnessed it, was familiar with ILA Local 28's personnel, and recalls a male placing the poster, but is unable to identify the individual or any identifying characteristic of the individual placing the poster except gender[201] The poster has, in fact, been in place since 2013 and a claim that it was only posted on or just after July 1, 2016 is inaccurate.[202]

Mata provided conflicting evidence concerning the timing of meetings after she initially informed San Miguel, Jr. of her allegations against Harris. Mata testified these

[197] TR p. 484, l. 23-25.
[198] TR p. 293, l. 22-25. ("Q. When you spoke to him [San Miguel, Jr.] - - when you responded to those requests, did you tell him your true intent about withdrawing the charge? A. No.").
[199] TR p. 107, l. 3-p. 108, l. 21.
[200] TR p. 283, l. 9-284, l. 9.
[201] TR p. 284, l. 15-285, l. 23.
[202] TR p. 479, l. 23-p. 481, l. 5.

meetings occurred within days or a week at the beginning of July 2016.[203] Mata also testified these meetings were concluded by the third week in July 2016 at the latest, the second meeting not occurring until the second or third week of July.[204] Mata then testified she had not heard anything from Eric Nelson after the second meeting for about two weeks resulting in her decision to go to the Equal Employment Opportunities Commission ("EEOC") and NLRB.[205] This would place the second meeting in the second week of July 2016 at the latest. Mata sought to convey that despite attesting that San Miguel, Jr. informed her that Sopchak wanted to get her into classes the day after the second meeting, San Miguel, Jr actually conveyed this information only at the end of July 2016.[206] Appearing unsure of how the timing impacted her claims, Mata appeared to seek ambiguity. When asked what she was told concerning training after the second meeting, Mata simply answered she went to classes in August 2016.[207]

Mata's testimony concerning when San Miguel, Jr.'s informed her of her placement in the August 2 and 4, 2016 classes followed suit. Mata testified she did not know she was in the classes until or after August 1, 2016[208] Mata was initially clear that San Miguel, Jr. phoned her on the jobsite informing her that the August 2016 RoRo, Heavy Lift, and Forklift classes were available to her.[209] Mata was then asked if she previously testified she learned of these classes a day or two prior to their occurrence. [210] Due to Mata's expressed confusion and after confirming the August 2, 2016 date of the

[203] TR p. 156, l. 4-24; TR p. 171, l. 16-21.
[204] TR p. 156, l. 25-p. 157, l. 16; TR p. 267, l. 16-21..
[205] TR p. 269, l. 3-11.
[206] TR p. 158, l. 17-p. 159, l. 1.
[207] TR p. 173, l. 23-p. 174, l. 1.
[208] TR p. 151, l. 10-13; TR p. 269, l. 16-p. 270, l. 3.
[209] TR p. 151, l. 14-24; TR p. 155, l. 10; TR p. 161, l. 7-12.
[210] TR p. 159, l. 20-23.

RoRo class, inquiry was again made. Mata was asked, "Have you ever testified that at least a couple of days prior to that class, you received notification that you were in those classes from Mr. San Miguel, Jr.?"[211] After additional obfuscating discourse, Mata ultimately admitted she received the initial phone call from San Miguel, Jr. a couple of days before the August 2, 2016 class.[212]

Mata also offered contradictory testimony concerning whether she told San Miguel, Jr. of her NLRB charge filing prior to or after being informed she was in the August 2016 classes. After conclusively answering multiple times in the negative, she then sought to answer in the affirmative, simply not recall, or offer dates between August 1 and 4, 2016 depending on the question and questioner.[213]

In her August 2016 affidavit provided to the NLRB, Mata was, at best, incomplete in failing to note certification in Yard Tractor.[214] This is despite her knowledge that some certifications last "forever" and some must be renewed "every couple of years."[215] Based on this admitted knowledge, Mata knew her June and July 2015 certification was valid in August 2016 but did not identify it with other identified certifications. Mata's explained simply that she mentioned driving trucks so, by implication, she felt the certification was identified.[216]

Similarly, despite receiving numerous employment dispatches during the time period, Mata attested in her August 1, 2016 charge that:

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[211] TR p. 160, l. 12-20.
[212] TR p. 164, l. 16-23.
[213] TR p. 153, l. 18-p. 154, l. 16 (negative); TR p. 181, l. 23-p. 182, l. 5 (negative); TR p. 182, l. 14-21 (negative); TR p. 182, l.22-p. 183, l. 23 (affirmative/doesn't recall); TR p. 186, l. 9-18 (doesn't recall); TR p. 279, l. 18-p. 280, l. 9 (doesn't recall); TR p. 280, l. 21-25 (doesn't recall).
[214] TR p. 124, l. 11-p. 130, l. 25.
[215] TR p. 138, l. 9-15.
[216] TR p. 127, l. 20-p. 128, l. 16.

> Since the last six months, the above referenced labor organization [ILA Local 28], through its Business Agent, Tim Harris, has unlawfully refused to refer its member, Donna Marie Mata, to any jobs for unfair, arbitrary, and invidious considerations.[217]

Mata, who admits reading the charge and recalls making no modification to it, sought to explain this inaccuracy by asserting she meant only that Harris individually had not dispatched her for employment, not that ILA Local 28 had not.[218]

These were not mere side issues to Mata's claims. Rather, these issues are at the center of Mata's claims that ILA Local 28 discriminated against her and that it improperly sought the withdrawal of her claims. The fact that Mata had difficulty keeping her testimony straight is indicative of the lack of evidence supporting her claims.

VI.

The April 3, 2017 Hearing Testimony of Michael Atwood Should Not Be Admitted into Evidence in this Proceeding

Some twenty-four hours after Michael Atwood ("Atwood") testified, the General Counsel sought the admission of his entire April 3, 2017 hearing testimony into evidence to supplement his April 10, 2018 testimony.[219] By that point, Atwood, who was a witness subpoenaed and sponsored by the General Counsel was long gone and the hearing was in its last scheduled day.

When asked whether Atwood was at ILA Local 28's hiring hall at the same time as Mata specifically between March 2016 and August 2016, Atwood responded he could not recall events occurring three years ago.[220] The General Counsel then attempted to refresh

[217] GC Ex. 1(a).
[218] TR p. 147, l. 3-22.TR p. 149, l. 12-23.
[219] TR p. 250, l. 9-12.
[220] TR p. 22, l. 16-24.

Atwood's recollection with his prior testimony.[221] It did not.[222] The General Counsel then moved on to other topics prior to passing the witness. No effort was made at that time to question, offer, admit, or otherwise place into evidence testimony on the subject matter Atwood was unable to recollect. Instead, the next day the General Counsel simply sought to admit the entirety of Atwood's April 7, 2016 hearing testimony.

Federal Rule of Evidence 801(d)(1) is not a rule of admissibility. It is a definition of evidence that may be admissible if offered. Under Federal Rule of Evidence 801(d)(1) the prior statement must be inconsistent with the declarant's testimony.[223] The rule is written in the singular; applying to statements individually rather than collectively. Assuming Atwood's lack of memory constitutes an inconsistent statement, the only subjects on which he expressed lack of memory of was whether he was at ILA Local 28's hiring hall at the same time as Mata between March 2016 and August 2016 and whether he recalled the events "constituting" his prior testimony. There was no attempt to demonstrate Atwood's answers were inconsistent with his prior testimony as no portion of his prior testimony was presented so as to establish inconsistency. Therefore, Atwood was not subject to cross-examination about a prior statement because there was no prior statement offered on which he was subject to cross-examination. In short, no predicate for removing Atwood's prior testimony from exclusion as hearsay was laid.

Even so, however, an avenue for admission remained. Federal Rule of Evidence 803(5) allows recorded recollections to be admitted even if hearsay. However, a predicate must be laid. In addressing the admissibility of an affidavit utilized in an attempt to refresh a witness's recollection, the Sixth Circuit wrote:

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[221] TR p. 23, l. 2-5.
[222] TR p. 23, l. 14-p. 24, l. 9.
[223] FED. R. EVID. 801(d)(1) ; 801(d)(1)(a).

> To meet the accepted standards of admissibility, the trial court must also be satisfied the writing was made at a time when the events were fresh in the writer's mind and the witness must verify the writing's authenticity and truthfulness.[224]

The Court determined:

> The trial examiner here was very careful to ascertain that the witness had no present recollection of the statements contained in the affidavit, but that he did recall giving and signing it and that the statements were true at the time it was given.[225]

There was no predicate laid for the admission of the entirety of Atwood's testimony. There was no examination addressing whether Atwood had a present recollection of the specific testimony previously provided and there was no inquiry as to whether it was truthful at the time it was given. More critically, "If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party," in this case ILA Local 28.[226] There was no effort to read the transcript into the record and it was not offered as an exhibit by ILA Local 28.

The fact that investigatory affidavits have been admitted in other cases does not lead to the admissibility of prior hearing testimony in this matter. In *Delmas Conley d/b/a Conley Trucking*, *Three Sisters Sportswear Co.*, and *New Life Bakery*, affidavits made by witnesses prior to the hearing were admitted as substantive evidence only after the judge in each case found the witness's testimony at the hearing was untrustworthy.[227] There was no attempt to elicit sufficient testimony demonstrating that Atwood was untrustworthy or that his lack of memory was a ruse. Moreover, the affidavits were timely offered and the parties each had an opportunity to question the witness regarding the

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[224] *J.C. Penney v. NLRB*, 384 F.2d 484, (6th Cir. 1967)(citations omitted).
[225] *J.C. Penney*, 384 F.2d at 484.
[226] FED R. EVID. 803(5) .
[227] 349 N.L.R.B. 308, 309–10 (2007); 312 N.L.R.B. 853, 865 (1993); 301 N.L.R.B. 421, 426 (1991).

statements therein, including whether the statements were true when made. In this case, the prior hearing testimony was offered after the witness was excused.

Finally, the transcript should be rejected under Federal Rule of Evidence 403 because it would be unfairly prejudicial to admit it. Admitting Atwood's prior testimony rather than requiring the proper presentation of it while he testified in this hearing, prevents ILA Local 28 from further cross-examining Atwood on his testimony. While Atwood may have been subject to cross-examination originally, accepting his prior testimony in lieu of that provided in this hearing, prevents ILA Local 28 from fully presenting its case before this trial examiner. If the General Counsel desired to offer Atwood's prior testimony in lieu of his live testimony, it should have been done while he was on the stand and subject to further cross-examination on the prior testimony. Waiting to do so unfairly prejudices ILA Local 28 in the presentation of its questioning of Atwood and the presentation of its case.

VII.

Conclusion

ILA Local 28 has a duty to operate its hiring hall in a manner that is not arbitrary, discriminatory, or in bad faith. It is alleged ILA Local 28 violated this duty. The evidence shows that ILA Local 28 did violate this duty.

No credible evidence suggests ILA Local 28 acted or acts in a discriminatory, invidious, arbitrary, or unconscionable manner. Rather, the evidence establishes a regular and routine training procedure which Mata has, at times, followed. At other times, Mata did not follow the regular and routine procedure. That Mata was unable to obtain spots in training classes does not lead to a conclusion that she was discriminated

against. Rather, it simply shows that not following the procedure may result in an inability to obtain a class spot.

The claim that Jessie San Miguel, Jr. improperly sought to coerce Mata into withdrawing her charge against ILA Local 28 is also unsupported by any credible evidence. Simply put, Mata lied to San Miguel, Jr. about her intentions and allowed him to operate under that lie in his dealings with her. There is nothing to support an assertion that ILA Local 28 was directing San Miguel, Jr.'s actions or communications concerning Mata's expressed intent. Mata brought San Miguel, Jr., her relative, into the matter in the beginning and discussed it with him throughout. There was nothing nefarious or improper in San Miguel, Jr.'s interaction with Mata.

In the end, the only result which can arise from the evidence is a determination that the Complaint in Case Numbers 16-CB-181716 and 16-CB-194603 be dismissed in its entirety.

WHEREFORE, PREMISES CONSIDERED, International Longshoremen's Association Local 28 respectfully requests that the Complaint in Case Numbers 16-CB-181716 and 16-CB-194603 be dismissed in its entirety and denying any and all relief, and for such additional relief to which International Longshoremen's Association Local 28 may be entitled to in law or equity.

Dated this 6th day of June, 2018.

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of June, 2018, the undersigned attorney affirms under penalty of perjury that he caused a true and correct copy of International Longshoremen's Association Local 28's Post-Hearing Brief to be electronically filed using the National Labor Relations Board Region 16's website and thereafter served the following by United States First-Class Mail in a postage pre-paid properly addressed envelope at the following addresses designated for such purpose or, as where indicated, via e-mail.

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