International Longshoremen's Association, Local 28 (Ceres Gulf, Inc.) *and* Donna Marie Mata.
Cases 16–CB–181716 and 16–CB–194603

May 15, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On June 13, 2017, Administrative Law Judge Robert A. Ringler issued a decision in this proceeding. On February 20, 2018, the National Labor Relations Board vacated that decision and remanded the case to the chief administrative law judge for reassignment to a different judge for a hearing de novo on the issues raised by the allegations of the complaint.[1] On October 23, 2018, Administrative Law Judge Sharon Levinson Steckler issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt her recommended Order.

[1] 366 NLRB No. 20.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(b)(1)(A) of the Act by soliciting Donna Marie Mata to withdraw her unfair labor practice charge in Case 16–CB–181716. There are also no exceptions to the judge's admission of the transcript of Michael Atwood's testimony from the previous hearing before Judge Ringler.

In adopting the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(b)(1)(A) by arbitrarily denying training opportunities to Mata because of her gender, we reject, on due process grounds, the General Counsel's new argument that: the Respondent's system of administering training was itself arbitrary; the Respondent denied Mata training based, in part, on the application of that system; and the training system "independently or jointly" violates Sec. 8(b)(1)(A). The amended consolidated complaint alleges that the Respondent violated the Act by arbitrarily denying Mata training "because of [her] gender." The complaint's legal theory is not so closely connected to the General Counsel's new theory as to have put the Respondent on notice that it should have defended itself against allegations involving its training system. That is especially the case where, as here, the General Counsel did not raise the new theory at the first hearing before Judge Ringler, on exceptions to Judge Ringler's decision, or during the second hearing before Judge Steckler.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

Dated, Washington, D.C. May 15, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Laurie Monahan Duggan, Esq., for the General Counsel.
Eric H. Nelson and *Bruce Johnson, Esqs.,* for Respondent.
Donna Marie Mata, Charging Party.

DECISION

STATEMENT OF THE CASE

SHARON LEVINSON STECKLER, Administrative Law Judge. When the Board vacated a previous administrative law judge's decision, it remanded the case to Chief Administrative Law Judge Robert Giannasi for reassignment, a de novo hearing and decision. *International Longshoremen's Association, Local 28 (Ceres Gulf, Inc.)*, 366 NLRB No. 20 (2018). The remanded case was assigned to me and heard in Houston, Texas on April 10 and 11, 2018.

Charging Party Donna Marie Mata, an Individual (Mata) filed the charge in Case 16−CB−181716 on August 5, 2016, and the charge in Case 16−CB−194603 on March 8, 2017, against the International Longshoremen's Association, Local 28 (the Union). General Counsel issued complaint and the consolidated complaint respectively on November 30, 2016, on March 22, 2017. Respondent filed timely answers.

On the entire record, including my observation of the demeanor of the witnesses, and after carefully considering the briefs filed by General Counsel and the Union, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

Ceres Gulf, Inc., a corporation, engages in stevedoring, freights and cargo transport and terminal operator work at numerous ports throughout the United States, including the Port of Houston, Texas. In the past 12 months, Ceres Gulf has provided services in excess of $50,000 at ports outside the State of Texas. Ceres Gulf, Inc. is a member of the West Maritime Gulf Association (WGMA), a multiemployer association. WGMA, a trade organization, represents employer-members in negotiating and administering collective-bargaining agreements with labor organizations, including the Union. It also keeps records and completed payroll for its member-employers. I find Ceres Gulf is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

The Union is the exclusive representative of the warehouse workers and has entered into agreements with WGMA on behalf of the bargaining unit. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The consolidated complaint alleges that, since about March 1, 2016, the Union violated Section 8(b)(1)(A) by prohibiting Mata from being added to certification training lists and receiving certification training due to an invidious reason of gender. Also alleged to violated Section 8(b)(1)(A) is on about December 1, 2016, a union official solicited Mata to withdraw her unfair labor practice charge in Case 16−CB−181716. The Union denies that it discriminated against Mata or unlawfully solicited her withdrawal of the charge. To better understand these events, I first discuss the Union's hiring hall and training programs, and then proceed to the allegations and analysis.

[1] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006).

[2] The parties also stipulated that Houston Terminal, LLC, which is also an employer with ties to WGMA, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

A. The Union Operates a Hiring Hall and Training Program

The collective-bargaining agreement covers several types of employees: regular employed workers; dedicated workers; and casual workers. Regular employed workers work 40-hour weeks and are subject to the employer's call to work additional hours. Harris testified that jobs are distributed by seniority and the individual coming to the union hall for work scans his or her card, which reflects seniority. Work orders are available on screens in the building so that workers can see what jobs are available before they are dispatched. Those with higher seniority are first selected from the seniority list. To accrue seniority, a worker has to work 1000 hours per year, with the annual period ending in September.

Causals do not have seniority cards to scan upon entering the union hall for work and do not sign in. Casuals are not guaranteed work but must have certifications to work certain jobs. If an individual does not have certifications, jobs such as clean up may be available. To obtain a job as a casual, the casual goes to the union hall and stands on the line for casuals, known as the red line. Approximately 20 to 25 casuals are present on the red line. Casuals do not have a list and the business agent selects the right person for a job and sometimes rotates who is assigned jobs. A dedicated employee goes to hall each Monday morning and waits for the name to be called and is assigned for a week to a specific employer. The assigned dedicated worker is manually entered in the Union's system if given a job. (Tr. 398.)

If jobs are still available, the union official, such as Tim Harris, the business agent/financial secretary, or Jesse San Miguel, Jr. (San Miguel Jr.), the business agent/treasurer, offers positions to the casuals who have the certifications for the available jobs. Michael Atwood testified that he had been a member of the Union for about 3 years. He was able to testify that he had seniority and precisely knew his placement number. He defined seniority, involving accruing hours that allowed a person to obtain "better jobs or take specific jobs." (Tr. 20.) Seniority permitted an individual to pick jobs. (Tr. 21.) He also knew what a casual was—someone who did not have a seniority number and had to wait to be assigned a job.

To become qualified and eligible for selection for a job, an individual must be trained, usually with a classroom component and a practicum to operate the equipment. (Tr. 21.) The individual usually asks to obtain the training. (Tr. 22.)

WGMA contracts with private vendors to provide the certification training for 16 unions, including this Union, in the Gulf Coast region. At the time of these events, Patrick McKinney, the president of the contractor, administered training. The number of classes offered through WGMA for each skill may vary, depending upon demand for trained persons. Class size and number of slots available to each union also varies, with ILA Local 24 (Local 24) usually having the largest proportion of slots due to its size.

In order to obtain a certification, an individual usually has classroom training, practicum, and pass a test. Since 2005, Harris coordinates training for the Union. On the Mondays occurring approximately a week before the next month, Harris usually announces the next month's training, without announcing the specific classes, and ask for interested persons to see

him during hiring. If some training is available later in the next month and not all slots are taken, he might announce training again as the time approaches.

An individual requests training from Harris or another business agent. Harris has a notepad for tracking individuals requesting training, then sends the list of selected trainees to WGMA via email. If another business agent takes down a name for training, that business agent usually gives Harris a sticky note. However, in the previous hearing, Harris testified that he did not keep a running list of persons interested in training. (Tr. 321−322.) Harris testified that the only reasons an individual would be denied training would occur would be if someone did not have the prerequisites or did not qualify for some other reasons. If the class size already reached capacity, Harris puts the person on for standby in case a training spot opens for that class. If an individual is not included in the scheduled training for the upcoming month, Harris does not keep a list of the rejected individuals and relies on making the announcements towards the end of the next month. He later testified that the General Counsel's question confused him and he kept a list for the following month. (Tr. 362.) The regularly employed workers and dedicated workers have priority for classes; seniority also plays a role. (Tr. 327−328.) Once Harris receives confirmation from WGMA that the worker is scheduled for training, Harris notifies the worker of time and place.

The training opportunities are also offered on the WGMA website. Mata, however, testified that the website was not always working properly, depending on phone service. The training opportunities were not posted at the union hall.

WGMA ensures the trainees have the necessary prerequisites before they are allowed to take the class. An individual must pass both classroom and practicum portions of testing. The classroom portion involves watching videos and taking a test. After passing the classroom portion, the individual then is given a slip with the date and time for taking the hands-on portion of the test. (Tr. 430.)

B. The Union Allegedly Prohibited Mata from Receiving Training and Being Added to Certification Training Lists (Complaint ¶¶ 9-10)

The complaint allegations in this portion are two-fold:

(1) From March 1, 2016, to August 1, 2016, the Union prohibited Mata from inclusion on certification training lists; and,

(2) From March 1 to about August 1, 2016, the Union prohibited Mata from receiving certification training.

In examining the facts as presented, Mata's work history and allegations of Harris allegedly touching Mata unwantedly are discussed. Also included is her testimony about how she attempted to obtain training. Mata's eventual report of Harris's alleged conduct to the Union and the Union's response also are detailed below.

1. Facts

a. Charging Party Mata's work history

Charging Party Donna Marie Mata (Mata) is a member of the Union. She was a casual worker. Since 2001, she went to the union hall for jobs but did not work consistently through the Union. The jobs she held included driving trucks, cleaning up and bracing. Bracing involves loading and securing cargo. She also was a checker, who ensured the product was correct, checked the measurement and ensured the items would be delivered correctly. The majority of her work involved truck driving.

Mata left in 2001 due to pregnancy and returned in 2002, then took more time off. In 2004, she began driving after receiving her commercial drivers' license. In 2004 and 2005 she found work through the hall was slow, so she obtained work as an over-the-road trucker instead.

In 2007, Mata worked in Iraq and stayed until 2010. Between 2007 and 2010, Mata received leave every 4 months from her work in Iraq and came back to Texas. Leave was usually 10 to 14 days. She testified that, during that time, she went to the Union hall to see if she needed certificates and obtain jobs while she was there. However, Harris testified that scheduling someone who came to the union hall every four months for only 10 days would be difficult to do for the following month.

In 2008, Mata obtained certification in lashing, which was good for the remainder of her life. Most of Mata's certifications expired between April 2010 and September 2010. These certifications included yard tractor,[3] forklift and trained worker. She recertified in hazardous materials on April 1, 2010, which expired three years later. (R. Exh. 2.) Mata's work history showed no work under the Union's jurisdiction from 2007 until 2015.

When she returned from Iraq in June 2010, Mata testified she could not get work through the union hall. She said her certifications were expired and she asked Harris to get recertified. Mata testified that, on one or two occasions per year, she approached Harris in his office with the door shut, to obtain training. He would grab her on the breast. Each time she pushed him off and said it was never going to happen, then leave the office quickly. At an unknown time after June 2010, Mata instead obtained work for private trucking companies.

In 2012, Mata did not attempt to obtain work through the Union. In 2013 and 2014, she testified that she needed certification and did not obtain them. Without the certifications, she could perform clean-up jobs, but many of those positions were single-day assignments.

Mata later testified that she was injured in 2011 and was off from December 2011 to 2013. (Tr. 105.) She also testified that she was terminated from one trucking company for using her personal telephone while driving, for which she received a ticket. The ticket was dismissed, allegedly because she was not on the phone, but the trucking company did not take her back. (Tr. 108.) When work was slow for the trucking companies, Mata testified that she perhaps went to the union hall for jobs about every couple of months; sometimes she would go for about 2 days in a row if she was off from the trucking compa-

[3] A yard tractor is a smaller version of the over-the-road truck with automatic transmission and required a commercial driver's licenses. (Tr. 121.)

ny. She admitted that between June 2010 and March 2015 her efforts to obtain employment through the hall were "sporadic."

b. In 2015 Mata returns to the Union hall for work and training

Mata could not recall when in 2015 she stopped driving for a private trucking company. She stated she was available for work through the union hall consistently in April and May 2015. Mata found she was not receiving enough work in bracing and driving, so she wanted to obtain certifications for operation of forklifts, heavy lifts and top loaders. She then testified that the third certification was to "roll on/roll off" vehicles.[4] All three certifications involve moving cargo. The heavy lift is similar to a forklift, bur larger and capable of carrying more weight. Mata also testified "roll on/ roll off" involves driving vehicles (e.g., car, truck or van) off and on ships and park them.

Mata further testified that she requested training from Harris in the Union hall's open are and in the office. She said she was in the hall "all the time" and then "just about every day." She arrived at about 5:30 to 5:45 a.m. because 6 a.m. was the time for hiring casuals, and would stay until 2:30 p.m. to 4:30 p.m. in case a replacement was needed for a position.

Mata testified that, in 2015, Harris told her that her certifications were no longer valid. She later corrected herself that her yard tractor certification had not expired. (Tr. 129.) For June 2015, Mata recertified in longshore and was on standby for yard tractor training. (R. Exh. 13.) In early 2016, Mata held certifications in hazardous materials, longshore, and lashing, plus she passed a Department of Transportation physical.[5] Because she was certified in truck driving as well, she also was certified to operate yard tractors. These certifications also were prerequisites to obtaining further certifications.

Mata testified that, in 2010 and 2015, she went to Harris' office to talk about certification training. The door was shut and she and Harris were the only ones in the office. Harris testified that he kept his blinds open in his office for natural light. However, no windows faced into the offices.

Mata said she requested certifications and Harris tried to engage in small talk about her husband and family. She said she would tell Harris that they were fine but she was there to discuss the certifications. Harris told her not to worry about it and he would take care of it, then come around his desk and grab her, particularly on the breast. Mata pushed him away and quickly got out of the office. (Tr. 51.) She then avoided going to the union hall and obtained driving jobs elsewhere instead. Mata testified that the last of these incidents occurred before Easter 2015, which was April 5, 2015. (Tr. 131.)

In June 2015, Mata obtained certification class assignments through Harris. On redirect, she testified that she had to "hound" Harris to obtain these trainings. She further testified that she continued to ask for roll on/roll off class, heavy lift class, and the forklift class, which Harris stated he could not recall.

Harris recalled that Mata requested training after membership meetings. He specifically recalled that, about October 7, 2015, when the quarterly membership meeting was completed, Mata found him in the main office. Harris advised her that the classes for October were filled. He recalled another incident, date unknown, when Mata came into the office with other officers present, and asked for class. The class was scheduled for the same day and Harris told her she could go to the training location to see if she could stand by for the course.

Mata opined that a female asking for certification classes would get the same treatment she experienced. Mata testified that she observed that men who asked Harris for certification training would obtain Harris' assignment for class. Mata said she tried to go around Harris, seeking out the Union president at the time, Larry Sopchak,[6] or other union officials such as A.L. Williams, the assistant vice-president, or B.R. Williams, the vice-president; they directed her to Harris. Mata said that she did not report it because others told her the Union would "blackball" her. "Others" were not identified, nor was the time frame in which she was told not to report it.[7]

In January 2016, Mata received a "dedicated" employee assignment through the Union as a truck driver for Ceres Gulf. (Tr. 204.) Mata maintained that she requested training from Harris every day she was in the union hall, at least 10 times in March 2016, then shifted to 6 to 10 times after General Counsel re-asked the question. (Tr. 43.) She testified that Harris told her classes were full or she would have to wait until the following month. However, she answered the question about why she thought Harris was not putting her on the training list because "He would tell me that he didn't want me to get those classes. He told me himself that he didn't want me to do the forklift, he didn't want me to do the heavy lift . . . because those are dirty jobs, those are physical jobs, and that's not what he wanted me to do." (Tr. 43.)

Harris testified that, about March 2016, the WGMA employers had a high demand for truck drivers. Mata was assigned as a dedicated driver. As a dedicated driver, she was assigned for the entire week and not in the hall except on Mondays when the casuals received the dedicated assignments. San Miguel Jr. testified generally that Mata was sporadic in attendance at the hall, and would come in after hiring, or in the afternoons; if he had work, such a truck driving, he would call her and direct her to go "straight to the job." (Tr. 458.)

Atwood recalled that he had been at the Union hall every Monday, the same as Mata, then testified he could not recall whether she was present at the hall with him between March and August 2016. Suddenly Atwood could not recall events from one to three years prior and blamed an accident that oc-

[4] Harris testified that the Union does not have a contractual rate for roll on/roll off, which is referred more frequently to Local 24. (Tr. 380.)

[5] Mata's affidavit did not mention that she was certified in yard tractors or in hazardous materials. However, she testified that she was operating yard tractors. (Tr. 125−127.)

[6] Sopchak served several terms as president and left office in May 2017.

[7] Mata did not avail herself of the collective-bargaining agreement procedures to report sex discrimination or sexual harassment through WGMA. (R. Exh. 22, p. 8. et seq.) A local union is supposed to report any sexual harassment allegations to WGMA.

curred before any of these events. He denied having job-related issues. In response to a leading question, he did recall he was laid off about 3 weeks before he testified in the previous hearing. (Tr. 24.) According to Harris, Atwood tested for a mechanic position within the previous 3 years and he became a regular employee.

c. Mata reports to San Miguel Jr. about Harris's alleged conduct and meets with Union officers

About the end of June 2016, after a health fair, Mata reported Harris's conduct to her relative[8] and Union business agent/treasurer, Jesse San Miguel, Jr. Mata met San Miguel Jr.'s wife at the health fair and they went to San Miguel Jr.'s home for lunch. San Miguel Jr. showed up at the house and Mata told him that Harris assaulted her. San Miguel Jr. however, recalled that Mata talked about the alleged assault, but mentioned nothing about training or going to the EEOC. (Tr. 446.) San Miguel Jr. then asked Mata for permission to notify the appropriate authority with the Union and Mata consented. San Miguel Jr. called Union President Sopchak immediately, then reported to Mata that he, Sopchak and A.L. Williams would meet with her at the union hall.[9] Due to Mata's report, the Union determined that San Miguel Jr. should be Mata's liaison at the union hall.

On July 1, 2016, during the meeting at the union hall, Mata told the union officials that Harris touched her inappropriately on multiple occasions and that she needed to obtain her certifications, which she was having problems obtaining because Harris would not schedule her for them. Sopchak testified that Mata left the meeting a few time to go to the restroom because she said she had to vomit. He also observed that Mata was emotional and in tears several times. Sopchak testified he informed Mata that he spoke with the union attorney and he would like to schedule a meeting with her. He also asked if Mata wanted to invoke the WGMA facilitation process. Mata declined the facilitator but agreed to meet with the Union attorney. (Tr. 476.) The meeting lasted between 1½ to 2 hours.

On July 6, Mata met with Sopchak, B.R. Williams and attorney Eric Nelson at the union hall. Mata repeated the information she previously shared. Nelson said he would get back with her.[10] On Thursday July 7, Mata was offered a forklift training class for the following day, but declined to attend on short notice. (R. Exh. 21.)

About August 1, 2016, San Miguel Jr. and Sopchak each notified her about a training schedule for her, beginning the following day.[11] Mata's testimony went back and forth about when she learned about her assignment to classes. Mata first testified that she heard nothing for about 3 weeks after the meeting that included Nelson and contacted the Board. She filed an unfair labor practice charge against the Union. She testified that, before filing the charge, she contacted San Miguel Jr. by text message, telling him she intended to speak with the Board because she heard nothing. (Tr. 79.)

Mata's testimony about when she was enrolled in upcoming classes was not consistent. She testified that after she filed the charge, San Miguel Jr. notified her that she would be enrolled in certification classes Mata was working on a job site when San Miguel Jr. notified her she was enrolled in the certification classes and that it occurred before she filed the unfair labor practice charge. (Tr. 151−152, 162.) Mata then testified that she did not tell anyone at the Union of her intent to file a charge before she did so. (Tr. 154.) She later testified that, before August 3, she told San Miguel Jr. that she filed an unfair labor practice charge, and more likely on August 1. (Tr. 268.) She then testified she did not know whether she told San Miguel Jr. if she filed a charge or just spoke with the Board. (Tr. 280.) However, after Mata was assigned, San Miguel Jr. texted her about August 4 and asked whether she got her information straight at the Board. (GC Exh. 4.) Because Mata's testimony shifted, I find that the Union registered Mata in the certification classes before she filed the unfair labor practice charge.

d. Mata's training sessions in August 2016

Mata received a telephone call from Sopchak, who also advised that she would be placed in the roll on/roll off, forklift and heavy lift classes. (Tr. 81.) Mata attended those classes in August 2016. (Tr. 81.) She attended the first two of the three classroom portions on August 2 and 4, respectively. (Tr. 162.) She attended the hands-on portions of classes on August 8, 10 and 11, 2016. (Tr. 83; R. Exh. 2.)

For the roll on/roll off practice, Mata was ill that day and did not complete it. She testified she did not complete the training because the practice car was "messed up." McKinney sent her home, despite her protests, because she might have been contagious and if she failed the hands on portion, she would have to retake the entire course no sooner than 60 days later. (Tr. 431.) For forklift, Pat McKinney instructed her; according to Mata, he became ill and told her they would need to reschedule. For the heavy lift, McKinney told her not to show up and she would be rescheduled. Mata also had two more "no show/excused" for the other two practice classes and apparently had other things to do. (Tr. 434.) On August 10, Mata was again at the practical portion and told McKinney she was feels effects of the heat. (R. Exh. 10). McKinney rescheduled Mata's practicum for the three classes for August 17, 2016. (Tr. 435; R. Exh. 10 at p. 2.) About mid-August, San Miguel Jr. telephoned Mata with her rescheduled times for training. (Tr. 272.) She performed roll on/roll off duties since that time. Mata apparently never completed the practical portions of the forklift and heavy lift courses and did not obtain certification. However, no evidence demonstrates that Mata requested to complete these two courses at a later date or the Union prohibited her completion.

[8] Mata testified that San Miguel Jr. was a cousin; he testified she was his stepmother's niece.

[9] San Miguel Jr.also testified that, on a later date, Mata mentioned that she might go to the EEOC, but thought Mata "probably" told him she would seek help at the NLRB. (Tr. 448.) He recalled discussions about the EEOC occurring in late July 2016 and Mata saying she did not want the Union sweeping things under the rug. (Tr. 449.)

[10] Mata believed this meeting took place in the second or third week of July. She later testified the meeting took place at the end of July.

[11] Mata later testified that the phone conversations regarding training assignments occurred on August 2 and August 4. (Tr. 277.)

McKinney testified that no one from the Union asked or told him Mata should not complete her August 2016 certifications. (Tr. 436.)

e. Additional witnesses called by General Counsel

1. Donna Kaminski

Donna Kaminski, a truck driver who was a member of Longshoremen's Local 24 (Local 24), previously was a member of the Union but had not been there in "a very long time." (Tr. 55.) On occasion, Kaminski saw Mata in Bayport, Texas, where both Local 24 and the Union shared a breakroom. Mata also obtained jobs through Local 24.

Kaminski holds certifications in truck driving, heavy lift, forklift, roll on/roll off operations, hazardous materials, and supervisory skills, all of which she received while working through Local 24. Local 24 maintained a monthly calendar for certification training. She only went to the Union in 2007-2008 and did not attempt to obtain certifications from it.

2. Atwood

Atwood was called in General Counsel's case in chief on the first day of hearing. I credit Atwood simple explanations of how seniority works. However, his sudden forgetfulness regarding his knowledge about Mata at the union hall was too convenient. He introduced his alleged memory failure by saying he was talking to his wife about it and his tone of voice shifted to an attempted nonchalance. I found it difficult to believe that a person with his supposed memory loss was able to work as a mechanic. General Counsel tried leading questions and prodded, yet nothing worked. As General Counsel notes in her brief, Atwood's refusal to answer questions demonstrated hostility and possible coercion. The Union had an opportunity to examine him. General Counsel excused him as a witness.

On the second day of hearing, the day after Atwood was excused and was no longer present, General Counsel moved to include in the record the transcript of Atwood's testimony from the prior hearing involving both parties and the same issues. The Union objected. The parties engaged in robust discussion, leading me to ask the parties to brief the matter. The prior testimony, which I have reviewed, is contained in Rejected General Counsel Exhibit 1.

a. Parties' positions regarding admitting prior testimony

General Counsel argues that Atwood's prior testimony is admissible as an exhibit pursuant to Fed.R.Evid. 801(d)(1)(A). General Counsel also argues that Atwood's memory failure makes him unavailable, as defined in Fed.R.Evid. 804(a)(3). Another rule of evidence, Fed. R. Evid. 804(b)(1), also cited, should make the prior testimony admissible because it was offered against the same party who was allowed to cross-examine the witness. General Counsel also raises the possibility of witness intimidation. See *Conley Trucking*, 349 NLRB 308, 312 (2007), enfd. 520 F.3d 629 (6th Cir. 2008). In her discussion General Counsel cites to additional cases where affidavits were admitted when witnesses had claimed memory failures: *New Life Bakery*, 301 NLRB 421, 426 (1991); *Snaider Syrup Corp*., 220 NLRB 238 fn. 1 (1975); and *Starlite Mfg. Co*., 172 NLRB 68, 72 (1968).

The Union has three arguments against admission of Atwood's prior testimony. First, it contends that Fed.R.Evid. 801(d)(1) is not a rule of admissibility of a definition of evidence that might be admissible if offered, particularly when a prior statement is inconsistent with the testimony. Atwood's testimony was not inconsistent because no portion of the prior testimony was presented and therefore could not establish inconsistency. Secondly, regarding Fed.R.Evid. 803(5), the predicate to admissibility was not satisfied that the testimony was made when events were fresh in the witness's mind and the witness must ascertain the authenticity and truthfulness. Here the Union differentiates *Three Sisters Sportswear*, supra, *Conley Trucking*, supra, and *New Life Bakery*, supra, because affidavits were admitted as substantive evidence only after the judge found the testimony at hearing untrustworthy.[12] Lastly, the transcript should be rejected as unfairly prejudicial because the General Counsel should have offered the prior testimony while Atwood was on the stand; as a result, the Union did not have an opportunity to cross-examine Atwood about his prior testimony. (R. Br. 31.)

b. Analysis

I find that the rules of evidence and judicial prerogative allow admission of the affidavit. Fed.R.Evid. 801(d)(1)(A) identifies statements that are not hearsay when a declarant witness made a prior statement. Initially, as defined in Fed.R.Evid. 801(d)(1), the declarant testifies and is subject to cross-examination. More specifically in Fed.R.Evid. 801(d)(1)(A), the statement given "is inconsistent with the declarant's testi-

[12] In *Three Sisters Sportswear Co*., 312 NLRB at 865, the witness claimed she could not recall providing an affidavit or any of the events that occurred. The administrative law judge discredited her lack of memory as a ruse to refuse to answer question and found the witness, who was still employed by the respondent employer, was too frightened to say she recalled anything. However, she did verify her signature. Board representatives also credibly testified to introduce the affidavit. The administrative law judge admitted the affidavit as a past recollection recorded exception to hearsay. Id. The judge *in Three Sisters Sportswear* relied upon three cases in which affidavits were admitted into evidence: *New Life Bakery*, 301 NLRB 421 (1991); *Snaider Syrup Corp*., 220 NLRB 238 fn. 1 (1975); and *Starlite Mfg. Co*., 172 NLRB 68, 72 (1968).

The judge in *New Life Bakery*, supra, admitted the affidavit after the witness feigned memory loss when examined by General Counsel but answered respondent employer's questions. The judge ruled the witness was unavailable to General Counsel by refusing to answer questions even after the judge so ordered. The judge admitted the affidavits into evidence as an exception to hearsay (past recollection recorded) and other grounds, which is now contained in Fed.R.Evid. 807. In *Snaider Syrup Corp*., 220 NLRB at 238 fn. 1 and 244–245, the Board affirmed the judge's admission of affidavits when two of General Counsel's witnesses' memories allegedly failed; the judge considered the affidavits as affirmative evidence of what they previously knew and rejected some of the affidavit.

The affidavit in *Starlite Mfg. Co*., 172 NLRB at 72 was admitted pursuant to the California evidence code regarding prior statements of witnesses. Because the declarant was available for confrontation and cross-examination, the affidavit was admitted "as substantive evidence." Id. at 73.

mony and was given under penalty of perjury at a trial, hearing or other proceedings or in a deposition . . . ." In *Conley Trucking*, 349 NLRB at 310−311, the judge gave a detailed discussion of why pretrial affidavits could be admitted. First, the judge has authority to admit substantive admission of such affidavits because the judge applies the rules of evidence as far as practicable, following the legislative history of the Taft-Hartley Act. Secondly, Fed.R.Evid. 801(d)(1)(A) permitted admission of the affidavit when the witness was in court and subject to cross examination about the pre-hearing statement, or at least close enough to a deposition to be admitted. Id. The administrative law judge also warned not to confused admissibility with the sufficiency of the evidence and "consider[] the assertions against and with the record evidence as a whole . . . ." Id. at 312.

Fed.R.Evid. 804 applies when a declarant is not available as a witness. The applicable definition of unavailable is provided in Fed.R.Evid. 804(a)(3): "testifies to not remembering the subject matter . . . ." Fed.R.Evid. 804(b)(1) identifies that prior sworn testimony given at hearing is an exception to the hearsay rule and can be offered against a party who had an opportunity and similar motive to develop it by "direct, cross- or redirect examination."

Accepting that Atwood lost his memory for whatever reason, he was not available as a witness in this case and earlier testimony was subject to the Union's examination in the same factual case. In re *Panoceanic Tankers Corp.*, 54 F.R.D. 284 (S.D.N.Y. 1971). He also was available to cross-examination in the present hearing. I find that the Union suffers no prejudice with admission of the prior testimony as the Union had the opportunity to examine Atwood at the prior hearing.

Despite this finding, the prior testimony, although not hearsay or subject to a hearsay exception, is not admitted reflexively. "Admission of a sworn statement by a 'turncoat witness'" is an appropriate application" of the catchall provisions. *Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356 (11th Cir. 1986).[13] Application of Fed.R.Evid. 807 is fact-specific and the testimony offered should be viewed in context. *U.S. v. Prevezon Holdings, Ltd.*, 319 F.R.D. 459, 465 (S.D.N.Y. 2017). Pursuant to the catchall exception, if applied, the testimony still must have "probative value" and balanced against unfair prejudice as required in Fed.R.Evid. 403. *U.S. v. Carneglia*, 256 F.R.D. 366, 372-373 (E.D.N.Y. 2009). Not only must this statement have probative value, the statement must meet 4 criteria:

> 1. The statement has equivalent circumstantial guarantees of trustworthiness;
> 2. It is offered as evidence of a material fact;
> 3. It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> 4. Admitting it will best serve the purposes of these rules and the interests of justice.

[13] *Balogh's*, supra, arose under Fed.R.Evid. 803(24), which is contained now in Fed.R.Evid. 807.

Fed.R.Evid. 807(a).

The statement is sworn testimony given at a prior hearing, which provides significant guarantees of trustworthiness. General Counsel is offering the prior testimony for material facts concerning Mata's attendance at the union hall, discrimination against women in general and Mata's attempts to obtain training. As above, the information provided is supposed to corroborate Mata's testimony and is not the only source of information. I therefore admit what is currently marked as General Counsel's Rejected Exhibit 1, Atwood's prior testimony.

c. Atwood's testimony from the previous hearing

At the time of the prior hearing, Atwood had been a member of the member for 1½ years, working as a driver and mechanic. He had seniority at the time but previously worked as a casual. Between March 2016 and August 2016, Atwood had been at the hall with Mata and spoke with her. He testified that Mata told him that she requested training, which was denied. He observed that Harris "usually" awarded training to men rather than Mata. He suggested to other women who could not obtain training to seek training from other local unions; two took his advice and obtained training "immediately."

On cross-examination, Atwood testified that one man obtained training before Mata, although she was more experienced and more qualified. The man in question, whose name Atwood could not recall, supposedly received truck driving jobs faster than Mata. He also admitted Mata was a truck driver. He admitted he was a fulltime regular during the period in question and would not have to come to the hiring hall except usually on Monday mornings. However, he also claimed he was at the hall to help out his son in finding a job, but in response to whether he attended on Mondays, Atwood said he was present, "Almost every day we could."

Atwood was laid off as a regular for "a couple of weeks" because his regular employer had cutbacks. He had been at the hiring hall about twice during that time, but did not go more frequently because he had issues at home. He then testified that he was at the hall and saw Mata about "a couple of dozen times" from January 1, 2016, forward.

Atwood did not obtain his certifications through the Union but ILA Local 20-Galveston, because he was unable to obtain training through the Union in June and/or July 2015. He also testified that, while he was a casual, others received jobs he wanted possibly due to seniority, experience, and training. He further admitted that it was not unusual that Harris and the Union dispatched women to jobs through the hiring hall.

Regarding training opportunities, Atwood did not know whether the training slots were allocated between the local unions. He then testified that he talked with Mata twice outside of work in 2016, about trying to obtain training through the union hall.

2. Credibility

Kaminski, while credible, provided little evidence of what occurred at the Union in recent history. She provided information about Local 24, where she has worked in recent history.

Atwood, based upon his testimony from the prior hearing, contradicted himself. Much of his testimony was intended to

bolster General Counsel's case but instead undermined it. He was not consistent about the times he saw Mata. He admitted that he too had to seek training elsewhere and he was not familiar with all elements in assignments of training.

I find that some of Mata's discussions about her certifications were misleading. Her statements about needing recertification before 2010 were not accurate compared to the Union's computerized records. Mata switched what was the third certification she sought in 2016 from top lift to roll on/roll off. (Tr. 31−33.) She first claimed she was in the Union hall "all the time" and then shifted to "just about every day." (Tr. 34.) Regarding employment during the early 2010s, Mata testified first that she did not work in the hall at all and seemed to imply that it was because of inability to obtain further certifications. Mata also testified that she was denied opportunities to train while she was in Iraq and when she returned. However, her training history indicates she recertified in lashing and hazardous materials during that time. She subsequently recertified in yard tractor in June 2015. She admitted that the training calendars were available to her through a website, but apparently relied upon the announcements as she did not testify whether limited access to the website was due to her computer system or WGMA's.

Mata's testimony about her work history was not exactly forthcoming either. Mata worked part time for other trucking firms during the time between 2010 and 2015, plus had slightly more than 12 months off due to an injury in December 2011. (Tr. 105−106.) Mata once was terminated for having her personal phone out; despite the police dismissing the ticket, Mata apparently does not understand why a trucking company would not want her to bobble the personal phone in the truck cab.

I find it inherently improbable that Mata requested training 6 times in March 2016. First, Mata testified that she requested training 6 to 10 times, then quickly changed her answer. She was a dedicated worker most of this time and would have been more likely to be in the hall only on Mondays, when she picked up her assignment. A 2016 calendar shows March 2016 only had 4 Mondays. Mata does not place where in the month she requested training; as demonstrated by Harris' testimony about Mata's earlier request after a union meeting, she may have made requests at a time when the training calendar was not available or already filled for the month.

San Miguel Jr. generally is credited here. However, I do not credit his testimony that he learned of the charge in December as his text to Mata places it in early August, but after Mata was assigned to classes.

I found Sopchak credible. He testified under less than ideal circumstances—the lights in the courtroom went dark and he testified by computer light and telephone light. His answers were not evasive. His testimony was bolstered by his documentary evidence. (See R. Exh. 21.) Harris was credible regarding how training is assigned and how the Union assigns work.

Mata and Harris were diametrically opposed about whether he engaged in unwanted touching over the years. Sopchak's report of his initial meeting with Mata is compelling. I found neither Mata nor Harris particularly credible here. Mata was confused about a number of details in her other testimony; although she certainly believed these events occurred, she had so many issues that I cannot see clear to credit her fully. Although the criminal charges were dropped against Harris, I am not examining these versions at a criminal law standard of "beyond a reasonable doubt." In a civil procedure, such as before a regulatory agency, the standard is "more likely than not." Harris, in addition to his discussion of the criminal investigation, generally denied doing so but sounded weak. Because of the nature of the allegations, I will presume that Harris engaged in such conduct. Additionally, and for similar reasons, I do not credit that Harris made statements to Mata about her work assignments and training, such as keeping her off of dirty jobs, until San Miguel Jr. took over assignments to Mata.

Regarding assignments to training and completing training, Patrick McKinney was subpoenaed to testify and no longer administers training for WGMA. I credit his testimony as much of it was based upon his extensive experience in training and supported with documentary evidence. He had clear recollection of the events involving Mata. Further, Mata was not penalized for failing to take the complete courses and was permitted to complete the roll on/roll off class undermines the implication that the Union later blocked her from completing the courses. Mata did not testify that she requested to complete those courses and I find that she did not do so.

3. Analysis

General Counsel puts forth two theories: The Union's actions were based upon invidious reasons; and, The Union's actions are based upon discriminatory treatment.

a. Invidious reasons

A union violates its duty of fair representation towards employees it represents when it engages in conduct affecting those employees' employment conditions and the union's conduct is arbitrary, discriminatory or done in bad faith. *Vaca v. Sipes,* 336 U.S. 171 (1967). 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. Sex has long been held as an irrelevant, invidious and unfair consideration in operation of a hiring hall. See, e.g.: *In re Pacific Maritime Assn*., 209 NLRB 519 (1974); In re *Olympic S.S. Co.*, 233 NLRB 1178 (1977) (sex-based seniority system).

An example occurs when an employee requests a civil rights complaint over harassment for union activity and the union fails to do so because the employee opposed union leadership and supported other candidates. *Delphi/Delco East Local 651 (General Motors Corp.)*, 331 NLRB 479, 479−480 (2000).

General Counsel suggests the Union had two issues of sexual discrimination as the basis for denying Mata training opportunities: First, the Union discriminates against women in general; secondly Mata spurned Harris's unwanted advances, which caused him to deny her training opportunities.

Regarding the first grounds, that the Union discriminates against women, testimony was generalized and does not support a conclusion that the Union discriminates against female workers. Kaminski's testimony was dated and therefore could not assist with events from 2015 forward. Mata made unsupported conclusory assertions. Atwood's testimony also revealed only one to two anecdotal incidents and he admitted that he too had been passed over for training. Based upon this lack of evidence, I cannot find that the Union generally discriminates against women. *Dispatch Printing Co*., 306 NLRB 9, 13−14 (1992) (general accusations do not prove that union had animus towards female gender). 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.

Regarding the second grounds, although I give General Counsel the benefit of the doubt about Harris likely engaging in unwanted touching, I find insufficient intent to discriminate and deny training upon this reason based upon credited evidence. *Dispatch Printing Co.*, 306 NLRB at 11. First, from March 2016 forward, Mata received assignments as a dedicated driver. She was a casual worker and did not have priority, plus Harris testified credibly that he was required to distribute assignments. Atwood's testimony also revealed that he had little idea about this requirement. Secondly, the alleged touching had stopped in the previous year and was increasingly remote. Thirdly, I did not credit that Mata made all timely requests that she claimed. She testified more about March 2016 only than the entire period afterwards.

b. Discriminatory treatment

For General Counsel's second theory, in cases where a union is accused of action based upon unlawful discrimination or motivation, the appropriate analysis falls under *Wright Line*.[14] *Plasterers Local 121,* 264 NLRB 192 (1982). General Counsel must establish three elements: 1. The union member was engaged in protected activity; 2. The Union knew of the activity; and, 3. Animus and/or hostility towards the activity was a motivating factors in the union's determination to take adverse action in question against the union member. *Teamsters General Local Union No. 200,* 357 NLRB 1884, 1852 (2011), affd. 723 F.3d 778 (7th Cir. 2013).

General Counsel argues that Mata, as a member of a protected class, was subject to discrimination, and the Union demonstrated animus against Mata because of her protected class. Regarding alleged denial of training opportunities, to complete training, even after Mata reported the alleged inappropriate sexual conduct, General Counsel contends that Harris was in touch with McKinney, who denied Mata her opportunity to complete her training.

General Counsel argues that the first prong of the test permits analysis permits a protected status for females. However, the cited case does not support that inference. See *Consolidated Bus Transit*, 350 NLRB 1064−1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). Board cases are replete with examples of what protected activity is, and gender alone is not one of them. Although General Counsel analogizes *Wright Line* to discriminatory conduct, the case cited is a Title VII equal employment opportunity case, not one occurring under the Act.[15] For example, dissident union activity fits into the Act's category. Reporting alleged discrimination by a union official to the Union, however, should be considered protected activity. Yet Mata only reported the activity on about June 30. Therefore, Mata could not have engaged in protected activity between March 1 and June 30 of that year.

Taking General Counsel's theory to the next step, the Union knew of Mata's report. It is at the third step, requiring animus and/or hostility towards Mata and causing an adverse action where this theory particularly fails. First, between June 30 and August 2016, I find no evidence of animus against Mata's reports that deprived her of training opportunities and retesting. Instead, the Union took appropriate actions and immediately offered Mata a training opportunity in July, one that she declined. She was scheduled for training in August before she filed unfair labor practice charges. The credited evidence does not demonstrate that the Union, and Harris in particular, harbored ill will towards her. Compare *Kroger Co.*, 312 NLRB 7, 12−13 (1993). She was not penalized for not completing certain practicums and I discredited her rationale particularly on the roll on/roll off driving tests. Lastly, I found that Mata made no effort to complete her training and an inference that McKinney, who was a contractor to WGMA, was influenced by Harris when Mata attempted to train is a big leap that is more based on faith than fact. General Counsel has not proven its prima facie case.

I therefore find that the credited evidence does not prove that the Union discriminated against Mata regarding assignment to training or in completing her training. I shall recommend that both allegations be dismissed.

c. The Union Allegedly Solicited Mata to Withdraw Her Unfair Labor Practice Charge (Complaint ¶11)

The complaint alleges that the Union, by San Miguel Jr., solicited Mata to withdraw her unfair labor practice charge in violation of Section 8(b)(1)(A).

1. Facts

As noted above, about August 3, 2016, San Miguel Jr. texted Mata about getting things straight with the Board. San Miguel also testified that he was confused about whether Mata was seeking assistance from the Equal Employment Opportunity Commission or the Board, and that he believed that they were one entity. I find San Miguel Jr.'s testimony here not credible based upon his text and his longevity as a business agent.

[14] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

[15] Employees may state a cause of action against the Union for both Title VII and Sec. 8(b)(1)(A) of the Act in the same complaint. *Golleher v. Aerospace District Lodge 837, IAM*, 122 F.Supp.2d 1053 (E.D.Mo. 2000). However, the Title VII cause of action alone cannot be enforced through the Board. Additionally, the Board is not the only venue for cases against unions regarding hiring hall practices. See *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989).

At some time in December, the Board agent notified Mata that the Union wanted to settle the first charge. About December 6, 2016, San Miguel Jr. while attending a Union staff dinner, claimed he learned that Mata filed an unfair labor practice with the Board. (Tr. 460−461.) However, his email in August 2016 to Mata reflects otherwise. Sopchack testified that, in early December, the Union's Executive Board discussed settlement, which he personally favored, but the Executive Board did not reach consensus to do so. (Tr. 484−485.)

On Tuesday, December 8, 2016, Mata was at the union hall, trying to obtain a job. San Miguel Jr. contacted Mata by text message, asking if she had left the union hall yet. She indicated she had not and he asked that she meet him outside the building. Once outside, San Miguel Jr. asked Mata about the Board charges. Mata testified that San Miguel Jr. asked her to drop the charge and "to see if he could get me to drop the charges." (Tr. 88−89.) Mata then testified that she told San Miguel that she was going to file charges but had not heard back from the Board. She testified that she wanted the Board to know that the Union repeatedly asked her to drop the charges. (Tr. 90.) She testified that she told San Miguel Jr. that right is right and wrong is wrong, so "this has to stop." The conversation lasted no longer than 5 to 10 minutes.

About December 12, 2016, the Board agent advised Mata that the Union had not responded to the settlement offer. Mata had not seen a copy of a settlement. At some point in December, Mata told San Miguel Jr. that she was considering withdrawing the unfair labor practice charge. She gave San Miguel Jr. no explanation why she was considering the withdrawal. (Tr. 290−291.) During General Counsel's efforts to rehabilitate Mata, Mata's testimony indicates she told San Miguel Jr. she was "not sure how far she wanted to take [the charge]." (Tr. 293.)

On the morning of Thursday, December 15, San Miguel Jr. again sent to Mata a text message, this time saying, "Hey, have you gone down to withdraw the charges at the labor board?" At some point Mata told San Miguel Jr. she was trying to reach the Board, but unsuccessfully. No text message follows regarding San Miguel Jr.'s question. Mata testified that San Miguel Jr. continued to ask about her withdrawing the charge. San Miguel Jr. never indicated to her that any consequences would occur if she failed to withdraw the charge. (Tr. 295.)

By January 2017, Mata received a few complaints about her work from her dedicated employer, Ceres Gulf. She was brought before the JPRC meeting on January 25, 2017. The disciplinary actions were for safety issues. However, the Joint Productivity Review Committee found Mata was careless, caused damage while operating the truck, and had low productivity. The resulting punishment was a one-week non-referral for certain jobs and the requirement that she take a refresher course before she could be referred again as a truck driver. (R. Exh. 11.) Apparently, she received the necessary training as she continued to work elsewhere as a driver.[16]

Mata testified that, in February 2017, San Miguel Jr. asked her to come to his office after she received a job. She told him she had to pick up her job ticket, which she did, and then went to his office. San Miguel Jr. asked whether he had spoken to the Board. Mata said she had left messages but had not been able to reach the Board. San Miguel Jr. suggested she leave at that time. Mata protested that she needed an appointment. Although only the two of them were in the office, Mata testified that San Miguel Jr. took her ticket and gave it to Harris,[17] saying "Cancel her ticket. Give the job to someone else. Go ahead and sit at the NLRB until somebody talks to you." Mata stated she tried to call the Board office, and receiving no answer, drove to the Board office. (Tr. 94−95.) She later testified that San Miguel Jr. stated that she should wait at the Board office until someone spoke to her and she should withdraw the charges. (Tr. 191.) She also failed to include in her affidavit that San Miguel Jr. took her work ticket out of her hands. (Tr. 193.)

San Miguel Jr. denied ever taking a ticket away from anyone and stated he told her to sit in the office until the Board agent talked to her. (Tr. 444, 449.) He testified he placed no conditions upon her withdrawal of the charge. San Miguel Jr. testified that he and Mata had a long conversation about her decision, including "everything that was a stake, and that the demands that were met at that time." (Tr. 462.) He testified that Mata said she did not want this to happen and asked what is the next best thing. San Miguel Jr. told Mata, "We got everything we came out to accomplish. You know we did." (Tr. 463.) At some later point, San Miguel Jr. testified that Mata, in a phone conversation, told him that she was not withdrawing the Board charge and filing a criminal charge against Harris.

Sopchak's testimony is credited. He discussed frankly that he was interested in settling the matter despite the rest of the Executive Board's lack of agreement. I also credit that he did not instruct anyone to tell Mata to withdraw the charge and knew of no one else who did instruct San Miguel Jr. to pressure Mata for a withdrawal. However, this testimony does not exclude the possibility that someone else, unknown to Sopchak, instructed San Miguel Jr. to contact Mata about withdrawing the charge.

Regarding her December 8, 2016 conversation with San Miguel Jr., Mata's testimony does not seem correct: This conversation appears to be, at most, the second discussion with San

[16] Mata testified that she had no disciplinary issues until she filed charges. Mata later testified that she believed that she received the disciplinary actions because she wrote up the trucks for safety issues. The documentation from Ceres Gulf instead reflects that Mata used the incorrect means to report her safety concerns after instruction on how to do so correctly. Mata again was required to appear before the Joint Productivity Review Committee about this issue and incompetence occurring during February 2017. Because of the discipline, about March 1, 2017, Mata's dedicated employment with Ceres Gulf ended and she could not be referred to Ceres as a mule driver. (Tr. 207; R. Exh. 11.) Mata filed a grievance over one of the non-referrals but could not recall which one and she was aware that union officials other than Harris represented her in the grievance process. (Tr. 212.) Since summer 2017, Mata worked a dedicated employee for CPA Bayport. (Tr. 212.)

[17] Mata later testified that Harris was in the front office and San Miguel Jr. left his office to hand the work ticket to Harris. (Tr. 191.)

Miguel Jr. about the charge, but Mata talks about repeated attempts by this time. (Tr. 89–90.) As the Union's Executive Board meeting met in early December and discussed the possibility of settling the matter, it is unlikely that San Miguel Jr. asked Mata about withdrawal before December 7, 2016. I also find it unlikely that Mata, a charging party with a merit case possibly going to complaint, repeatedly called the Board agent without any response. More likely, Mata was torn about withdrawal, as demonstrated by her testimony, or she was unable to talk to the Board agent when the Board agent returned the calls. She was either not sure about what to do or she was not interested in withdrawing the charge. Mata instead told him that she could not reach the Board agent.

The crux is whether I credit Mata or San Miguel Jr. regarding whether San Miguel Jr. took a work ticket from Mata. Mata's repeated statements that she could not reach the Board agent certainly contributed to continued questioning from San Miguel Jr. about what Mata's intentions were for her charge. Here, I credit San Miguel Jr. He admitted he asked Mata about her charge and what he told her in more specific detail from December forward. In addition, Mata again was not quite forthcoming on her disciplinary record and she omitted from her affidavit that San Miguel Jr. took the work ticket on the day she went to the Board. I therefore credit that San Miguel did not take a work ticket from Mata.

A union acts in derogation of Section 8(b)(1)(A) of the Act if it threatens to restrain or coerce an employee from her right to access Board processes. In re *Int'l Brotherhood of Teamsters, Local 391*, 357 NLRB 2330, 2330 (2012), discussing *NLRB v. Marine & Shipbuilding Workers Local 22*, 391 U.S. 418, 424 (1968). The concept of "coercion" is rooted in the legislative history of Section 8(b)(1)(A): It was modeled after Section 8(a)(1), making it unlawful to coerce in employees' Section 7 rights. *NLRB v. Construction and General Laborers' Union Local No. 534*, 778 F.2d 284, 291 (6th Cir. 1985), denying enf. in rel. part, 272 NLRB 926 (1984). The terms "interfere with" were deleted from the proposed 8(b)(1)(A), and the Supreme Court interpreted the deletion as limiting action to act upon "'reprehensible'" acts, but not "'peaceful persuasion.'" Id. at 291, quoting *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274 (1960). Filing a charge with the Board is considered a protected act. *Sheet Metal Workers' Int'l Assn. v.* NLRB, 716 F.2d 1249, 1259–1260 (9th Cir. 1983), enfg. 254 NLRB 773 (1981).

A union that coerces an employee about filing a Board charge has violated an employee's Section 7 rights. Id. The appropriate test for these remarks is "whether the remark can reasonably be interpreted by the employee as a threat." *Consolidated Bus Transit*, 350 NLRB at 1066 (internal quotes omitted). The statements are assessed objectively. Id.

General Counsel relies upon Mata's testimony that San Miguel Jr. took her work ticket and told her to go sit at the Board until she spoke with a Board agent as evidence of the coercive nature of statements about withdrawal.[18] Because I find San Miguel Jr. denial more credible than Mata's testimony about the work ticket, I find no violation on this point.

Nor do I find a violation on any other times when San Miguel Jr. asked about the status of her charge and withdrawal. Mata admitted none of San Miguel Jr.'s additional conversations were marked with promises or threats. See *Construction and General Laborers' Union 534*, supra (peaceful persuasion). Therefore, I recommend dismissal of this allegation.

III. CONCLUSIONS OF LAW

1. Ceres Gulf, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent International Longshoremen's Association, Local 28 is a labor organization within the meaning of Section 2(5) of the Act.

3. The parties stipulated, and I find, the following are agents of the Respondent within the meaning of Section 2(13) of the Act:

a. Tim Harris	Business Agent/Financial Secretary
b. Jesse San Miguel, Jr.	Business Agent/Treasurer

4. Respondent admits, and I find, that the following were agents of Respondent within the meaning of Section 2(13):

a. Larry Sopchak	President (until May 2017)
b. B.R. Williams, Sr.	Executive Vice President
c. A.L. Williams	Vice President

5. Respondent did not violate the Act in any manner alleged in the consolidated complaint.

Accordingly, based upon the foregoing findings of fact and conclusions of law, I issue the following recommended[19]

ORDER

The complaint is dismissed.

Dated, Washington D.C. October 23, 2018

[18] General Counsel did not plead the removal of the work ticket as a violation of Sec. 8(b)(2) and I do not reach that issue.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.