

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

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

and

DUANE KORPOLINSKI, an Individual

**Cases 03-CB-202698
03-CB-207801**

and

FRANK MANTELL, an Individual

Case 03-CB-211488

GENERAL COUNSEL'S ANSWERING BRIEF

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief in response to Respondent's Exceptions to the Decision and Recommended Order of Administrative Law Judge Donna Dawson (ALJ) dated June 28, 2019, in the above-captioned cases. It is respectfully submitted that in all respects the findings of the ALJ are appropriate, proper, and fully supported by the credible record evidence.

I. Preliminary Statement

The ALJ found that Respondent committed numerous and serious unfair labor practices. LIUNA, Local No. 91, JD-53-19 (June 28, 2019). More specifically, the ALJ concluded that Respondent violated Section 8(b)(1)(A) of the Act by threatening charging party Duane Korpilinski with a lawsuit over legal fees if he utilized the Board's processes; failing to refer Korpilinski from November 1, 2015 and thereafter; removing Korpilinski from the out-of-work referral list from June 2, 2017, and continuing thereafter, and from July 10, 2017, and continuing until November 21, 2017; and removing charging party Frank Mantell from its out-of-work referral

list from November 20, 2017 to January 19, 2018.¹ The ALJ's factual findings to that end are adopted herein and can be found throughout her decision.

Respondent's attempt, through its Exceptions, to reverse the entirety of the ALJ's comprehensive and judicious decision (ALJD), is largely based on unfounded assertions and mischaracterizations of the record. Respondent even seeks to overturn the ALJ's well-founded credibility assessments. Contrary to Respondent's contentions, after thoroughly assessing and weighing the credible evidence, the ALJ correctly held Respondent accountable for its actions and the Board should uphold the ALJ's determinations.

II. ALJ Dawson reached the appropriate foundational conclusions

Respondent seeks to overturn a large portion of the ALJD based on properly reasoned foundational matters. This includes purported 10(b) and jurisdictional issues.² In both instances, the ALJ fully considered the evidence and relevant caselaw and reached the correct conclusion.

¹ References to the ALJ's Decision shall be designated as (ALJD ___:___) showing the page number first followed by the line numbers; to the Respondent's Brief as (R. Br. __) where the blank is the page number; to the transcript as (Tr. __); to the General Counsel's Exhibits as (GC Ex. ___); and to the Respondent's Exhibits as (R. Ex. ___).

² To the extent that Respondent argues that the ALJ exceeded her authority, it is well-established that the ALJ has the authority to regulate the course of the hearing. Sec. 102.35(a)(6). The ALJ's breadth of authority includes, ensuring the hearing is "confined to material issues and conducted with all expeditiousness consonant with due process," curtailing witnesses or lines of inquiry, and restricting or excluding the participation of any party due to that party's conduct. Indianapolis Glove Co., 88 NLRB 986, 987 (1950), American Life Insurance and Accident Co., 123 NLRB 529, 530 (1959); Section 102.38, 102.177(a), 102.35(a)(6).

For example, Respondent claims that "[t]he ALJ blatantly restricted the scope of Respondent Counsel's examination of **witnesses**" (R. Br. 19 emphasis added), and yet only cites one instance where this allegedly occurred. In actuality, this incident highlights Respondent's blatant disregard for court room decorum and the ALJ's rulings. (Tr. 471-73). Counsel for the General Counsel had objected to Respondent's argumentative and irrelevant question (i.e. whether or not Mantell had heard "all the back and forth" that had gone on in the court room where he was present on the stand) (Tr. 471) and rather than accept the ALJ's sustaining that objection, Respondent proceeded to argue with the judge. And now in brief, claims that her ruling somehow restricted Respondent's examination of the witness. In this way, throughout its brief, Respondent's

A. The ALJ properly considered Respondent's 10(b) argument

Respondent asserts that by not deciding the 10(b) issue in its favor before the hearing even began, that Respondent was not given full and fair consideration. (R. Br. 18). Specifically, Respondent argues that charge 03-CB-202698, Respondent's refusal to refer Korpinski for work from the referral list since November 2015, is untimely based on Section 10(b). (R. Br. 21). The ALJ gave full and fair consideration to this argument.³ Indeed, there is an entire section of the ALJD dedicated to Respondent's 10(b) defense. (ALJD 24-25). All arguments that Respondent presents in its brief are already reflected in the ALJD.

While Respondent's status as a non-exclusive hiring hall typically works toward its benefit under Board law, in this circumstance it does not. It was clear throughout the hearing that Palladino had ultimate control over who was referred for work, and the ALJ accepted that evidence. (ALJD 25:25-28; GC Ex. 5, paragraph 4A; Tr.121-24, 128, 278-84). In addition, as a non-exclusive hiring hall, Respondent's members obtain work on their own. (Tr. 564-65). Thus, Respondent's contention that Korpinski's access to the list should have been sufficient notice is untenable. Even after looking at the list, it was impossible for Korpinski to deduce why Respondent was not referring him to work. Korpinski had no clear and unequivocal notice of the violation until

counsel fails to acknowledge that the ALJ's commentary he cites (R. Br. 19-20) was in direct response to his raised voice, refusal to accept the ALJ's rulings, and continued repetition of tired topics, often speaking over the judge, long after a decision had been made and his point was already on the record. Moreover, the ALJ treated counsels for both parties equally. She appropriately used her authority to limit repetitive arguments and ensure the proceedings ran smoothly and expeditiously. Accordingly, any argument that the decision should be overturned due to judicial misconduct should be dismissed.

³ Respondent argues generally that the ALJ improperly limited its presentation regarding this 10(b) defense, but provides no specifics regarding what evidence was restricted or how that would have impacted the findings. Respondent was permitted, and indeed gave, a full presentation of its 10(b) defense during the hearing.

his conversations with Weipert and Mantell in July 2017. (Tr. 556, 559-60; ALJD 25:18-25). Without such notice, 10(b) cannot begin to toll.

Perhaps Respondent's argument could be plausible if Respondent followed its own rules. According to the record, it certainly did not. The rules provide that members who work a job for more than 16 hours are supposed to be removed from the referral list. (Tr. 233, 284-85). Respondent, however, does not regularly remove members from the referral list, even if they work a job for weeks. (Tr. 236-48). Palladino testified that Respondent's removal of working members from the referral list is quite lax and that it is not "that important" to him. (Tr. 816-17). The referral rules also provide that all referral rules and policies must be in writing. (GC Ex. 5, paragraph 5; Tr. 119-20). However, there are circumstances in which Respondent does not follow the written rules to refer members in order from the referral list. For instance, Palladino testified that Respondent sometimes tries to refer members with few work hours out of order to try and bring them to the 500-hour threshold for getting unemployment and medical insurance benefits. (Tr. 760-61, 842, 906). Palladino's overall testimony shows this to be an ad hoc determination.⁴ Notably, Respondent did not exercise this exception for the benefit of Korpolinski in 2017, when his work hours were a mere 141.75 hours, which meant he was ineligible for medical benefits. (GC Ex. 20; Tr. 989-90). In addition, Palladino testified repeatedly that Respondent sometimes takes a members' personal hardship into account when it determines who it will refer to a job out of order – for instance, a member whose wife is ill⁵ (Tr. 761, 892), a member who was going through a

⁴ Indeed, Palladino testified that he sometimes refers members to jobs without looking at the referral list, solely from his memory of who is on the list. (Tr. 278).

⁵ Palladino testified inconsistently about who this member was. Twice he testified that the member was Ralph Rose (Tr. 761, 892), but later referred to his earlier testimony and said that this member was Peter Morreale (Tr. 919).

divorce (Tr. 772, 834), a member who was having drinking problems and whose wife was leaving him (Tr. 809), and a member who did not have a driver's license (Tr. 789). No such special consideration was ever shown to Korpolinski, at least since the October 2015 union meeting. Considering Respondent fails to follow its own rules with regard to the basics like the list order, who is to be referred out, or when they are to be removed from the list, it was impossible for Korpolinski to know that Respondent was refusing to refer him from the list because of his protected activity.

Respondent failed to meet its burden to demonstrate that Korpolinski was aware that Respondent was refusing to refer him for an unlawful reason and then failed to act. To support its 10(b) argument Respondent cites Local 25, Intern. Broth. Of Elec. Workers, 321 NLRB 498 (1996). That case is easily distinguishable from the facts here. In that case Local 25, operating an exclusive hiring hall, refused to grant the charging party a light duty assignment. Id. at 500-01. The charging party had been informed by several other members that such a light duty assignment had been granted to another member. Id. She failed to act in a timely manner, thus triggering 10(b). Moreover Local 25 did not engage in this conduct due to any protected concerted activity.

Here, Respondent operates a non-exclusive hiring hall. Charging party Korpolinski was not made aware of Respondent's unlawful conduct until almost two years after Respondent's unlawful conduct began. (Tr. 556, 559-60; ALJD 25:18-25). In July 2017, Korpolinski had a conversation with Phil Weipert, a supervisor at Scrufari Construction. (Tr. 554-57). Korpolinski was asking if Scrufari had any work for him. (Tr. 556). Weipert said to him, "I heard you got blackballed." (Tr. 556). Prior to that, Korpolinski had assumed that Respondent was not calling him to work because work was slow. (Tr. 554). Also in July 2017, Korpolinski learned in a conversation with Mantell that Korpolinski was not on Respondent's referral list at all. (Tr. 335-

37, 558-60; GC Ex. 2, pp. 134-70). Shortly thereafter, on July 7, 2017, Korpilinski signed the instant unfair labor practice charge, Case 03-CA-202698, alleging that Respondent had been refusing to refer him and had removed him from the referral list because of his support for Mantell in the October 2015 meeting; the charge was docketed and served on Respondent on July 20, 2017. (GC Ex. 1(a), GC Ex. 1(b)). Thus, unlike the charging party in Local 25, once Korpilinski was aware that he was taken off of the referral list and Respondent was blackballing him, he promptly took action and filed a charge. Respondent failed to demonstrate any other occasion, prior to July 2017, that Korpilinski was made aware of Respondent's unlawful conduct and failed to act. Again, in this case, Respondent unlawfully refused to refer Korpilinski because he engaged in protected concerted activity. Accordingly, Respondent's reliance on Local 25 is misplaced and the ALJ reached the correct conclusion that Korpilinski's allegation was not time-barred.

B. The ALJ correctly determined that the NLRB has jurisdiction over these matters

Respondent further claims that the decision should largely be overturned on jurisdictional grounds. It asserts that the charges which alleged that Respondent improperly refused to refer members Korpilinski and Mantell for work are outside the scope of the Board's jurisdiction. Again, an entire section of the ALJD is dedicated to addressing Respondent's defense. (ALJD 10-11). And, again, all of these arguments were considered in the ALJD.

Here, Respondent's referral rules are only the beginning of the analysis, rather than the end, as Respondent asserts. Naturally, the referral rules themselves are an internal union matter, but applying those rules in a discriminatory way to affect the employment of members who engaged in protected concerted activities is certainly within the Board's jurisdiction. (ALJD 11:1-6). Respondent's argument that its conduct here is an inherently intra-union matter is baseless. Respondent's actions impact Korpilinski and Mantell's employment relationship, thus it falls

squarely within the Board's jurisdiction. Indeed, the Board already made this ruling, twice, against this same Respondent using the same referral rules for members engaging in the same or similar activity. Laborer's Local 91 (Council of Utility Contractors Inc. and Various Other Employers), 365 NLRB No. 28 (2017); Laborer's Local 91 (Scrufari Construction Co., Inc.) and Ronald J. Mantell, 368 NLRB. No. 40 (Aug. 12, 2019).

Similarly, Respondent's outburst – that permitting the Board to rule on this case somehow prevents Respondent from interpreting its own rules – is obviously untrue. (R. Br. 21). Respondent is free to interpret its rules, so long as that interpretation does not target members because of their protected concerted activity in a way that impacts their employment. Indeed, Respondent used these rules to unlawfully target Korpolinski and Mantell in this case. Neri and Palladino testified that members are obligated to keep Respondent informed that they are working longer-term so that they can be removed from the referral list (Tr. 234, 287; GC Ex. 5, paragraph 3C), but Respondent does not regularly take disciplinary action of any kind for a member's failure to do this. (Tr. 236-50, 254-56, 258). In fact, Palladino could not recall any member ever being disciplined for violating this obligation other than Korpolinski. (Tr. 288, 989). Further, the General Counsel subpoenaed all of Respondent's records for the previous seven years of discipline against members, including removal from the referral list, for violating the referral rules, and Respondent produced nothing in response. (Tr. 35-40, 316-17, 383-90). As the ALJ wrote, "It also appears that Mantell was treated differently than other members, except Korpolinski, in that Palladino and Neri could not recall any other members who had ever been disciplined for violating the referral rules." (ALJD 13:38-40). Respondent's jurisdictional argument is without merit and should be dismissed.

III. The ALJ properly found that Respondent threatened Duane Korpolinski

To begin, Palladino’s statement according to Korpolinski’s testimony violates the Act. “Any coercion used to discourage, retard, or defeat” access to Board processes “is beyond the legitimate interest of a labor organization.” NLRB v. Marine & Shipbuilding Workers Local 22, 391 U.S. 418, 424 (1968). Accordingly, union threats against employees for filing Board charges are unlawful under Section 8(b)(1)(A) of the Act. International Brotherhood of Teamsters, Local 391, 357 NLRB 2330, 2330 (2012). The Board should uphold the ALJ’s finding that Palladino threatened Korpolinski by telling him that he had no right to contact the NLRB and that he could be liable for lawyers’ fees for making false statements.

To overturn this finding, Respondent argues that the Board discredit the ALJ’s credibility determinations.⁶ (R. 26). When considering contradictory testimony during a hearing, an administrative law judge is entitled to make appropriate credibility determinations. The Board allows ALJs to make “demeanor-based” credibility determination based on “nervousness of the witness, self-contradiction and evasiveness” while testifying. Atlantic Veal & Lamb, Inc., 342 NLRB 418, 421 (2004). ALJs can also make credibility determinations “based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. Shen Lincoln-Mercury-Mitsubishi, Inc., 321 NLRB 586, 589 (1996) citing Panelrama Centers, 296 NLRB 711, fn. 1 (1989); see also Northridge Knitting Mills, Inc., 223 NLRB 230, 235 (1976). Credibility determinations are afforded great deference because the judge “sees the witnesses and hears them testify, while the

⁶ Again, Respondent generally asserts that it was not permitted a full and fair hearing. However, he does not state with any specificity how any rulings negatively impacted this particular allegation. (R. 27). Respondent was permitted to do an extensive and belabored cross examination of Korpolinski and a full direct examination of Palladino.

Board and reviewing court only look at the cold records.” NLRB v. Walton Mfg. Co., 369 NLRB 404, 408 (1962); see also USPS, 365 NLRB No. 51, slip. op. at 1, fn. 1 (2017).

Here, the ALJ made appropriate credibility determinations. She described Korpolski’s recollection of these events as detailed. (ALJD 23:3-4). She further found that Respondent’s botched attempt at an impeachment about the terms “false charges” verse “false statements” was not enough to diminish Korpolski’s credibility. (ALJD 23:27-30). Contrary to Respondent’s brief, which states that the ALJ “completely rejected [the testimony] of the Union Business Manager for a reason that is entirely unclear” (R. 26), the ALJD is perfectly clear. The ALJD states:

Here, I credit Korpolski’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 Korpolski with attorney’s fees is not believable given his admission that he brought up the fact that Korpolski had filed a Board charge and asked him, ‘if [he] had a problem, why didn’t you tell me?’

(ALJD 23-24). The ALJ went on to discredit Palladino’s mere denial of the threat as he failed to explain the basis for threatening Korpolski with the Board charge. (ALJD 24:1-3). The ALJ also cited Respondent’s failure to provide any corroborating evidence, such as questioning Neri about this conversation as he was present testifying about other matters or calling Dominguez to testify about the conversation, as a reason to distrust Respondent’s testimony. (ALJD 23:30-32; 23:5-6). These types⁷ of credibility assessments are entirely appropriate and form a reasonable basis for the ALJ’s conclusion that Palladino unlawfully threatened Korpolski.

⁷ Interestingly, Respondent wants Mantell’s conduct during a different portion of the hearing to somehow diminish Korpolski’s credibility on this matter. (R. 27). It also calls Mantell the “instigator” in all three current charges. (R. 27). Despite being obviously inappropriate,

Though the underlying precedential case was not yet available at the time the ALJ issued her decision, the Board has previously found that Palladino has threatened a member about engaging with the NLRB. In the latest case between this Respondent and its members, the Board upheld the ALJ's ruling that Palladino threatened to retaliate against Frank's brother Ron Mantell because he contacted the NLRB. Laborer's Local 91 (Scrufari Construction Co., Inc.) and Ronald J. Mantell, 368 NLRB. No. 40, slip op. at 5 (Aug. 12, 2019). In conclusion, the ALJ's credibility assessments should stand and the Board should conclude that Palladino's threats to Korpolinski violate the Act.

IV. Respondent's actions against Korpolinski and Mantell violate Section 8(b)(1)(A)

Independent of its foundational arguments,⁸ Respondent spends little time on the substance of the matter. Of its 35-page submission, less than three pages are spent on addressing its actual misconduct. Respondent's cursory analysis is insufficient to overturn any of the ALJ's well-supported and well-reasoned conclusions. All of Respondent's arguments in its exceptions were considered by the ALJ in her decision and are incorporated herein. As discussed in further detail below, ALJ Dawson correctly concluded that Respondent unlawfully refused to refer Korpolinski and removed him and Mantell from the referral list based on animus. In doing so, the ALJ used the appropriate Wright Line framework, and analyzed all of the relevant factors. (ALJD: 11-14).

Respondent's attempt to use Mantell's alleged conduct to discredit Korpolinski highlights its targeted hatred toward Mantell and anyone who dares to support him.

⁸ Respondent again attempts a jurisdictional argument here. However, as is evidenced by the prior board decisions against this very Respondent for the same or similar actions, and contrary to Respondent contentions, its actions are not purely "intra-union" in nature. (R. Br. 34). Removing members from the referral list, and refusing to refer them from that list, directly affects their employment relationship. (ALJD 10:28-34). Accordingly, Respondent still cannot evade responsibility for its actions by trying to shield itself with an inapplicable jurisdictional argument.

The animus factors all support the ALJ's ultimate conclusion that Respondent violated Section 8(b)(1)(A) of the Act.

Again, this is not the first time Respondent has unlawfully removed members from its referral list. Laborer's Local 91 (Council of Utility Contractors Inc. and Various Other Employers), 365 NLRB No. 28. Now, just as it did in 2015, Respondent removed Frank Mantell from the referral list. This time, Respondent also discriminated against Mantell's friend and supporter, Duane Korpolinski. As a Mantell supporter, Respondent decided the appropriate course of action was to refuse to refer Korpolinski from the out-of-work list, and ultimately remove him from that list. The Board has already held that this Respondent removing members from its referral list in retaliation for their protected activity is unlawful. Laborer's Local 91 (Council of Utility Contractors Inc. and Various Other Employers), 365 NLRB No. 28. Similarly, the Board has already held that this Respondent refusing to refer a member, even more specifically – a Frank Mantell supporter, from its referral list in retaliation for his protected activity is unlawful. Laborer's Local 91 (Scufari Construction Co., Inc.) and Ronald J. Mantell, 368 NLRB. No. 40. In its brief, Respondent even admits, “[t]o be sure, retaliating against a member for protected activity by failing to refer them from the out-of-work list, would violate the NLRA.” (R. Br. 33). As detailed further below, Mantell and Korpolinski were treated unlawfully and the ALJ's decision in that regard should be upheld.

A. The ALJ's conclusions regarding Mantell were proper

As the ALJ rightly determined, Wright Line is the proper analysis here. To establish a prima facie case under Wright Line, the General Counsel must here establish that Mantell's protected activity was a substantial or motivating factor in Respondent's refusal to place Mantell on the referral list in November 2017, which burden is satisfied by showing that (1) Mantell had

engaged in protected activity, (2) Respondent had knowledge of the protected activity, and (3) Respondent bore animus toward the protected activity. See Camaco Lorain Mfg. Plant, 356 NLRB 1182, 1185 (2011). If the General Counsel makes this required initial showing, the burden then shifts to Respondent to prove that it would have taken the same action even in the absence of Mantell’s protected activity. See id. However, if the evidence shows that the reasons Respondent has given for its action are pretextual – that is, either false or not relied upon – it fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the Wright Line analysis. SFO Good-Nite Inn, LLC, 352 NLRB 352 NLRB 268, 269 (2008) (citing United Rentals, 350 NLRB 951, 951-52 (2007)).

As stated above, in cases involving discipline, “[t]o support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the [respondent], disparate treatment of certain employees compared to other employees with similar work records or offenses, [and] deviations from past practice....” Case Farms of North Carolina, 353 NLRB 257, 260 (2008) (citing, e.g., Fluor Daniel, Inc., 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992)).

The evidence shows that Mantell’s protected activity was a substantial or motivating factor in Respondent’s refusal to place Mantell on the referral list from November 2017 until January 2018. First, it is already established in the prior Board decision that Mantell had engaged in protected activity in posting comments to Facebook that were critical of Respondent and Palladino. (ALJD 11: 17-19). Among his other engagements with the Board since 2015, Mantell also engaged in protected activity by filing a Board charge on July 5, 2017, against Respondent over its failure to put him back on the referral list. (ALJD 11:19-21; Tr. 339-40; GC Ex. 21). Second, it is undisputed that Respondent had knowledge of this protected activity – both the Facebook posts

and the July 2017 Board charge. Third, it is already established in the prior Board decision that Respondent bore animus toward Mantell's protected Facebook posts. That this animus remains fresh to this day is shown by Respondent's and Palladino's ongoing defamation suit, seeking \$330 million, against Mantell for precisely the same Facebook comments that were the subject of the prior Board decision. (Tr. 300-01, 325, 415-19).

Respondent's unlawful motive is supported by its handling of returning Frank to the referral list. A June 2017 Scrufari Construction job was his first referral from Respondent since May 2015 – his first in well over two years. (Tr. 329). After being unable to complete that job, Respondent refused to put Mantell back on the referral list (alleging a violation of referral rule 4C), despite the International's instructions to do so. (GC Ex. 19; Tr. 355). Respondent justified this action by a new rule apparently made up for Mantell's situation. Palladino presented Mantell with a letter from Palladino himself, addressed to Respondent's attorney which stated that after receiving the November 14, 2017 letter from the International Union, "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 completion of that same job along with the members who worked that job." (GC Ex. 23). And yet, Respondent didn't even follow its contrived rule. The third shift to which Mantell was assigned on the June 2017 Scrufari job ended about eight or nine weeks later, or in approximately August-September 2017. (Tr. 682, 689). Despite this fact, Respondent still did not return Mantell to the referral list until January 2018. This failure to follow its own asserted rule, fashioned for Mantell alone, further indicates that this rule was itself a pretext for Respondent prolonging the period that Mantell was kept off the referral list for unlawful reasons.

The inference of Respondent's unlawful motive in keeping Mantell off of the referral list is also supported by the departure from its past practice. Again, Palladino testified that he cannot

recall any members aside from Korpolinski and Mantell ever being removed from the referral list for violation of a referral rule. (Tr. 288, 989). Moreover, Respondent produced nothing in response to the General Counsel's subpoena of Respondent's records reflecting discipline against members for violation of the referral rules for the last seven years, or otherwise presented any evidence of its enforcement of the referral rules in any way, other than in the cases of Korpolinski and Mantell. (ALJD 13:38-40; Tr. 35-40, 316-17, 383-90).

Because the evidence establishes that Respondent's reasons given for refusing to place Mantell on the referral list in November 2017 are pretextual Respondent has failed by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the Wright Line analysis. SFO Good-Nite Inn, LLC, 352 NLRB at 269.

In sum, the evidence shows that Mantell's protected activity in posting comments to Facebook and for filing a Board charge were substantial or motivating factors in Respondent's refusal to place Mantell on the referral list, and Respondent has not shown that it would have taken the same action absent Mantell's protected activities. Therefore, Respondent's refusal to place Mantell on the referral list from November 2017 to January 2018 violated Section 8(b)(1)(A) of the Act.

B. The ALJ's conclusions regarding Korpolinski were proper

The ALJ properly concluded that Respondent's actions – refusing to refer him to work and place him on the out of work list – violated the Act. To reach this conclusion a Wright Line analysis must again be performed. The General Counsel's burden is satisfied by showing that (1) Korpolinski was engaged in protected activity, (2) Respondent had knowledge of the protected activity, and (3) Respondent bore animus toward the protected activity. See Camaco Lorain Mfg. Plant, 356 NLRB at 1185. If the General Counsel makes this required initial showing, the burden

then shifts to Respondent to prove that it would have taken the same action even in the absence of Korpolinski's protected activity. See id. And again, if the evidence establishes that Respondent's reasons are pretextual, there is no need to perform the second part of the Wright Line analysis. SFO Good-Nite Inn, LLC, 352 NLRB at 269.

Record evidence clearly establishes that Korpolinski's protected concerted activity was a substantial or motivating factor in Respondent's removal of Korpolinski from the referral list. Duane Korpolinski, like Ron Mantell, supported Frank Mantell's actions against Respondent's business manager, Richard Palladino. An employee-member's right to engage in intraunion activities in opposition to the incumbent leadership of his union is concerted activity protected by Section 7 of the Act. Laborers' Local 91, slip op. at 1; United Steel Workers of America, Local 1397, 240 NLRB 848, 849 (1979); Machinists Local 707 (United Technologies), 276 NLRB 985, 991 (1985). At Respondent's monthly membership meeting in October 2015, it held a vote among members regarding the fine and suspension of Frank Mantell for his protected Facebook comments. (GC Ex. 18; Tr. 318-19, 552-53). Frank Mantell's brother Ron Mantell asked to have the vote by secret ballot, but Palladino refused and insisted on a show of hands. (Tr. 319-20). Four members, including Korpolinski, voted in support of Frank Mantell, and against the fine and suspension. (GC Ex. 18; Tr. 320-21, 553). Although Respondent is not required to do so, it made a point of identifying those voters in the minutes to the meeting. (Tr. 290; GC Ex. 18). Korpolinski's open support of Frank at a union meeting, in direct contravention to Palladino's desires, was protected concerted activity, and Respondent knew about that activity.

The timing factor also supports an inference of Respondent's unlawful motive in continuing to keep Korpolinski off the referral list for filing a Board charge. Korpolinski filed his Board charge in Case 03-CB-202698 on July 20, 2017. Filing that charge was a protected activity.

About a month later, in late August or early September 2017, Palladino and Neri told Korpinski, pretextually, that he was being kept off the referral list because of the purported violation of paragraph 3C. (Tr. 562-63; see GC Ex. 5). In this same conversation, Palladino told Korpinski that he had no right to go to the NLRB and made an unlawful threat related to Korpinski's filing of his Board charge. (Tr. 563-64, 650). Palladino's statement makes it clear that he was aware of his engagement in the protected activity of filing a Board charge.

Third, Respondent bore animus toward Korpinski's protected activity. Korpinski has been a member of Respondent for 22 years. (Tr. 548-49). Respondent's discriminatory motive may be demonstrated by circumstantial evidence based on the whole record, and "[t]he Board frequently finds that the timing factor supports an inference of animus and discriminatory motivation." Case Farms of North Carolina, 353 NLRB at 260. The timing factor here could not be starker: before Korpinski's vote in support of Mantell at the October 2015 meeting, he had been referred regularly for work by Respondent; after that meeting, *Respondent has not referred Korpinski once*, for a period of nearly three years. (Tr. 554). For the ten years from 2006 to 2015, Korpinski averaged over 985 hours typically from referrals: prior to the October 2015 union meeting, he would simply wait for Respondent's phone calls for work. (GC Ex. 20; GC Ex. 62; Tr. 565-67). After the October 2015 meeting, all Korpinski's hours have been from jobs he obtained on his own through a direct hire, with no help from Respondent. (Tr. 564-65). Moreover, Respondent's own records support this conclusion. From 2014 through the October 2015 meeting only three of Korpinski's jobs were direct hires or contractor requests, the rest were referrals off of the out-of-work referral list from Respondent. (GC Ex. 62). Korpinski had even been selected by Respondent twice as a steward during this period. (GC Ex. 62). Since the October 2015 meeting, Korpinski was forced, for the first time in his 22 years as a member of Respondent, to find non-

laborer landscaping work because he is not getting any work through Respondent. (Tr. 567-68). Thus, the night-and-day difference between Respondent's referrals of Korpolinski before and after his October 2015 vote amply supports an inference of Respondent's animus towards that protected activity.

Again, Respondent's animus towards Korpolinski's support of Mantell is buttressed by Respondent's demonstrated animus against protected activity, as established in the prior Board decisions. Laborer's Local 91 (Scrufari Construction Co., Inc.) and Ronald J. Mantell, 368 NLRB No. 40 (2019); Laborer's Local 91 (Council of Utility Contractors Inc. and Various Other Employers), 365 NLRB No. 28 (2017). Korpolinski voting against the very union sanctions that were the subject of the 2017 Board decision put him in essentially the same posture as the charging party in the 2019 Board decision. Moreover, Palladino's threat to Korpolinski regarding suing him for making false statements to the Board also supports the inference that Respondent harbors animus toward those who engage in Board activity. When Palladino told Korpolinski that he was (pretextually) being kept off the list for a purported violation of Rule 3C he also told Korpolinski that he had no right to go to the NLRB and made an unlawful threat related to Korpolinski's filing of his Board charge. (Tr. 563-64, 650). Palladino thus connected Respondent's pretext for keeping Korpolinski off the referral list with his animus against Korpolinski's protected right to file charges with the Board.

Specific to the allegation regarding Respondent's refusal to place Korpolinski on the referral list: there is ample evidence that Respondent's enforcement of paragraph 3C of the referral rules in Korpolinski's case was a departure from past practice and reflected disparate treatment, which supports the inference of an unlawful motive. First, Respondent did not show that such a rule violation even occurred. On the contrary, Korpolinski credibly testified that it is his consistent

practice to notify Respondent when he is working to avoid “getting in trouble” with Respondent (Tr. 565, 644-45), and Respondent offered no evidence to the contrary. Further, Palladino testified that he could recall no other member who had been removed from the referral list for failing to notify Respondent that he or she was working (Tr. 989, 288), despite his and Neri’s acknowledgement that other members work extended periods while remaining on the referral list, in apparent violation of paragraph 3C, without consequence – in fact, that removing working members from the referral list is not “that important.” (Tr. 816-17, 236-48). Finally, Respondent produced nothing in response to the General Counsel’s subpoena of Respondent’s records reflecting discipline against members for violation of the referral rules for the last seven years, nor did it otherwise present any evidence that it has ever enforced its referral rules at all, other than in the cases of Korpolinski and Mantell. (ALJD 13:38-40; Tr. 35-40, 316-17, 383-90). These facts make clear that Respondent simply seized on this pretext to further punish Korpolinski, on top of continually refusing to refer him for work, because of his support for Mantell in the October 2015 meeting.

The timing factor also supports an inference of Respondent’s unlawful motive in continuing to keep Korpolinski off the referral list for filing a Board charge. Korpolinski filed his Board charge in Case 03-CB-202698 on July 20, 2017. About a month later, in late August or early September 2017, Palladino and Neri told Korpolinski, pretextually, that he was being kept off the referral list because of the purported violation of paragraph 3C. (Tr. 562-63; see GC Ex. 5). In this same conversation, Palladino told Korpolinski that he had no right to go to the NLRB and made an unlawful threat (discussed further below) related to Korpolinski’s filing of his Board charge. (Tr. 563-64, 650). Palladino thus connected Respondent’s pretext for keeping Korpolinski off the referral list with his animus against Korpolinski’s protected right to file charges with the Board.

Therefore, regarding Korpolinski's removal from the list – because the evidence establishes that Respondent's reasons given for removing Korpolinski are pretextual Respondent has failed by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the Wright Line analysis. SFO Good-Nite Inn, LLC, 352 NLRB at 269.

However, regarding Respondent's refusal to refer Korpolinski to work, Respondent's burden must be analyzed. Palladino was unable to adequately explain at least 28 instances since October 2015 where Respondent did not follow its own referral rules and skipped over Korpolinski, for jobs for which he was qualified, in favor of other members below Korpolinski on the referral list. It simply strains credulity that Korpolinski would not have been called *even once* from the referral list since October 2015, for nearly three years, if this were not Respondent's deliberate intent, particularly considering the night-and-day difference between Respondent's referrals of Korpolinski before and after his October 2015 vote.

In sum, the evidence shows that Korpolinski's protected activity – standing up for Mantell in opposition to union leadership and filing a Board charge – was a substantial or motivating factor in Respondent's refusal to refer Korpolinski following October 2015 and his removal of from the referral list. Respondent has failed to show that it would have taken the same actions absent Korpolinski's protected activity. Therefore, Respondent's removal of Korpolinski from the referral list violated Section 8(b)(1)(A) of the Act.

V. Conclusion

Respondent's exceptions to the ALJ's thorough and well-researched decision are baseless and demonstrate a careless disregard for the record evidence and established Board law. For all

the reasons set forth above, Counsel for the General Counsel respectfully requests that the Board deny Respondent's Exceptions to the Decision of the Administrative Law Judge in their entirety.

DATED at Buffalo, New York this 23rd day of August, 2019.

Respectfully submitted,

/s/ Jessica L. Cacaccio

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