

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

DUANE KORPOLINSKI, an Individual,

03-CB-202698

03-CB-207801

and

FRANK S. MANTELL, an Individual.

03-CB-211488

CHARGED PARTIES' EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS
TAKEN ON BEHALF OF LABORERS INTERNATIONAL UNION OF NORTH
AMERICA, LOCAL UNION NO. 91

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SUMMARY OF EXCEPTIONS

These three consolidated cases present the National Labor Relations Board (“Board”) with an opportunity to either uphold its longstanding principles or allow its jurisprudence to run amuck by complainants who prioritize themselves over their bargaining unit. Prior decisions of this Board clearly provide for the dismissal of each charge. Instead of respecting these precedents, General Counsel attempted to, and the Administrative Law Judge enabled, the manipulation of clear boundaries set by this Board determining when a claim is properly considered.

First, in regard to Duane Korpolski, both claims must be dismissed. The first charge (case: 03-CB-202698), regarding a lack of referrals from the union out-of-work referral list, is blatantly time-barred by Section 10(b) of the National Labor Relations Act. Rather than exercising any measure of reasonable diligence to remedy or even acknowledge a potential unfair labor practice, Korpolski allowed years to pass before becoming concerned. The record and the precedent of this Board unequivocally show that entertaining this claim would be unfair to Respondent and improper. Furthermore, this claim is outside the scope of the Board’s jurisdiction. Had Korpolski brought this issue to the attention of his union, it could have been properly resolved for what it is – an internal union affair.

Second, the next charge brought by Korpolski (case: 03-CB-207801), regarding an alleged threat by his union business manager, must be dismissed. The record shows that this allegation is only supported by uncorroborated and unreliable evidence. The Administrative Law Judge erroneously disregarded credible evidence and failed to conduct a fair and unbiased tribunal to base her conclusions in the intermediate report.

Third, the charge brought by Frank Mantell (case: 03-CB-211488), pertaining to his removal from the out-of-work referral list, must be dismissed. Under established precedent of this Board, a union's out-of-work referral rules are strictly an internal union affair. Allowing such a dispute to be resolved by the Board instead of through intra-union processes, will expand the scope of the Board's jurisdiction beyond what was intended by Congress when it enacted the National Labor Relations Act.

For these reasons, which will be discussed more in-depth below, Respondent asks that this Board grant exception to each and every component of the intermediate report issued by the Administrative Law Judge.

STATEMENT OF THE CASE

This action arises out of three consolidated complaints brought by Charging Parties, Duane Kopolinski ("Kopolinski"), who filed on July 20, 2017 and October 12, 2017, and Frank Mantell ("Mantell"), who filed on December 13, 2017, against Laborers' International Union of North America, Local Union No. 91 ("Union" or "Respondent"). Both Charging Parties contend that Respondent committed unfair labor practices, in violation of Section 8(b)(1)(A) of the National Labor Relations Act ("NLRA"), by restraining or coercing them of their rights guaranteed by Section 7 of that same act. 29 U.S.C. §§ 157; 29 USC 158(b)(1)(A).

After a hearing which spanned five days, June 12 through June 14 of 2018 and July 2 and third of 2018, Administrative Law Judge ("ALJ"), Donna N. Dawson, issued a decision in favor of both Charging Parties. *See, LIUNA, Local No. 91, JD-53-19* (June 28, 2019). There were six witnesses who were called to testify: (1) Mario Neri, Respondent employee and records witness

(Tr. 63-140; 171-259; 991-1003);¹ (2) Richard Palladino, Respondent Business Manager (Tr. 261-307; 707-876; 884-991); (3) Charging Party, Frank Mantell (Tr. 317-367; 397-544); (4) Charging Party, Duane Korpolinski (Tr. 547-660); (5) David Penque, former Site Supervisor for the Employer, Scrufari Construction Company (Tr. 666-691); and (6) Thomas Warda, former Vice President of the Employer, Scrufari Construction Company (Tr. 692-706).

The ALJ intermediate report embodied five main conclusions of law. First, the ALJ held the Union violated Section 8(b)(1)(A) of the NLRA by removing Mantell from its out-of-work referral list from November 20, 2017 to January 19, 2018. *LIUNA, Local No. 91*, JD-53-19, 29 (June 28, 2019). Second, the ALJ held the Union violated Section 8(b)(1)(A) of the NLRA by refusing to refer Korpolinski from its out-of-work referral list from November 1, 2015, and thereafter. *Id.* Third, the ALJ held the Union violated Section 8(b)(1)(A) of the NLRA by removing 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. *Id.* Fourth, the ALJ held the Union violated Section 8(b)(1)(A) of the NLRA by threatening Korpolinski, that it would sue for legal fees based on false statements made by Korpolinski. *Id.* Fifth and finally, the ALJ held the Union has engaged in unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the NLRA. The ALJ awarded the Charging Parties with respective back pay and related damages, and ordered the Union to post a public notice to its members memorializing its findings. *Id.* at 29-30.

The order was then transferred to the Board, pursuant to Section 102.45 of that Agency's Rules and Regulations, providing all parties with the opportunity to file for exceptions to that

¹ "Tr. ____" refers to the hearing transcripts.

decision in accordance with Section 102.46 of those same regulations. 29 C.F.R. §§ 102.45 – 102.46. On July 18, 2019, Respondent’s request for an extension to file exceptions was granted by the Board, with an amended deadline of August 9, 2019. This supplemental brief is submitted on behalf of Respondent in support of the exceptions taken from the ALJ intermediate report.

FACTS

I. Background

Laborers Local No. 91 is a labor organization pursuant to Section 2(5) of the NLRA. Based in Niagara Falls, New York, the Union represents skilled laborers working in the building and construction trades throughout the region. The Union maintains and operates a non-exclusive Referral Hall from which refers certain members to work on jobs pursuant to requests from signatory contractors. In accordance with the Union’s Collective Bargaining Agreement, contractors are welcome to hire members directly for temporary or long-term positions - typically based on previous working relationships.

The Union has adopted and implements a list of Referral Hall Rules which govern the way its members are referred to jobs. (GC Ex. 5). According to those rules, the Union must maintain out-of-work referral lists for journeyman laborers who are not working and seek referral to a signatory employer. Members must register to be placed on an out-of-work referral list by signing the list at the union hall. (Tr. 99: 10-18). There is a plethora of considerations which go into the order of referrals including, but not limited to, specific requests from contractors, requisite skills and certifications, relative hour and benefit status and, when appropriate, significant life struggles being faced by individual members. (Tr. 123:1-5; 124: 21; 127:10; 126: 1-4). However, the Union and its office administrators attempt to apply the general principle of referring its members in the order of registration on the list. (Tr. 70:20 - 71:5).

Beyond the general cycle of the out-of-work referral list, there are several rules that dictate the proper procedure for removing or relocating members on the list when necessary. (GC Ex. 5). The current Referral Hall Rules have been in effect, as they are written, since in or around 2004. Pertinent Referral Hall Rules include the following:

- Pursuant to Rule 3(C), only members who are not currently employed at the trade may register on the out-of-work list. If a member on the out-of-work list obtains work on their own consisting of five or more days of employment, the member is required to contact Local No. 91 immediately and the member will be removed from the out-of-work list. If the member fails to advise Local 91, they will also be removed from the out-of-work list.
- Pursuant to Rule 4(A)(1), the first applicant referred to any job shall be a Shop Steward, who is selected by the Business Manager without regard to the member's position on the out-of-work list.
- Pursuant to Rule 4(A)(2), the Union will refer members who require hours of employment to qualify for Federal, State or Union Trust benefit eligibility prior to members who already qualify for such benefits.
- Pursuant to Rule 4(A)(3), requests for foremen shall be referred at the discretion of the Business Manager without regard to the member's position on the out-of-work list.
- Pursuant to Rule 4(B), the Union will honor requests by an employer for specific members.

- Rules 4(C) provides that: (1) job referrals that last 16 hours or less will not be counted as a referral and will not affect the members' position on the out-of-work list; (2) for a job referral that lasts 5 days or less because the job is terminated or the member is laid off/discharged, the member will be returned to their position on the out-of-work list; (3) a member will be removed from the out-of-work list, if the member takes any action within the first (5) days of employment designed to manipulate the provisions of Rule 4 (C) regarding short term referrals.
- Pursuant to Rule 4(F), members who are unavailable for two consecutive referrals shall be moved to the bottom of the out-of-work list.

Particularly relevant for the current dispute are Referral Rules 3(C) and 4(C). (*See*, GC Ex. 5).

Mario Neri (“Neri”) and Dianna Dominguez (“Dominguez”), employees of Respondent, are primarily responsible for the operation of the out-of-work list. (Tr. 76-77). The out-of-work list is consistently posted for the members to view, in the same window where they are expected to pay their union dues (Tr. 95-96; 101-102). The list is updated weekly, though some members pay their dues monthly, bi-monthly, or even annually (Tr. 76-77). Each member on the list is required to sign a 90-day renewal to maintain their position on the list. (Tr. 105-108). Both Respondent employees testified that members are obligated, according to the referral rules, to keep the Union updated on their employment status to keep their position on the list. (Tr. 234; 287).

While Union Business Manager, Richard Palladino (“Palladino”) typically arranges the initial calls with contractors regarding work referrals, Neri and Dominguez carry out the next stage of the referral process which is coordinating the members on the list with the requisite conditions of the work order. (Tr. 68-69; 132-134). A work order dispatch form is compiled and the

recruitment begins. The Union employees follow the referral rules and the specific demands of the contractor referral when determining who to offer the job. (Tr. 178; 180-181; 183-184; 791).

All referral rules and policies are expected to be in writing. (GC Ex. 5). However, the application and interpretation of the referral rules are accepted by the Union members as extending well beyond the words specifically dictated. (Tr. 124:17-20; 126:1-4; 126:21; 127:10; 293:21-24). The rules are expected to accommodate for unpredictable situations and the interpretation of those circumstances is, according to the Union International, within the discretion of the local. (GC Ex. 19). Aside from the conflict surrounding Complaining Party, Mantell, the referral rules have generally operated to the satisfaction of the members of Laborers Local No. 91. Furthermore, nothing in the record suggests that any other Union member regards their available internal union procedures as insufficient to clarify the scope of these referral rules.

The alleged event underlying these charges occurred in October 2015, where Respondent held a meeting regarding Charging Party, Mantell. (Tr. 551). During that meeting, Paladino sought to bring union charges against Mantell regarding defamatory social media remarks that tarnished the Union. (Tr. 551). Kopolinski was one of four members in Local 91 to vote against bringing union charges upon Mantell. (Tr. 553). None of the other three members who voted “no” claim to have been retaliated against for their union activity. In fact, the record reflects that Palladino exerted great energy to secure work placement for one of those members who was struggling with addiction (Tr. 749-751), and considers another as a close friend and colleague. (Tr. 909).

Palladino, has been an active member of Local 91 since 1959. (Tr. 288). Similarly, he has been elected and held the position of Union Business Manager since 2007. (Tr. 261:17-18). Palladino testified that he never referred positions from the out-of-work referral list based on relation or animus towards protected activity. (*See e.g.*, Tr. 752:2-8; 955-956).

II. Facts Pertaining to Duane Korpolinski

Duane Korpolinski, a member of Local 91 for 22 years, filed two charges against Respondent (Tr. 548-549). The first, case 03-CB-202698, was filed on July 20, 2017, and alleges that Respondent violated section 8(b)(1)(A) of the NLRA by failing to refer Korpolinski for jobs from the out-of-work referral list. The second, case 03-CB-207801, was filed in October of 2017 and alleges that Respondent violated section 8(b)(1)(A) of the NLRA when Paladino threatened Korpolinski with legal fees if he were to make “false statements” while filing charges with the Board.

Korpolinski had not received any job referrals from Local 91, despite his regular presence on the out-of-work referral list, since that meeting. (Tr. 554). However, Korpolinski has not been without work for the entirety of that time. In fact, throughout the time of the alleged violation, Korpolinski has continuously worked directly for contractors, including Patterson-Stevens, C’errone and Scrufari. (Tr. 624-625; 630). Beginning in June 2016, Korpolinski worked as a regular laborer for Villani’s Lawn and Landscape, a non-union landscaping company. (Res Ex. 12). Furthermore, his union-affiliated work has rarely been his only source of income, his average hours ranging from 16 in 2005 to 1701.25 in 2000. (GC Ex. 20). Despite these direct contracts, Korpolinski has remained on the Union out-of-work referral list – an unacceptable practice according to the local’s Referral Rules. (GC Ex. 5). Korpolinski admits that he was not expecting to receive a work referral based on his outside employment. (Tr. 623).

The referral rules state, in relevant part:

“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.” (GC Ex. 5, Rule 3C).

Korpolinski admits that he was not entirely familiar with these Rules, except for a general and practical understanding, prior to bringing these charges. (Tr. 606; 611). Also, Korpolinski confirmed that the Referral Rules were always available for his review at the Union Hiring Hall, where he was required to sign his name to be put on the list. (Tr. 559).

There were various purposes for Korpolinski to visit the Union Hall throughout the events leading to this proceeding. For instance, the record shows that he would visit the Hall either once a week or once every two weeks, often driving a company truck of his non-union employer. (Tr. 559). Whether it was to sign up for the out-of-work referral list (Tr. 559), sign the ninety day request to stay on the list (Tr. 559), attend union meetings (T. 612), pay union dues (Tr. 613), obtain records of hours worked (Tr. 613), check his unemployment benefit status (Tr. 613), track his benefit funds (Tr. 614), pick up a sub-check (Tr. 944), or update his labor qualifications (Tr. 625), Korpolinski was consistently present. Furthermore, Korpolinski was continuously aware of the bulletin board with the referral rules and other membership information posted for review. (Tr. 615; 622).

Korpolinski testified that the out-of-work referral list was consistently available for his review on the window where he would always pay his union dues during the time of the alleged unfair labor practice. (Tr. 614). Though, he admits, to this day he has not taken the necessary

steps to become fully familiar with the Referral Rules. (Tr. 611; 647). Nor has he spoken with other members in regard to the Referral Rules outside of Mantell. (Tr. 611).

Despite being invited to every union meeting and always being able to speak with a union employee regarding his membership (Tr. 625), Korpolinski went nearly two years without raising his concerns regarding a lack of referrals (Tr. 554). Instead, he assumed he was not receiving referrals because of the lack of work available during this period. (Tr. 554). It was not until his friend, Mantell, informed Korpolinski that he was taken off of the list that he became concerned. (Tr. 558). Then, according to the hearsay testimony, Korpolinski called a Superintendent of Scufari Construction, Phil Weiphart, who claimed that he had been blackballed. (Tr. 556). Finally, in July of 2017, Korpolinski contacted the Union, via Maro Neri, to discover why he was not receiving work referrals. (Tr. 559-560). In response to his inquiry of the union, Korpolinski was informed that he was removed from the list because he had failed to notify the union of his outside work in violation of the Referral Rules. (Tr. 563). Korpolinski worked his final days at Villani's Landscaping less than a month after filing his current charges with the Board. (Res Ex. 12).

In response, Korpolinski began meeting with Mantell and building his complaint to the Board with the help of his wife. (Tr. 579-580). Korpolinski stated that he met with the Board twice and made one phone call to assist him in preparing the complaints. (Tr. 585). Additionally, Korpolinski had to change his original affidavits because he had mistaken the dates of the alleged unfair labor practice. (Tr. 589; 643). He became aware of the mistaken date after discussing the complaint with Mantell. (Tr. 593). The two are friends of around fourteen years and regularly meet outside of work to socialize at bars and each other's homes. (Tr. 600-601).

Korpolinski claims that he has been retaliated against for supporting his friend, Mantell, and voting against bringing union charges against him in October of 2015. (Tr. 603). Despite Korpolinski's claimed ignorance with the Referral Rules, he testified that according to those rules, a member who obtains outside employment and fails to inform the Union will be put on the bottom of the list. (Tr. 645).

Lastly, Korpolinski testified that he was threatened with legal fees by Richard Palladino in an amended affidavit signed on October 11, 2017. (Tr. 649-650). At first, Korpolinski claimed the threat was for making false statements, though it was changed to state false charges. (Tr. 650). Richard Paladino testified that he never made any such threat. (Tr. 960:18-20).

III. Facts Pertaining to Frank Mantell

Frank Mantell, a member of Local 91 for 22 years, alleges that Respondent violated section 8(b)(1)(A) of the NLRA by removing him from the out-of-work referral list. The charge, case 03-CB-211488, was brought to the Board on December 13, 2017. Aside from Mantell's occasional jobs from Local 91, he is a full-time firefighter for the City of Niagara Falls. Due to the shifting hours from his firefighter position, Mantell typically only takes positions that are short-term and can accommodate shifts.

This is one part of an ongoing saga between Mantell and the Union Business Manager, Richard Palladino. There has already been another charge brought before the Board which was decided on February 7, 2017. *Laborers' Local 91*, 365 NLRB No. 28. Also, Palladino has brought a pending civil claim against Mantell for allegedly defamatory social media postings. Most importantly, the members of Local 91 have elected to bring union charges against Mantell three separate times. (Tr. 409).

The events underlying this specific charge are quite narrow. Specifically, Mantell claims that the Union committed unfair labor practice when it took his name off the out-of-work referral list for accepting a position he could not fulfill and subsequently quitting that same position with Scrufari Construction. (Tr. 679). This, the Union asserted, was in violation of Referral Rule 4(c). (Tr. 975). The Referral Rules state, in relevant part:

“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.” (GC Ex. 5, Rule 4C).

The original work request was submitted to Palladino in early June 2017, requesting several laborers for a concrete-busting job during the midnight shift (Tr. 673:20-25). The job required extensive screening prior to the start of work which included fitting respirators, blood testing and even a special training course which was at the expense of the contractor (Tr. 671:15-17; 673:10-14; 675:2-4; 677; 678:1-7). The contractor emphasized at the outset that it was important that the Laborers referred were ready and able to fulfill this position based on the complexity and time-frame. (Tr. 716:18-25). Additionally, the final date of this referral was not clear, but rather, open-ended which was explained to the members offered the position. (Tr. 484:25- 485:14).

Based on his position on the out-of-work list, Mantell was called and informed about this opportunity with Scrufari. (Tr. 476:3-19). According to Mantell, he accepted the position under the assumption that he would be able to accommodate his full-time fireman’s position by alternating shifts. (Tr. 330-331). To be sure, he was well aware of the schedule conflicts when he accepted the referral. (Tr. 493:11-20).

According to David Penque (“Penque”), the Site Supervisor on this particular referral, Mantell never requested for accommodation or made any effort to manage both positions. (Tr. 679). Instead, Mantell approached Penque on the first day of the project and explained that he could only work the job for two days because he was due to work a night shift for his regular job with the Fire Department. (Tr. 679:9-13). This was especially troubling for Penque, because this particular job required an extensive amount of investment for respirator masks, medical testing and other preparations. (Tr. 679-680). Putting aside his frustration, Penque understood Mantell’s conflict and wished him well. (Tr. 681:16-22).

Thomas Warda, Scrufari Vice President at the time, was less understanding and testified that because of Mantell’s actions he was very disappointed with Local 91. (Tr. 698). Warda instructed Penque to express their disapproval of suggesting this referral and followed up himself by writing a letter to Palladino and following up with a phone call. (Tr. 698:24-699:1; R. Ex. 3). Palladino’s offer to remedy the problems caused by Mantell’s by referring another member of Local 91 was denied (Tr. 722:8-14), citing the costs associated to prepare and qualify each laborer for this project. Mantell’s manipulation did not stop there and even engaged in a social media argument with Penque regarding the terms of his exit from the job. (Tr. 684:13- 685:6). Mantell tried to impose his false claim of being laid off, to which Penque unequivocally denied.

Despite the seemingly clear language of the Union Referral Rules, Mantell took issue when he was removed from the out-of-work referral list after leaving the Scrufari job before it was finished. (Tr. 332-333). In response, he spoke with Mario Neri who informed Mantell that he had been removed because he quit the position and attempted to manipulate the Referral Hall Rules, in accordance to referral rule 4(c). (Tr. 334-335). When the two could not reach common ground, Neri suggested that Mantell should write to the International Union to seek clarification on the

application of Rule 4(c). (Tr. 339-340; 729:13-17). Shortly after, Mantell filed charges with the Board on July 5, 2017. (Tr. 339-340; GC Ex 21).

Palladino also contacted the International Union to seek clarification on referral rule 4(c). (Tr. 968-969). The International responded to both members with a single letter, dated on November of 2017 (four months after charges were filed), that did not quite solve the problem (Tr. 355). Specifically, the letter reiterated the general understanding of referral rule 4(C), but did not affirmatively state when a member was to be put back on the list after quitting a position. (Tr. 355-356; 731:15-18). The letter did suggest that the local maintains discretion on the implementation of the referral rules beyond the interpretations provided by the International (GC Ex 19).

The International's General President, Terry O'Sullivan, responded that, generally, members "who are removed from the [out-of-work list] for any of the cited reasons should be restored to the bottom of the list upon registering again." (GC Ex 19). However, O'Sullivan also explained that Local 91 was empowered to interpret and amend its own Referral Hall Rules. The analogies used by O'Sullivan to issue his recommendation were not directly correlated or responsive to Mantell's quitting Scrufari. (Tr. 739:1-16). Rather than continuing to pursue resolution through internal union processes, Mantell brought this issue to the Board.

IV. Summary of Fact-Finding Tribunal

The five-day fact-finding tribunal was plagued before it even began. The ALJ failed to offer Respondent full and fair consideration and even prevented Respondent from articulating points of argument for the record. (*See e.g.*, Tr. 44-50). Specifically, counsel for Respondent raised the clear Section 10(b) conflict during a pre-trial proceeding (Tr. 48-49; 51).

Instead of performing diligent evaluation, the ALJ served as a bulwark to the presentation of argument and evidence in this regard (Tr. 52; 157; 185-186; 188; 455; 460; 467-468; 940). Furthermore, the ALJ altered its ruling in this regard several times throughout the proceeding, never with particular clarity. (Tr. 53; 151-152; 156-157; 185-186; 190-191 472-273). When Respondent Counsel sought clarity, he was denied and called “a smart-aleck” by the ALJ. (Tr. 516). Additionally, the record is littered with instances of the ALJ cutting off Respondent Counsel, refusing to preserve the record and using inappropriate language and demeanor for such a tribunal. (*See e.g.*, Tr. 188-189; 191; 198; 326; 455; 481-482; 586). The ALJ often used phrases towards Respondent Counsel such as “I’m not hearing it” (Tr. 190), and “I’m done with you okay.” (Tr. 199). At one point, Respondent asked to articulate an objection and the ALJ’s response was simply, “[n]o, you cannot” (Tr. 192). Multiple times, the ALJ formulated arguments for General Counsel, (*See e.g.*, Tr. 431), and forced Respondent Counsel out of his form of witness examination. (Tr. 590-591).

The ALJ insisted on considering irrelevant evidence from outside the record for “context” which now is clearly evidence of prejudice. (Tr. 414; 469). The record reflects that the ALJ often raised her voice and displayed prejudicial demeanor towards Respondent. (Tr. 442; 473). Instead of allowing Respondent to articulate its arguments, the ALJ threatened to “shut this [meaning the proceeding,] down completely,” and to remove Respondent’s opportunity to cross-examine a Charging Party (Tr. 445; 459). The ALJ refused Respondent counsel the opportunity for a break to consider evidence admitted to the record. (Tr. 457-458). The ALJ blatantly restricted the scope of Respondent Counsel’s examination of witnesses. (Tr. 473). Further, when Respondent Counsel explained a relevant line of questioning, the ALJ rejected the valid rationale by saying, “[w]ell, too bad, that’s how it goes here.” (Tr. 517).

If Respondent had been saved from this prejudicial effect, a great deal of time and resources could have been saved in the presentation of its Section 10(b) affirmative defense (*Cf.* Tr. 143; 189; 310). The ALJ often claimed that she was allowing the trial to proceed to better reach a conclusion on the 10(b) issue (*See e.g.*, Tr. 186-188), however, it is not clear whether there was any impact whatsoever from such consideration other than the introduction of evidence that has no relevance. Aside from the generally inappropriate conduct during the proceeding, the ALJ even rushed the final days of hearings. (Tr. 941-942). The record clearly reflects that the ALJ maintained no control of the proceeding which undoubtedly resulted in a prejudicial impact on Respondent. Now, this Board is Respondent's first and final opportunity for fair consideration.

ARGUMENT

The intermediate report of the ALJ must be dismissed for several reasons. From the record, it is clear that the tribunal was conducted in a biased and prejudicial manner. While multiple conclusions of the ALJ report were credibility determinations, not all relevant evidence was fairly considered. For this reason alone, the Board must not accept the report as it was written but instead, thoroughly examine the record and relevant precedent with fair consideration.

According to unambiguous precedent of this Board, none of the charges brought against Respondent can prevail. It cannot be disputed that the ALJ here failed to allow, never mind consider without prejudice, the arguments raised and evidence presented by counsel for Respondent during this five-day proceeding. In that same vein, each of the conclusions reached by the ALJ do not represent justice.

Specifically, charge 03-CB-202698 is time-barred by Section 10(b) of the Act. If Respondent had been allowed to fully present its argument in this regard, that charge would be dismissed. If the ALJ's finding is not abandoned, employees will now be armed with the precedent to stack damages and run their locals into bankruptcy by simply claiming ignorance.

Additionally, the ALJ swayed in favor of the Charging Party who claimed, without any corroboration, that he was threatened for conducting protected activity. This baseless allegation was not supported by any reliable testimony or evidence and should not be endorsed by this Board. On the other side of this allegation were two life-long union members who diligently serve their local. While the ALJ's credibility determinations warrant inherent deference from this Board, the record as a whole clearly proves that the ALJ was wrong.

Finally, each of the charges regarding Respondent's Referral Rules are clearly outside the scope of the Board's jurisdiction as established by the National Labor Relations Act and as applied by this Board. Furthermore, even if considered, Respondent maintains a critical and exclusive interest in the underlying matter asserted. If this Board determines that a Union may no longer interpret its own out-of-work referral rules, as the ALJ concluded, there will be no use to a great deal of precedent issued by this Agency.

This Board must not allow these two members to derail Laborers' Local No. 91 for their own self benefit.

EXCEPTIONS TAKEN

Respondent takes the following exceptions to the ALJ intermediate report, pursuant to Section 102.46 of the Board's Rules and Regulations. 29 C.F.R. §§ 102.45 – 102.46.

I.
THE CHARGE BROUGHT BY KORPOLINSKI, 03-CB-202698, IS TIME-BARRED BY SECTION 10(b) OF THE ACT

The ALJ erred when it held that section 10(b) of the NLRA does not bar Korpinski's charge related to the out-of-work referral list. *See LIUNA, Local No. 91*, JD-53-19, at 24-25. Specifically, it cannot be disputed that Korpinski received constructive knowledge of the alleged unfair labor practice, and could have timely filed a claim, if he had conducted reasonable diligence to discover as much. *See, Castle Hill Health Care Center*, 355 NLRB No. 196, at 1991-1192 (2010); *Ohio & Vicinity Regional Council of Carpenters*, 344 NLRB No. 37, at 367-369 (2005); *Local 25, International Brotherhood of Electric Workers, AFL-CIO*, 321 NLRB No. 71, at 500-501 (1996) (constructive notice found and claim barred by Section 10(b) for employee who was passed on union's out-of-work referral list). The record clearly demonstrates that Korpinski possessed the means of discovery to bring this allegation within the confines of Section 10(b). *C.f., Phoenix Transit System*, 335 NLRB No. 100, at 1271-1273 (2001); *United Kiser Services, LLC*, 335 NLRB No. 55, at 319-320 (2010); *Concourse Nursing Home*, 328 NLRB No. 91, at 694 (1999); *In re Miramar Hotel Corp.*, 336 NLRB No. 123, at 1252-1253 (2001); *Moeller Bros. Body Shop, Inc.*, 306 NLRB No. 29, at 192-193 (1992). If the Board accepts the ALJ decision in this regard, individuals will now be able to claim ignorance - despite clear notice - and amass damages to the detriment of their labor organizations. *A&L Underground and Plumbers Local Union No. 8*, 302 NLRB No. 76, at 468-469 (1991). To be sure, Korpinski filed a complaint with the Board, in response to uncorroborated speculation, before he ever brought this issue to the attention of his Union.

Section 10(b) of the NLRA states, “[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.” 29 U.S.C. § 160(b). This statute of limitations “does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice.” *Castle Hill*, 355 NLRB No. 196, at 1191, *citing*, *Vanguard Fire & Security Systems*, 345 NLRB 1016 (2005); *Allied Production Workers Local 12*, 337 NLRB 16, 18 (2001). Where a charging party “could have discovered the alleged misconduct through the exercise of reasonable diligence.” *Ohio & Vicinity*, 344 NLRB No. 37, at 368; *citing*, *Phoenix Transit System*, 335 NLRB 1263, n. 2 (2001) (claim is barred when the charging party is “on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred”). The party asserting the affirmative defense has the burden of proving the charging party was on notice to the alleged misconduct. *Id.*; *citing*, *Chinese American Planning Council*, 307 NLRB 410 (1992), *rev den. mem.* 990 F.2d 624 (2d Cir. 1993).

While General Counsel contends and the ALJ erroneously determined that Korpolski was not on notice for purposes of Section 10(b), the record shows that Korpolski is merely hiding behind a veil of unreasonable ignorance. To be sure, this Board has held that a union member maintained constructive notice, pursuant to Section 10(b), when they were bypassed on their Union Hiring Hall out-of-work referral list. *See, Local 25, IBEW, AFL-CIO*, 321 NLRB No. 71, at 500. In *Local 25*, the complaining party was similarly active and present within the Union Hiring Hall. *Id.* at 498-499. Just as is the case with Korpolski, the complainant was cognizant of her hours worked during the time in question, socialized with other members to discover who was getting referred where, and despite being told explicitly, via a “rumor,” failed to bring a timely claim or

otherwise seek remedy. *Id.* at 500. The Board held that this constitutes constructive notice for the purposes of Section 10 (b) and bars an otherwise valid claim of unfair labor practice. *Id.* at 502-503. Importantly, the Board found that the claimant “possessed knowledge of the unfair labor practice,” based on her lack of referrals and knowledge of other members’ referrals, “but did not exercise reasonable diligence in filing the charge within the time limit.” *Id.* at 500.

There are additional factors relevant to Korpolinski’s charge that prove his claim is barred by Section 10(b). For instance, this Board has held that a party has constructive notice where they visually see other members being referred while they are not. *United Kiser Services, LLC*, 355 NLRB No. 55, at 320. Not only did Korpolinski visit the Hiring Hall weekly or bi-weekly, he continuously had access to the out-of-work referral list which would update members’ referral status on a weekly basis. (Tr. 76-77; 95-96). Korpolinski’s constant presence and access to Respondent’s referrals provide constructive notice alone.

Further, this Board has held that constructive notice may be provided from summaries of a member’s pension fund contributions. *Concourse Nursing Home*, 328 NLRB No. 91, at 694. The record clearly shows that Korpolinski was able to, and did in fact, monitor his pension fund contributions to determine whether he was receiving adequate referrals. (Tr. 613-614). If he were to exert and sort of reasonable diligence, the issue could have been resolved before almost three years of monetary damages accrued.

Next, this Board has found constructive notice where the employee had open access to their wage information. *In re Miramar Hotel Corp.*, 336 NLRB No. 123, at 1252-1253. It is undisputed that Korpolinski regularly went to the Union Hall to access his wage information and to pick up sub-checks. (Tr. 613; 944). Korpolinski should have been aware of the alleged unfair labor practice based on this information alone. Instead, as the record reflects, Korpolinski maintained

non-union employment and was entirely unconcerned about his referrals until his friend provoked him into filing charges against his Union. (Tr. 624-625; 630; Res. Ex. 12).

If the Board allows Korpolinski's claim to prevail, Respondent will suffer undue hardship. These hardships are an essential purpose of Section 10(b) and its unique relativity to labor organizations. *See, A&L Underground and Plumbers*, 302 NLRB No. 76, at 468-469. To be sure, "a respondent's ability to prepare a defense is increasingly prejudiced as those circumstances become more distant in time and pertinent evidence grows increasingly stale." *Id.* While the ALJ called Palladino and Neri's integrity into question based on their occasional vagueness, the reality is that this Board bars claims of this nature because the testimony naturally gets diluted after a period of nearly three years. *Cf. Laborers' Local No. 91*, JD-53-19, at 14. For this precise reason, this Board imposes a duty upon a charging party to exercise reasonable diligence before being allowed to bring a charge in accordance with Section 10 (b). *Moeller Bros. Body Shop, Inc.*, 306 NLRB No. 29, at 192-193. The ALJ's refusal to fully consider Respondent's affirmative defense and to blatantly discredit the testimony of Palladino and Neri is a clear indication that the tribunal was conducted in a prejudiced manner.

Accordingly, Respondent asks the Board to take exception to the ALJ's conclusion regarding Respondent's affirmative defense pursuant to Section 10 (b) of the National Labor Relations Act.

II.
**THE RECORD DOES NOT SUPPORT THE FINDING OF THE ALJ THAT
KORPOLINSKI WAS THREATENED FOR CONDUCTING PROTECTED ACTIVITY**

There is no reliable or corroborated testimony to credit Korpolinski's accusation of threat by Richard Palladino for making false statements and the ALJ decision must be rejected insofar as it held to the contrary. *See, LIUNA, Local No. 91*, JD-53-19, at 28-29. This portion of the report accepted Korpolinski's testimony and completely rejected that of the Union Business Manager for a reason that is entirely unclear. Such a threat, the ALJ held, would limit an employee's access to the Board's processes in violation of Section 8(b)(1)(A) of the Act. *Id., citing Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1418-1419. While the ALJ is of course empowered to make credibility determinations, and if such a threat had in fact occurred, Respondent would be liable for unfair labor practice. *In re International Brotherhood of Teamsters, Local 391*, 357 NLRB No. 187, at 2330-2331 (2012). However, where the record shows by a clear preponderance of all the relevant evidence that the ALJ's credibility determination was wrong, the Board may reverse that finding. *See, Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957); *citing, Standard-Toch Chemicals, Inc.*, 104 NLRB 1120 (1953).

Furthermore, where an ALJ fails to conduct a fair and unbiased tribunal, their findings must be set aside. *Indianapolis Glove Co.*, 88 NLRB No. 207, at 986-987 (1950); *Reading Anthracite Co.*, 273 NLRB No. 187, at 1502-1503 (1985); *Dayton Power & Light Co.*, 267 NLRB No. 41, at 202-203 (1983); *The Center for United Labor Action*, 209 NLRB No. 130, at 814-815 (1974). Here, the record clearly demonstrates, by at least a preponderance of the evidence, that the Union Business Manager was and continues to be a diligent leader of his local. The ALJ improperly disregarded his and supporting testimony, instead looking only to uncorroborated and unreliable testimony of the Charging Party. This credibility determination calls into question the integrity of

the entire proceeding and the record reflects that counsel for Respondent Counsel was not afforded a fair opportunity to introduce evidence or present arguments on behalf of its client. Accordingly, any credibility determination of this ALJ must be carefully examined and ultimately set aside. *Cf. Dayton Power & Light Co.*, 267 NLRB No. 41 (setting aside an ALJ decision where the record showed bias, pre-judgment and refusal to admit or consider evidence and arguments).

Respondent was at a disadvantage from the commencement of this proceeding. Throughout the five-day hearing, the ALJ consistently prevented Respondent Counsel from stating, never mind justifying his contentions of law. (Tr. 52; 157; 185-186; 188; 455; 460; 467-468; 940). The record shows that the ALJ called Respondent Counsel offensive names and regularly refused to allow him the opportunity to speak. (Tr. 192; 199; 516). The ALJ admitted and considered irrelevant evidence which had no true relation to the current charges, but still found its way into the intermediate report. (Tr. 414-469; *Laborers' Local No. 91*, JD-53-19, at 5-6). In that report, a nearly two-page section entitled "Background of Central Controversies" casts Palladino as a villain which was apparently the ALJ's impression coming into the proceeding. On the record, there is nothing to call into question the character or demeanor of Palladino or Neri, the two Respondent employees.

However, there is a multitude of testimony which calls into question the honest nature of the complaining parties. For instance, Mantell who is undoubtedly the instigator in all three of the current charges, was "grinning" at the frustration of the ALJ during the proceeding. (Tr. 433-434). Palladino, on the other hand, was respectful and composed while observing each day of the proceeding. Each time Palladino was asked whether he considered animus towards protected activity when referring jobs, he answered to the negative under the penalty of perjury. Palladino has been re-elected as Respondent Union's Business Manager several times and commands the

loyalty and respect of his members. Meanwhile, Mantell has had three union charges brought against him since 2015.

A Trier of Fact is entitled to deference in their credibility determinations. *Stretch-Tec Co.*, 118 NLRB No. 183. However, this Board cannot adopt a determination which is simply not supported by the record. This Board has rejected ALJ decisions where the “Trial Examiner was biased and prejudiced.” *See e.g., Indianapolis Glove Co.*, 88 NLRB No. 207, at 986-987. Also, the report cannot be accepted when “the Trial Examiner, in one or more instances, cut off attempts of witnesses for the Respondent to explain apparent inconsistencies in their testimony, limited the Respondent’s cross-examination of witnesses, and examined witnesses for the Respondent intensively and in a hostile manner in an over-zealous effort to attack their credibility.” *Id.* at 986.

Further, each party is entitled to a Trier of Fact who will not engage in “hostility, bias, and prejudice towards the Respondent and prejudgment of the merits of the case.” *Reading Anthracite Co.*, 273 NLRB No. 187, at 1502-1503. While Respondent did not move to disqualify this ALJ, as was done in *Reading Anthracite Co.*, the record clearly shows that Respondent suffered from the same prejudice and prejudgment. *See also, The Center for United Labor Action*, 209 NLRB No. 130 (prejudgment found where the ALJ rejected arguments without allowing counsel to introduce evidence); *Dayton Power & Light Co.*, 267 NLRB No. 41 (an ALJ report is set aside where there is clear evidence of refusal to entertain evidence or arguments sought by parties).

Accordingly, Respondent asks the Board to disregard the ALJ’s credibility determinations and dismiss Kopolinski’s complaint regarding threats which the record does not support.

III.
CHARGES, 03-CB-202698 AND 03-CB-211488, ARE OUTSIDE THE SCOPE OF THE BOARD'S JURISDICTION

The ALJ erred when it held that charges, 03-CB-202698 and 03-CB-211488, regarding the out-of-work referral rules, are within the Board's jurisdiction. *See LIUNA, Local No. 91*, JD-53-19, at 24. This determination was based, in large part, on the Board's recent clarification of the scope of Section 8(b)(1)(A) of the NLRA in *Laborers' Local 91*, 365 NLRB No. 28 (Feb. 7, 2017); *citing, Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000). In *Laborers' Local 91*, the Board reiterated "that internal union discipline may give rise to a violation only if the union's conduct: [in relevant part], affects the employment relations" *Id.* at 1. This rationale, however, is misplaced because the underlying events that Kopolinski and Mantell now base their allegations on are strictly internal union affairs outside the scope of the Board's jurisdiction. *See, Sandia National Laboratories*, 331 NLRB 1417; *Local 254, Service Employees International Union, AFL-CIO*, 332 NLRB No. 103, at 1120-1123 (2000); *Pacific Maritime Assoc.*, 358 NLRB No. 133, at 1185-1186 (2012).

To be sure, the Referral Rules of Local No. 91, which are implemented at the discretion of its members, prescribe each of these occurrences and has little or no impact on the broader policies of the NLRA or collective bargaining. *Cf. Laborers' Local 91*, 365 NLRB No. 28 (jurisdiction upheld where the discipline was in response to underlying concerted action regarding the Union Business Manager's political action); *with, Pacific Maritime Assoc.*, 358 NLRB No. 133, at 1190 (the underlying protected activity asserted must have an impact *beyond the individual employee*) (*emphasis added*).

If the Board were to hold that charges 03-CB-202698 and 03-CB-211488 are within the scope of its jurisdiction prescribed by Congress, the fundamental distinction laid out in *Sandia*

Corporation, will be obliterated. *See, Sandia National Laboratories*, 331 NLRB No. 193, at 15 (“We decline to take such an approach, which in our judgment would unduly expand Section 8(b)(1)(A) to enmesh the Board in intraunion disputes that have only a speculative impact on the employer-employee relationship and do not significantly impact the rights and duties established by the Act”). Congress did not empower the Board to control the day-to-day function of a local’s out-of-work referral rules and the ALJ erred insofar as it found these charges within the scope of the Board’s jurisdiction.

In *Sandia National Laboratories*, this Board conducted a large-scale re-examination of scope of Section 8(b)(1)(A) and clarified which types of claims are within its jurisdiction. 331 NLRB No. 193, at 3-16. While it is not necessary to reiterate each of the Board’s progressions every time a claimant asserts a violation of Section 8(b)(1)(A), it is essential to recall the distinction drawn in that decision. Specifically, this Board held that it would no longer examine Section 8(b)(1)(A) claims “which involve[] a purely intraunion dispute” *Id.* at 16. While the Board protected its jurisdiction over disputes that either: (1) interfere with the employee-employer relations; (2) impede access to the Board’s processes; or (3) contravene a policy of the National Labor Relations Act. These types of conflicts, this Board determined, are all that was intended by Congress when it enacted the NLRA.

In *Laborers’ Local 91*, this Board relied on *Sandia* to assert its jurisdiction over a dispute involving some of the same parties to this claim. 365 NLRB No. 28. That decision cannot be interpreted to mean an otherwise unrelated claim is also within the scope of the Board. Rather, this Board asserted its jurisdiction in *Laborers’ Local 91* because the underlying events leading to the charge had a broader impact on the member’s Section 7 rights. *Id.* at 5. The ultimate sanction in *Laborers’ Local 91*, stemmed from protected activity, and for the Union to impose punishment

in direct response to that activity, placed the dispute within the Board's jurisdiction. *Cf. Sandia National Laboratories*, 331 NLRB No. 193, at 13.

To be sure, there is no true correlation between a protected activity and the alleged discipline in the present case. Instead, what is being challenged before the Board is the mere functionality of this Union's - and even further - this local's Hiring Hall Referral Rules. Both Charging Parties contradict themselves by attempting to attach their claims to this Board's decision in *Laborers' Local 91* and *Sandia National Laboratories*. Meanwhile, Mantell has already sought the proper means of remedy by writing Laborers International Vice President, Terry O'Sullivan, who provided a resolution. (GC Ex. 19).

Specifically, all parties were provided with clarification and where it was unclear, it was left to the discretion of the local. Unfortunately for the Charging Parties, they disagree with the rest of their members who continue to support Palladino and his leadership. It cannot be contested that the actual cause of these charges would be better solved if the Charging Parties sought leadership positions within their local and gained the right to exercise discretion in the application of the referral rules. The Board must once again decline to resolve "purely intra local factional quarreling" and dismiss both charges attempting to have this body dictate Local 91's referral rules. *Pacific Maritime Association*, 358 NLRB No. 133, at 13.

The record clearly shows that the alleged misconduct is a purely internal union affair within the meaning of *Sandia National Laboratories*. 331 NLRB No. 193, at 14. This Board has consistently considered the underlying act, versus the ultimate result, when deciding the scope of its jurisdiction according to Section 8(b)(1)(a). *See e.g., Local 254, Service Employees International Union, AFL-CIO*, 332 NLRB No. 103, at 1124. In *Local 254*, this Board declined to assert jurisdiction where union members had been sanctioned with removal from union

positions. *Id.* at 1121. This post-*Sandia* decision reasoned that if the scope of the underlying conduct does not exceed union interests, it cannot be examined by the Board.

Similarly, here, the interpretation and application of Respondent's Referral Rules does not concern or touch any broad policy of the NLRA. *Cf. Sandia National Laboratories*, 331 NLRB No. 193, at 15, n.15. As the Board explained, intra-union quarrels are properly resolved in Federal Court under the LMDRA. Section 8(b)(1)(A) is reserved for charges where the broader policy implications of the NLRA are effected. These charges have no such impact and must be dismissed.

Accordingly, Respondent asks the Board to take exception to the ALJ's conclusion that these charges fall within the scope of the Board's jurisdiction.

IV.

LOCAL NO. 91 DID NOT VIOLATE SECTION 8(b)(1)(A) OF THE ACT WHEN IT EXERCISED ITS DISCRETION TO APPLY AND INTERPRET ITS OWN REFERRAL RULES

If charges 03-CB-202698 and 03-CB-211488 are within the Board's jurisdiction, the claims fail because Respondent's interest in the application of its Referral Rules, in their respective ways, substantially outweigh the burden placed on the charging parties' Section 7 rights. *Cf. Wright Line*, 251 NLRB No. 150 (1980); *Sandia National Laboratories*, 331 NLRB No. 193, at 14. Unions operating a hiring hall are entitled to a certain level of discretion in their referral order which includes considerations such as loyalty and dependability of employees. *Electrical Workers IBEW Local 11*, 270 NLRB No. 79 (1984); *Pacific Maritime Association*, 172 NLRB No. 234 (1968); *Local 18, Operating Engineers*, 204 NLRB No. 112 (1973); *Kudla v. NLRB*, 821 F.2d 95 (1987). While General Counsel contends that Respondent's interests should not be considered based on the ALJ's biased determination of animus (*see Case Farms of North Carolina, Inc.*, 353 NLRB No. 26 (2008)), the record shows that Respondent could have been liable for not following

the rules as agreed to by the local. *See, Electrical Workers IBEW Local 11*, 270 NLRB No. 79 (1984). The Board must not follow suit with the ALJ and place the disgruntled interests of the Charging Parties above the collective interest of Local 91.

i. Kopolinski's Lack of Referrals

While the ALJ found that Respondent stopped referring Kopolinski from its out-of-work referral list as animus retaliation in violation of section 8(b)(1)(A), the record extensively demonstrates that no such animus ever existed. *Cf., LIUNA, Local No. 91*, JD-53-19, at 26-28; *with e.g., Tr. 980*). Again, the credibility determinations of this ALJ must not be accepted because they are simply unfair and have no valid base in the record. *Cf., Dayton Power & Light Co.*, 267 NLRB No. 41. To be sure, retaliating against a member for protected activity by failing to refer them from the out-of-work list, would violate the NLRA. *Teamsters Local 460*, 300 NLRB 441, Note 1. Here, however, the record clearly demonstrates that Respondent has only conformed with its own referral rules and never referred work based on animosity towards protected activity. *Cf. Camaco Lorain Manufacturing Plant*, 365 NLRB No. 143, at 1184-1185 (2011). If the Board determines that the ultimate consequence here is within its scope, then it must acknowledge that Respondent's interest in the appropriate functionality of its own Referral Rules substantially outweighs the minimal harm experienced by this one member.

Accordingly, the portion of the ALJ decision that entertains a wild conspiracy theory versus systematic balancing of interests by a Union Business Manager must be rejected.

ii. Kopolinski's Removal from the Out-of-Work Referral List

The ALJ erred when it held Respondent violated the NLRA by removing Kopolinski from the out-of-work referral list. *See LIUNA, Local No. 91*, JD-53-19, at 28. To reach this conclusion, the ALJ essentially disregards an accepted fact established in the record that Kopolinski violated

referral rule 3(C) by remaining on the list while gainfully employed incognito of Respondent. (Tr. 624-625; 630). Korpolinski was removed from the out-of-work referral list according to the rules each member of Laborers' Local No. 91 agrees to and it was improper for the ALJ to discredit testimony proving compliance with those very rules to formulate a retaliatory action. Korpolinski does not even challenge the validity of Rule 3(C) which clearly shows this is a conflict best resolved by the union members. Furthermore, it would be unfair labor practice for Respondent to allow Korpolinski to violate this rule with no consequence, while the other members of Local 91 stay in compliance. *Electrical Workers IBEW Local 11*, 270 NLRB No. 79.

The record does not support the ALJ's determination in this regard and it therefore must be abandoned.

iii. Mantell's Removal from the Out-of-Work Referral List

Even if the Board were to consider the merits of Mantell's charge, the ALJ decision must not be accepted insofar as it held Respondent violated the NLRA by refusing to place Mantell on the out-of-work referral list after he quit a referred position. *See, LIUNA, Local No. 91*, JD-53-19, at 11-14. The ALJ found that Respondent retaliated with animus against Mantell's protected activity by keeping him off of the out-of-work referral list. *Id.* at 12, citing *Laborers' Local 91*, 365 NLRB No. 28, slip op. at 1 (2017). This conclusion and the consideration of an unrelated Board decision to justify as much, is improper and warrants exception.

It cannot be denied that the application of the Union's own referral rules is an intra-union activity and the record clearly demonstrates that a large component of that application was left to the discretion of the local. (GC Ex. 19). Instead of accepting this clear standard which requires no conspiracy or inter-connected conflict, the ALJ tied together its own web of retaliation and coercion. The Board must not allow this portion of the decision to stand and instead follow its

own principles of allowing Unions to resolve their own conflicts so long as the broad policies of the NLRA are not infringed upon. *Cf. Pacific Maritime Association*, 358 NLRB No. 133, at 12.

Accordingly, Respondent requests that the Board take exception to the ALJ's finding that the Complaining Parties' Section 7 rights were violated in such a way that outweigh the Union's interests.

CONCLUSION

For each of the reasons listed above, Respondent respectfully requests that the Board take exception to the ALJ decision and uphold its longstanding principles of law.

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Buffalo, New York

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