

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL UNION NO. 91
(Scrufari Construction Co., Inc.)

and

Cases 03-CB-202698
03-CB-207801

DUANE KORPOLINSKI, an Individual

and

Case 03-CB-211488

FRANK MANTELL, an Individual

Eric Duryea, Esq. and Jessica L. Noto, Esq.,
for the General Counsel.
Robert L. Boreanaz, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Buffalo, New York, on June 12-14 and July 2-3, 2018. Charging Party Duane Korpolski filed charges against Respondent Laborers' International Union of North America (IUNA), Local Union No. 91 (the Union) (Cases 03-CB-202698 and 207801) on July 20 and October 12, 2017. Charging Party Frank Mantell filed a charge against Respondent Union (Case 03-CB-211488) on December 13, 2017. The General Counsel issued the Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing based on these charges on March 21, 2018.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following.

¹ The General Counsel moved to correct the record according to the error in the transcript at Tr. 24-25. I hereby grant that motion. (GC Br. at 15.)

FINDINGS OF FACT

I. JURISDICTION

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It is admitted, and I find, that for all material times, the employer named here, Scrufari Construction Co. Inc., is a corporation with an office and place of business in Niagara Falls, New York, and has been a general contractor in the construction industry engaged in commercial construction. At all material times, Council of Utility Contractors, Inc.; The Independent Builders of Niagara County; Associated General Contractors of America, New York State Chapter, Inc.; and The Building Industry Employer’s Association of Niagara County New York, Inc., collectively referred to as the Associations, have been organizations composed of various employers, including Scrufari, engaged in the construction industry. One purpose of these Associations is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including Respondent Local 91. Annually, the employer-members of each of these Associations, in the course of their business operations collectively, purchase and receive goods valued in excess of \$50,000 directly from points outside the State wherein the employer-members are located. As such, for all material times, Respondent admits, and I find, that Scrufari, and the other employer-members of the Associations have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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It is also admitted, and I find, that for all material times, Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that the Union, by operation of its non-exclusive hiring hall, refused to refer Korpilinski from its out-of-work referral list, subsequently removed him from that list without providing him with a mechanism to return to the list and threatened to sue him for legal fees lost because of his protected activity. The complaint further alleges that Respondent, by operation of its nonexclusive hiring hall, refused to place Charging Party Mantell on its out-of-work referral list because of his protected activity. The complaint alleges that by these actions, Respondent has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

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A. Union’s Hiring Hall and Referral Rules

Respondent operates its nonexclusive hiring hall from its offices located in Niagara Falls, New York, with Richard Palladino as its business manager since 2007. In doing so, it refers and dispatches members for work with signatory contractor-employers; however, members are permitted and do obtain work directly with employers without going through the hiring hall. In fact, employers often request specific members who have worked for them in the past.

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Respondent maintains an out-of-work referral list (also referenced herein as “the list”) for its journeymen members.² Members seeking job referrals must file with Local 91 a signed and dated referral form providing name, telephone number, social security number, skills he or she possesses, jobs able to perform, relevant licenses, certifications and other
 5 qualifications.³ From these forms, Local 91 compiles the out-of-work referral list, consisting of members who have registered their availability for referral. Local 91 employees post the list on a weekly basis in an area in the office visible to members. The list is updated weekly unless it is unchanged.⁴

10 It is undisputed that Respondent is supposed to adhere to its “LOCAL UNION NO. 91, LIUNA, AMENDED JOB REFERRAL RULES.” (GC Exh. 5.) Generally, members on the out-of-work list are to be referred in the order in which they registered to be added to the list, with the first member referred first, “provided that the applicant has the qualifications requested by the employer.” (Id.) Although not set forth in their entirety here, these rules
 15 include a number of exceptions, for example, the first applicant referred to any job shall be a shop steward selected by the business manager without regard to position on the out-of-work list; requests for foremen are filled by the business manager without regard to position on the out-of-work list; and applicants who require additional hours of employment in order to qualify for federal, state, or union trust fund benefit eligibility shall be referred prior to
 20 applicants who qualify for such benefits, with the members requiring such additional hours being referred in order of their position on the out-of-work list. The rules also permit Local 91 to fulfill an employer’s request for specific applicants employed by the employer within the previous year, recently laid off employees, and applicants who have worked for signatory contractors for not less than one year from the time of the request for hiring. (GC Exh. 5,
 25 rules 4A and 4B). In addition to these exceptions, Local 91 has made their own exceptions. Business Manager Palladino testified that he fulfills employers’ requests for specific employees, if available, under any circumstances, without regard to their spot on the out-of-work list. He also implied that Local 91 would also fulfill employers’ requests for minority applicants to fulfill state and local contractual requirements. However, he later denied that he
 30 referred members out for work solely because of their minority status. Finally, Palladino testified that he often considered members’ personal circumstances such as illness of the member or member’s spouse, financial hardship due to divorce and having too few hours to qualify for unemployment or health benefits.

35 The rules further require that when Local 91 determines that a member who is first on the out-of-work list cannot be referred because of refusal, unavailability, or lack of required skills, it refers the next member on the list who is willing, available and has the necessary qualifications. Regarding employer requests for employees to be filled on the same day as the

² Apprentice members are not on this list, and Local 91, through Palladino, appears to assign them to various jobs at his discretion, although the referral rules state that “Apprentices shall be referred under a separate out-of-work list, and shall be listed according to their apprenticeship year.” There is no evidence that this rule was followed. Rather, Palladino said that he tried to send them out whenever he could. (GC Exh. 5, Rule 3B.)

³ See for example, GC Exh. 3; Tr. 99.

⁴ Respondent provided, in response to subpoena requests, computer print outs of “Referral List Snapshot Reports.” These reports reflect the out-of-work referral lists as they appeared on the dates indicated at the top. See GC Exh. 2- compiled “Referral List Snapshot Report[s].”

request (or on a weekend), Local 91 is to go down the out-of-work list making one telephone call to each applicant who has the required qualifications until the job is filled. Failure of the member to accept such a short-term referral, “for whatever reason,” shall not be treated as a refusal or as being unavailable. (GC Exh. 5, rule 4A.)

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Members are required to re-register for the out-of-work list within 90 days to maintain their position on the list.⁵ Requests for members for jobs lasting 16 hours or less do not constitute referrals, and members so referred should be returned to his or her position on the out-of-work list. A member who is referred to a job which lasts five working days or less either because the job is terminated or the member is laid off or discharged will return to his or her position on the out-of-work list.⁶ However, after receiving a referral after such a short-term assignment, regardless of the subsequent referral’s length, the member must re-register in order to be included on the out-of-work list. (Id.)

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Sections of these referral rules which are in dispute in this case are, in relevant part, as follows:

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Applicants who, after registering their availability for referral, on their own, obtain one or more jobs at the trade in the aggregate lasting five (5) working days or more of employment, must advise Local 91 immediately. Those applicants will then be removed from the out-of-work list. Failure to advise Local 91 of such employment as required herein will result in the applicant being removed from the out-of-work list.

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The short term referral provisions herein are immediately inapplicable and the applicant will be removed from the out-of-work list, if the applicant takes any action within the first five (5) days of employment designed to manipulate this provision of the Amended Job Rules, such as voluntarily quitting or requesting to be laid off or discharged from a job to which he or she is referred.

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(GC Exh. 5, rules 3C, 4C.)

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The rules also require that Local 91 notify members of a job referral by calling them at the telephone number on file. “Local 91 shall record the date and time of the call, the person making the call, the name of the employer, the location of the job, the start date of the job, and the results of the call, including whether the call was answered, by whom and what response, if any, was made.” (GC Exh. 5, rule 4D). Palladino is the primary person who determines which members get referred out to jobs, while Local 91’s part-time jobs dispatcher, Mario Neri, and secretary, Diana Dominguez, are responsible for maintaining the out-of-work lists.⁷

⁵ See GC Exh. 4- 90-Day “Rollover Report” indicating “a regular daily rollover report,” printed the first week of the month for members to sign for the 90-day list, which members must sign to maintain their position on the referral list. (Tr. 106–107).

⁶ This means the position that he or she had on the list prior to being referred to a job.

⁷ Neri typically works only part of the year, from about the first or second week of May until after Christmas. He returned early in February through March 2017 to cover for Dominguez while she was out on maternity leave. During relevant time periods, other employees filled in for Neri and Dominguez when they were both absent or on breaks.

They are also responsible for calling members regarding referrals and completing work order dispatch forms containing information about the contract employers, dates of requests, project name and address, number of members requested, length of the projects, type of work to be performed and licenses needed. The backs of the dispatch forms include the name of each member called, time of the call, the caller's initials, member's response and any comments. (E.g., see GC Exh. 6.) Palladino repeatedly admitted that many of these forms introduced into evidence contain incomplete information. If a job lasts longer than 2 days, the information on the work order dispatch forms is also entered into a computer. (Tr. 69; e.g. GC Exh. 26)

B. Background of Central Controversies

Recently, the Board found that Local 91 violated the Act when it removed Charging Party Frank Mantell from its out-of-work referral list in retaliation for his August 2015 Facebook posts criticizing Local 91's business manager Palladino. See *Laborers' International Union of North America, Local Union No. 91*, 365 NLRB No. 28 (2017).⁸ Mantell's Facebook comments criticized the Union, and specifically Palladino, for permitting a Niagara Falls city councilman and mayoral candidate to obtain a journeyman's book without having to complete the Union's 5-year apprentice program. These posts prompted Palladino to file internal union charges against him in about September 2015 alleging the comments damaged his ability to run the local. In early October 2015, the Union's executive board conducted a trial, sustaining the charges, and sanctioning Mantell with a \$5000 fine and 24-month membership suspension. During a monthly membership meeting on about October 11, 2015, members voted to ratify that decision.⁹ The minutes of this meeting specifically list Charging Party Korpolski, along with three other members, who voted "no against the fine and suspension" of Mantell. (GC Exh. 18.) Palladino denied a request for a secret ballot, and had members vote openly by a show of hands. (Tr. 319-320; GC Exh. 18.) The Union removed Mantell from its out-of-work list on October 12, 2015. Mantell appealed this decision to the International Union, and the International Union informed Local 91 on December 4, 2015 that it dismissed all charges against Mantell. In addition to his appeal to the International Union, Mantell filed Board charges, alleging that Local 91 removed him from its out-of-work referral list from October 12 until November 19, 2015, in retaliation for his Facebook postings criticizing Palladino. These charges led to the Board's decision in *Laborers' Local 91*.

At some point, Palladino also filed a defamation complaint in state court in connection with Mantell's Facebook posts. There is no dispute that Palladino and Mantell do not like each other. There is also no dispute based on testimony and Palladino's demeanor at times during his testimony that he continues to be angry over Mantell's criticism of him and his union leadership.

⁸ See *Laborers' International Union of North America, Local Union No. 91*, 365 NLRB No. 28 (2017) (hereinafter referred to as *Laborers' Local 91*), for Board and administrative law judge decisions.

⁹ The meeting minutes reflect that there were 70 members in attendance, although Mantell testified that there were additional members present who may not have signed the sign-in sheet. (GC Exh. 18.)

Here, Charging Party Mantell believes that Respondent refused to place him on its out-of-work referral list from November 20, 2017, to January 19, 2018, because of his protected Board activity, including but not limited to, his Board activity described above. Similarly, Charging Party Kopolinski contends that Respondent retaliated against him for his October 11, 2015 vote in support of Mantell (and Board activity) by refusing to refer him for jobs from its out-of-work referral list from November 2015 and thereafter; by removing him from and not returning him to the list from about May 31, 2017, and thereafter, and by threatening him with legal fees. Since this saga began with Mantell, I will address his allegation first.

C. Refusal to Place Mantell Back on the Out-of-Work List from November 20, 2017 to January 19, 2018

Mantell has been a Local 91 member for over 20 years. In addition to his laborer work through the Union, Mantell has also been a full-time firefighter for the Niagara Falls fire department for over 20 years.

It is undisputed that in June 2017, the Union referred Mantell to employer Scrufari Construction to perform work for the New York State Power Authority (NYPA). Neri called Mantell the week before the job was scheduled to begin. He explained that there was a job available on the midnight shift busting concrete (with a jack hammer).¹⁰ Neri also explained that the job required a fitting for a full face respirator due to potential lead hazards, along with respiratory fitness and blood tests. Mantell admitted that he accepted the job with an understanding that it required him to work a midnight shift, and that it might last anywhere from 2 weeks to several months. Prior to starting the Scrufari job, Mantell completed all the prerequisite testing and fitting.

Mantell attended the first night of the job on Monday, June 19, 2017, which included an orientation class. Dave Penque, Scrufari superintendent, confirmed that they would be working the midnight shift, but also advised that due to some preliminary sandblasting, the NYPA job would be delayed such that the employees would not begin work before that Thursday. According to Mantell, when he realized that the job would not permit him to work or switch to a day shift, he advised Penque, that he would only be able to work two nights because of a conflict with his fire department work schedule. He claimed that Penque called him the next day to tell him that he was “laid off.” (Tr. 331, 507.) On the other hand, Penque testified that he interpreted Mantell’s inability to work more than two nights as his quitting the job. Penque said that on Monday evening, he told Mantell that he assumed that he was not returning because he could only work two days, and that Mantell responded, ““that’s right.”” They shook hands, and Mantell left. (Tr. 681-683.)

Penque and Scrufari, vice president, Thomas Warda, informed Palladino about Mantell’s inability to complete the job because he could only work 2 days. They expressed their frustration with Mantell’s taking the job when he knew that he would not be able to work the midnight shift for more than 2 days. Warda also wrote to Palladino on June 23, 2017,

¹⁰ Mantell testified that he received a call on a Thursday or Friday, and that the job started on Monday. (Tr. 475-476; 330.)

stating his disappointment “on losing the productivity and the employment of Frank Mantel[] due to his conflict of work with the Niagara Fire Department.” (Tr. 692-704; GC Exh. 63; R. Exh. 3.)

5 Penque confirmed that the referred employees began the NYPA work on a Thursday, after the sandblasting was done. That midnight or third shift for which Mantell was hired initially lasted 8 to 9 weeks, stopped for about a month and a half, and then resumed. In the interim, Scrufari laid off the four employees who started with Mantell. Penque testified that he specifically asked that these employees return, but never considered requesting Mantell
10 given the circumstances under which he left the job. (Tr. 682, 689-690.)

Mantell’s testimony about his inability to work due his fire department schedule was somewhat inconsistent.¹¹ Initially, when asked what happened after he accepted the Scrufari assignment, Mantell responded that, “I worked for two years before that I wanted to take the
15 job, but I didn’t know that I had to work midnights at the firehouse sometime in the future.” When he was asked this question again, he said that, “I took the job because I assumed at the time that I was going to be able to switch my days to bust concrete for Scrufari.” He claimed to have made this assumption because he had done this in the past. (Tr. 330-331, 474-477.) Further, Mantell, after much reluctance, admitted that prior to accepting the job, he knew that
20 he was scheduled to work the night shift at the fire house and that his fire chief would not approve a schedule change or vacation request so that he could work the Scrufari midnight shift. On cross-examination, when asked what fire department shift he was working at the time he accepted the job, he responded that, “I was off those —days.” When asked again, he said that, “I was off when I accepted the job.” Then he admitted that he was off for 4 days,
25 and then started working nights the following week, from 4:30 until 7:30 in the morning. He finally revealed that, “I work four days on, then I’m off for four days, then I work four nights, then I’m off for four and then it returns back to four days.” (Tr. 492-493.)

30 Mantell understood why Penque was not happy with him, as reflected in his testimony that:

So I let the superintendent know, Penque, know...that I was only available for those two nights. He did voice some displeasure, I felt very bad about it and I still do to this day, that...because I knew that my fire chief - - there’s a policy

¹¹ 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.

out there to change my vacations from day shift to night shifts, if it causes overtime, he will deny it.

(Id.) Mantell never informed Neri, Palladino, or Scrufari of this potential conflict when he
 5 accepted the Scrufari referral, nor did he inquire as to whether he would be able to switch
 back and forth between day and night shifts at Scrufari. (493–499.) He also contradicted his
 earlier testimony that he did not know that he would have to work nights “at the firehouse
 sometime in the future.” (Tr. 502–503.) Regarding the dispute over whether Scrufari laid
 10 him off or he quit, I find Mantell to be less credible. Mantell testified that Penque “called him
 on the phone to lay me off.” When he was asked several times if Penque explained why he
 believed that he (Mantell) quit, his testimony was nonresponsive. At first, he asked that the
 straight forward question be repeated. Next, he repeated that, “[h]e called me on the phone to
 lay me off.” Then, he finally testified that Penque never explained, but “just told me that I
 15 quit and I said no, I got laid off and him and I went at it about that . . . [h]is position was that I
 quit.” When asked if during Facebook interactions with Penque, Penque explained his
 position, he testified that “I don’t remember.” (Tr. 526–527.)

Penque recalled that during subsequent Facebook communications with Mantell,
 20 Mantell accused him of “falling into politics.” When Penque asked him what he was talking
 about because he had quit the job, Mantell said, “I did not quit.” In his opinion, Mantell had
 confused being told there was a delay in the job on Tuesday and Wednesday with a layoff.
 He said that he tried to explain that a delay was different than a layoff, but that Mantell
 “started bashing” him so that he “ended up blocking him” from his Facebook page. (Tr. 684–
 685.) I credit Penque’s testimony that Mantell was not laid off. Even if Penque told him that
 25 he was, I find that this terminology, under the circumstances, would have been a matter of
 semantics since the evidence is clear that Mantell determined his own fate with Scrufari.

A week after June 20, Mantell went to the union office and signed the new out-of-
 work referral list. Shortly thereafter, he went back to check the list. He testified that Local 91
 30 office secretary, Diane Dominguez, did not want to show him the list. When he asked
 Palladino for a copy of the list. Palladino responded that he would give him a copy, but that
 his name would not be put on the list because he had “quit the job” with Scrufari. (Tr. 331–
 333.) When he next returned to the office, Neri told him that he was not on the list because he
 was in violation of the Union’s referral rule 4C, and that Scrufari had sent a letter telling the
 35 Union that he had “quit.” (Tr. 334–335.) He claimed not to have been familiar with rule 4C
 at the time, but told Neri that Palladino was “being ridiculous,” and that he (Mantell) would
 “just have to file more charges with the N.L.R.B.” (Tr. 510.)¹² Palladino believed that he had
 manipulated the provision by quitting the Scrufari job. (GC Exh. 5, Rule 4C.)

40 In early October 2017, Mantell wrote to the International Union, insisting that there
 was no rule stating when a member should be put back on the out-of-work referral list, and

¹² Respondent’s counsel spent an inordinate amount of time trying to impeach Mantell’s testimony that prior to talking to Neri, he was unfamiliar with referral rule 4C. In this instance, it is believable that Mantell did not know or recall each one of the referral rules. Therefore, I credit his testimony that once Neri informed him of the alleged violation, he familiarized himself with the rule. Moreover, rule 4C does not instruct on how or when members should be returned to the list if they intentionally quit a job.

that he had not been referred to work since the incident in June. He further stated his belief that this was “further abuse that [his] business manager exercises with [him] dating back to September 2015 when he spoke up in a union meeting and [his] Facebook posts.” He insisted that Palladino was “hiding behind” the referral rule and lying about having contacted the
 5 International Union to “correct” the rule. Mantell requested that the general executive board attorney amend the rule as to when a member can be put back on the list and referred for work. (GC Exh. 22.) However, Palladino also requested clarification of the referral rules from the International Union. (Tr. 733; GC Exh. 19.)

10 The IUNA general president, Terry O’Sullivan, responded to both Palladino and Mantell by letter dated November 14, 2017. O’Sullivan wrote that, “[o]rdinarily, the interpretation of a Local Union’s referral rules is within the Local Union’s discretion. However, under the circumstances, it makes sense for me to advise you of the Local Union’s experience with such language.” (GC Exh. 19.) In referencing several provisions relating to
 15 short-term referrals, he explained that they all, including rule 4C, “result in the same consequence: ‘the applicant will be removed from the out-of-work list.’” According to O’Sullivan, the question posed by both parties was “when can such an applicant be restored to the bottom of the list.” He pointed out that in the case of the rule dealing with multiple short-term referrals and referrals lasting longer than 5 days, the rules require “that individual must
 20 again register in order to be included on the out-of-work list.” He stated that scenarios under all provisions required the applicant to re-register to be placed on the out-of-work list, and that “[a]ccordingly, applicants who are removed from the list for any of the cited reasons should be restored to the bottom of the list upon registering again.” O’Sullivan concluded by stating that, “[h]owever, Local Union 91 is empowered to interpret and amend its own rules
 25 consistent with the LIUNA Code of Best Practices and applicable law.”¹³ (GC Exh. 19.)¹⁴

Mantell’s interpretation of O’Sullivan’s letter was that he should have been returned to the bottom of the list once he re-registered. Palladino’s interpretation was quite the opposite, however. (Tr. 735–737.) By letter dated November 27, 2017, Palladino advised the Union’s
 30 counsel, Robert Boreanaz, that,

After receiving the communication from November 14, 2017 from President O’Sullivan, it is our understanding that our position when a member who quits a job can go back on the out of work list at the bottom of the list at the
 35 completion of that same job along with the members who worked that job [sic].

(GC Exh. 23.) Palladino testified that after consulting with the Local’s executive board, the Local decided that Mantell should be returned to the out-of-work referral list “when the first
 40 person is laid off from that job. When that job finishes to a point where somebody is laid off, where he would have normally been laid off.” Palladino asserted that, “[w]hen that particular aspect of that job, the crew that he would have been with, when the first person got laid off,

¹³ The record does not include any such best practices or other applicable law.

¹⁴ Referral rule 4C does not specify the circumstances under which a member who voluntarily quits or requests to be laid off or discharged from a job is returned to the out-of-work referral list. (GC Exh. 5.)

Frank went back on that list at the same time.” He said that Mantell “should” have been put back on the list when the first Scrufari crew member was laid off on about January 19, 2018.¹⁵ (Tr. 741-742, 744.) Palladino explained that the Local came to this conclusion to prevent members who think “by taking the job that we have just called you for is going to prevent you from being in a favorable spot on the out-of-work list,” to go to a more favorable job, “the easiest thing to do is quit and want your position [on the list] back.” (Tr. 742-743.) Palladino was also clearly upset that Mantell had quit the Scrufari job, knowing he would not be able to fulfill the responsibilities and depriving another member of work. He was also concerned about the Local’s credibility. (Tr. 725.)

Analysis

1. The alleged conduct falls within the jurisdiction of the NLRB

Although the Local does not owe employees a duty of fair representation in connection with referrals from a nonexclusive hiring hall, a Union violates Section 8(b)(1)(A) when it refuses to refer members for employment in retaliation for protected and concerted activity. *Laborers’ Local 91*, 365 NLRB No. 28, slip op. at 1 (2017). The Board in *Laborers’ Local 91* adopted the judge’s finding that, “Mantell engaged in protected, concerted activity by posting his criticism of the Respondent and its business manager on Facebook.” In doing so, the Board recognized “an employee’s right to engage in intraunion activities in opposition to the incumbent leadership of his union is concerted activity protected by Section 7,” citing *Steelworkers Local 1397 (U.S. Steel Corp.)*, 240 NLRB 848, 849 (1979); accord *Laborers’ Local 836 (Corbet Construction)*, 307 NLRB 801, 803 (1992) (members have a statutory right to object to the way officers operate the union); *Plasterers Local 121*, 264 NLRB 192 (1982) (individual’s criticism of union leadership is protected by the Act).

In addition, the Board in *Laborers’ Local 91* discussed how it had previously clarified the scope of Section 8(b)(1)(A) “by finding that internal union discipline may give rise to a violation only if the union’s conduct: (1) affects the employment relationship, (2) impairs access to the Board’s processes, (3) pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or (4) otherwise impairs policies imbedded in the Act.” *Id.*, citing *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000). The Board then stated that if the union’s discipline falls within the ambit of Section 8(b)(1)(A), it “weighs the Section 7 rights of the union member against the legitimate interests of the union to determine whether the discipline violates the Act.” *Id.*, citing *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118, 1122 (2000). The Board next analyzed the Union’s interests against Mantell’s rights, concluding that Mantell’s Section 7 right to “press the union to change its policies, especially those affecting members’ employment opportunities, outweighs the Respondent’s vague claim that its reputation was damaged.” *Laborers’ Local 91*, 365 NLRB No. 28, slip op. at 2. The Board relied in part on *Electrical Workers Local 2321 (Verizon)*, 350 NLRB at 262-263, where the Board found that the members’ interest to engage in Section 7 rights to work voluntary overtime contrary to the union’s request, outweighed the union’s legitimate interest in

¹⁵ However, as previously stated, Penque testified that he laid off the crew that started with Mantell eight to 9 weeks after they began working in June 2017. (Tr. 682, 689-690.)

maintaining loyalty and solidarity of its members. Applying these standards, the Board found that by removing a member (Mantell) from the out-of-work referral list, Respondent deprived him of work opportunities, and thereby affected the employment relationship within the scope of Section 8(b)(1)(A). *Id.*, citing *Electrical Workers Local 2321 (Verizon)*, 350 NLRB 258 (2007) (“finding union discipline impacted the employment relationship where it resulted in less opportunity to work overtime”).

I find that in applying these principles here, where Respondent refused to place Mantell back on the referral list, it deprived him of employment opportunities, placing the Union’s decision within the orbit of Section 8(b)(1)(A). Therefore, I reject Respondent’s asserted defense that this matter constitutes an intraunion issue outside the jurisdiction of the NLRB.

2. Respondent violated the Act by refusing to place Mantell on the out-of-work referral list from November 20, 2017, to January 19, 2018

As previously noted, in *Laborers’ Local 91*, above, the Board recognized that an employee’s Section 7 right to engage in intraunion activities such as Mantell’s Facebook postings criticizing Palladino, is concerted activity protected by Section 7. Similarly, I find that in this case, the same prior activity also constitutes protected concerted activity, as does Mantell’s prior Board filings, hearing, and decisions.

In this case, where the question of mixed motives is raised, the next question is whether Respondent discriminated against Mantell by failing to place him back on the referral list, in retaliation for his protected activity. Analysis of this type of 8(b)(1)(A) allegation is analogous to that of an 8(a)(3) discrimination claim against an employer. Thus, in determining a motivation based 8(b)(1)(A) discrimination case, involving discipline, the Board utilizes the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).¹⁶ See also, *Plasters Local 121*, 264 NLRB 192 (1982); *Electrical Workers Local 429*, 347 NLRB 513, 515 (2006), *remanded on other grounds* 514 F.3d 646 (6th Cir. 2008). Under *Wright Line*, the General Counsel has the initial burden of showing that Respondent’s decision to take adverse action was motivated, at least in part, by animus against Mantell’s protected activity. In doing so, the General Counsel must show that Mantell was engaged in protected activity; the Respondent had knowledge of the protected activity; and that Mantell’s protected activity was a motivating factor in Respondent’s decision to take adverse action against him.

If the General Counsel establishes a prima facie case, then the burden shifts to Respondent to prove that it would have taken the same action even in the absence of the member’s protected activity. See e.g., *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), *enfd.* Sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015); *Willamette Industries*, 341 NLRB 560, 563 (2004). But where the record demonstrates that the employer’s proffered reasons are pretextual, “either false or not in fact relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct.” *Golden State Food Corp.*, 340 NLRB 382, 385

¹⁶ There is no doubt here that Respondent’s actions here constituted discipline.

(2003), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

5 Factors which may support an inference of animus include the timing of the adverse action in relation to the protected activity, other unfair labor practices committed, respondent’s reliance on pretextual or shifting reasons to justify the adverse action, disparate treatment of members based on protected activity and a respondent’s deviation from past practice. See *Case Farms of North Carolina, Inc.*, 353 NLRB 257 (2008), citing *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. Mem. 184 Fed Appx. 476 (6th Cir. 2006); *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005); *JAMCO*, 294 NLRB 896, 905 (1989), affd. Mem., 927 F.2d 614 (11th Cir. 1991, cert. denied 502 U.S. 814 (1991); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999). Evidence in support of these factors may be either direct or circumstantial. *SCA Tissue North America LLC*, 338 NLRB 1130 (2003), enfd. 371 F.3d 983, 988-989 (7th Cir. 2004).

15 I have found that Mantell engaged in protected activity, and the evidence is clear that Respondent was aware of his activity, including his Facebook postings criticizing Respondent’s and Palladino’s actions which impacted members’ employment conditions, as well as his prior Board activity. The Board decision in *Laborers’ Local 91* issued on 20 February 7, 2017. That case closed on compliance by Board letter dated June 20, 2017. Further, Palladino, during the time frame at issue, had a pending defamation lawsuit against Mantell involving the same Facebook posts which the Board deemed protected activity.¹⁷ Evidenced by lines of questioning at trial and argument in its brief, Respondent has also indicated its belief that Mantell motivated Charging Party Korpilinski to file his Board 25 charges in July and October 2017. Therefore, the timing of Local 91 refusing to return Mantell to the list is within close enough proximity to infer animus.

30 Moreover, I find that Respondent’s overall conduct demonstrates continued animus towards Mantell’s protected activity. The Board has allowed as background evidence of animus a respondent’s conduct born out in prior Board findings. *Grand Rapids Press of Booth Newspapers, Inc.*, 327 NLRB 393, 395 (1998), enfd. 215 F.3d 1327 (6th Cir. 2000). Here, there is certainly a finding in the Board’s decision in *Laborers’ Local 91* of Palladino’s animus towards Mantell’s protected activity involving the Facebook posts. I also find that Respondent, through Palladino, continued to show animus towards Mantell’s protected 35 activity, including his continued disdain for Mantell’s Facebook postings. It was obvious from his demeanor at trial, including his facial expressions and anger tinged tone of voice when testifying about Mantell, that his attitude towards Mantell extended beyond Mantell’s accepting and then leaving the Scrufari job after the first night. (Tr. 300–303.)

40 Understandably, Palladino was upset when Mantell accepted the Scrufari job when he knew that he would have a conflict with his work schedule. However, I find that his explanation for punishing Mantell was inconsistent with the prolonged sanction, in other words, keeping him off the out-of-work referral list through January 18, 2018, which was well beyond the time that the initial work team was laid off (8 to 9 weeks after the job started in

¹⁷ Palladino did not refute testimony that his defamation suit involved some of the same Facebook comments.

June). In addition, the sanction itself went against the International Union’s advice and experience with how referral rule 4C had been interpreted by Local 91. Both Mantell and Palladino sought clarification of the referral rules at issue from the International Union as they pertained to when and how a member should be returned to the referral list after working less than 5 days, and in Palladino’s mind, after quitting to manipulate his or her position upon returning to the list. Specifically, referral rule 4C states that a member will be removed from the referral list if he or she “takes any action within the first five (5) days of employment designed to manipulate this provision of the Amended Job Rules, such as voluntarily quitting or requesting to be laid off or discharged from a job to which he or she is referred.” (GC Exh. 5, p. 5.) Terry O’Sullivan, the International Union’s general president, responded to both Mantell and Palladino in the same letter, dated November 14, 2017, as to when an applicant under those circumstances should be “restored to the bottom of the list.” (GC Exh. 19.) He acknowledged that it was within Local 91’s discretion as to how it interpreted the referral rules. However, O’Sullivan further advised that in his experience with Local 91, under all circumstances when a member has been removed from the referral list, including one who “end[ed] a referral prematurely to avoid the five-day rule (Section 4C),” “should be restored to the bottom of the list upon registering again.” Therefore, the International Union essentially recommended that Mantell be placed at the bottom of the referral list as soon as he re-registered to be on the out-of- work list.

Instead of taking the advice that he sought, Palladino conferred with his executive board, and determined that Mantell should not be returned to the out-of-work referral list until Scrufari laid off the members who started the job with Mantell in June 2017. Palladino testified that they did this to preclude members from quitting a job early so that they would be returned to the same position on the list in the hopes of being referred out to a better job. The evidence shows that Mantell took the Scrufari job hoping that he would be able to work a shift other than the one offered.¹⁸ Respondent has not shown that Mantell intentionally quit the Scrufari assignment to manipulate this provision of the rules, or to get back on the list in the same position so that he could be selected for a better job or perhaps one that would not conflict with his fire department schedule. In fact, the allegation here is that Mantell should have been returned to the out-of-work list on November 20, 2017, rather than in January 2018 which was well after the Scrufari third shift was laid off (according to Penque). (Tr. 689.) Further, moving a member to the bottom of the list, per the International Union’s guidance, would have ensured that the member would not immediately be selected for another job. I find that Palladino specifically targeted Mantell by departing from Local 91’s referral rules and Local 91 practice and exacting punishment inconsistent with his own “ad hoc” rule.¹⁹

It also appears that Mantell was treated differently than other members, except Korpolski, in that Palladino and Neri could not recall any other members who had ever been disciplined for violating the referral rules. Although there was no evidence of any members, other than Mantell and Korpolski, being disciplined for violating referral rules, I find it unbelievable that in all the years that Palladino has been business manager for Local 91 that

¹⁸ Mantell testified that he had been able to switch shifts in the past under these circumstances; no other witnesses rebutted this testimony.

¹⁹ Although Respondent claims in its brief that Local 91’s executive board decided what sanction Mantell would receive in this case, the decision was based on Palladino’s recommendation.

no other members have violated the referral rules or left a job early. In fact, the General Counsel submitted evidence showing that members were often not removed from the referral list when they violated referral rule 3C by working directly for a contract employer over 5 consecutive days without notifying the local. Although dissimilar to Mantell’s alleged violation, it is nevertheless one that Respondent enforced against Charging Party Kopolinski, and therefore additional evidence of Respondent’s animus against Mantell and Kopolinski for their protected activity.²⁰

I also find as evidence of animus, that during the time that Mantell was kept off the referral list, Respondent, through Palladino, committed another unfair labor practice as set forth later in this decision. Based on inconsistencies in the reasons for keeping Mantell off the referral list for an unreasonably extended period, timing, departure from the referral rules and Respondent’s practices, and evidence of disparate treatment, I find that Palladino sought to punish Mantell in most part due to his protected activity. I further find that his explanation for the discipline was pretextual. There is simply no evidence that Respondent would have taken the same action against Mantell but for Palladino’s disdain for his protected activity.

In balancing interests, Respondent has not shown that its pretextual reasons for keeping Mantell off the referral list for over 5 months (July 2017 through January 2018) outweigh Section 7 right to “press the union to change its policies, especially those policies affecting members’ employment opportunities.” *Laborers’ Union Local 91*, 365 NLRB No. 28, slip op. at 5.

D. Failure to Refer Kopolinski for Work Off of the Out-of-Work List and Kopolinski’s Removal from the Out-of-Work List

1. Kopolinski has not received work from Local 91’s out-of-work list

As previously stated, Kopolinski voted against sanctioning Mantell during the monthly union meeting in October 2015. Kopolinski, like Mantell, has been a long-time laborer member of Local 91 (over 20 years). He testified that he realized in early July 2017 that he had not been receiving any work through the Union since November 2015. In the same time frame, he also discovered that since about the end of May 2017, he had been removed from the out-of-work list. The evidence substantiates that when Kopolinski was on the out-of-work referral list, the Union never referred him out to work. This was the case despite the Union on numerous occasions, referring other members positioned below him on the list. Kopolinski claimed that this was the first time in his 20 plus years with the Union that he had not been referred out for work for such an extended period of time.²¹ Kopolinski testified that he did not say anything to anyone from the Local about not getting referrals until the summer of 2017 because, “[t]here’s a slow time of the year, and I just thought there was no work.” (Tr. 554). He claimed that his opinion changed when he talked to one of the Scufari superintendents, Phil Weipert, in July 2017.²² He said that when he contacted Weipert to ask if he had any work available, “the first thing out of [Weipert’s] mouth was, ‘I

²⁰ This will be discussed further below relating to Kopolinski’s allegations.

²¹ This testimony was not disputed.

²² I note that the transcript spelling of Weipert’s name is incorrect.

heard you got blackballed.” (Tr. 556.) He denied having been blackballed, informing Weipert that he remained a union member in good standing. Weipert then told him that he/Scrufari might have work the following week. Kopolinski insisted that he told Weipert to call him first, and then he (Kopolinski) would in turn notify the Union if he went to work for him. Weipert called him to work for Scrufari the next week. Kopolinski maintained that he called the union office and told Neri that he would be going to work for Scrufari, despite having stated in his August 2, 2017 Board affidavit that he told Weipert to call him (Kopolinski) first and then to call the union hall to let them know that he would be going to work for Scrufari. He claimed that he always followed this procedure after receiving work from a contract employer.²³ (Tr. 557–558, 643–645.)

2. Mantell informs Kopolinski that he is no longer on the out-of-work referral list

Kopolinski initially testified that he learned, through a telephone conversation with Mantell “in August ’17 some time,” that his name was not on the out-of-work referral list. He advised Mantell that he was working for a landscaping company (nonunion job) at the time. He said that Mantell told him to find out why he was not on the list. Kopolinski did not recall when he filed his charge, but when it was shown to him, and he was asked if he filed it before or after his conversations with Mantell and Weipert, he responded, “I think shortly thereafter.”²⁴ (Tr. 559–560.) Kopolinski’s charge, dated July 7, 2017, was filed with the NLRB on July 20, 2017. Kopolinski testified that he did not know his name was not on the out-of-work list prior to speaking to Mantell because he did not stop into the union every day to look at the list. Instead, he tried to stop in once every 2 weeks. (Tr. 559.) Mantell confirmed that he called Kopolinski in July of 2017, to tell him that his name was not on the referral list. He also said that he told him “that he has every right to file charges with NLRB for Local 91 taking him off the list.” He then gave him the contact information for the NLRB. Mantell denied that he had been coaching Kopolinski on what to tell the Board. (Tr. 337–339.)²⁵

Kopolinski did not contact Neri or anyone else in the union office before he filed his July 2017 charge. When asked what he did after he discovered that his name was not on the referral list, Kopolinski responded that, “I called the hall and talked to Mario [Neri].” (Tr. 560.) He recalled that “I think it was end of August, beginning of September maybe” when

²³ On cross-examination, Respondent’s counsel showed Kopolinski his Board affidavit where he stated that “I told him to call me first and then to call the hall.” Respondent’s counsel then asked him, “And you don’t know as you sit here today, whether or not Phil Weipert did call the hall to tell them that they—he was going to hire you like you instructed him to?” Kopolinski responded that, “He told me that he didn’t call the hall. He called me and I am the one that called the hall.” (Tr. 644.)

²⁴ Kopolinski’s July 7, 2017 charge allegation that he voted against sanctioning Mantell in October 2015 confirms that he probably spoke to Mantell about his name not appearing on the out-of-work list in early July rather than in August. (GC Exh. 1(a).)

²⁵ Mantell also spoke to Kopolinski after he (Kopolinski) made his Board affidavit, and told him that he had put down the wrong year (2016 rather than 2015) that the membership meeting occurred (during which Kopolinski voted in support of Mantell). I find that they must have discussed what Kopolinski wrote. However, I do not find this to be evidence that Kopolinski knew or should have known or discovered before July 2017 that he had been retaliated against because of his support of Mantell.

he called Neri at the union hall. He said that Neri told him that Palladino wanted to speak to him the next time that he came into the union hall. The next time that he went to the union hall, he met with Palladino, in the presence of Neri and the secretary, Dominguez, in the front office. Neri showed him a highlighted paragraph in the referral rules and they told him that he had worked more than 5 days in a row and had to contact the hall if he worked more than 5 days. Kopolinski told them that he always contacted the office to notify them that he was working on a union job. (Tr. 560-562.) Palladino and Neri did not refute testimony that they informed Kopolinski that he had been removed from the out-of-work referral list because he had violated rule 3C.

It appears from referral list snapshot reports that Kopolinski was not on the referral list from June 5, 2017, until November 21, 2017. (GC Exh. 2, pp. 134-171.) On a corresponding out-of-work sign in sheet, Kopolinski signed in on June 30, 2017, and indicated that his last day worked was "6-1-17." (GC Exh. 3.) Based on this document, he should have been returned to the out-of-work referral list after June 1, 2017. Prior to June 5 and after November 21, 2017, except for a short period between December 8 and 13, 2017, his name appeared on all referral lists of record through June 7, 2018. (GC Exh. 2, pp. 1-133, 179-182, 183-215.)

3. Between November 2015 the Union bypasses Kopolinski for laborer jobs over members positioned lower on the out-of-work referral list between November 2015 and June 2018

Kopolinski testified that prior to his voting against sanctioning Mantell in October 2015, he had received work "pretty steady in the summer," and that winter was usually the slower time of the year, with summer being the busiest.²⁶ He was last referred out by the Union as a steward in 2014.²⁷ (Tr. 638-639, 648.) (Tr. 549-550, 567-568.) He admitted that he worked directly (outside of the union referral system) for Scrufari and Patterson-Stevens, both contract employers, in December 2015. He also worked directly for these contractors, as well as contract employer C'errone, at various times in 2016 and for Scrufari in 2017. Therefore, he understood that he would not have been referred off the out-of-work list during these times. (Tr. 624.) Although he knew that the referral hall rules were posted in plain sight for members at the union hall, he testified that he never actually read the rules. He only knew that he was supposed to notify the Union if he received work directly from contractors, sign up for the out-of-work referral list when he was not working for a signatory employer and re-sign for the 90-day list.

The General Counsel submitted evidence, consisting of Respondent's records, showing that the Union has not equally applied its rules to members, with some members who worked well over 5 days before (or without) being removed from the out-of-work referral list. Palladino and Neri did not know of any other members (other than Kopolinski) who had been removed from the referral list or not placed back on the list after re-registering under those

²⁶ He identified and confirmed that GC Exh. 20 accurately reflected his work hours throughout his history with the Union.

²⁷ Kopolinski did not recall if it was Palladino who appointed him as steward in 2014, but Palladino would have been the business manager at that time. (Tr. 261; GC Exh. 62.)

circumstances. Evidence was also provided to show how the Union repeatedly, after November 2015, skipped over Korpinski to call and refer those members below him on the referral lists. Although Korpinski admitted that he had not been qualified to work on jobs involving lead abatement, asbestos work and hazmat for 8–10 years, there was no dispute that he maintained other certifications such as his OSHA 30 and/or 40 and an up to date drug card. (Tr. 629–630.) Nor was there any dispute that he was qualified to be called out for many of the general labor jobs which did not require any special certifications. (Tr. 549.) Although Respondent had not called him to work as a steward through Local 91 since early 2014, there is no evidence that Korpinski had been disqualified to act as a steward. In addition, there is no dispute that members who were listed above Korpinski were also passed over for members positioned below them on the list.

Palladino denied having discriminated against Korpinski because of his support of Mantell or prior protected activity. Instead, he testified that Korpinski was “probably” passed over for various reasons, including but not limited to: not being qualified for a job, not being specifically requested or recalled by an employer, not being a minority, not having any special need for extra work due to an illness or other financial difficulty, and even not being young or strong enough for certain jobs. However, in many instances, Palladino simply did not know or recall why Korpinski was passed over in favor of other general Laborers’ who filled spots below him on the out-of-work referral lists. In other cases, he speculated about why Korpinski was overlooked. Palladino also admitted that many of the work orders in evidence had not been properly maintained. In other words, they did not include initials of the staff person who took down referral call information, the qualifications required, if any, by the employer, or the reasons why a specific employee was selected.

The General Counsel presented numerous alleged examples where Respondent referred other members who were below Korpinski on the respective lists without explanation (GC Br., Chart A) or without an adequate explanation (GC Br., Chart B). A review of the General Counsel’s Brief Charts A and B reveal that the General Counsel accurately captured most of those occasions and supporting information from the work order forms and corresponding referral lists (set forth at GC Exh. 2) dated on or closest to the dates of the employers’ requests for members. After an examination (below) of this data and Palladino’s testimony as to why Korpinski was not referred for work, I find the evidence substantiates most of these allegations and additional instances of insufficient or speculative reasons for repeatedly bypassing Korpinski on the referral list.

a. Review of the General Counsel’s Chart A

On November 10, 2016, employer Accent Stripe requested an employee to stripe roads. Palladino initially testified that the Union referred member David Singer in November 2016 because he thought he was an apprentice and was young. However, since Singer appears on the November 7, 2016 out-of-work list at #34, he admittedly was not an apprentice. There was no explanation as to why Singer was referred and Korpinski, #24 on the list, was not. In addition, there is no evidence that this employer requested someone who was young, nor was there evidence that Korpinski could not perform the work. (GC Exh. 29 and GC Exh. 2, p. 80; Tr. 838–840.)

In response to a job request from employer Anastasi on May 16, 2016, the Union sent Member Spotted Elk, #93 on the list. Korpolinski, #56, was not referred. Palladino initially testified on direct that Spotted Elk was a minority, implying that this was why he was selected. However, on cross-examination, he testified that, “if that[‘s] the impression I gave, it’s not the reason he was sent. I just said he is a minority. . . [t]here might have been other reasons why he was sent. I wasn’t asked that question.” Although he subsequently indicated that employers like Anastasi might have requested a minority to fulfill their obligation for Department of Transportation work, he confirmed that he did not know why Spotted Elk was called for this job. (Tr. 895–896, 982–983; GC Exh. 44, GC Exh. 2, pp. 51–52.)

In response to a job request from employer Anastasi on May 9, 2016, the Union called members Alex Lotterio and Mark Nichelson. Nichelson, #38 on the list, was ultimately referred after Lotterio, #57, did not answer the call. Korpolinski, #56, was not called. Although Palladino believed that Lotterio was called first because he needed the hours to qualify for retirement, he was surprised that he was still on the referral list. (Tr. 900–902; GC Exh. 48 and GC Exh. 2, pp. 49–50.)

In response to employer Edbauer Construction’s request for a laborer with a drug and background check on May 22, 2017, the Union, on May 30, 2017, called member Timothy Hertel, #46 on the list. Palladino did not know the reason why Hertel was called and referred while Korpolinski, #35, was not, but testified that there was no need for a drug and background check for this contractor’s work. (Tr. 912–914; GC Exhs. 52, 2, pp. 132–133.)

Similarly, in response to employer Scrufari’s request for a concrete worker on August 26, 2016, the Union called/referred members Ed Passero, #44 on the list, as well as members Nichelson and Peter Morreale who were not on the referral list at the time. Korpolinski, #35, was not called. Palladino testified that he “[had] no idea other than the fact that I know they do concrete work. I don’t know why, other than that.” There was no evidence that Korpolinski was unqualified to perform concrete work (Tr. 927–928; GC Exhs. 60, 2, p. 70).

b. Review of the General Counsel’s Chart B

In response to employer Patriot Field Services’ March 10, 2017 request for 5 laborers, the Union called and referred: David Singer (#51 on the list), John Jaruszawicus (#30), Gregg Strassel (#57), Ralph Rose (#79) and John Pattatoni (#63). Pattatoni was sent as a steward. Palladino said that Singer was an apprentice, but again, he was not an apprentice as he appeared on the referral list. Korpolinski, #11, was not called. Palladino testified that, “[t]he chances are—I don’t know, but the chances are they were asked for as previous employees.” He then stated that there could be “a bunch” of reasons that Jaruszawicus would have been selected- he might have needed a day to meet his unemployment threshold or they might have tried to help him because he was going through an “ugly divorce.” I find these reasons were mere speculation. Moreover, there is no evidence that this contractor specifically requested these members, other than perhaps Pattatoni as the steward. (Tr. 768–772; GC Exhs. 8, 2, pp. 118–119.)

In response to employer W. Johnson Company’s April 26, 2017 request for two general laborers with drug and OXY cards, the Union referred members Willie Johnson, #6,

on the referral list, and Karl Walker, #56. Palladino testified that this employer had difficult requirements, including the drug and OXY cards and an OSHA certification. He further testified that Johnson’s minority status and prior work for the employer may be the reason he was sent. Regarding Walker, Palladino said that “[h]e got very little work that year . . . I’d be surprised if he had \$3 or \$400 . . . I don’t know other than [that] we try to get the hours for these guys, at least to get their unemployment and their medical.” He did not offer a reason as to why Kopolinski, #53, was not sent. (Tr. 775–778; GC Exhs. 10, 2, pp. 122–124.)

Pinto Construction’s June 17, 2016 request for three members with OXY orientation was filled with members James Drabczyk, #42 on the list, Joseph Sardina, #2, and Vincent Mameli, who was not on the list. Palladino explained that Drabczyk was always sent out as a steward because the employer’s safety person liked him. However, he only speculated that they referred Sardina and Mameli because they needed the hours. (Tr. 840–842; GC Exhs. 30, 2 pp. 59–60.) There was no evidence that Kopolinski, #37, did not have the requirements for this job.

The Union responded to employer Patterson-Stevens, Inc.’s August 15, 2016 request for two members with a drug card, OXY orientation and a steward by referring members Carl Schul, #45 on the list, and Drabczyk, #43. The contractor requested Drabczyk, but Palladino did not know why Schul was sent, or explain why Kopolinski, #40, was not called or referred. (Tr. 869–871; GC Exhs. 38, 2, p. 69.)

Palladino testified, regarding employer Pinto Construction’s October 10, 2016 request for one general laborer, that member Schul, #42 on the list, “was probably sent as a steward.” However, he was not sure. Palladino did state the qualities that he sought in a steward. He did not, however, explain why he never sent Kopolinski out as a steward when a contractor did not request a specific employee. Although, Kopolinski, #29 on the list, had not been referred as a steward since 2014, there is no evidence that he was not qualified to perform the work. (Tr. 884–886; GC Exhs. 41, 2, p. 77.)

Employer Woodsmith requested one member on May 10, 2016. The Union called members Alex Lotterio, #57 on the list, and Mike Ujesti, who was an apprentice and not on the list. Palladino guessed that Lotterio “[p]robably needed time.” Kopolinski, #55, was not called. (Tr. 898–900; GC Exhs. 47, 2, pp. 49–50.)

On May 10, 2016, employer CVF, a concrete contractor requested one employee. The Union referred member Dave Belling, #93 on the list (Kopolinski was #55). Palladino’s explanation was, “[o]ther than the fact he’s just young and strong. He’s one of the young people. The concrete work is really difficult, so the only thing I can think of is we wanted to send somebody young that could help.” Again, this reason is speculative at best, and there is no evidence that Kopolinski was not strong enough to perform concrete work. (Tr. 902–903; GC Exhs. 49, 2, pp. 49–50.)

Employer Anastasi made two requests in May 2016 for members to perform general labor work. On May 17, the Union sent member Spotted-Elk, #93 on the list. On May 26, the Union called members Nicholson, who was not on the list, and Roger Hedlund, #62. Nicholson declined and Hedlund accepted. Kopolinski, at #56 on the May 16 list and #36 on

the May 23 list, was not called. Regarding Spotted Elk, Palladino testified that “[o]ther than the fact that he’s a minority and he gets very few hours. We try to help wherever we can. I don’t know why he was so high on that list.” He then testified about the mayor’s referendum to try to hire minorities in the city, and how he “firmly” believed in it. This testimony was contrary to his testimony that he did not send members out because they were minorities. Regarding the May 26 job, Palladino testified that Hedlund is a “finish laborer, and that he sends him for special caulking jobs. However, he said it was unusual for him to be sent out on this type of job. Nevertheless, I find that Palladino failed to sufficiently justify why the Union referred Spotted Elk and Hedlund out over Korpinski. (Tr. 903-904, 910-912; GC Exhs. 50-51, 2, pp. 51-54.)

Similarly, Palladino guessed as to the reasons the Union sent out members Mameli, #42 on the referral list, to employer Certified Safety Products on about September 9, 2016. He could only guess that “maybe the work was similar” to work performed on other jobs. (Tr. 921-923; GC Exhs. 57, 2, p. 72.)

It appears that on June 7, 2016, employer American Environmental requested the “same employees” for general labor. The Union referred three employees who held spots below Korpinski, #37 on the list, during that time: Tracy Russell, #60, Dave Knack, #49, and Nichelson, #40.²⁸ Palladino testified that when an employer requests the same employees who had previously worked for them, without providing names, the Union has to look in the computer system to see who had been sent in the past. He believed that Winn and Major may have also come up as members who worked for the employer, but they were not available. Since the job order request form indicates that this contractor requested “the same employees,” I accept Respondent’s explanation in this case. (Tr. 923-926; GC Exhs. 58, 2, pp. 57-58.)

The General Counsel sites a work order request, dated August 31, 2017, for one general laborer. The Union referred member Karl Walker, #10 on the list. At that time, Korpinski was not on the referral list. Although, this is during a period when the General Counsel alleges that Korpinski should have been placed back on the list, I find that had he been placed back on the list, there is no evidence that he would have been returned to the list in a spot higher than #10. (Tr. 926-927; GC Exhs. 59, 2, p. 145.)

c. Additional instances of unexplained reasons for bypassing Korpinski

There were several other instances, not listed in the General Counsel’s charts A and B, where I find that the Union did not adequately explain why Korpinski was not called or referred out to work. In response to employer PFS’ April 28, 2016 request for three members with an OSHA 30 certification, the Union called five members: Louis Marcantonio, #60 on the list, Glenn Zientara, #13, Stanley Kajfasz, #54, Spotted Elk, #13, and Dominico Anello, #26. The Union referred out the last three, noting that the first two called back too late. There was no explanation as to why Korpinski, #55, was not called, and no evidence why he

²⁸ Members John Winn, #63, and Justin Majors, not on the list, were named on the referral form, but it was not clear as to whether they were called.

would not have been qualified over Marcantonio. In fact, Palladino testified that he thought Korpolski had his OSHA 30 certification. (Tr. 793-798; GC Exhs. 12, 2, pp. 122-123.)

5 Similarly, Palladino could not explain why the Union referred employees Karl Walker, #40 on the list, Joseph Sardina, #43, and John Jaruszawicus, #17, over Korpolski, #15, other than they “may not have had much time” or may have needed money or had another hardship such as divorce in the case of Jaruszawicus. (Tr. 832-835; GC Exhs. 27, 2, pp. 63-64.)

10 In addition, I find that Palladino only speculated as to why Korpolski, #32 on the list, was passed over to work for employer Accent Stripe on September 1, 2016 (members Ed Passero, #41 on the list and Mameli, #36, referred). Palladino testified that they probably worked for the company before, and “they liked” them. However, no specific requests were noted on the work order dispatch forms. (Tr. 835-837; GC Exhs. 28, 2, p. 71.)

15 Next, Palladino only guessed that member Marvin Dye, #31 on the list, was referred over Korpolski, #18, on June 20, 2016, because he is a minority, and that the employer, Mill Lawn “does not normally carry minorities. So that would have been a perfect fit for them.” (Tr. 851-853; GC Exhs. 32, 2, p. 61.)

20 As stated, Palladino offered speculative reasons, not listed as exceptions in the referral rules, for various referrals, including but not limited to: “guess” that the member was sent because “he had very few hours;” “[o]ther than the fact he’s just young and strong . . . [h]e’s one of the young people . . . [t]he concrete work is really difficult, so the only thing I can think of is we wanted to send somebody young that could help;” and “I have no idea other
25 than the fact that I know they do concrete work . . . [h]e’s a big man . . . [a]nd this job was a really tough job.” (See e.g., Tr. 772, 809, 830, 834, 903, 922, 928.) He emphasized that he considered a member’s personal situation when making referrals, such as a member’s illness or that of his or her spouse (Tr. 761, 892); a member’s “ugly divorce.” a member without a driver’s license (Tr. 789); and even a member with drinking problems on the job. (Tr. 809.)
30 As the General Counsel pointed out, there was no evidence that Korpolski was afforded such special treatment or consideration, even when his hours were so low (at 141.75 hours in 2017) that he was ineligible for medical benefits. (Tr. 989-990; GC Exh. 20.) There was even an incident where Palladino repeatedly referred out and assisted with a transfer to another local for a member who was caught “drunk and disorderly” on one job and “stealing”
35 on another. (Tr. 748-749.)

The General Counsel pointed out several members who remained on the out-of-work referral list despite having worked for contract employers for over 5 days. Given the various reasons provided for referring members out of order from the out-of-work list, it was not
40 surprising that Palladino admitted that unless someone in the office happens to see a member on the out-of-work list and knows that they are in fact working, that member may stay on the list. Surprisingly, he also volunteered that “it wasn’t that important to me and that happens,” and he “just didn’t pay attention.” He also attributed the failure to remove working members from the list to being short staffed, claiming that they were “not looking to offend we’re not
45 looking to hurt anybody’s feelings, but it’s not as punctual as it should be.” (Tr. 816-817.) There is no evidence that these members had notified the union office that they were working, or that they were disciplined for not having done so.

4. Credibility

5 It is a bit unusual that Korpolinski never questioned Palladino or Neri about why he did not receive any work from the out-of-work referral list between November 2015 and July 2017; however, I credit his testimony that he did not discover or believe that he had not received jobs from the referral list because of his protected activity until July 2017. This is when he heard that he had been blackballed. It is also when Mantell told him he had been removed from the referral list, and that he should file a charge with the NLRB. Korpolinski testified that he did not question Palladino or Neri as to why he was not receiving referrals from Local 91 because work had been slow. He explained that work through Local 91 typically had been slower in the winter and picked up in summer months. Although he did not obtain work through Local 91 in the summer months of 2016, when work should have picked up, Korpolinski continued to work directly for contract employers such as Scrufari and Patterson-Stevens in December 2015, and periodically in 2016, 2017, and 2018. (Tr. 631.) Respondent’s records reflect that during the time that Korpolinski did not receive work through Local 91 in 2016 and 2017, he worked directly for contractors for 958.75 hours in 2016, 141.75 hours in 2017, and 739.75 hours in 2018 (through May). In comparison, in 2014, he worked 1637.50 hours and in 2015, he worked 1282.50 hours, with many of those hours from referrals through Local 91. (GC Exh. 20.)²⁹ Further, the various referral lists do not show how many members were referred by Local 91 or employed directly by employers in the summer versus the winter. Although he did not inquire about why he did not get work from Local 91, there is no evidence to support a finding that he knew or should have known or discovered prior to his conversations with Weipert and Mantell that Respondent stopped sending him out to work because of his support of Mantell in October 2015.³⁰

Respondent points out that beginning in June 2016, Korpolinski worked for a non-union employer, Villani’s Lawn and Landscape. He worked a total of 1083.49 hours for Villani in 2016 and 718.51 hours in 2017. (R. Exh. 12.)³¹ However, working for a nonunion employer should not preclude a member from receiving referrals from the Union.

35

²⁹ Korpolinski provided uncontroverted testified that prior to his vote against sanctions for Mantell in October 2015, most of his union hours resulted from referrals, while after that time, he received no referrals from Local 91.

³⁰ Respondent sought to show through his questioning of Korpolinski that Mantell talked him into and coached him on what to say in filing his charge allegations in this case. However, it does not matter how Korpolinski came to believe in July 2017 that Respondent stopped sending him out to work after October 2015 because of his vote against sanctioning Mantell.

³¹ Respondent also noted in its brief that Korpolinski’s last day of work for Villani was August 14, 2017, less than a month after he filed his charge, citing Exh. R-12 with GC Exh. 1(a). However, evidence of his work hours and pay derived from his direct work for union contract employers and nonunion work hours and pay for Villani goes to any compliance proceedings and not to the merits of this case. (R. Br. at 5-6).

5. Palladino threatened Korpolinski

Korpolinski described his September meeting with Palladino and Neri with a good degree of detail.³² He said that Palladino invited him to the front office, and that Neri sat
 5 across from him and Palladino was on his right. He also said that Dominguez sat farther over on the right. As previously stated, he testified that Neri pulled out the referral rules, and showed him a highlighted paragraph, before they told him how he had worked more than 5 days in a row without contacting them. He testified that Palladino next told him that he should call the International Union, and that, “I had no rights of contacting you guys or the
 10 N.L.R.B.” (Tr. 562–565.) Korpolinski maintained that Palladino explained that the Local executive board had implemented a rule 6 months prior “that if a union member files false statements, the member could be reliable (sic) to pay for the lawyer fees—lawyer fees for false statements.” He recalled Palladino ending their conversation with, “this is how it’s going down.” (Id.)

Palladino denies that he threatened Korpolinski with attorney’s fees if he made false charges or statements against him.³³ He testified that in June 2017, Neri told him that Korpolinski was in the Union office wanting to speak to him. However, when he went to talk to him, Korpolinski had left. Palladino said that Korpolinski did the same thing about 3 days
 20 later. Palladino said that he did not speak to Korpolinski until a later (unspecified) date when he ran into him in the union office. He testified that he told him that “I just got a charge from the NLRB,” and asked that “If you had a problem, why didn’t you tell me?” Palladino said that Korpolinski repeatedly denied having filed a NLRB charge. When asked on direct in leading fashion if he specifically threatened him with having to pay attorney’s fees if he went
 25 to the NLRB, Palladino responded, “[t]hat never happened. I wouldn’t do that.” (Tr. 960.)

First, I find that Respondent’s attempt to impeach Korpolinski’s testimony by pointing out an inconsistency in his testimony and Board affidavit fails. The terms “charges” used in his Board affidavit and “statements” used in his testimony is are so similar in the context of
 30 this case that they do not diminish Korpolinski’s credibility. Since Neri was not questioned about his role in this conversation, we are left with Korpolinski’s testimony and statement as to what Palladino told him and Palladino’s denial. Here, I credit Korpolinski’s testimony over that of Palladino. His testimony regarding this encounter was more direct, detailed and convincing. On the other hand, Palladino’s testimony that he did not threaten Korpolinski with attorney’s fees is not believable given his admission that he brought up the fact that
 35 Korpolinski had filed a Board charge and asked him, “if [he] had a problem, why didn’t you

³² In his second charge dated October 11, 2017, and filed on October 12, 2017, Korpolinski alleged that in September 2017, and continuing thereafter, the Union violated the Act “by threatening to sue him to recover legal fees in retaliation for filing charges with the Board.” (GC Exh. 1(c).) Therefore, his charge supports Korpolinski’s later recollection that he met with Palladino and Neri in September 2017.

³³ Palladino admits that Korpolinski was kept off the list because he had not contacted the Union about his contract work with Scufari; however, Neri was not questioned regarding this conversation. Respondent’s counsel attempted to impeach Korpolinski’s testimony by showing that in one of his Board affidavits, he used the term “false charges” instead of “false statements.” (Tr. 648, 651, 653.) However, I find that these terms are so similar in context that they do not diminish Korpolinski’s credibility.

tell me?” Palladino merely denied having threatened Korpolski with attorney’s fees if he made false statements; he did not explain why he was questioning Korpolski about his Board charge. Even if Korpolski denied having filed an NLRB charge, I do not believe that Palladino brought up his charge out of his concern for any “problem” that he may have had. Instead, I find that it was more likely than not meant to intimidate. Therefore, I find it believable that he went a step further and told Korpolski what the consequences would be if he made false statements or charges in connection with his NLRB claim.³⁴

Analysis

1. Korpolski’s allegations fall within the Board’s jurisdiction

Respondent also argues that Korpolski’s allegations should be dismissed as intraunion matters pursuant to the Board’s decision in *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417. I reject this argument in relation to Korpolski for the same reason that I rejected it in Mantell’s case. The Board in *Laborers’ Local 91*, 365 NLRB No. 28 clarified the scope of Section 8(b)(1)(A) “by finding that internal union discipline may give rise to a violation only if the union’s conduct: (1) affects the employment relationship, (2) impairs access to the Board’s processes, (3) pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or (4) otherwise impairs policies imbedded in the Act.” Id. I find that the removal of Korpolski from the referral list and refusal to return him to the list interfered with his employment opportunities and the employer-employee relationship under Section 8(b)(1)(A). Id., citing *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000). Therefore, his allegations fall within the Board’s jurisdiction.

2. Section 10(b)

I will also initially address Respondent’s 10(b) defense. Section 10(b) of the Act provides that “[n]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” It is well established that the 10(b) limitations period does not begin to run until the charging party has “clear and unequivocal notice,” either actual or constructive, of an unfair labor practice. *Castle Hill Health Care Center*, 355 NLRB 1156, 1191 (2010); *Ohio and Vicinity Regional Council of Carpenters*, 344 NLRB 366, 367–368 (2005); *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004); *Concourse Nursing Home*, 328 NLRB 692, 694 (1999); *Leach Corp.*, 312 NLRB 990, 991 (1993). Actual or constructive knowledge may be ascribed where the conduct was “sufficiently ‘open and obvious’ to provide clear notice” and/or where the party would have discovered the violation had it exercised reasonable diligence. See *Ohio and Vicinity*, above at 367–368; *Duke University*, 315 NLRB 1291 fn. 1 (1995). See also *Phoenix Transit System*, 335 NLRB 1263 fn. 2 (2001) (charging party was “on notice of the facts that reasonably

³⁴ This is not the first time that an administrative law judge credited a charging party’s testimony that Palladino threatened a member with internal union charges if he filed charges with the Board. See *Laborers’ International Union of North America, Local Union No. 91 (Scrufari Construction Co., Inc.)*, Case 03-CB-196682, JD-98-17, 2017 WL 6349846 (Dec. 11, 2017).

engendered suspicion that an unfair labor practice occurred,” and could have been discovered by exercising due diligence); *United Kiser Services*, 335 NLRB 319, 320 (2010).

5 I reject Respondent’s argument that Korpinski’s claim that Respondent refused to refer him out to work since November 2015 is barred by Section 10(b). Respondent accuses Korpinski of “mak[ing] a veiled attempt to escape the time limits of 10B,” to have the judge believe that “it only dawned” on him, when he spoke to Weipert, almost 2 years later, that the Union had not been referring him out to work because of his October 2015 membership vote. Respondent insists that Korpinski’s case is time barred because if there was an unfair labor
 10 practice, Korpinski knew or should have known about it when he did not receive referrals from the Union in 2016 or at the latest in mid-2017 when work presumably picked up in the warmer months. Respondent further asserts that since Korpinski was a member who regularly visited the hall, viewed the list and re-registered for the list, he had “‘the means of discovery in his power’ to discover the alleged unfair labor practice, and possessed
 15 ‘knowledge of the facts necessary to support a ripe unfair labor practice.’” (R. Br. at 13–14, citing *St. Barnabas Medical Center*, above at 1127.)

The General Counsel argues that Respondent’s defense is without merit, because Respondent has not shown that Korpinski had “clear and unequivocal” notice of a violation
 20 before his conversation with Weipert regarding his being “blackballed,” in conjunction with his conversation with Mantell who told him that his name had not been on the referral list. I agree with the General Counsel that in the nonexclusive hiring hall context, Respondent’s unlawful conduct was not open and obvious such that the Union would have been likely to inform Korpinski had he asked that it had been intentionally bypassing him on the referral
 25 list because of his support of Mantell. Moreover, within Local 91’s hiring hall, where Palladino appears to have nearly unbridled control over determining how members are selected, without regard for the boundaries set by the referral rules or a member’s position on the out-of-work referral list, I find that Korpinski did not have the “means of discovery in his power” to find out about the potential violation. This is not like the case of an empowered
 30 union with access to certain pension fund contribution information that would have “engendered suspicion” that an unfair labor practice had occurred. See e.g. *Castle Hill Health Care Center*, above. Further, within the Local 91 hiring hall environment, where members were permitted to and did solicit and receive work directly from contract employers, outside of the referral process, it would have been difficult for Korpinski to discern the reasons why
 35 Respondent had not been selecting him from the referral list. This was certainly the case where Korpinski received work directly from union employers in 2016 and 2017, in conjunction with his nonunion work.

40 For these reasons, I find that Respondent has not met its burden of showing that Korpinski’s “clearly and unequivocally knew” of a violation before July 2017, and that his allegation here is time barred.

45

3. Respondent violated the Act by failing to refer Korpolinski from its out-of-work referral list from November 2017 and thereafter

As shown, it is undisputed that Respondent continuously stopped referring
 5 Korpolinski from the out-of-work job referral list after his October 2015 vote. I find this action was taken unlawfully in retaliation for his protected activity.

The analytical framework set forth in *Wright Line*, above, is also applicable here. See
 10 *Teamsters Local 657 (Texia Productions)*, 342 NLRB 637, 637 fn. 1 (2004). The General Counsel must establish that Respondent’s decision to take adverse action was motivated, at least in part, by animus against Korpolinski’s protected activity. In doing so, the General Counsel must show that he engaged in protected activity; Respondent had knowledge of the protected activity; and that his protected activity was a motivating factor in Respondent’s decision to take adverse action against him. If the General Counsel establishes a prima facie
 15 case, then the burden shifts to Respondent to prove that it would have taken the same action even in the absence of Korpolinski’s protected activity. See e.g., *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enfd. Sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015); *Willamette Industries*, 341 NLRB 560, 563 (2004). If the record demonstrates that Respondent’s proffered reasons are pretextual, “either false or not in fact relied upon—
 20 [Respondent] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct.” *Golden State Food Corp.*, 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

25 Factors which may support an inference of animus include the timing of the adverse action in relation to the protected activity, other unfair labor practices committed, respondent’s reliance on pretextual or shifting reasons to justify the adverse action, disparate treatment of members based on protected activity and a respondent’s deviation from past practice. See *Case Farms of North Carolina, Inc.*, 353 NLRB 257 (2008), citing *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. Mem. 184 Fed Appx. 476 (6th
 30 Cir. 2006).

As previously stated, the Board has long held that denying a member a referral in retaliation for participation in protected activities is unlawful. *Teamsters Local 460*, 300
 35 NLRB 441, Note 1. This includes failing to assist members in obtaining jobs in retaliation for protected activity. *Carpenters Local 537*, 303 NLRB 419. The Board in *Laborers’ Local 91*, above, found that Mantell’s activity leading up to and during the October 2015 membership vote to sanction him was protected. Therefore, I find that Korpolinski’s public vote against Union leadership’s recommendation for sanctions against Mantell and his Board activity are
 40 protected. I also find that Respondent was fully aware of Korpolinski’s protected activity. In fact, Palladino made it known to Korpolinski that he had seen his Board charge. I discredit Palladino’s testimony that he was not aware of how Korpolinski voted. Since Palladino was present during the October 11, 2015 membership meeting, I find it unbelievable that he did not witness the four members, including Korpolinski, out of 70 members, who raised their
 45 hands to vote no against fining and suspending Mantell. It is even more implausible that Palladino was oblivious to Korpolinski’s vote, since his name, along with the others who supported Mantell, was memorialized in writing in the minutes of the October 2015 meeting.

(GC Exh. 18.) In fact, evidence indicates that Palladino rejected one of those members' request for a secret ballot vote.

5 I find that Respondent intentionally bypassed Korpolinski when it referred members
 out to contract employers after October 2015 because of his vote in support of Mantell. First,
 Respondent's motivation is evidenced by its departure from referring Mantell from the out-of-
 work list after that fateful meeting. Second, motivation or animus is evident from the multiple
 unexplained and under explained incidents where Respondent selected laborers who were
 10 positioned below Korpolinski on the referral lists. On numerous occasions, as pointed out
 above, there was no evidence that the members who were called and referred in response to
 employer requests for general laborers were more qualified than Korpolinski. To the
 contrary, the overwhelming evidence supports a finding that Korpolinski was as qualified for
 most of the laborer jobs as those selected. However, he was passed over (and apparently not
 even considered) for members who were placed below him on the relevant referral lists. I
 15 reject Respondent's reasoning that Respondent did not violate the Act because it treated
 Korpolinski similarly to members above him on the referral lists given Palladino's inability to
 explain why Korpolinski was never considered, called or selected. Palladino's pat and
 blanket testimony that he did not discriminate against him because of protected activity is
 insufficient. Although Korpolinski was never shown as number one on a list, he was not even
 20 called to be given the opportunity to reject a job as others were when he was near the top of
 the list. Further, Respondent's argument that Local 91 was aware of Korpolinski's outside
 employment (with nonunion employers) with Villani landscaping, in addition to the work he
 obtained directly with contract employers does not pass muster. There is no evidence that
 Respondent refused to refer other members who obtained outside work or work directly with
 25 contract employers. In fact, Palladino testified on numerous occasions that he referred
 members because they had previously received work directly from contract employers.³⁵
 Thus, I find that the record is replete with evidence of disparate treatment in support of a
 finding of animus against Korpolinski's protected activity.

30 Other evidence of animus includes Respondent's departure from Local 91 practice and the
 referral rules. The job referral rules state in the preamble and Section 1 that they "shall be
 adopted and implemented by each LIUNA Local Union" and that "[r]eferrals to jobs shall be
 on a nondiscriminatory basis and shall not be based, or in any way affected by...lawful union-
 related activity." (GC Exh. 5.) As set forth above, the rules list specific exceptions for
 35 referring members out of order from the referral list. (Id.) However, Palladino often ignored
 these exceptions, making up its own rules. For example, Palladino testified that he considered
 members' personal problems such as divorce, drinking habits, risk of losing medical coverage
 and financial hardship. This is admirable, except that he never afforded such consideration to
 Korpolinski when he only had 141 hours of work in n 2017, making him ineligible for
 40 medical benefits.

³⁵ The exception would have been if they were "currently employed at the trade" during the time a request for laborers was made, or if they were otherwise unavailable. There is evidence that even under those circumstances, some members positioned below Korpolinski on the lists were considered/called and at least afforded the opportunity to decline the offer.

Respondent’s animus is also shown by Respondent’s subsequent and contemporaneous pretextual and unlawful actions in refusing to place Mantell back on the referral list as described above, and by failing to refer Korpolinski from the list and by threatening him with potential legal action as shown below. Therefore, the General Counsel has clearly established a prima facie case. Moreover, I find the evidence shows that Palladino conveniently hid behind his ability to control Local 91’s job referral process and create his own exceptions to the referral rules as a pretext in this case for not selecting Korpolinski from the referral list in violation of the Act. Accordingly, for these reasons, I find that Respondent has not met its burden of showing that it would have acted in the same manner in the absence of Korpolinski’s protected activity. Moreover, Respondent’s interest in removing Korpolinski from the referral list under pretext for discrimination does not outweigh his Section 7 rights.

4. Respondent violated the Act by removing Korpolinski from its out-of-work referral list

For the same reasons stated above, I find that Respondent, under the applicable *Wright Line* standards, violated the Act when it removed Korpolinski from the out-of-work job referral list in June and July 2017 and thereafter. Respondent was aware of that activity and exhibited animus when it unlawfully discriminated against Korpolinski. Respondent, by Palladino, continued to unlawfully show animus and discipline Korpolinski when he removed Korpolinski from the out-of-work referral list and failed to return him to the list or provide him with a mechanism to do so.

Respondent also departed from its practice and referral rules when it disciplined Korpolinski by removing him from the referral list for such an extended period. As previously discussed, the International Union had advised Palladino that in all cases where the rules called for a member to be removed from the out-of-work referral list, the member was to be returned to the bottom of the list once he or she completed the job and re-registered to be placed on the list. (GC Exhs. 5, 19). I credit Korpolinski’s testimony that he notified Local 91 that he was working for Scrufari in July 2017.

I find that Palladino’s explanation that he removed Korpolinski from the referral list because he did not tell them he had been working for Scrufari is pretextual. Palladino not only failed to return him to the list, he did not tell the truth about Korpolinski’s removal. Respondent claims that Korpolinski violated referral rule 3C; however, the evidence reveals, as previously stated, that other members were not removed from the list when they went to work for contract employers without apparently notifying Local 91. In fact, Palladino testified that he really did not even pay attention to the list or care about receiving such notifications from employers or otherwise. Further, animus and pretext are shown by other evidence described in this decision. Thus, I find that Respondent has not shown in connection with this allegation that but for Korpolinski’s protected activity, it would have still removed him from the referral list continuously from June 5 through November 21, 2017.

5. Respondent violated the Act by threatening Korpolinski

Since I have credited Korpolinski’s version of the conversation between he and Palladino and Neri at the Union office in August/September 2017, I find that the threat of

penalizing Korpolinski with attorney’s fees if he made false statements or charges in connection with his protected Board charges is unlawful. See *Teamsters Local 391 (UPS)*, 357 NLRB 2330, 2330–2331 (2012). Such an unlawful threat would reasonably “[impair] access to the Board’s processes,” therefore bringing this final allegation under the jurisdiction of the Act. *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1418–1419.

CONCLUSIONS OF LAW

1. Respondent, Laborers’ Local Union Number 91, violated Section 8(b)(1)(A) of the Act by refusing to place Charging Party, Frank S Mantell, on its out-of-work referral list from November 20, 2017, to January 19, 2018.

2. Respondent, Laborers’ Local Union Number 91, violated Section 8(b)(1)(A) of the Act by refusing to refer Charging Party, Duane Korpolinski, from its out-of-work referral list from November 1, 2015, and thereafter.

3. Respondent, Laborers’ Local Union Number 91, violated Section 8(b)(1)(A) of the Act by removing Charging Party, Duane Korpolinski, from its out-of-work referral list from June 2, 2017 and continuing thereafter, and from July 10, 2017, and continuing until November 21, 2017.

4. Respondent, Laborers’ Local Union Number 91, violated Section 8(b)(1)(A) of the Act by threatening Charging Party, Duane Korpolinski, that it would sue him to recover legal fees if he made false statements or charges in connection with this pursuing this case.

5. By the unlawful conduct committed by the Respondent, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(b)(1)(A) of the Act by refusing to place Charging Party, Frank S Mantell, on its out-of-work referral list from November 20, 2017, to January 19, 2018, I shall order the Respondent to make Mantell whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him. In addition, having found that the Respondent violated Section 8(b)(1)(A) of the Act by refusing to refer Charging Party, Duane Korpolinski, from its out-of-work referral list from November 1, 2015, and thereafter and removing him from its out-of-work referral list from June 2, 2017, and continuing thereafter, and from July 10, 2017, and continuing until November 21, 2017, I shall order the Respondent to make him whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him. Backpay for the Mantell and Korpolinski shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the

rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

5 In addition, I shall order the Respondent to compensate Mantell and Korpolinski for any adverse tax consequences of receiving a lump-sum backpay award and to file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

10 The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Respondent’s offices or wherever the notices to members are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or
15 other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 3 of the Board what action it will take with respect to this decision.

20 Further, the Respondent shall be required to remove from its files any reference to the removal of Korpolinski from its out-of-work list, and notify him in writing that this has been done and that his removal from the list will not be used against him in any way. Respondent shall also notify Duane Korpolinski in writing that it will make employment referrals
25 available to them in their rightful order of priority, without regard to his exercise of Section 7 rights.

30 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁶

ORDER

35 The Respondent, Laborers’ International Union Local 91, Niagara Falls, New York, its officers, agents, and representatives, shall

- 1. Cease and desist from
 - (a) Refusing to place Frank S. Mantell or other member employees on its out-of-work referral list in retaliation for activity protected by Section 7 of the Act, including
40 criticizing the Union or any of its decisions.

³⁶ 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.

(b) Refusing to refer Duane Korpolinski or other member employees from its out-of-work referral list for activity protected by Section 7 of the Act, including voting against internal sanctions for another member.

5 (c) Removing Duane Korpolinski or other member employees from its out-of-work referral list for activity protected by Section 7 of the Act, including voting against internal sanctions for another member.

10 (d) Threatening Duane Korpolinski or any member employee that it will sue to recover legal fees if he makes false statements or charges for activity protected by Section 7 of the Act, including voting against internal sanctions for another member.

15 (e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

20 (a) Make Frank Mantell whole for any loss of earnings and other benefits suffered as a result of refusing to place him on its out-of-work referral list from November 20, 2017, to January 19, 2018, in the manner set forth in the remedy section of this decision.

25 (b) Make Duane Korpolinski whole for any loss of earnings and other benefits suffered as a result of refusing to refer him from its out-of-work referral list from November 1, 2015, and continuing thereafter, in the manner set forth in the remedy section of this decision.

30 (c) Make Duane Korpolinski whole for any loss of earnings and other benefits suffered as a result of removing him from its out-of-work referral list from June 2, 2017, and continuing thereafter, and from July 10, 2017, and continuing until November 21, 2017, in the manner set forth in the remedy section of this decision.

35 (d) Notify Duane Korpolinski in writing that it will make employment referrals available to them in their rightful order of priority, without regard to his exercise of Section 7 rights.

40 (e) Within 14 days from the date of this Order, remove from its files any reference to the removal of Duane Korpolinski from its out-of-work referral list, and within 3 days thereafter, notify him in writing that this has been done and that his removal from the list will not be used against him in any way.

45 (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic

form, necessary to analyze the amount of backpay due to Frank Mantell and Duane Kopolinski under the terms of this Order.

5 (g) Compensate Frank Mantell and Duane Kopolinski for any adverse tax consequences of receiving a lump-sum backpay award and to file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

10 (h) Within 14 days after service by the Region, post at its hiring hall in Niagara Falls, New York copies of the attached notice marked "Appendix."³⁷ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be 15 distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved 20 in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2015.

25 (i) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by any employers to whom referrals were made between November 1, 2015 and the date of this Order, if willing, at all places or in the same manner as notices to employees are customarily posted.

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

35 Dated, Washington, D.C. June 28, 2019



Donna N. Dawson
Administrative Law Judge

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³⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to place Frank S. Mantell or other member employees on its out-of-work referral list in retaliation for activity protected by Section 7 of the Act, including criticizing the Union or any of its decisions.

WE WILL NOT refuse to Duane Korpinski or other member employees from its out-of-work referral list for activity protected by Section 7 of the Act, including voting against internal sanctions for another member.

WE WILL NOT remove Duane Korpinski or other member employees from its out-of-work referral list for activity protected by Section 7 of the Act, including voting against internal sanctions for another member.

WE WILL NOT threaten Duane Korpinski or any member employee that it will sue to recover legal fees if he makes false statements or charges for activity protected by Section 7 of the Act, including voting against internal sanctions for another member.

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

WE WILL make Frank Mantell whole for any loss of earnings and other benefits suffered as a result of refusing to place him on its out-of-work referral list from November 20, 2017, to January 19, 2018, in the manner set forth in the remedy section of this decision.

WE WILL make Duane Korpinski whole for any loss of earnings and other benefits suffered as a result of refusing to refer him from its out-of-work referral list from November 1, 2015, and continuing thereafter, in the manner set forth in the remedy section of this decision.

WE WILL make Duane Korpinski whole for any loss of earnings and other benefits suffered as a result of removing him from its out-of-work referral list from June 2, 2017, and continuing thereafter, and from July 10, 2017, and continuing until November 21, 2017, in the manner set forth in the remedy section of this decision.

WE WILL notify Duane Korpinski in writing that it will make employment referrals available to them in their rightful order of priority, without regard to his exercise of Section 7 rights.

WE WILL within 14 days from the date of this Order, remove from its files any reference to the removal of Duane Korpinski from its out-of-work referral list, and within 3 days thereafter, notify him in writing that this has been done and that his removal from the list will not be used against him in any way.

LABORERS' LOCAL UNION NO. 91

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

Niagara Center Building, 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2465
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/03-CB-202698 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (518) 419-6669.