JD–67–19
Niagara Falls, NY

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

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

and **Case 03–CB–225477**

FRANK S. MANTELL, an Individual

Jessica L. Cacaccio, Esq., for the General Counsel.
Robert L. Boreanaz, Esq. (Lipsitz Green Scime Cambria LLP), of Buffalo, New York, for the Respondent.
Frank S. Mantell, for the Charging Party.

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on June 25, 2019, in Buffalo, New York. After the parties rested, I adjourned the hearing until August 6, 2019, when it resumed by telephone for oral argument. It then adjourned until August 9, 2019, when it resumed, again by telephone, and I issued a bench decision, pursuant to Section 102.35(a)(10) of the 'Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] Along with further discussion concerning the credibility of witnesses, the remedy, conclusions of law, order, and notice provisions are set forth below.

Credibility of Witnesses

The Charging Party, Frank Mantell, is the defendant in a lawsuit alleging that comments he made about the 'Respondent's leadership were defamatory. During cross-examination of

[1] The bench decision appears in uncorrected form at pp. 33 through 52 of the transcript for August 9, 2019. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

the Respondent's business manager, Richard Palladino, the General Counsel asked who had brought this lawsuit against Mantell. Initially, Palladino answered "the Union," and he stuck by this answer when questioned further:

> Q. You didn't bring them against him personally?
> A. No. Frank's got a copy of the charges, and that's all brought by the union.

The General Counsel then showed the witness the first page of a deposition he had given in connection with that lawsuit. The case caption identified both Palladino and Laborers Local 91 as plaintiffs in that lawsuit. The General Counsel then asked Palladino:

> Q. So you brought a charge against Mr. Mantell?
> A. I had the union, and I brought it for myself and the union because we were both slandered.
>
> Q. Okay, so you did bring a charge against him in civil court? It was not just the union. It was you as well; isn't that right?
> A. That is correct.

It seems unlikely that Palladino would forget that he was a named plaintiff in a lawsuit alleging defamation, particularly when he believed that the defendant in the lawsuit had slandered him as well as slandered the Union. (If Palladino had believed that Mantell only had defamed the Union, he would not have testified "we were both slandered.")

However, before being shown the deposition, Palladino had testified expressly that he did not file the lawsuit, explaining "that's all brought by the union." Arguably, this denial, which Palladino's subsequent testimony contradicted, might result simply from a momentary lapse of memory and signify little about the reliability of his other testimony. But, in general, being a plaintiff in a lawsuit is not the sort of fact a person would be likely to forget.

Moreover, the lawsuit alleged defamation, a matter likely to be taken personally. When someone who believes that he has been slandered decides to sue the alleged slanderer, such a decision carries with it more than a little emotion, arising both from a feeling of having been insulted and from making the decision to seek personal vindication through the courts.

In these circumstances, it seems somewhat unlikely that Palladino would forget that he was a named plaintiff in the lawsuit. However, he not only forgot, but denied it until confronted with his deposition.

There is also another reason to doubt reliability of Palladino's testimony, and this reason also calls into question the Respondent's explanation concerning why it removed Mantell's name from the referral list. Palladino gave vague testimony about calling International Union Official Danny Bianco with a question related to the interpretation of the Respondent's referral rules. However, the record indicates that the Respondent's counsel, rather than Palladino, contacted Bianco and did so by email. Further, it appears that the inquiry by the Respondent's counsel pertained to another matter rather than 'Mantell's eligibility to be placed on the hiring hall referral list.

More specifically, Palladino testified that because of unfair labor practice charges which had been filed against the Union, he had occasion to review the Union's referral rules and discovered a rule which had long been on the books but previously had been overlooked. This Rule 3C used the phrase "employed at the trade" of laborer.

Palladino explained that he believed the phrase "employed at the trade" meant the same thing as working "at the calling," a phrase used in the local Union's constitution. If the two phrases had identical meanings, then a previous holding by the Respondent without executive board and affirmed by the International Union—a holding that Mantell was not working "at the calling"[2]—would be tantamount to a conclusion that he was not employed "at the trade."

Palladino testified that he "called the international and asked them if there is a distinction between the two, and I was told that they're one and the same." According to Palladino, he asked the International Union official, Danny Bianco, to send him a letter to that effect and received such a letter a "month later or two months later, yeah."

However, after Palladino testified that he received such a letter, it became clear that no such letter existed. Specifically, the General Counsel objected that such a letter had not been included in the documents furnished by the Respondent. Then Palladino, responding to a leading question by the 'Respondent's counsel, testified that he had received an email from Bianco which stated that no written response was necessary.

Thus, Palladino admitted that the testimony he had just given, that he had received a letter from the International Union, was incorrect. Doubts raised by this instance of Palladino giving incorrect testimony, and by the other instance discussed above, lead me to look elsewhere in the record for evidence which would corroborate his testimony. However, that search was not availing.

Bianco did not testify and no other evidence documents that Palladino communicated with him, or with someone else at the International Union, about this matter. Instead, the documentary evidence consists of emails between the Respondent's attorney and the International Union official. '

If the emails exchanged between the Respondent's attorney and Bianco clearly pertained to Mantell's eligibility to be on the referral list, that at least would support the Respondent's explanation for removing him from the list. However, as discussed more fully in the bench decision, I conclude that the Respondent's attorney likely emailed Bianco for a different reason.

[2] In 2016, the local Union's executive board had held that Mantell was ineligible run for union office because the local Union's constitution did not allow individuals not working "at the calling" of laborer to have a voice or vote at union meetings. The International Union had sustained the executive board's conclusion that Mantell was not working "at the calling" of laborer.

The June 27, 2018 email from the Respondent's counsel to Bianco stated that a "prompt response would be appreciated as our hearing reconvene on Monday morning. . ." It appears that "our hearing" referred to a hearing resulting from earlier charges against the Respondent which had been filed by Mantell and another charging party, Duane Korpolinski, who was a landscaper. The Respondent's counsel wanted to know whether an individual working for a nonunion landscaper was "working at the calling" or "employed at the trade."
'

Perhaps the Respondent's counsel also was thinking about Mantell's status when he wrote the June 27, 2018 email, but just failed to mention in that email that Palladino was contemplating removing Mantell's name from the list and therefore wanted to know whether "working at the calling" and "employed at the trade" meant the same thing. However, another fact makes it difficult to conclude that Palladino's concern about Mantell's status prompted the June 27 email. Bianco did not provide an answer to the question raised in the June 27 email—whether the International Union considered the two phrases to have the same meaning—until well after July 5, 2018, the day when Respondent admittedly removed Mantell's name from the referral list. Moreover, from the email thread, it appears that Bianco did not even speak with Palladino about it until the morning of August 14, 2018.

If Palladino wanted to be sure that the two phrases meant the same thing before removing Mantell's name from the list, why did he go ahead and do so anyway, before receiving an answer to that question? Mantell's name had been on the referral list for years and the record reveals no reason why Palladino would act with a sense of urgency while his question remained unanswered.

It is difficult to escape the conclusion that the Respondent's asserted defense is pretextual. Under the *Wright Line* framework[3] followed in the bench decision, a finding of pretext defeats any attempt by a respondent to show that it would have discharged the discriminates absent their union activities. *Rood Trucking Co.*, 342 NLRB 895, 898 (2004).

However, this case does not turn on whether animus should be inferred from the pretextual nature of the Respondent's defense. Ample evidence of animus exists without such an inference.

REMEDY

For the reasons set forth above and in the appended bench decision, I have concluded that the Respondent removed the Charging Party's name from its hiring hall referral list on July 5, 2018, and thereafter has failed to restore his name to the list, because the Charging Party engaged in activities protected by the Act, including the protected concerted activities found by the Board in *Laborers' International Union of North America Local 91 (Council of Utility Contractors)*, 365 NLRB No. 28 (2017), his filing of unfair labor practice charges against the Respondent, and his giving testimony and otherwise participating in Board proceedings concerning those charges. Finding that the Respondent thereby violated Section 8(b)(1)(A) of

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

the Act, I further conclude that the Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

The Respondent must make the Charging Party whole, with interest, for any loss of earnings and other benefits he suffered because it unlawfully removed his name from the hiring hall referring list and failed and refused to restore it to the list. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, the Respondent must compensate Charging Party Mantell for any adverse tax consequences of receiving a lump-sum backpay award and must file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Further, the Respondent must compensate Mantell for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above. The Respondent also must remove from its files any reference to the removal of Mantell from its out-of-work list and notify him in writing that this has been done and that his removal from the list will not be used against him in any way.

It also must post the notice to members attached hereto as Appendix B.

CONCLUSIONS OF LAW

1. At all material times, the Respondent, Laborers' International Union of North America, Local Union No. 91, has been and is a labor organization within the meaning of Section 2(5) of the Act.

2. At all material times, Mader Construction Co. has been and is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, Council of Utility Contractors, Inc., The Independent Builders of Niagara County, Associated General Contractors of America, New York State Chapter, Inc., and The Building Industry Employer's Association of Niagara County New York, Inc., have been organizations composed of various employers, including Mader Construction Co., engaged in the construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including Respondent. At all material times, the employer-members of these organizations and associations have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. The Respondent, which operates a nonexclusive hiring hall, violated Section 8(b)(1)(A) of the Act by removing the name of Frank Mantell from its referral list and by thereafter refusing to place Mantell's name on the list.

5. The Respondent did not engage in any unfair labor practices alleged in the consolidated complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[4]

ORDER

The Respondent, Laborers' International Union of North America, Local Union No. 91, Niagara Falls, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Removing employees from its out-of-work referral list in retaliation for activity protected by Section 7 of the Act, including criticizing the Union, criticizing union officers for matters related to the performance of their official Union duties, filing charges with the Board, giving testimony in Board investigations and proceedings, and otherwise assisting in Board investigations and proceedings.

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

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

(a) Notify Frank Mantell in writing that it will make employment referrals available to him in his rightful order of priority, without regard to his exercise of Section 7 rights.

(b) Make Frank Mantell whole for any loss of earnings and other benefits suffered as a result of removing him from the out-of-work referral list, in the manner set forth in the remedy section of this decision, above.

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

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

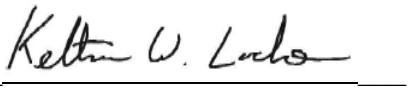
(d) Compensate Frank Mantell for the adverse tax consequences, if any, of receiving a lump-sum backpay award above, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to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

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all hiring hall and referral records, and any other records and documents, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its hiring hall in Niagara Falls, New York, and all other places where notices to members are customarily posted, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 3, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. August 26, 2019



Keltner W. Locke
Administrative Law Judge

[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read, "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The evidence establishes that the Respondent violated Section 8(b)(1)(A) of the Act by removing the Charging Party from its referral list because he engaged in activities protected by the Act.

Procedural History

This case began on August 13, 2018, when the Charging Party, Frank S. Mantell, an individual, filed an unfair labor practice charge against the Respondent, Laborers International Union of North America, Local Union No. 91. Staff at the Board's regional office in Buffalo, New York, docketed the charge as Case 03–CB–225477.

On November 15, 2018, after investigation of the charge, the Regional Director for Region 3 of the Board issued a complaint and notice of hearing. In doing so, the Regional Director acted for and with authority delegated by the Board's General Counsel.

On June 25, 2019, a hearing opened before me in Buffalo, New York. All parties had the opportunity to call, examine and cross-examine witnesses and to introduce evidence into the record. After both the General Counsel and the Respondent had rested, I adjourned the hearing until August 6, 2019, when it resumed by telephone conference call so that counsel could present oral argument. After oral argument, I recessed the hearing until today, August 9, 2019, when it resumed by telephone for the delivery of this bench decision.

Uncontested Facts

In its answer, which it amended during the hearing, the Respondent admitted certain allegations. Based upon those admissions, I find that the General Counsel has proven the facts alleged in complaint paragraphs 1, 2(a), (b), (c), 3, 4, 5, 6(a) (b), and (c), as amended.

More specifically, I find that the charge was filed and served as alleged in complaint paragraph 1.

Further, I find that at all material times, Mader Construction Co. has been a corporation with an office and place of business in Elma, New York, and a general contractor in the construction industry as alleged in complaint paragraph 2(a).

As alleged in complaint paragraph 2(b), I find that at all material times, the Council of Utility Contractors, Inc., the Independent Builders of Niagara County, the Associated General Contractors of America, New York State Chapter, Inc., and the Building Industry Employer's Association of Niagara County New York, Inc., have been organizations composed of various employers engaged in the construction industry, and that Mader Construction Co. is a member of these associations. Further, I find that these associations share the common purpose of

representing their employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Respondent.

Additionally, I conclude that the employer-members of these associations satisfy the Board's standard for the exercise of its jurisdiction, as alleged in complaint paragraph 2(c). Therefore, I further conclude that at all material times, the Employer and the employer-members of the Associations have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as alleged in complaint paragraph 3.

The Respondent has admitted, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act, as alleged in complaint paragraph 4. Additionally, I conclude that at all material times, Richard Palladino has held the position of Respondent's Business Manager and has been an agent of the Respondent within the meaning of Section 2(13) of the Act, as alleged in complaint paragraph 5.

The Respondent also has admitted, and I find, that since about April 1, 2012, the Associations and Respondent have entered into and since then have maintained collective-bargaining agreements that contain language that allows Respondent to be a nonexclusive source of referrals of employees for employment with employer-members of each of the Associations, as alleged in complaint paragraph 6(a).

Complaint paragraph 6(b) alleges and the Respondent has admitted that the National Labor Relations Board issued a decision finding that Respondent violated Section 8(b)(1)(A) of the Act by removing the present Charging Party, Frank S. Mantell, from Respondent's out-of-work referral list during the period October 8 through November 19, 2015, due to his protected concerted activity. Based on the Respondent's admission and the Board's published opinions, I so find.

The Board's decision referred to in complaint paragraph 6(b) began with a charge filed by Frank S. Mantell, who is also the Charging Party in the present case and bears the docket number 03–CB–163940. The Board's decision in this case may be found at 365 NLRB No. 28 and is dated February 7, 2017.

Complaint paragraph 6(c), as amended, alleges that since about July 5, 2018, Respondent, by operation of its nonexclusive hiring hall, has refused to place Mantell on its out-of-work referral list. Respondent's answer, as amended, "admits that on or about July 5th, 2018, the Respondent removed Mantell from it's out of work list by operation of its nonexclusive hiring call of rules. Since that date, he has not been restored to the list because he remains ineligible for the list." Based on this admission, I find that the Respondent removed Mantell from its referral list on or about July 5, 2018.

Judicial Notice

In addition to filing the unfair labor practice charges in the present case and in Case 03–CB–163940, Frank S. Mantell also filed the unfair labor practice charge in Case 03–CB-211488. Another individual, Duane Korpolinski, also filed charges, docketed as Cases 03-CB-202698 and 03-CB-207801 against the Respondent. These cases were consolidated for hearing,

which took place before the Honorable Donna N. Dawson, Administrative Law Judge, on June 12 through 14, 2018, and July 2 and 3, 2018. Judge Dawson issued a decision, reported as JD-53-19, on June 28, 2019.

In her decision, Judge Dawson concluded that the Respondent had unlawfully refused to place Charging Party Mantell on its out-of-work list during the period November 20, 2017 to January 19, 2018, and also violated the Act by refusing to refer Charging Party Korpolinski, by removing his name from the referral list for certain specified periods, and by threatening to sue him if he made false statements or charges. The Respondent has filed exceptions and the case is now pending before the Board.

The General Counsel has moved that I take judicial or administrative notice of Judge Dawson's findings. The Respondent opposes that motion.

It certainly is proper to take notice of the fact that Judge Dawson has issued a decision which includes findings and conclusions and, likewise, to take notice that she found and concluded certain things. However, taking such notice falls short of considering her findings and conclusions to be res judicata for the purposes of the present case. Because the Respondent has filed exceptions, the Board must decide whether or not to adopt some or all of them. The Act gives this authority and responsibility to the Board and the Board has not delegated it to its administrative law judges.

Rule 201 of the Federal Rules of Evidence governs the taking of judicial notice of adjudicative facts. The rule permits taking judicial notice only if the fact "is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Applying this standard, I conclude that it is proper to take notice that the present charging party, Frank S. Mantell, filed one of the charges in the case heard and decided by Judge Dawson, and that he gave testimony in that proceeding. Certainly, these facts are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

These facts are quite relevant to the present case because they establish that Charging Party Mantell has engaged in continuing activity protected by the Act. Additionally, they are material to the issue of whether the Respondent's alleged conduct, if proven, violates the Act.

Legal Standard

In *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1418 (2000), the Board clarified the scope of Section 8(b)(1)(A) by finding that internal union discipline may give rise to a violation only if the union's conduct: (1) affects the employment relationship, (2) impairs access to the Board's processes, (3) pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or (4) otherwise impairs policies imbedded in the Act. See also *Laborers' International Union of North America, Local 91 (Council of Utility Contractors)*, 365 NLRB No. 28 2017).

The alleged violation, removing the Charging Party's name from the out-of-work referral list, most certainly would affect the employment relationship, and therefore would fall within the scope of Section 8(b)(1)(A) of the Act. Because the Charging Party's protected activities include filing charges and giving testimony in Board proceedings, retaliation for those activities would directly affect the willingness of union members to use the Board's processes. Therefore, I conclude that the violation alleged in the complaint falls well within the scope of Section 8(b)(1)(A).

Animus

The Respondent has admitted taking the action which the complaint alleges to violate Section 8(b)(1)(A), namely removing Mantell's name from the referral list. However, the Respondent denies that it did so for the unlawful reasons alleged in complaint paragraphs 6(d) and 6(e).

More specifically, complaint paragraph 6(d) alleges that the Respondent removed Mantell's name from the referral list because he had engaged in the protected concerted activities described in the previous Board decision. As discussed above, that decision is *Laborers' International Union of North America, Local o. 91 (Council of Utility Contractors, Inc. and Various Other Employers)*, 365 NLRB No. 28 (February 7, 2017).

Complaint paragraph 6(e) alleges that the Respondent removed Mantell's name from the referral list because he had utilized the Board's processes by filing unfair labor practice charges. These two motivations are not mutually exclusive. Here, I will consider first the motivation alleged in complaint paragraph 6(d), namely, retaliation for Mantell's protected activities discussed in the previous Board decision. He had posted on Facebook serious criticisms of certain union officers.

Reacting to these posts, Local 91 Business Manager Richard Palladino filed internal Union charges against Mantell. The Local Union's executive board found Mantell guilty of those charges, fined him $5000 and suspended his union membership for 24 months. It also removed him from the hiring hall referral list.

The Board's finding of animus in 365 NLRB No. 28 is, of course, res judicata here. However, it warrants discussion because the analytical process applied in that case differs from the framework I will use here.

The Union's actions obviously resulted from Mantell's protected activity. The legal analysis therefore did not concern whether an asserted reason for the Union's action was a pretext. Rather, the Board weighed the importance of the protected activity, which involved a union member criticizing union leadership, against the Union's asserted interest in taking action against the member, an interest in protecting its reputation and the reputation of its business manager. The Board concluded that the importance of the protected activity outweighed the Union's "vague claim that its reputation was damaged." 365 NLRB No. 28, slip op. at 2.

In this previous case, the Board found that the Union acted with animus in October 2015. Here, I must decide whether the passage of time has dissipated that animus the way a

bad stink would fade into the wind. Judge Dawson's findings in JD-53-19 indicate that the animus which the Union loosed in 2015 was more persistent than a skunk's. But the Board has not yet ruled on the Respondent's exceptions to Judge Dawson's decision, and it is not necessary to rely on it to conclude that more than a whiff of the old animus is still in the air.

In addition to the internal union actions which the Respondent's executive board took against Mantell in October 2015, the Union brought a defamation lawsuit against Mantell. Business Manager Palladino also is an individual named plaintiff in that lawsuit.

Nothing in the present record indicates that either the Union or Palladino has withdrawn or sought to dismiss that lawsuit. The same hostility which motivated the Union's executive board to fine and suspend Mantell also prompted the Union and Palladino to sue. Here, I do not consider the merits of the lawsuit but simply the fact that it continues to exist, which suggests that the old animus lingers as well.

Complaint paragraph 6(e) alleges that the Union removed Mantell from the referral list because he filed charges with the Board and utilized the Board's processes. The Respondent, however, asserts that it took this action because, under rules which have been in effect since 2004, Mantell was not eligible to use the hiring hall. Under these rules, the Union argues, Mantell's work as a firefighter disqualifies him from appearing on the referral list.

This explanation itself raises suspicions. If the rule had been in effect since 2004, why was it never enforced against Mantell before he engaged in protected activity? When asked about the rule on direct examination, Palladino conceded that "It should have been enforced a long time ago." His testimony then continued as follows:

> Q. Okay, well, the question comes up as to why did you have this interpretation at this point in July of 2018? I mean, can you explain why that happened in July of 2018 as opposed to maybe in 2015 or 2016 or any time after the Facebook post?
>
> A. We have never spent that much time reading through all the rules until the National Labor Relations Board started sending us -- where we had to answer subpoenas. Some of the stuff, I hadn't even read before. I've seen it, but I didn't pay a lot of attention to it. But because of the letters that we got and the subpoenas that we has to produce the documents for, it made everybody start reading it, and obviously, it speaks for itself, and we should have done something about it a long time ago.
>
> Q. So to be clear, was it the actual filing of the charge by the NLRB, or was it the hearing that caused you to change your mind. Or was it the reflection of the words and study of the words?
>
> A. Once you read this, it's hard just to walk away from it and not take care of business like you're supposed to. As long as it wasn't on the tip of my nose, I never paid a lot of attention. But once we had to start, and everybody in the office had to read it. And had to be discussed with the executive board. So you had to do something, and that's what I decided to do.

That explanation leaves a big question unanswered. If believed, it might explain why they didn't use this rule earlier to justify removing Mantell from the referral list. For example, why didn't the Union use this rule to justify its removal of Mantell from the list in October 2015? Presumably, the answer would be "we didn't know about the rule then" or "we hadn't noticed that there was such a rule at that time." But ignorance of the rule simply explains why they did not use it *as an excuse*.

To say, "we just discovered that this rule was on the books" does not address why the Union decided to use it then and there. By analogy, Person A cannot satisfactorily explain why he hit Person B with a hammer by saying, "Well, I just noticed it was lying there."

Business Manager Palladino testified, "So you had to do something, and that's what I decided to do." That leaves unanswered why he felt he had to do something. Was animus a substantial motivating factor? It is difficult to believe that Palladino was obsessively punctilious about obeying a previously overlooked union rule when he has demonstrated no similar compulsion to observe the labor law.

Because the issue concerns whether the Respondent's asserted reason is a pretext, it is appropriate to apply principles the Board uses in determining whether an employer's stated reason for discharging or disciplining an employee is the true reason or a pretext. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' union activity was a motivating factor in a respondent's decision to take action against them. The General Counsel meets that burden by proving protected activity on the part of employee, a respondent's knowledge of that activity, and unlawful animus on the part of the respondent. See *Willamette Industries*, 341 NLRB 560, 562 (2004).

In the present case, Mantell has engaged in protected activity, filing unfair labor practice charges and participating in Board proceedings, which by its very nature placed the Respondent on notice.

The record also establishes the third element, animus. In the earlier decision involving this Respondent, found at 365 NLRB No. 28, the evidence clearly established that the Respondent removed Mantell from the referral list, and took other action against him, because of his protected activity, posting criticism of union officers on Facebook. The Respondent's motivation was not in dispute.

In the present case, the Respondent again removed Mantell's name from the referral list after he had engaged in protected activity within the Respondent's knowledge. In light of the Respondent's past conduct, the sequence of events in the present case raises the possibility that the Respondent again is acting from unlawful motivation.

In sum, under the *Wright Line* framework, I would conclude that the General Counsel has established all 3 of the initial elements needed to show that unlawful animus was a substantial or motivating factor. The burden therefore shifts to the Respondent to prove as an

affirmative defense that it would have taken the same action even if Mantell had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See also *El Paso Electric Co.*, 350 NLRB 151(2007).

The Respondent also has offered a nondiscriminatory reason for its action. In essence, and paraphrasing, Business Manager Palladino testified that because Mantell had filed charges with the Board resulting in Board proceedings, the Respondent's officers had to look through a bunch of union documents and that when they did this work they noticed a hiring hall referral rule which had been overlooked before. Now aware of the rule, they felt obliged to enforce it and therefore removed Mantell's name from the referral list.

On its face, the rule did not quite fit the situation as perfectly as the golden slipper fit Cinderella's foot. To explain the mismatch, it is helpful to begin with some background information.

In 2016, Mantell had tried to run for local union office. However, he had been disqualified on the basis of section 6 of the Uniform Local Union Constitution, which states:

> Any member who is not working at the calling or who is engaged in independent enterprise shall not have a voice or vote at meetings of the Local Union. A retired member shall have voice and vote at Local Union meetings only on matters of direct concern or interest to retired members.

The Respondent, which represents laborers in the construction industry, had concluded that because Mantell worked regularly as a firefighter, he was not "working at the calling." Mantell appealed to the International Union. The legal department of the International Union conducted a hearing by telephone.

In a May 24, 2016 letter, General President Terry O'Sullivan informed Mantell that the International Union was upholding the Respondent's decision. The letter stated, in pertinent part:

> "The central focus in determining whether one is working at the calling is the individual's primary or full-time employment.' Matter of Local 135, No. 05-SAO-15 (October 2005). A member, whose primary employment does not meet that term's definition, is not working at the calling, even where his or her part-time work does meet the term's definition. Id., citing Matter of Local 447, No. 01-SAO-13 (May 2001) (citing similar past decisions).

Testimony received at the hearing established that that, while you have assiduously performed work as a construction Laborer for many years, your primary occupation is firefighter. . .

Thus, the International Union had held that Mantell's primary occupation was firefighter, not laborer, and concluded that he was not "working at the calling." However, the hiring hall referral rule which the Respondent asserts as justification for removing Mantell's name from the referral list - the rule which the Respondent's officials "noticed" in 2018 - does not use the phrase "working at the calling." Instead, it states:

> Only applicants who are not currently employed *at the trade* may register their availability for referral. . . [Italics added]

If "employed at the trade" and "working at the calling" mean the same thing, the International Union's 2016 decision that Mantell was not working "at the calling" could be cited in support of a decision to refuse to allow Mantell to sign the referral list. There is some evidence which would indicate that the Respondent's officials had treated the two phrases as meaning the same thing.

This evidence is found in an email thread which began when the Respondent's attorney sought information from the International Union concerning whether these two phrases had been treated as identical in meaning. Although a few portions appear to have been redacted, the Respondent did not assert a claim of privilege over the communication and the emails are in evidence.

Respondent's counsel sent the first email to the International Union on Wednesday, June 27, 2018. The hearing before Judge Dawson was set to resume the following Monday. The email from Respondent's attorney stated, in part as follows (spelling and punctuation appearing as in original):

> Local 91 has interpreted: "employed at the trade" to be the same as "working at the calling". That is, when an individual is working for a nonunion landscaper (local 91 has union landscapers that are signatory), that individual may not register the out of work list. Is local 91's interpretation consistent with the internationals understanding of the term "working at the calling" or "employed at the trade"?
>
> A prompt response would be appreciated as our hearing reconvene on Monday morning. . .

There were two charging parties in the consolidated case being heard by Judge Dawson. One was the charging party in the present case, Frank Mantell. The other was Duane Korpolinski, who had been employed by nonunion landscapers. In the email, the Respondent's attorney specifically referred to an individual "working for a nonunion" landscaper, but not to an individual working as a firefighter. Therefore, it would appear likely that the Respondent's attorney was seeking information to use in defending against Korpolinski's charge.

In these circumstances, I conclude that the Respondent's officials probably did equate the two phrases. However, the fact that they may have considered the phrases as identical in meaning does not compel the conclusion that they simply had overlooked the hiring hall rule until the summer of 2018 and then, once they noticed it, felt compelled to apply it to Mantell.

Moreover, it may be noted that the wording of the referral rule in question, rule 3C, does not, on its face, appear to require that Mantell be removed from the referral list because he also worked as a firefighter. The rule states that "Only applicants who are not currently employed *at the trade* may register their availability for referral. . ." The word "trade" certainly must

mean the sort of work which would be performed by laborers referred through the hiring hall. That work does not include firefighting.
Therefore, to apply the language of the rule literally, someone working as a firefighter would fall within the definition of an applicant "not currently employed at the trade" and therefore would be eligible, not ineligible, to sign the referral list.

Even if the rule's language is not interpreted literally, but rather in the way advanced by the Respondent, the Respondent's defense falls short. Under the *Wright Line* framework, once the General Counsel has carried the government's initial burden, the respondent must present sufficient evidence to establish more than that it *could* have taken the same action in the absence of protected activity. Rather, the respondent's evidence must show that it *would* have taken that action, a burden typically carried by evidence of how it treated other employees in similar situations.

It certainly is not true that a respondent can prevail only by showing that there were identical situations in which it treated others exactly the same way it treated the alleged discriminatee. *Sara Lee d/b/a International Baking Co.*, 348 NLRB 1133(2006). Nonetheless, to carry its rebuttal burden, a respondent must present persuasive evidence, typically based upon its past treatment of how it treated others in similar, if not identical circumstances.

The Respondent has not carried that burden here. The Respondent has not presented evidence showing that it removed others from the referral list because such individuals held other jobs as well as doing the work of laborers. In other respects, the evidence does not establish that the Respondent would have treated Mantell the same way if he had not engaged in protected activities.

Accordingly, I conclude that the General Counsel has proven that the Respondent acted with the unlawful motivation alleged in complaint paragraphs 6(d) and (e). Further, I conclude that the Respondent has violated Section 8(b)(1)(A) of the Act and that this unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the findings of fact, conclusions of law, remedy, order and notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

The hearing is closed.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT remove any of you from our out-of-work referral list in retaliation for activity protected by Section 7 of the Act, including criticizing the Union or the manner in which union officers perform their duties, and also including filing unfair labor practices with the National Labor Relations Board, providing information to the Board or otherwise assisting the Board in any investigation or proceeding, and giving testimony during any Board investigation, hearing or proceeding.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL notify Frank Mantell in writing that we will make employment referrals available to him in his rightful order of priority, without regard to his exercise of Section 7 rights.

WE WILL make Frank Mantell whole for any of loss earnings or other benefits suffered as a result of our removing him from our out-of-work referral list.

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

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

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 91

(Labor Organization)

Dated _____ By _____

(Representative) (Title)

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

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

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/03-CB-225477 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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

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