UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

March 5, 2020

Catherine O'Hagan Wolfe
Clerk, United States Court of
Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: *NLRB v. Laborers' International Union of North America, Local Union No. 91*,
Docket Nos. 19-3699 and 19-3925

Dear Ms. Wolfe:

I am enclosing a certified copy of the agency record in this case.

Very truly yours,

/s/ David Habenstreit

David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half St., S.E.
Washington, D.C. 20570
(202) 273 - 2960

Encls.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner/Cross-Respondent	:	
	:	Docket Nos.:
v.	:	19-3699
	:	19-3925
	:	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 91	:	
	:	
Respondent/Cross-Petitioner	:	

CERTIFIED AGENCY RECORD

Pursuant to authority delegated in Section 102.115 of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. § 102.115, I certify that the attached papers and documents constitute the record before the Board in *Laborers' International Union of North America, Local Union No. 91 and Frank S. Mantell*, Board Case No. 03-CB-225477.

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half St., S.E.
Washington, D.C. 20570

March 5, 2020

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner/Cross-Respondent	:	Docket Nos.:
v.	:	19-3699
	:	19-3925
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 91	:	
	:	
Respondent/Cross-Petitioner	:	

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half St., S.E.
Washington, D.C. 20570

Dated at Washington, D.C.
this 5th day of March 2020

INTERNET
FORM NLRB-508
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

FORM EXEMPT UNDER 44 U.S.C 3512

DO NOT WRITE IN THIS SPACE	
Case 03-CB-225477	Date Filed 8/13/18

INSTRUCTIONS: File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to contact	
Laborers Local 91	Richard Palladino, Business Agent	
c. Address *(Street, city, state, and ZIP code)*	d. Tel. No.	e. Cell No.
4500 Witmer Industrial Estate Niagara Falls, New York 14305	716 297-6441	
	f. Fax No.	g. e-Mail

h. The above-named organization(s) or its agents has *(have)* engaged in and is *(are)* engaging in unfair labor practices within the meaning of section 8(b), subsection(s) *(list subsections)* 1(A) ____ ____ ____ ____ ____ ____ ____ ____ of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Since on or about July 27, 2018, and continuously thereafter, it, a labor organization, by its officers, agents, and representatives, restrained and coerced and is restraining and coercing Frank Mantell, an employee of Mader Construction, in the exercise of (his) (their) rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, which rights are guaranteed in Section 7 of the said Act by removing him from the union's referral list.

3. Name of Employer	4a. Tel. No.	b. Cell No.
Mader Construction	716 655-3400	
	c. Fax No.	d. e-Mail

5. Location of plant involved *(street, city, state and ZIP code)*	6. Employer representative to contact
970 Bullis Road Elma, New York 14059	

7. Type of establishment *(factory, mine, wholesaler, etc.)*	8. Identify principal product or service	9. Number of workers employed
construction		

10. Full name of party filing charge	11a. Tel. No.	b. Cell No.
Frank S. Mantell	716 471-6824	
	c. Fax No.	d. e-Mail

11. Address of party filing charge *(street, city, state and ZIP code.)*
6811 Kies Street Niagara Falls, New York 14304

12. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Frank S. Mantell *(signature of representative or person making charge)* Frank S. Mantell *(Print/type name and title or office, if any)*

Address 6811 Kies St, Niagara Falls, NY 14304 *(date)* 8/10/18

Tel. No.
Cell No. 716 471-6824
Fax No.
e-Mail nffirell91@yahoo.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Frank S. Mantell, an Individual (Mantell). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Laborers' International Union of North America, Local Union No. 91 (Respondent) has violated the Act as described below.

1.

The charge in this proceeding was filed by Mantell on August 13, 2018, and a copy was served on Respondent by U.S. mail on the same date.

2.

(a) At all material times, Mader Construction Co., Inc. (the Employer), has been a corporation with an office and place of business in Elma, New York (the Employer's facility), and has been a general contractor in the construction industry doing commercial construction.

(b) At all material times, Council of Utility Contractors, Inc.; The Independent Builders of Niagara County; Associated General Contractors of America, New York State

Chapter, Inc.; and The Building Industry Employer's Association of Niagara County New York, Inc., collectively referred to as the Associations, have been organizations composed of various employers, including the Employer, 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.

(c) Annually, the employer-members of each of the Associations, in the course of their business operations described above in paragraph 2(a), collectively, purchase and receive goods valued in excess of $50,000 directly from points outside the States wherein the employer-members are located.

3.

At all material times, the Employer and the employer-members of the Associations have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4.

At all material times, Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

5.

At all material times, Richard Palladino has held the position of Respondent's Business Manager and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

6.

(a) 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 non-exclusive source of referrals of employees for employment with employer-members of each of the Associations.

(b) On February 7, 2017, the National Labor Relations Board issued a decision finding that Respondent violated Section 8(b)(1)(A) of the Act by removing employee-member Mantell from Respondent's out-of work referral list from October 8, 2015 through November 19, 2015 due to his protected concerted activity.

(c) Since about July 27, 2018, Respondent, by operation of its non-exclusive hiring hall, has refused to place Mantell on its out-of-work referral list.

(d) Respondent engaged in the conduct described above in paragraph 6(c) because Mantell engaged in the protected concerted activity described in the Board decision referred to above in paragraph 6(b).

(e) Respondent engaged in the conduct described above in paragraph 6(c) because Mantell engaged in protected conduct by utilizing the Board's processes by filing Board charges.

7.

By the conduct described above in paragraph 6(c), (d), and (e), Respondent has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

8.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 6 and 7, the General Counsel seeks an order requiring Respondent, inter alia, to preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in

electronic form, necessary to analyze the amount of backpay due under the terms of such Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before November 29, 2018, or postmarked on or before November 28, 2018.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a

pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on April 2, 2019, at 10:00 a.m., in the Hearing Room at the Niagara Center Building, 130 South Elmwood Avenue, Suite 630, Buffalo, New York, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED: November 15, 2018.

/S/PAUL J. MURPHY

PAUL J. MURPHY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Attachments

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing (with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on November 15, 2018, I served the above-entitled document(s) by **certified or regular mail,** as noted below, upon the following persons, addressed to them at the following addresses:

Richard Paladino , Business Agent 4500 Witmer Rd Industrial Estates Niagara Falls, NY 14305-1342	**CERTIFIED MAIL** **7014-1820-0000-6579-6837** **RETURN RECEIPT REQUESTED**
Robert L. Boreanaz , ESQ. Lipsitz Green Scime Cambria LLP 42 Delaware Avenue, Suite 120 Buffalo, NY 14202-3924	**FIRST CLASS MAIL**
Frank S. Mantell 6811 Kies Street Niagara Falls, NY 14304	**CERTIFIED MAIL** **7014-1820-0000-6579-6844** **RETURN RECEIPT REQUESTED**
Mader Construction Co., Inc. 970 Bullis Rd Elma, NY 14059-9638	**FIRST CLASS MAIL**

November 15, 2018

Date

JULIO GONZALEZ, Designated Agent of NLRB

Name

/S/JULIO GONZALEZ

Signature

FORM NLRB 4338
(6-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

Case 03-CB-225477

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Frank S. Mantell
6811 Kies Street
Niagara Falls, NY 14304

Mader Construction Co., Inc.
970 Bullis Rd
Elma, NY 14059-9638

Richard Paladino , Business Agent
4500 Witmer Rd Industrial Estates
Niagara Falls, NY 14305-1342

Robert L. Boreanaz , ESQ.
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue, Suite 120
Buffalo, NY 14202-3924

Form NLRB-4668
(6-2014)

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative**. If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits: Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered**

in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision**: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

and

ORDER GRANTING EXTENSION OF TIME TO FILE ANSWER

On November 29, Respondent's Counsel requested an extension of time to file its answer in this matter.

Having duly considered Respondent's request and the reasons advanced therefore,

IT IS HEREBY ORDERED that the time for filing of Respondent's answer is extended to December 6, 2018, only. No further extensions will be granted.

DATED: November 30, 2018.

/S/PAUL J. MURPHY

PAUL J. MURPHY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and

FRANK S. MANTELL, an Individual

ANSWER

Case 3-CB-225477

Respondent, Laborers' International Union of North America, Local Union No. 91, by its attorneys, Lipsitz Green Scime Cambria LLP, Robert L. Boreanaz, of counsel, answers the Complaint as follows:

1. Admits the allegations set forth in paragraph 1;

2. Admits the allegations set forth in paragraphs 2(a) and 2(b) and further denies knowledge and information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2(c);

3. Denies knowledge and information sufficient to form a belief as to the truth of the allegations set forth in paragraph 3;

4. Admits the allegations set forth in paragraph 4;

5. Admits the allegations set forth in paragraph 5;

6. Admits the allegations set forth in paragraphs 6(a) and 6(b) and further denies the allegations set forth in paragraphs 6(c), 6(d) and 6(e);

7. Denies the allegations set forth in paragraph 7; and

8. Denies the allegations set forth in paragraph 8.

FIRST AFFIRMATIVE DEFENSE

The charges in the Complaint are barred by the Statute of Limitations.

SECOND AFFIRMATIVE DEFENSE

The Charging Party has engaged in misconduct.

THIRD AFFIRMATIVE DEFENSE

There has been inadequate investigation and compliance with the case handling manual.

FOURTH AFFIRMATIVE DEFENSE

The Complaint lacks the required clarity and description of the acts claimed to constitute unfair labor practices as required by Board rules.

WHEREFORE, Respondent respectfully requests that the Complaint be dismissed in its entirety.

Dated: December 6, 2018
Buffalo, New York

Respectfully submitted,

Robert L. Boreanaz, Esq.
Lipsitz Green Scime Cambria LLP
Attorneys for Respondent
42 Delaware Avenue, Suite 120
Buffalo, NY 14202-3924
(716) 849-1333 ext. 343
rboreanaz@lglaw.com

3476821, 1, 053330.0033

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and

FRANK S. MANTELL, an Individual

CERTIFICATE OF SERVICE

Case 3-CB-225477

I, Shirley J. Darin, hereby certify that on December 6, 2018, I electronically filed the foregoing Amended Answer with the National Labor Relations Board and a copy was served upon:

Frank S. Mantell
6811 Kies Street
Niagara Falls, NY 14304

Mader Construction Co., Inc.
970 Bullis Road
Elma, NY 14059-9638

by depositing a true copy of same enclosed in a postage-paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Shirley J. Darin

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that, upon the request of the Charging Party, Frank S. Mantell, with good cause shown, the hearing in the above-entitled matter, which is currently scheduled to commence on April 2, 2019, at 10:00 a.m., is rescheduled to commence on June 25, 2019 at 10:00 a.m. and continue consecutive days thereafter until concluded.

DATED at Buffalo, New York this 5th day of February 2019.

/S/PAUL J. MURPHY

Paul J. Murphy, Regional Director
National Labor Relations Board
Region Three
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and

FRANK S. MANTELL, an Individual

MOTION FOR BILL OF PARTICULARS

Case 3-CB-225477

Respondent Laborers' International Union of North America, Local Union No. 91(Mader Construction Co., Inc.) submits this Motion for Bill of Particulars. The allegations in several paragraphs of the Complaint dated November 15, 2018 contain insufficient particularity to provide Respondent fair notice of the grounds for the relief sought by the Regional Director as required by the NLRA §102.15 and the Case Handling Manual §10264.2. A Bill of Particulars is necessary to ensure the Respondent is afforded a fair, complete and meaningful opportunity to understand, investigate, and respond to the claims alleged against it.

PARTICULARS REQUESTED

1. Paragraph 6(b) of the complaint is unduly vague as fails to adequately identify the charge which it is referring to. With respect to paragraph 6(b) of the complaint, the Regional Director should be required to:

   a. Identify the charge in which it refers to;

   b. describe the date and details of the charge;

   c. provide a copy of the decision which is being referred to.

2. Paragraph 6(d) of the complaint is unduly vague with respect to its incorporation of paragraph 6(b) for the reasons discussed therein. Additionally, Paragraph 6(d) of the complaint

is unduly vague and provides no factual specifics, or even general detail, of the protected concerted activity Charging Party allegedly engaged in or when such activity occurred. With respect to paragraph 6(d) of the complaint, the Regional Director should be required to:

a. describe the date and details of the alleged protected concerted activity Charging Party allegedly engaged in as referenced in paragraph 6(d) of the complaint.

3. Paragraph 6(e) of the complaint is unduly vague. The allegations of this paragraph are unduly vague and provide no factual specifics. With respect to paragraph 6(e) of the complaint, the Regional Director should be required to:

a. describe the date and details of the action or conduct the Charging Party alleges consist of "utilizing the Board's processes by filing Board charges" as referenced in paragraph 6.(e) of his complaint.

b. provide a copy of all charges filled by the Charging Party, or at the least, provide information sufficient enough to locate and identify such charges.

4. Paragraph 7 of the complaint is exceedingly vague. The allegation that "Respondent has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act" is entirely unexplained. There is no indication of what the alleged exercise of Section 7 rights was, nor how those unspecified acts interfered with the exercise of rights under the act. Further, the "employees" who engaged in the alleged unspecified acts are not identified. Additionally, there is no indication of what the alleged restraint or coercion consisted of nor. With respect to paragraph 7 of the complaint, the Regional Director should be required to:

a. identify each and every "employee" referred to therein,

b. identify each and every alleged Section 7 "right" each employee has allegedly been coerced or restrained by the Respondent

c. identify each and every action or conduct and provide dates, the Charging Party alleges constitutes "restraint or coercion"

Wherefore, Respondent respectfully requests that its Motion for a Bill of Particulars be granted in its entirety by an order requiring the complaint be re-pled as to the paragraphs described herein in order to provide Respondent with a sufficient and fair notice of the allegations against.

Dated: June 17, 2019
Buffalo, New York

Respectfully submitted,

/s/ Robert L. Boreanaz

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OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 3

In the Matter of:

Laborers' International Union of North America, Local Union 91, (Mader Construction Co., Inc.), Case No. 03-CB-225477

and

Frank S. Mantell, An Individual.

_____

_____

Place: Buffalo, New York

Dates: June 25, 2019

Pages: 1 through 208

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 3

In the Matter of: LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION 91, (MADER CONSTRUCTION CO., INC.), and FRANK S. MANTELL, AN INDIVIDUAL.	Case No. 03-CB-225477

The above-entitled matter came on for hearing, pursuant to notice, before **KELTNER W. LOCKE**, Administrative Law Judge, at 130 South Elmwood Avenue, Buffalo, New York 14202, on **Tuesday, June 25, 2019, 10:09 a.m.**

1 **A P E A R A N C E S**

2 **On behalf of the General Counsel:**

3 **JESSICA L. CACACCIO, ESQ.**
NATIONAL LABOR RELATIONS BOARD
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Buffalo, NY 14202
5
On behalf of the Employer:
6
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9
On behalf of the Charging Party:
10
FRANK S. MANTELL
11
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14
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1 **I N D E X**

2

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Frank S. Mantell	34	53	128	133	
Richard Palladino	148	181			
Frank Mantell	201				

1 **E X H I B I T S**

EXHIBIT	IDENTIFIED	IN EVIDENCE
General Counsel:		
GC-1(a) through (l)	19	19
GC-2	21	21
GC-3	20	21
GC-4	23	23
GC-6	26	26
GC-7	27	27
GC-8	37	37
GC-9(a)	39	39
GC-9(b)	40	40
GC-10	139	139
GC-11	51	51
GC-13	199	199
GC-14	202	202
Union:		
U-1	64	125
U-2	71	116
U-3	126	126
U-4	127	127
U-5	127	127

1 **P R O C E D I N G S**

2 JUDGE LOCKE: The hearing will be in order. This is a
3 formal hearing before the National Labor Relations Board in the
4 matter of Laborers' International Union of North America, Local
5 Union number 91, Mader Construction Company, Inc. and Frank S.
6 Mantell, an individual. Case 03-CB-225477. Administrative law
7 Judge conducting this hearing is Keltner W. Locke.
8 All parties have been informed of the procedures at formal
9 hearings before the Board by service of the statement of
10 standard procedures with the complaint and notice of hearing.
11 Additional copies of this statement are available for the
12 counsel for the General Counsel on request.
13 Will counsel and other representatives please state your
14 appearances for the record?
15 MS. CACACCIO: Yes, Your Honor. My name is Jessica
16 Cacaccio, C-A-C-A-C-C-I-O, and I am counsel for the General
17 Counsel.
18 MR. BOREANAZ: Good morning, Your Honor. Robert Boreanaz
19 of law firm Lipsitz Green Scime Cambria, on behalf of the
20 Respondent, Laborers' Local 91.
21 JUDGE LOCKE: And you're Mr. Mantell, I guess?
22 MR. MANTELL: Yes, I am.
23 JUDGE LOCKE: Well you have the -- I'll just make sure
24 that when an individual's a charging party, that you know that
25 you're a full party to the proceeding, and you have the right

1 to call witnesses, to examine and cross-examine them, to
2 subpoena records or witnesses. Sometimes I get busy and I
3 inadvertently skip over the Charging Party, and I don't mean to
4 do that. And if I do, call my attention to it, if you want to
5 say anything. Don't be shy about that. Because I certainly
6 don't want to leave you out. But unless I hear from you to the
7 contrary, I'll assume that the position taken by the General
8 Counsel is the same as your position.
9 MR. MANTELL: Yes.
10 JUDGE LOCKE: Anything we need to talk about before we
11 proceed to the formal documents?
12 MR. BOREANAZ: I have a few issues.
13 MS. CACACCIO: Sure.
14 MR. BOREANAZ: So Judge, the Respondent brought a petition
15 to revoke the subpoena early on in the proceedings, and that
16 petition is hereby revoked. We have worked out the issues with
17 General Counsel, and we're hoping that petition -- we're
18 withdrawing that petition to revoke.
19 In addition, I'd like to amend the Respondent's answer.
20 In particular, with respect to its response to paragraph
21 2(c) -- as in Charlie. We had originally indicated we did not
22 have knowledge or information sufficient to form a belief with
23 respect to that particular charge, 2(c). We now have
24 sufficient information, and amended our answer to admit that
25 paragraph 2(c) of the complaint with respect to the members'

1 contract -- employer members of the associations being engaged
2 in more than $50,000 in business. So we amend our answer in
3 that regard.
4 JUDGE LOCKE: Thank you. The amendment is received.
5 MR. BOREANAZ: Lastly, we have a Respondent's motion for a
6 bill of particulars. During a pre-trial conference, we had
7 some discussions with respect to that. And General Counsel's
8 office has clarified two things: One, the particularization
9 that the Charging Party engaged in specified protected activity
10 as reflected in a prior Board decision. The protected activity
11 particularly described in that decision is the protected
12 activity that is relied upon by the General's (sic) Counsel's
13 Office, in addition to various charges. And General Counsel's
14 Office identified four charges that are a part of their
15 allegations with respect to protected activity. With those
16 representations, we would then withdraw our motion for bill of
17 particulars.
18 JUDGE LOCKE: Very well. That is noted. Anything
19 further?
20 MR. BOREANAZ: Not from the Respondent.
21 JUDGE LOCKE: Very well.
22 MS. CACACCIO: Yes, Your Honor. All right, so Your Honor,
23 as we discussed previously on the conference calls held before
24 this hearing, the counsel for the General Counsel's asking that
25 you take judicial notice of the Board decision in case 03-CB-

1 163940, issued by the Board on February 7th, 2017. The
2 citation for that case is 365 NLRB number 28. I have a copy --
3 JUDGE LOCKE: Okay. 365 NLRB --
4 MS. CACACCIO: Number 28. And I did print a copy, if you
5 wanted a physical copy.
6 JUDGE LOCKE: I just happen to have that on my computer.
7 MS. CACACCIO: Okay.
8 JUDGE LOCKE: So we're in good shape.
9 MS. CACACCIO: Is there any -- does there have to be a
10 ruling on that? I don't know if --
11 JUDGE LOCKE: A ruling on?
12 MS. CACACCIO: On the judicial notice of that.
13 JUDGE LOCKE: Well, if it's a Board decision, it's more
14 like precedent than it is judicial notice. But of course, the
15 judge has authority to notice the Board's own records, and of
16 course I will.
17 MS. CACACCIO: Also --
18 JUDGE LOCKE: I'd be in trouble if I didn't, so --
19 MS. CACACCIO: Also, as we discussed previously, Your
20 Honor, the General Counsel is asking that you take judicial
21 notice of selected exhibits and portions of the transcript in
22 the last hearing between these parties, held before ALJ Donna
23 Dawson. The three case numbers for that hearing are 03-CB-
24 202698, 03-CB-207801, and 03-CB-211488. At your request, Your
25 Honor, I did speak with Mr. Boreanaz prior to this hearing to

1 go over with him what it is that I was looking for you to take
2 notice of. And as you requested, I did review the transcript
3 and pull pages and specific exhibits.
4 JUDGE LOCKE: Before I ask the Respondent's position on
5 that, let me be sure I understand. Do all of these documents
6 that were part of the record, are they part of the record in
7 this previous case, that 365 NLRB number 28?
8 MS. CACACCIO: No, Judge. It's a separate hearing.
9 JUDGE LOCKE: In a different case?
10 MS. CACACCIO: Yes.
11 JUDGE LOCKE: Okay. What's the Respondent's position on
12 that?
13 MR. BOREANAZ: So what General Counsel's trying to do is
14 to put into this record documents that were part of a prior
15 case that has yet to be decided by the administrative law
16 judge. We do not have a decision on that. It involved a
17 different set of facts -- same parties, of course -- different
18 set of facts, different application of Union rules. And I'm
19 not sure, with respect to the exhibits -- one of the exhibits
20 is a referral hall rules in general. We would have no
21 objection to those being introduced. I don't see the need to
22 take judicial notice of something; let's put them in as an
23 exhibit. I'll stipulate to them as being an exhibit. There's
24 also a membership meeting that occurred in October 2015; I
25 would stipulate to those minutes coming in as an exhibit to

1 this proceeding. There's a 2004 letter from the International
2 Union down to the local-level union with respect to these
3 referral hall rules generally. I would also stipulate to that
4 coming into the record as an exhibit. And the fourth thing was
5 a November 14th, 2017 letter --
6 MS. CACACCIO: Yeah, and I think there's actually one
7 more.
8 MR. BOREANAZ: Oh, I remember what that is.
9 MS. CACACCIO: And I'm not entirely sure. The other one
10 would be the complaint for the last hearing, just so there's
11 context. Which I'm not sure I --
12 MR. BOREANAZ: You didn't reference that.
13 MS. CACACCIO: Yeah, I don't know that I --
14 MR. BOREANAZ: But with respect to the fourth document,
15 the fourth document, this November 14th, 2017 letter. Again,
16 this related to a different application of the rule. I would
17 object to that going in. As far as the complaint in the prior
18 case, I don't see any relevance to these proceedings. I would
19 object to that going in. I think with respect to the exhibits,
20 the application of judicial notice is not the proper mechanism
21 to draw in from a prior proceeding. Again, there's no finding,
22 there's no precedent from the other case. Judicial notice is
23 generally not for facts that are maybe in dispute.
24 And, you know, if they want to bring testimony in, let
25 them put testimony on. You can judge the credibility for

1 yourself. And if they want to drag testimony in from someplace
2 else, you're going to not be able to judge credibility. I did
3 look at the excerpts of the testimony that they want to bring
4 in. Again, you know, when it's different application of a
5 different rule in the hiring hall procedures, and proof comes
6 in that may not be necessarily related to that prior case, you
7 make decisions on what questions to ask, what follow-up to ask
8 and not ask. And so it's just misplaced. If they want
9 testimony to come in, bring the witnesses here, let them
10 testify, let you judge their credibility, and let them be
11 exposed to cross-examination on both sides, and you can decide
12 what to do. But judicial notice for transcript of proceedings
13 that has no precedent value is misplaced, and I object.
14 JUDGE LOCKE: Any response?
15 MS. CACACCIO: Yes, Your Honor. We're making this request
16 in the interest of judicial efficiency. That hearing lasted a
17 number of days. I haven't read into the record yet the
18 specific page numbers which we're requesting for the
19 transcript, which I will happily do. Whether or not Respondent
20 wants to stipulate different exhibits into the record, I mean,
21 we can discuss that if that's what your preference is, but I
22 don't know that it's necessary, as it's already in a record
23 which we all have access to.
24 Respondent's counsel and I were counsels for the prior
25 case. We had full ability to cross-examine documents, records;

1 this is what ended up in the transcript. And Your Honor can
2 take it for its value, whatever that value is. It doesn't
3 mean, in the General Counsel's position, that you shouldn't be
4 able to reference it or use it at all. These targeted pages
5 are those that would provide you necessary background for this
6 particular hearing, including evidence of animus, for issues
7 that should not and need not be relitigated in this matter.
8 Like I said, the parties remain the same, and the rules
9 themselves remain the same. Whether or not it's a different
10 rule that we're looking at here is a separate issue. The
11 actual rules that we're discussing from the last case are
12 identical to those that are being discussed in this case. So
13 that's why the General Counsel is making this request.
14 JUDGE LOCKE: Well, I think the situation falls within the
15 Board's policy that a judge is not to rely upon testimony of a
16 witness that he hasn't had the opportunity to examine or
17 observe while testifying and the opportunity to make a
18 credibility determination based upon that observation. So in
19 this particular case, I can see -- even apart from that policy,
20 I can see a problem that if I should rely on testimony, and the
21 judge who heard the case then decides the witness isn't
22 credible, that presents a little bit of a complicated
23 situation. So I will not take judicial notice of that or of
24 the exhibits. I will take judicial notice, if that's what you
25 want to call it, of the Board's decision, which is precedent in

1 365 NLRB number 28. But otherwise, denied.
2 MS. CACACCIO: Judge, the General Counsel's going to need
3 a couple minutes. Because now I may have to change my entire
4 presentation of this case.
5 JUDGE LOCKE: You need what?
6 MS. CACACCIO: I may need a few minutes.
7 JUDGE LOCKE: Oh.
8 MS. CACACCIO: Because I need to speak with management --
9 JUDGE LOCKE: Right now?
10 MS. CACACCIO: -- and see if I have to -- yes, Judge.
11 JUDGE LOCKE: Okay. Why don't we take a 10-minute break.
12 Off the record.
13 (Off the record at 10:21 a.m.)
14 MS. CACACCIO: Judge, with that ruling in mind, the
15 General Counsel's now requesting that you take judicial notice
16 of ALJ Goldman's decision in -- the lead case was 03-CB-196682.
17 It's JD-9817.
18 MR. BOREANAZ: Can you give me that cite again please?
19 MS. CACACCIO: It's JD-9817.
20 MR. BOREANAZ: It's Goldman?
21 MS. CACACCIO: Yes.
22 JUDGE LOCKE: This is Laborers' Local 91 as the
23 Respondent?
24 MS. CACACCIO: Yes, Judge.
25 MR. BOREANAZ: Can I have some understanding as to the

1 reason why it's being asked that you take judicial notice of
2 it?
3 JUDGE LOCKE: Yes.
4 MS. CACACCIO: Judge, that particular decision also
5 explains Respondent's continued animus toward Mr. Mantell and
6 his allies.
7 JUDGE LOCKE: Well, since the Board hasn't ruled on it
8 yet, I will take your request under advisement. And it's
9 possible I may take judicial notice of some things, for
10 instance the fact that a charge was filed or that the decision
11 issued, but not other things. But I will cross that bridge
12 when I come to it. So anything further?
13 MR. BOREANAZ: Judge, I would just note on that, if that's
14 the purpose in which the General Counsel is asking that it be
15 put in or considered by Your Honor, you know, that was the
16 purpose for the request for the bill of particulars, to
17 identify what protected activity the Board has alleged, served
18 as the motivation of the alleged retaliatory act. I mean,
19 that's what I asked.
20 JUDGE LOCKE: Yeah.
21 MR. BOREANAZ: And the response I get was, the articulated
22 protected activity in the actual Board case -- the Facebook
23 case, I call it -- and then we've got the four charges. And
24 certainly I understand the filing of a charge, but again, I
25 think that the General Counsel's Office is trying to improperly

1 import into the record facts or circumstances that have not
2 been fully considered by the Board that relate to other
3 aspects. Mr. Mantell is here, he can testify about what
4 activity he claims he participated in. You can listen to him,
5 he can be subject to cross-examination, you can determine
6 whether or not it is protected activity, other than the Board
7 charges which he filed, which obviously are a protected
8 activity.
9 But to just throw something out of a case that hasn't been
10 heard by the Board, that actually had mixed reviews by the
11 administrative law judge, determined that a violation had not
12 occurred in some instance and that violation occurred in
13 another instance. And so for those reasons, I think, again,
14 that the General Counsel's Office is just trying to improperly
15 import facts into the record that can come in through the
16 proper channel.
17 MS. CACACCIO: If I may be heard?
18 JUDGE LOCKE: Sure.
19 MS. CACACCIO: We aren't alleging -- and I didn't allege
20 in my first explanation -- that his protected activity was part
21 of that case. Because that's not why we're offering this.
22 We're offering it for Respondent's continued animus against Mr.
23 Mantell and his allies. That's an entirely separate issue from
24 Mr. Mantell's protected activity. As Your Honor pointed out in
25 a pre-trial conference, it's going to be the General Counsel's

1 responsibility to demonstrate the timing and how this could
2 possibly be continuing from the Board's decision in 2015 to
3 what's carrying on now. And it's the General Counsel's
4 position that everything that has happened in the interim
5 demonstrates that. And so it's important that Your Honor will
6 at least acknowledge that this is a decision that has come out
7 from the ALJ from then to now.
8 JUDGE LOCKE: Well, I'll take your motion under
9 advisement. Anything else before we get to the formal papers?
10 MS. CACACCIO: Yes, Your Honor. Respondent, in its first
11 pre-trial -- things we've discussed prior to now -- indicated
12 that it was answering paragraph 2(c) of the complaint as an
13 admission. But it has not admitted paragraph 3 yet. Paragraph
14 3 is the ultimate conclusion for commerce, and it was the
15 General Counsel's understanding that Respondent was going to be
16 admitting commerce in this instance. If that is not the case,
17 then we're going to need more time, Your Honor, because I'm
18 going to have to go about subpoenaing various entities for
19 commerce.
20 MR. BOREANAZ: Your Honor, I inadvertently failed to
21 mention that Respondent would further amend its answer to admit
22 paragraph 3.
23 JUDGE LOCKE: Very well. That amendment is received --
24 noted.
25 MS. CACACCIO: Your Honor, the General Counsel is also

1 asking in accordance with Rule 615 that all parties other than
2 party representatives be sequestered in this matter.
3 The General Counsel's -- the party representative is Mr.
4 Mantell for us, as he already indicated.
5 JUDGE LOCKE: Well, I'll read to you from Greyhound Lines,
6 319 NLRB 554. "Counsel has invoked a rule requiring that the
7 witnesses be sequestered. This means that all persons who are
8 going to testify in this proceeding, with specific exceptions
9 that I will tell you about, may only be present in the hearing
10 room when they are giving testimony.
11 "The exceptions are alleged discriminatees, natural
12 persons who are parties, representatives of nonnatural parties,
13 and a person who is shown by a party to be essential to the
14 presentation of the party's cause. They may remain in the
15 hearing room even if they are going to testify, or have
16 testified. However, alleged discriminatees, including charging
17 parties, may not remain in the hearing room when other
18 witnesses on behalf of the General Counsel or the charging
19 party are giving testimony as to events as to which the alleged
20 discriminatees will be expected to testify.
21 "The rule also means that from this point on until the
22 hearing is finally closed, no witness may discuss with other
23 potential witnesses either the testimony that they have given
24 or that they intend to give. The best way to avoid any problems
25 is simply not to discuss the case with any other potential

1 witness until after the hearing is completed.
2 "Under the rule as applied by the Board, with one
3 exception, counsel for a party may not in any manner, including
4 the showing of transcripts, inform a witness about the content
5 of the testimony given by a preceding witness, without express
6 permission of the Administrative Law Judge. The exception is
7 that counsel for a party may inform counsel's own witnesses
8 (sic) of the content of testimony, including the showing of
9 transcripts, given by a witness for the opposing side in order
10 to prepare for rebuttal of such testimony.
11 "I expect counsel to police the rule and to bring any
12 violation of it to my attention immediately. Also, it is the
13 obligation of counsel to inform potential witnesses who are not
14 now present in the hearing room of their obligations under the
15 rule."
16 I will now go off the record to allow time for counsel to
17 police the rule. Off the record.
18 (Off the record at 10:49 a.m.)
19 MS. CACACCIO: Judge, would you be willing to take
20 judicial notice of the timing of the last hearing, the dates
21 that it began and ended?
22 JUDGE LOCKE: I think I can take notice of the days of the
23 -- of the hearing as is reported by the judge in the hearing --
24 in the decision, yeah. I don't think that -- that shouldn't be
25 a controverted fact, but hopefully --

1 MS. CACACCIO: Then -- then we ask that you do that,
2 Judge.
3 JUDGE LOCKE: Okay. Very well.
4 MR. BOREANAZ: Judge, on behalf of the Respondent, Richard
5 Palladino is -- is in the room. He is the business manager and
6 res -- representative of the Respondent, and he is critical for
7 preparation of -- of the matter on behalf of the Respondent.
8 JUDGE LOCKE: Very well.
9 MS. CACACCIO: Judge, I don't know if now is the
10 appropriate time, or if you want to do the formal papers first.
11 But I'd like a few minutes off the record to discuss with Mr.
12 Boreanaz stipulating some documents into the record.
13 JUDGE LOCKE: Very well. Why don't we get the formal
14 documents in first, so that we will -- I'm not a stickler about
15 any particular order; it doesn't really matter much. But it
16 might be better to get Exhibit 1 in before we get the others.
17 MS. CACACCIO: Yes, Judge. I offer into evidence the
18 formal papers. They have been marked for identification as
19 General Counsel's Exhibit 1(a) though 1(l), inclusive, Exhibit
20 1(l) being an index and description of the entire exhibit.
21 This exhibit has already been shown to all the parties.
22 JUDGE LOCKE: Any objections?
23 MR. BOREANAZ: No objection.
24 JUDGE LOCKE: Very well. General Counsel's Exhibits 1(a)
25 though 1(l) are received.

(General Counsel Exhibits Number 1(a) through 1(l) Received into Evidence)

MR. BOREANAZ: We off?

JUDGE LOCKE: Yeah, we're still on the record.

MR. BOREANAZ: Okay.

JUDGE LOCKE: Well, off the record.

(Off the record at 10:53 a.m.)

MS. CACACCIO: I discussed with Mr. Boreanaz -- Mr. Boreanaz some exhibits that, to my understanding, he's going to be stipulating to. The first is General Counsel's Exhibit 2, which is Local Union 91's amended job referral rules.

MR. BOREANAZ: Sorry, do you want to do the letter first?

MS. CACACCIO: It -- oh. I already marked them.

MR. BOREANAZ: Okay.

MS. CACACCIO: I'll do the letter next.

MR. BOREANAZ: Okay.

MS. CACACCIO: And immediately following that, a letter from 2004 indicating --

JUDGE LOCKE: And -- and is the letter part of Exhibit 2, or is it another exhibit?

MS. CACACCIO: I'm going to mark it as Exhibit 3.

(General Counsel Exhibit Number 3 Marked for Identification)

JUDGE LOCKE: Okay. Very well.

MS. CACACCIO: Which demonstrates when these rules went into effect.

JUDGE LOCKE: Okay.

MS. CACACCIO: The General Counsel's seeking a stipulation to demonstrate that the rules themselves -- the actual written rules -- had not changed since 2004.

JUDGE LOCKE: Now -- now, could you tell me again what the -- the letter -- if you can describe and tell me the date of it, if you would?

MS. CACACCIO: Yes, Judge. The letter was on June 10th, 2004, from a Robert Luskin. And what it does is, it -- it says that they are in receipt the proposed hiring hall rules and that what's attached is the rules, which is what I've marked as GC Exhibit 2.

JUDGE LOCKE: Very well. Is there any objection to General Counsel's 2, first of all?

MR. BOREANAZ: No, Your Honor.

JUDGE LOCKE: Very well. Any objection to General Counsel's 3?

MR. BOREANAZ: No, Your Honor.

JUDGE LOCKE: Well, General Counsel's 2 and 3 are received. Thank you.

(General Counsel Exhibit Number 2 and 3 Received into Evidence)

MS. CACACCIO: And Judge, I am looking for -- like I said, I'm looking for a stipulation that the rules themselves hadn't changed from 2004 to now.

MR. BOREANAZ: That's our understanding, Your Honor.

1 JUDGE LOCKE: Is -- is that a stipulation the rules
2 haven't changed? Well, let me -- let me try to couch it that
3 -- a little more precisely. Would the stipulation be that the
4 rules which are set forth in General Counsel's Exhibit number
5 have not changed since 2004 and are now in effect?
6 MR. BOREANAZ: That's -- that's our understanding. And --
7 and I guess even more precisely, the rule -- GC-2, the rules,
8 were in effect at the time relevant to these proceedings.
9 JUDGE LOCKE: Right. General Counsel stipulates that --
10 to that?
11 MS. CACACCIO: Yes, Judge. I just need to make sure that
12 it's been carrying on, not just --
13 JUDGE LOCKE: Yes.
14 MS. CACACCIO: You know what I mean?
15 MR. BOREANAZ: That's our understanding --
16 MS. CACACCIO: Okay.
17 MR. BOREANAZ: -- that they haven't changed. But more
18 particularly, the -- the rules reflected in General Counsel's 2
19 were the rules in effect at times relevant to these
20 proceedings.
21 JUDGE LOCKE: So stipulation's received.
22 MS. CACACCIO: Offering General Counsel's Exhibit 4, which
23 is the minutes of a meeting from October 2015 which was the
24 subject of a prior charge.
25 JUDGE LOCKE: I'm sorry, say that again?

1 MS. CACACCIO: It's meeting minutes from October of 2015.
2 JUDGE LOCKE: Okay.
3 MS. CACACCIO: Which discusses the membership vote for a
4 suspension of Mr. Mantell from that time.
5 MR. BOREANAZ: Judge, the fact is not in dispute that the
6 minutes are authentic. The import to these proceedings and
7 what you can draw from them is in dispute.
8 JUDGE LOCKE: Yeah.
9 MR. BOREANAZ: But the minutes themselves are not in
10 dispute, and we would stipulate to their entry for the limited
11 purpose as you see fit.
12 JUDGE LOCKE: Very well.
13 MS. CACACCIO: Judge was, GC-4 accepted?
14 JUDGE LOCKE: Oh, I haven't asked. Any objection?
15 MR. BOREANAZ: I don't object. Again, the import and --
16 and how they would be argued what they mean will be in dispute.
17 But the minutes themselves -- I do not object to their entry.
18 JUDGE LOCKE: Very well. General Counsel's 4 is received.
19 **(General Counsel Exhibit Number 4 Received into Evidence)**
20 MS. CACACCIO: Judge, I'm offering General Counsel's
21 Exhibit 5, which is a letter from the International to Mr.
22 Mantell and Mr. Palladino with respect to the referral rules
23 and their understanding of them. The letter's dated -- I don't
24 know if I said that yet -- the letter's dated November 14th,
25 2017.

1 JUDGE LOCKE: 2014, did you say?
2 MS. CACACCIO: 2017.
3 JUDGE LOCKE: 7?
4 MS. CACACCIO: Yeah.
5 JUDGE LOCKE: November the 4th --
6 MS. CACACCIO: November 14th --
7 JUDGE LOCKE: 14th, 2017.
8 MS. CACACCIO: -- 2017.
9 MR. BOREANAZ: Judge, this is a letter that Respondent
10 does not question the authenticity; is, in fact, a letter that
11 was sent in this period of time. The relevance to these
12 proceedings -- we object to the relevance of these proceedings.
13 But from a foundational standpoint, we do not object to the
14 foundation being entered in this matter. But we would argue
15 and ask that you hold off on taking them into evidence after
16 hearing the testimony and maybe Mr. Mantell's explanation as to
17 what they mean or the government's arguments or our arguments
18 as to what they might mean.
19 JUDGE LOCKE: So you admit the authenticity, but you
20 object to the relevancy, that it is --
21 MR. BOREANAZ: Right.
22 JUDGE LOCKE: -- irrelevant?
23 MR. BOREANAZ: We're trying to avoid a -- a foundational
24 witness to come in --
25 JUDGE LOCKE: Well, I will defer ruling on it in that

1 case, because better that -- it's easier to do that than to put
2 it in the rejected exhibit file, then fish it out later. But I
3 would like to hear testimony regarding the relevance of it
4 before -- before making a decision.
5 MS. CACACCIO: Judge, may I be heard?
6 JUDGE LOCKE: Ma'am?
7 MS. CACACCIO: May I be heard?
8 JUDGE LOCKE: I'm -- I'm sorry, do you --
9 MS. CACACCIO: I'm sorry, may I be heard?
10 JUDGE LOCKE: Oh, sure.
11 MS. CACACCIO: The last paragraph of this letter indicates
12 that the Local -- that -- that the International has empowered
13 the Local to interpret and amend its own rules as it sees fit.
14 So to the extent that Respondent has a defense, which I believe
15 they do, that the International gave them this new
16 interpretation of the rules, this letter sort of disputes that.
17 So --
18 JUDGE LOCKE: Very well. Well, I will refer ruling on it
19 till later.
20 Any other documents?
21 MS. CACACCIO: Yes, Judge. One second.
22 I'm going to let Robert explain how this is generated and
23 -- and what exactly this is. But I'll -- it's a -- it's Gen --
24 marked General Counsel's Exhibit 6. It's from Frank Mantell's
25 electronic file at the hall. It indicates -- there's a

1 highlighted portion. You're going to see that this document's
2 three pages. If you keep flipping, you'll be able to read the
3 whole content of that highlighted line. And then it also
4 indicates that he was manually deleted from the referral list
5 on July 5th, 2018.
6 JUDGE LOCKE: And that is 6, right?
7 MS. CACACCIO: 6.
8 JUDGE LOCKE: And do I have a copy of that?
9 MS. CACACCIO: You do now.
10 JUDGE LOCKE: Any objection?
11 MR. BOREANAZ: So again, General Counsel 6 is a union
12 record that contains some narrative comments that are reflected
13 here in the three pages of General Counsel 6. They are
14 authentic records. And there's no objection to their entry.
15 JUDGE LOCKE: You said no objection?
16 MR. BOREANAZ: Correct.
17 JUDGE LOCKE: Oh, I see. Now, tell me again what you call
18 this? I'm looking at, and I'm not quite sure what it's called.
19 MR. BOREANAZ: It's a union record of the Charging Party
20 and the referral history reflected in the comments.
21 JUDGE LOCKE: Very well. Well, General Counsel 6 is
22 received, then.
23 **(General Counsel Exhibit Number 6 Received into Evidence)**
24 MS. CACACCIO: Offering General Counsel Exhibit 7, which
25 is a referral list rollover report for journeymen which shows

1 that on -- you'll see the dates in the top left corner -- that
2 on July 2nd, Mr. Mantell was on the referral list, and then, as
3 of July 5th, he was removed.
4 JUDGE LOCKE: Any objection?
5 MR. BOREANAZ: No, Your Honor.
6 JUDGE LOCKE: Very well. General Counsel 7 is received,
7 then.
8 **(General Counsel Exhibit Number 7 Received into Evidence)**
9 MS. CACACCIO: Judge, if I can just have one moment before
10 I rest with my pre-trial? If I --
11 JUDGE LOCKE: Do you want to go off the record?
12 MS. CACACCIO: Just for a minute.
13 JUDGE LOCKE: Very well. Off the record.
14 MS. CACACCIO: Thank you.
15 (Off the record at 11:09 a.m.)
16 MS. CACACCIO: Your Honor, the General Counsel's asking
17 for a -- for leave at this time to clarify the complaint, amend
18 the complaint, whatever way you want me to -- to say it. In
19 paragraph 6-C, the way it currently reads is, "Since about July
20 27th, 2018, Respondent, by its operation of its nonexclusive
21 hiring hall, has refused to place Mantell on its out-of-work"
22 le -- "referral list." Based on the records that were produced
23 this morning, we'd like to clarify that to, since about July
24 5th, 2018, by operation of its nonexclusive hiring hall, has
25 removed Frank Mantell from its out-of-work referral list.

1 JUDGE LOCKE: I think I would prefer if you would -- if
2 you're going to amend the complaint, if you could submit it in
3 writing as an exhibit. Why don't we all --
4 MS. CACACCIO: Yes, Judge.
5 JUDGE LOCKE: -- take care of it now, then?
6 MS. CACACCIO: Yes, Judge. With that, the General Counsel
7 has no more pre-trial matters. But if I could again have a
8 minute just so I can make sure that it gets done?
9 JUDGE LOCKE: Very well. Off the record.
10 MS. CACACCIO: Thank you, Judge.
11 (Off the record at 11:13 a.m.)
12 MS. CACACCIO: We're ready to proceed with opening
13 statements, Your Honor.
14 JUDGE LOCKE: I'm sorry?
15 MS. CACACCIO: We're ready to proceed with --
16 JUDGE LOCKE: Very well.
17 MS. CACACCIO: -- opening statements.
18 JUDGE LOCKE: Opening statements.
19 MS. CACACCIO: Yes, Judge.
20 Your Honor, this case is about Respondent, Laborers' Local
21 91, continuing to retaliate against Charging Party, Frank
22 Mantell, for his protected activities. This case begins four
23 years ago, when Frank spoke out against union business agent
24 Richard Palladino. A charge was filed, a hearing was held, and
25 the Board in case 03-CB-163940 ultimately found that Frank's

1 Facebook posts criticizing Mr. Palladino for giving a
2 politician a journeyman's book without him having gone through
3 the required apprenticeship program were protected, and that
4 the Union removing Frank from the out-of-work referral list for
5 making those posts violated the Act.
6 Mr. Palladino filed a multimillion-dollar defamation
7 lawsuit against Frank for those Facebook posts, and the Board
8 determined -- that the Board had previously determined were
9 protected activity. That lawsuit remains ongoing.
10 Despite the Board's decision, the retaliation continued,
11 with Respondent targeting Frank and his allies. There were two
12 more NLRB hearings, one alleging Respondent retaliated against
13 Frank's brother, Ron, who had supported Frank; that case is
14 currently pending at the Board. And another alleging
15 Respondent retaliated against Frank's and another member who
16 supported Frank by removing them from the out-of-work list and
17 refusing to refer them; that case is still pending a decision
18 from the ALJ.
19 Since Frank's Facebook comments, Respondent has only
20 referred him for work twice -- twice in four years. Before his
21 2015 Facebook posts, Frank was regularly referred for work an
22 average well over 500 hours a year.
23 The facts before you in this case are simple. The
24 evidence will show that Frank has been duly employed at the
25 Respondent's hall and as a fireman since the mid-1990s. And

1 for the past 20 years, Respondent has never used Frank's
2 fireman status as a reason to refuse to put him on the out-of-
3 work list until now.
4 The evidence will show that a few days after Frank
5 completed the only -- only the second job he's had in four
6 years, he again signed the out-of-work list. And like so many
7 times before, when he went back to the hall a few weeks later
8 to pay his dues -- which Respondent accepted -- he discovered
9 that he had not been put on the referral list.
10 The evidence will show that Frank immediately went to find
11 Mr. Palladino and ask why he had not been put on the list. The
12 evidence will show that Mr. Palladino told Frank that because
13 Frank was working as a fireman, he doesn't get the benefits of
14 being on the list because he wasn't working "at the trade."
15 The record will show that Frank's brief conversation with Mr.
16 Palladino was the only notification he had regarding this new
17 interpretation of the rules or his inability to work or be
18 referred for work.
19 This "at the trade" language comes from the referral
20 rules, GC Exhibit 2. Rule 3-C states in part, "Only applicants
21 who are not currently employed at the trade may register their
22 availability for referral." The evidence will show that
23 working as a fireman and working as a laborer involve entirely
24 different duties.
25 By the end of the hearing, it will be clear that

1 Respondent's justification for removing Frank from the last
2 blatantly contradicts its own rules and defies logic.
3 Respondent should be held responsible for continuing its
4 retaliation against Frank for his 2015 Facebook comments and
5 utilizing the Board's processes to seek redress for that
6 retaliation. By refusing to place Frank on the out-of-work
7 list, Respondent has violated the Act.
8 JUDGE LOCKE: Mr. Mantell, do you have any statements
9 you'd like to make?
10 MR. MANTELL: No. I think -- I think she said it all.
11 MR. BOREANAZ: Your Honor, with respect to the Facebook
12 posts Board decision, the Facebook posts fit into two different
13 categories. Facebook posts category number 1 dealt with
14 Facebook posts on a public website, public group of Facebook
15 involving political discussion of what was going on with the
16 City of Niagara Falls mayoral race. Mr. Mantell made some
17 general Facebook posts regarding politics, and it then turned
18 into a comment about his union and support of a particular
19 candidate. Then it turned into a -- a different morph, that
20 the Union engaged in some criminal act by providing a book to
21 this candidate as a gift.
22 As you may know, if a union provides a politician with a
23 gift of some value, then that is a federal crime. Mr. Mantell
24 did, in fact, make post that Mr. Palladino gave a book without
25 having to go through the journeymen's process -- or go --

1 without have to go through the apprentice process. Mr.
2 Mantell, at the time that he made those posts, knew that he was
3 coloring the facts, because many people get books without
4 having to go through the apprentice program; he himself did.
5 And the Board looked at those posts and found that some
6 particular posts were, in fact, protected activity, and ruled
7 that the penalty that was imposed by the Union through an
8 internal union complaint, through a trial Board, through an
9 appeal to the International, was not appropriate. The Board
10 did not rule with respect to all of the Facebook posts that
11 were made by Mr. Mantell, and in fact, the Union did, in fact,
12 sue Mr. Mantell for defamation, because he -- Mr. Mantell --
13 alleged that the Union engaged in a criminal act. That is
14 ongoing.
15 And Mr. Mantell has been an active member of the Local,
16 and my client has no problem with him being an active member.
17 Mr. Mantell wants to cloak himself with the Board action on
18 anything and everything that he does. He wants to cloak
19 everything with protected activity. But lying and not
20 following the rules and not satisfying the rules within the
21 Union do not result in him getting the protection of the Act.
22 Mr. Palladino has interpreted the rules consistent with
23 the International Union's interpretation of the rules. There's
24 no doubt Mr. Mantell is a firefighter for the City of Niagara
25 Falls; that's his full-time job, that's where he gets his

1 pension from. Local 91 has a declining workforce. The -- the
2 hours are not what they used to be 10 and 20 years ago for the
3 members. Many of the members struggle to get their -- their --
4 their hours and unemployment. And so what would've been good
5 for the Union and the members 20 years ago or 10 years ago is
6 not good today.
7 The decision in this case with respect to Mr. Mantell was
8 that he violated rule 3-C of the hiring hall rules, in that he
9 was not working at the Hall by virtue of his employment with
10 the City of Niagara Falls. The International Union had
11 disqualified him from running for office because of that very
12 same factor, because he was not working at the Hall. And so
13 the -- the Union can't be handcuffed because Mr. Mantell filed
14 a Board charge on Facebook or any other Board charges from
15 following the rules within their procedures and trying to --
16 trying to help each and every member, not just Mr. Mantell.
17 So we think that at the conclusion of the hearing, you'll
18 find that the action taken by the Union was not because of any
19 animus; it was because of the application of the rules and a
20 reasonable reading of those rules.
21 JUDGE LOCKE: Thank you. Do you have a witness?
22 MS. CACACCIO: Yes, Judge. General Counsel calls Mr.
23 Frank Mantell to the stand.
24 JUDGE LOCKE: Have a seat, please. Please raise your
25 right hand.

Whereupon,

FRANK MANTELL

having been duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE LOCKE: Thank you, sir. If you would please and spell your full name, and then give us your address?

THE WITNESS: It's Frank Samuel Mantell. I live at 6811 Kies Street -- K-I-E-S -- Niagara Falls, New York 14304.

JUDGE LOCKE: Thank you. Counsel?

MS. CACACCIO: Yes, Judge.

DIRECT EXAMINATION

Q BY MS. CACACCIO: Can you spell your name, too, Frank?

A It's Mantell, M-A-N-T-E-L-L.

Q Okay. Mr. Mantell, what's your relationship with Laborers' Local 91, the respondent in this case?

A I've been a member since 1994.

Q Are you currently an active member --

A Ye --

Q -- of Respondent?

A Yes, I am.

Q And what are the benefits that come along with being an active member of Respondent?

A Being able to work as a laborer out in the trade. Being offered things like health insurance, a pension, and a paycheck.

Q Who is Respondent's current business manager, if you know?
A It's Richard Palladino.
Q And do you know about when he became the business manager?
A About 2007.
Q Is this the first time that you've testified in an NLRB proceeding?
A No, it hasn't.
Q Do you remember when the first time was, approximately?
A Yes. It was -- it was -- I don't know the exact date, but it was over an incident that happened in 2015.
Q And had we -- how many others times have you testified in NLRB proceeding?
A One other time.
Q And what was that about?
A That was about being taken off the out-of-work list also.
Q And about when did that occur?
A That was in 2018 -- June of 2018.
Q And did you file charges over those instances that led to the -- the hearings?
A Yes.
Q If I showed you a copy of those charges, would you be able to identify them for us?
A Yes, I would.
MS. CACACCIO: Can we go briefly off the record, Your Honor?

1 JUDGE LOCKE: So --
2 MS. CACACCIO: So I can get the records -- so I can get
3 the documents for him?
4 JUDGE LOCKE: Very well.
5 (Off the record at 11:28 a.m.)
6 Q BY MS. CACACCIO: If I showed you a copy of the charge
7 that you filed, would you be able to identify it for the Court?
8 A Yes, I could.
9 MS. CACACCIO: Now I'm approaching the witness with what's
10 been --
11 JUDGE LOCKE: Very well.
12 MS. CACACCIO: -- previously been marked as General
13 Counsel Exhibit 8.
14 Q BY MS. CACACCIO: Mr. Mantell, what's the document that I
15 just handed you?
16 A It's a charge that I put against Local 91.
17 Q And when did you file this charge, do you remember?
18 A It was December 13th, 2017.
19 MS. CACACCIO: Your Honor, I now offer General Counsel's
20 Exhibit 8.
21 JUDGE LOCKE: Any objection?
22 MR. BOREANAZ: What's the -- what's the reason for it
23 being offered that he filed a charge in and around December
24 9th, 2017?
25 MS. CACACCIO: Judge, as we've discussed previously, this

1 is evidence of the protect again certain activ -- the protected
2 activity and the Board's processes that Mr. Mantell engaged in
3 that the General Counsel's alleging Respondent's retaliating
4 against him for.
5 MR. BOREANAZ: I don't object to the exhibit.
6 JUDGE LOCKE: You don't?
7 MR. BOREANAZ: No, I do not?
8 JUDGE LOCKE: Very well. General Counsel's 8 is received.
9 **(General Counsel Exhibit Number 8 Received into Evidence)**
10 Q BY MS. CACACCIO: Mr. Mantell, you test -- you just
11 testified about -- was there a proceeding that resulted as a
12 result of that charge? Was there an NLRB hearing?
13 A Yes, there was.
14 Q Do you receiving a consolidated complaint and answer in
15 response to that proceeding -- about that proceeding?
16 A Yes.
17 Q If I showed you a copy of that, would you be able to
18 identify it for us?
19 A Yes, I can.
20 MS. CACACCIO: Judge, do you prefer the answer and
21 complaint as separate exhibits or one exhibit?
22 JUDGE LOCKE: I -- I'm sorry, say that again?
23 MS. CACACCIO: Would you prefer the answer and complaint
24 for the last hearing as separate exhibits or --
25 JUDGE LOCKE: I don't care.

1 MS. CACACCIO: -- one exhibit?
2 JUDGE LOCKE: Putting them together is fine.
3 MS. CACACCIO: Okay. Approaching with 9(a) and (b). 9(a)
4 -- well --
5 JUDGE LOCKE: Are you offering these?
6 MS. CACACCIO: Yes, Judge. But I have to --
7 JUDGE LOCKE: Very well. I'll take them in time.
8 Any objection to General Counsel's 9(a).
9 MR. BOREANAZ: Again, Judge, I really don't want to
10 relitigate that case. I mean, I acknowledge that there was a
11 consolidated complaint. I acknowledge that there was an
12 answer. But the contents of the complaint, and the contents of
13 the answer coming in and being part of this record, is going to
14 cause us to have to relitigate this charge.
15 JUDGE LOCKE: Well, what's the purpose of offering this?
16 MS. CACACCIO: Again, Your Honor, it's going to show the
17 continued allegations that Mr. Mantell filed against Respondent
18 for, essentially, the same conduct. And it continues --
19 demonstrates continued retaliation.
20 JUDGE LOCKE: Well, I am concerned about -- I don't want
21 to relitigate whatever was litigated in this case. On the
22 other hand, I can see that it might have -- might have some
23 relevance to the -- possibly to protected activity at least
24 showing that the charge had resulted in a complaint.
25 So for that reason, I'll overrule the objection, and

1 receive General Counsel Exhibit 9(a).

2 **(General Counsel Exhibit Number 9(a) Received into Evidence)**

3 JUDGE LOCKE: Any objection to 9(b)?

4 MR. BOREANAZ: It's the same thing, Judge. I mean, I

5 would stipulate that the charge reflected in General Counsel's

6 8 resulted in the issuance of a complaint, and then resulted in

7 the issuance of an answer, and ultimately resulted in the

8 conduct of an administrative law judge hearing. But the

9 contents, again, become troubling.

10 I mean, am I just to let the contents of the allegations

11 linger in there in the record without addressing them? I'm

12 going to have to be compelled to do that, I would think, if

13 you're going to give them any weight as to the allegations. If

14 you're going to limit your acceptance to the fact that a

15 complaint was issued, and that an answer was issued, and a

16 hearing was conducted, then we're not relitigating the second

17 case. But if they come in with this full purpose and full use

18 and full consideration, then we are relitigating.

19 JUDGE LOCKE: Any response?

20 MS. CACACCIO: Judge, this is precisely why we had asked

21 to deal with the second case in -- well, what would have been

22 the third case, but the second case for Mr. Mantell -- with the

23 transcript of the prior case. I mean, I don't -- I don't --

24 the General Counsel is not suggesting that what's stated in the

25 allegation for your purpose is fact, though it is -- from our

1 prospective, obviously. But for this proceeding, that's not
2 the purpose. And we don't intend to relitigate those issues.
3 JUDGE LOCKE: Well, I will receive it over objection for
4 whatever it's worth. But I'm going to be very profuse about
5 not relitigating the issues in the previous case. So General
6 Counsel's 9(b) and 9(a) are received.
7 **(General Counsel Exhibit Number 9(b) Received into Evidence)**
8 Q BY MS. CACACCIO: Mr. Mantell, when was the last time that
9 you were referred out for work from Respondent's Hall?
10 A June of 2018.
11 Q Do you remember about when in June it was?
12 A It was late June.
13 Q And who called to tell you that you got a referral?
14 A Mario Neri.
15 Q Who is he?
16 A He is the retiree that works part time, receives calls,
17 and sends people out to work.
18 Q How long did that job last?
19 A Three days.
20 Q And prior to the end of June 2018, when was your last
21 referral from the hall?
22 A Beginning of the summer of 2015. No, I'm sorry, before
23 that? What --
24 Q Before 2018, when was the last time you got a job from the
25 hall?

1 A It was be at 2017.
2 Q And prior to the job you got in 2017?
3 A That would be the beginning of summer of 2015.
4 Q And when was the last time you were getting consistent
5 work through Respondent's hall?
6 A I used to -- consistent work from 1994 until 2015.
7 Q And when you were getting consistent work, about how many
8 hours were you getting?
9 A Anywhere from 600 to 800 hours a year.
10 Q And can you explain to the Court very briefly what
11 happened in 2015?
12 A I made a Facebook post that Business Manager Palladino
13 denotes her defense to, because I was criticizing him, and he
14 brought charges upon me.
15 Q And was that the subject of a previous NLRB hearing?
16 A Yes.
17 Q Were those Facebook posts the subject of any other
18 litigation?
19 A Yes. He put a libel suit on me.
20 Q And when you say he, who's he?
21 A Dick Palladino.
22 Q Is that litigation ongoing?
23 A Yes, it is.
24 Q Now, I want to direct your attention back to the last job
25 you worked, the one that began at the end of -- the late June

1 2018. What did you do after the job concluded?
2 A I went to the Union Hall to sign the out-of-work list.
3 Q Do you remember when you did that?
4 A July 2nd.
5 Q Of what year? Just --
6 A 2018.
7 Q Okay. Can you briefly explain for the Court what happens
8 when you sign the out-of-work list?
9 A They take it daily, and put it into the computer, and make
10 it into the referral list.
11 Q And what happens when your name goes on a referral list?
12 A That's when calls come in, and jobs are opening up, the
13 business manager or Mario calls and sends people out to work
14 off that referral list.
15 Q And how, if at all, can you get work as a laborer, if not
16 through this referral list?
17 A You could be appointed by the business manager, you could
18 be requested by -- from a company, or you can unfavorably
19 solicit your own work.
20 Q When was the next time you went to the hall after July
21 2nd?
22 A July -- late July -- 27th, I believe.
23 Q Of what year?
24 A 2018.
25 Q And what happened that day?

A That day I paid my monthly dues, and I wanted to see where I was on the list.
Q What list?
A The referral list.
Q Did Respondent take your dues when you paid them at that time?
A Yes.
Q So did you look at the referral list?
A Yes.
Q What did you see?
A I did not see my name on there.
Q So what did you do when you discovered that your name wasn't on the referral list?
A I asked either Mario or Diane, who works in the office, if Dick was around.
Q Do you remember specifically who you asked?
A No.
Q So what did you do? Oh, did they answer you?
A Yes. They told me he was around -- it was lunchtime, he was around back cooking.
Q And so what did you do?
A I drove my truck around back, and I asked him why I was not put on the list.
Q Did he answer you?
A Yes.

Q What did he say?
A He stated that he had clarification from the International that by the rules I was not at the trade.
Q Did he say why?
A Because I'm a full-time firefighter.
Q Did he say anything else at that you remember?
A No, I don't remember. No.
Q Did you say anything in response?
A I think I -- no, I -- I said that -- I don't think I said anything. Maybe thank you and good-bye.
Q So do you know where that at-the-trade language comes from that he referenced?
A It's in the 3-C of our referral rules.
Q If I showed you a copy of those rules, you would be able to identify them for us?
A Yes.
MS. CACACCIO: Your Honor, I'm showing the witness a copy of General Counsel's Exhibit 2.
Q BY MS. CACACCIO: Mr. Mantell, what is it that I just handed you?
A This is referral rules.
Q So --
A Local 91's referral rules and LIUNA.
Q Can you identify for the Court where it is in those rules that that language comes from?

1 A It's under 3-C.
2 Q So other than your conversation with Mr. Palladino on July
3 27th, what notification did you receive, if any, from the
4 Local, regarding the new interpretation of the referral rules?
5 MR. BOREANAZ: Object to the leading and the
6 characterization of the new interpretation. There's no
7 evidence of that.
8 JUDGE LOCKE: Could you rephrase the question, please?
9 MS. CACACCIO: Sure.
10 Q BY MS. CACACCIO: Other than your conversation with Mr.
11 Palladino on July 27th, what notification, if any, did you
12 receive from the Local regarding the referral rules?
13 A None.
14 Q And other than your conversation with Mr. Palladino on
15 July 27th, what notification, if any, did you receive from the
16 Local regarding your eligibility to work through the Union
17 Hall?
18 A None.
19 Q Now, Mr. Palladino said to you that you are a fireman.
20 Are you indeed a fireman?
21 A Yes.
22 Q Where do you work?
23 A For the City of Niagara Falls.
24 Q And are you represented by a union with the City of
25 Niagara Falls?

A Yes. Local 714.
Q And do you know the full name of that local?
A Uniformed Firefighters Local.
Q Can you please describe for the Court your employment history as a fireman?
A I was hired in November of 1995. I was laid off April of 1996. I was re-hired back September of 1998, and I've been a fireman since.
Q So how long have you been duly employed as a fireman and as a laborer?
A However long I was a firefighter, so since 1995, or picked it back up in '98.
Q When did Respondent become aware of your work as a fireman?
A Respondent's known I've been a fireman since before I was hired in 1995.
Q How do you know that?
A Because I've had many conversations about how I was going to be able to be available for work.
Q Did you ever make Mr. Palladino aware that you worked as a fireman?
A Yes.
Q Do you know when that occurred?
A It occurred well before he was even business manager, when he worked in the offices as a training director, and reiterated

1 through my whole -- throughout most of his 12 years that I'm a
2 firefighter. So he's known.
3 Q How did you make him aware of that?
4 A By verbally speaking with him.
5 Q Why did you do that?
6 A Because to tell my schedule that I was -- how I was
7 available for work.
8 Q Were you ever told, up until July 27th, that your being a
9 fireman was a problem?
10 A No.
11 Q Can you describe for the Court what your duties are as a
12 fireman?
13 A My duties of fireman are putting out fires, providing
14 emergency medical service, many types of extrication of vehicle
15 accidents, doing rescues, in the gorge, or any type of -- any
16 type of need, we're there to help out and assist the citizens
17 of Niagara Falls.
18 Q Can you describe for the Court what your duties are when
19 you were getting work as a laborer?
20 A I started off with concrete demolition. I've done
21 carpenter tending, mason tending, I did pipe work, black top,
22 landscaping, cleaning up.
23 Q So I realize that none of those were probably exhaustive
24 lists. So what if any of the duties that you have as a
25 firefighter and that you have as a laborer overlap?

1 A None.
2 MS. CACACCIO: No further questions for this witness at
3 this time.
4 JUDGE LOCKE: Cross-examination?
5 MR. BOREANAZ: I'd like the Jencks material --
6 JUDGE LOCKE: Yes.
7 MR. BOREANAZ: -- and then an opportunity to look at it.
8 MS. CACACCIO: So Your Honor, for this particular matter I
9 have one confidential witness affidavit, and one other Jencks'
10 statement. I also have here -- so here are those. I also have
11 here all of the prior affidavits for the prior cases that Mr.
12 Mantell gave the Board. I don't know if -- I mean, they --
13 JUDGE LOCKE: Well, since you entered this -- some
14 materials about the prior case, I think it's only fair that he
15 should get the affidavits regarding those cases.
16 MS. CACACCIO: Yes, Your Honor.
17 JUDGE LOCKE: How many pages are we talking about
18 altogether?
19 MS. CACACCIO: I didn't do a count of that, Your Honor.
20 MR. BOREANAZ: I'll let you know as soon as I get them.
21 MS. CACACCIO: So for this case, Your Honor, I've turned
22 over an affidavit given in this case, 03-CB-225477. It should
23 be three pages, double-spaced. It's like two and a half.
24 MR. BOREANAZ: Can you hold on one second?
25 MS. CACACCIO: Sure.

1 MR. BOREANAZ: Responding to your question, Judge, there's
2 21 pages of single-typed, written information.
3 So if you want to go through on the record what you turned
4 over, I can follow through with you, if you don't mind, please.
5 JUDGE LOCKE: I'm sorry, what was the last thing you said
6 after you said 21 pages?
7 MR. BOREANAZ: Twenty-one single-spaced pages of
8 typewritten information.
9 MS. CACACCIO: Yeah, they're not -- they're not quite
10 single, but -- I turned over a -- in addition to that
11 affidavit, I just mentioned I turned over a handwritten letter
12 that the General Counsel received from Mr. Mantell that's two
13 and a half pages. I turned over an affidavit -- two of them,
14 in case 163940. One of them is three and a half pages, one of
15 them is four pages.
16 MR. BOREANAZ: Will you just identify the dates?
17 MS. CACACCIO: Yes. One of them is November 16th, 2015.
18 The other is January 25th, 2016. I turned over an affidavit
19 produced to the Board in case 03-CB-201812. That one is
20 single-spaced. It's three pages long. And it's dated 7/12/17.
21 I turned over one from case 03-CB-211488. That one is
22 two-and-a-half double-spaced pages, dated November -- December
23 19th, 2017. And I turned over one single-spaced paragraph that
24 was turned over to the Board in a previous matter.
25 JUDGE LOCKE: Well, it's now 11:49, almost 11:50; a good

1 time to take lunch. I would see if we could take lunch, and
2 then return at 1:30. And if you need more time -- at that time
3 if the Respondent needs more time, I'll be happy to grant it.
4 MR. BOREANAZ: Thank you, Your Honor.
5 JUDGE LOCKE: So sir, do anything you want to during the
6 lunch, expect please don't talk about your testimony to anyone.
7 THE WITNESS: Understood.
8 JUDGE LOCKE: And please be back at 1:30, so we'll be off
9 the record until 1:30.
10 (Off the record at 11:50 a.m.)
11 JUDGE LOCKE: Have you had enough time, or do you need
12 more?
13 MR. BOREANAZ: I've had enough time, Your Honor.
14 JUDGE LOCKE: Very well.
15 MS. CACACCIO: Judge, as we discussed -- I think we were
16 off the record when I asked -- but do you want before we resume
17 cross-examination the written amendment?
18 JUDGE LOCKE: That might be a good idea.
19 MS. CACACCIO: Okay. So this is what was produced to me,
20 so do you want me to mark it in some way?
21 JUDGE LOCKE: Yes. Why don't we put it in as an exhibit?
22 MS. CACACCIO: Okay. So I'm actually going to mark it as
23 GC Exhibit 11.
24 **(General Counsel Exhibit Number 11 Marked for Identification)**
25 MS. CACACCIO: I know that there's a 10 missing, but I

1 have that for later because I wasn't sure. So this is GC
2 Exhibit 11. It's the language the GC is proposing to amend the
3 complaint to for paragraph 6-C.
4 JUDGE LOCKE: Paragraph -- what was that again, 6-C?
5 MS. CACACCIO: 6-C, yeah.
6 JUDGE LOCKE: Any objection to receiving this?
7 MR. BOREANAZ: No.
8 JUDGE LOCKE: Very well. General Counsel's Exhibit 11 is
9 received.
10 **(General Counsel Exhibit Number 11 Received into Evidence)**
11 MS. CACACCIO: Does that mean that -- I've never done it
12 this way -- does that mean that the amendment is approved or --
13 JUDGE LOCKE: I beg your pardon?
14 MS. CACACCIO: Does that mean that the amendment -- that
15 you've accepted the amendment? Because now --
16 JUDGE LOCKE: Yeah. The -- yeah, the amendment -- the
17 complaint has been amended.
18 MS. CACACCIO: Okay.
19 JUDGE LOCKE: I don't think -- the Respondent hasn't
20 answered it yet.
21 MR. BOREANAZ: Well, the answer remains the same that it
22 denies the allegations contained in that particular paragraph.
23 JUDGE LOCKE: Or denied or -- I mean, I would have to look
24 at your answer to see how you answered paragraph 60.
25 MR. BOREANAZ: All right. Well, let's do that. I think

1 it's pretty straightforward.
2 JUDGE LOCKE: Yeah. Let me see what it says here.
3 MR. BOREANAZ: So there's a general denial under the
4 answer. And in light of General Counsel's Exhibit 11, and its
5 proposed amendment of the complaint to change, essentially, the
6 date from July 27th, 2018 to July 5th, 2018, and there's really
7 no other changes of the text.
8 MS. CACACCIO: Yeah, the text did -- the text did change.
9 MR. BOREANAZ: All right.
10 MS. CACACCIO: It says -- it basically -- it essentially
11 says now that July 5th he was removed and hasn't been restored
12 to the -- to the list.
13 MR. BOREANAZ: Well, Your Honor, I mean, there is an
14 admission that he was removed from the list on or about July
15 5th by operations of its nonexclusive hiring hall. I mean,
16 it's not technically accurate. And then the add-on here has
17 not restored him to the list.
18 JUDGE LOCKE: But I didn't mean to put you on the spot
19 because obviously you are not required to answer it
20 immediately. I was just -- brought it up because I didn't want
21 to get it. Would you like to consider what response that you
22 want to make?
23 MR. BOREANAZ: Yeah.
24 JUDGE LOCKE: Okay. Very well. Please remind me --
25 MR. BOREANAZ: Like, we're just changing the dates.

1 JUDGE LOCKE: -- before the hearing so we're good to go.
2 MS. CACACCIO: No, no. Well, it's --
3 JUDGE LOCKE: All right. Anything else before we go back
4 to the witness?
5 MS. CACACCIO: Not from the General Counsel, Judge.
6 JUDGE LOCKE: Very well. You have to stand again, and of
7 course, you're still under oath. On the record.
8 **CROSS-EXAMINATION**
9 Q BY MR. BOREANAZ: Mr. Mantell, you testified that you've
10 been a member of Local 91 since 1994, correct?
11 A Yes.
12 Q And having had such a long tenure as a member of Local 91,
13 are you familiar with Local 91 having a parent organization?
14 A Yes.
15 Q What is your understanding of Local 91 parent
16 organization?
17 A The International Laborers' Union of North America.
18 Q All right. Commonly referred to as LIUNA, L-I-U-N-A,
19 correct?
20 A Yes.
21 Q And do you know the relationship, besides it being a
22 parent organization, what level of control or lack of control
23 LIUNA has over Local 91 because of your long tenure as a
24 member?
25 A I think they have a lot of control due to our

1 constitution --
2 Q Okay.
3 A -- first and foremost.
4 Q You mentioned a constitution. What is your understanding
5 of whether or not Local 91 has a constitution?
6 A They do have a constitution.
7 Q What is your understanding of that constitution?
8 A Constitution is basically the laws and the rules of our
9 organization and how it's supposed to run.
10 Q Okay. And in that constitution, is there a reference to
11 the benefits of being a member of Local 91?
12 A Yes.
13 Q Okay. You testified under direct examination in response
14 to a question by General Counsel that the benefits of being a
15 member of Local 91 is you get to work at the trade, right?
16 A Yes.
17 Q And that's your understanding?
18 A Yes.
19 Q It is your understanding that you actually have to be a
20 member of Local 91 to work in the construction trade in Local
21 91's jurisdiction?
22 A Yes.
23 Q Would you be surprised to learn that that's not accurate?
24 A Well, I know there's other unions, other locals that come
25 in under certain circumstances, or maybe a couple non-union

1 workers from a company out of town, we might let -- allow.
2 That's about the only times.
3 Q Okay. So is it your testimony that a nonunion member
4 cannot work for a construction company in the Local 91
5 jurisdiction?
6 A It's not supposed to happen, but it has happened.
7 Q Okay. And you said one of the benefits of being a member
8 of Local 91 is that you get health insurance, right?
9 A Yes.
10 Q Okay.
11 A Offered health insurance.
12 Q Okay. Does the Union offer you health insurance?
13 A Yes.
14 Q Okay. Isn't it actually more accurate that the health and
15 welfare fund, which is separate and apart from the Union,
16 provides health insurance to members of Local 91?
17 A They provide it -- they -- yes.
18 Q Okay.
19 A They offer it.
20 Q The Respondent here is Local 91, right?
21 A Correct.
22 Q And Local 91 doesn't provide health-insurance benefits to
23 you and other members, correct?
24 A I'm not understanding your question. I believe that
25 they -- it's all under one umbrella. It's --

Q Okay. You think --
A -- Local 91 and the health and welfare fund, as we're all -- we're all the same members --
Q Okay.
A -- from each one, so --
Q So is it your belief that Local 91, the Union, is the same thing as the health and welfare fund that provides the health-insurance benefits, one and the same?
A Yes. It's all attached. Yes.
Q When you say all attached, what do you mean by all attached?
A Just like there's training, just like there's the health and welfare fund, there's the Local 91 side. They're all attached.
Q Okay. And so what is your understanding as to the body or group of people that is responsible to run the Local Union, the Respondent in this action?
A To run the Local Union, that would be to -- that's the office side, the Local 91 office side.
Q Okay. Are you familiar with an executive board of Laborers' Local 91?
A Yes.
Q Okay. Are there officers within Laborers' Local 91, as far as you know?
A Yes.

Q Okay. And in fact, did you ever have a relative that was an officer of Local 91?
A Yes.
MS. CACACCIO: Objection. Relevance.
JUDGE LOCKE: What's the objection?
MS. CACACCIO: Relevance. So that he had a member who was an officer. He already admitted that he knows that they're officers within the executive board.
MR. BOREANAZ: He's testified as to his knowledge of the benefits of a membership. And I'm testing that knowledge.
JUDGE LOCKE: Well, I'll allow it, overrule. Please proceed.
Q BY MR. BOREANAZ: Mr. Mantell, was one of your relatives actually an officer of Local 91?
A Yes.
Q For how long?
A Twenty-five years.
Q Okay. And do you know if the health and welfare fund has an executive board?
A No, I do not.
Q Okay. So what are the group of people that are responsible for running or operating the health and welfare fund? Are they the same people that are responsible for running the Local Union?
A Yes.

Q Okay. That's your understanding, right?
A Yes.
Q And that forms the basis of your testimony that these are the benefits of membership at Local 91, correct?
A Correct.
Q Would you be surprised to learn that the health and welfare fund is run by a joint board of trustees, consisting of some Union officials and some Employer officials? Would you be surprised to learn that?
A No.
Q Were you aware of that until I asked the question just now?
A If I -- yeah, I -- I knew that that was -- that was, right, that -- you know, that is true.
Q Okay. So you now know that's true, or you knew that was true --
A I knew that was true before.
Q Okay. When did you learn that that was true?
A Early on as a laborer.
Q Okay. And the training fund that you mentioned -- the training fund -- the people responsible for running and operating the training fund, is that the same group of people that are supposed to be running the Local Union, the Respondent in this action?
A I'm not sure about that.

Q Okay. Would you be surprised to learn that the training fund is run and operated by a joint board of trustees, consisting of half Union officials, and half management officials, or Employer officials? Would you be surprised to learn that?

A I wouldn't be surprised.

Q Okay. But today, at this point, you have no knowledge of that fact, right?

A I'm not sure. No.

Q So when you testify that they're one and the same; the health and welfare fund, and the Union, do you now recognize that that testimony may not be accurate?

A Well, I know that on the Union side, the Local side, the president, is the same person that is in charge of our health and welfare fund, so I know. They're definitely all intertwined with each other.

Q Are they one and the same?

A They're not one and the same, but they're intertwined with each other.

Q Okay. You mentioned that one of the benefits of membership is pension, right?

A Yes.

Q Does the Union provide members with pension benefits, as far as you understand?

A That would be under the health and welfare side of it

1 also.
2 Q Okay. So is there a pension fund that provides pension
3 benefits to Local 91 members --
4 A Yes.
5 Q -- to your knowledge?
6 A Yes.
7 Q Okay. Is that pension fund the same thing as the Union in
8 this case?
9 A It's in the same -- yes, it's all -- yes.
10 Q Okay. And will you be surprised to learn that the pension
11 fund also has a joint board of trustees consisting of half-
12 Union and half-management side of representatives that run and
13 control and operate the pension fund? Would you be surprised
14 to learn that?
15 A No. I already know that.
16 Q Okay. You mentioned one of the benefits of being a member
17 is to get a paycheck, right?
18 A Yes.
19 Q Has the Union ever given you a paycheck?
20 A No.
21 Q Okay. You get paychecks from contractors or --
22 A Actually, I --
23 Q -- right?
24 A I do get -- yes, I do.
25 Q You do get a paycheck from the Union, right?

1 A Yes.
2 Q Go ahead. You want to volunteer that information. Go
3 ahead. When did you --
4 MS. CACACCIO: Objection, argumentative.
5 Q BY MR. BOREANAZ: When did you get a paycheck from the
6 Union?
7 JUDGE LOCKE: Sustained.
8 MS. CACACCIO: Objection.
9 JUDGE LOCKE: I don't think there's a question right now
10 since I --
11 MS. CACACCIO: Okay.
12 JUDGE LOCKE: -- sustained the last objection.
13 Q BY MR. BOREANAZ: All right. So isn't it true, Mr.
14 Mantell, that as a member of Local 91, members get paychecks
15 from contractors or employers that are signatory to a
16 collective bargaining agreement with Local 91; isn't that
17 accurate?
18 A Yes.
19 Q Okay. So it's not accurate to state that the Union
20 provides pension -- or provides paychecks to members, right?
21 That would be inaccurate?
22 A That's inaccurate.
23 Q Now you said also, under the constitution of Local 91,
24 that you're familiar with, right?
25 A Yes.

Q You've read it.
A Yes.
Q More than once, right?
A Probably, yes.
Q Okay. One of the benefits of membership in Local 91 is perhaps the ability to hold office, right?
A Correct.
Q Okay. And you're a member of Local 91, right?
A Yes.
Q And do you have, as a member of Local 91, the ability to hold a Union office?
MS. CACACCIO: Objection, relevance.
JUDGE LOCKE: What is the relevance?
MR. BOREANAZ: I'll tie it in. It will not be long.
JUDGE LOCKE: Subject to that tie-in, overruled. Please proceed.
Q BY MR. BOREANAZ: No, you're not able to do that, right?
A No.
Q And why is that? Was there some decision by this parent organization, Laborers' International Union of North America, that issued some kind of a decision that indicated that you were not eligible to run for Union office?
A Yes.
Q All right. And that decision that you are not eligible to run for Union office was because you are not working at the

1 calling because of your status as a full-time employee with the
2 Niagara Falls Fire Department, correct?
3 A No, it was not correct.
4 Q Okay. Is there some other reason that you say that the
5 International Union determined that you are not eligible to run
6 for office in Local 91 --
7 A Yes.
8 Q -- despite the fact that you're a member?
9 A Yes.
10 Q Okay. And did you receive a letter from the International
11 Union regarding your concerns about being able to run for
12 office?
13 MS. CACACCIO: Your Honor, I'm renewing my objection to
14 the relevance of this line of testimony.
15 JUDGE LOCKE: Well, overruled.
16 THE WITNESS: He actually said that my fire-department job
17 was my main job and that I was able -- that I would not be able
18 to run for office for the Local 91 due to that, but I would be
19 able to continue working.
20 Q BY MR. BOREANAZ: So is it -- so your testimony is now
21 that, in fact, the International Union did indicate that you
22 could not run for Union office because you were not working at
23 the calling as a result of your full-time employment as a
24 Niagara Falls firefighter, correct?
25 A They did not say that.

Q All right. What did they say?
A I just said that, what I just told you.
Q Okay. So tell me again what the International said.
MS. CACACCIO: Objection, asked and answered.
MR. BOREANAZ: I'll do it a different way. Let's mark this.
JUDGE LOCKE: Overruled.
MR. BOREANAZ: I'll do it a different way. Let's mark this.
MS. CACACCIO: As what?
MR. BOREANAZ: I guess want to do letters, or you want to do numbers?
JUDGE LOCKE: However you'd like.
MR. BOREANAZ: All right. We'll do Union 1.
(Union Exhibit Number 1 Marked for Identification)
Q BY MR. BOREANAZ: Do you need a copy?
A I do.
Q Can I give to you, or do you need it now?
A I need it now.
Q Okay.
MS. CACACCIO: Do you know that this letter -- this is his letter to them, right?
MR. BOREANAZ: What's that?
MS. CACACCIO: This isn't their letter. This is his letter to them.

1 MR. BOREANAZ: I'm sorry.
2 Q BY MR. BOREANAZ: Mr. Mantell, will you take a look at
3 Union Exhibit number 1?
4 A Uh-huh, yes.
5 Q Will you review it and let me know when you're done?
6 A Okay.
7 Q Now you had -- this is a letter dated September 15th,
8 2016, correct?
9 A Yes.
10 Q And you had wrotten (sic) a letter to the International
11 Union, right --
12 A Yes.
13 Q -- in connection with your concerns about what's going on
14 at Local 91, right?
15 A Right.
16 Q There's been a lot of talk about the NLRB Board decision,
17 based upon your 2015 complaint, right?
18 A There has been talk, yes.
19 Q During these proceedings, right?
20 A During which proceedings?
21 Q These proceedings, right?
22 A Yes. Yeah.
23 Q Okay. And that Board charge relates to your Facebook post
24 in August of 2015, correct?
25 A Yes.

Q All right. Now did you consider that a landmark case?
A I've been told that.
Q Okay. Did you consider it a landmark case?
MS. CACACCIO: Objection, relevance.
Q BY MR. BOREANAZ: Overruled.
A I wouldn't know.
Q BY MR. BOREANAZ: Well, did you describe it as a landmark case to the Laborers' International Union?
A I might have. I'm not sure.
Q All right. Did you address your position at the fire department with LIUNA in this correspondence?
A Yes, I did.
Q This is your letter, right?
A Yes. Yeah.
Q Your signature?
A Yep.
Q And you copied here Vincent Masino and Scott DeLuca, right?
A Yes.
Q Who is Vincent Masino?
A He's the regional district manager for LIUNA.
Q All right. And who's Scott DeLuca?
A He is my attorney in my libel-suit case.
JUDGE LOCKE: He's your attorney in your what?
THE WITNESS: The libel suit that --

1 JUDGE LOCKE: Oh.
2 THE WITNESS: -- Mr. Palladino has against me.
3 JUDGE LOCKE: Okay. Thank you. So it's the one that says
4 you were sued civilly for 330 million; is that --
5 THE WITNESS: Yes.
6 JUDGE LOCKE: -- okay. Thank you.
7 Q BY MR. BOREANAZ: And in this letter, did you mention that
8 your position in the fire department should not, and does not,
9 disqualify you from attending Union meetings?
10 A Yes.
11 Q All right. Is that your position?
12 A Yes.
13 Q Okay. And is attending union meetings one of the benefits
14 of being a member, also laid out in the constitution?
15 A Yes.
16 Q An additional benefit that you didn't mention, right?
17 A Correct.
18 Q And as a Local 91 member, do you enjoy the same benefits
19 attending Union membership meetings as other local members?
20 A No.
21 Q Okay. And you had attended Union meetings, right?
22 A Yes.
23 Q You've indicated that repeatedly to the International
24 Union and to the Board that you're a member that comes to Union
25 meetings all the time, right, regularly, truth?

A I try to, yes, I do.
Q All right. And you do do that, right?
A Yes.
Q Except for times when you're not able to do that as a result of violation of some of the Union constitution and rules, right?
A Yes.
MS. CACACCIO: Objection.
JUDGE LOCKE: What's the nature of the objection?
MS. CACACCIO: I'm going to continue to object on a relevance objection.
JUDGE LOCKE: Say that again.
MS. CACACCIO: Relevance, Your Honor. It's a continuing relevance objection to this line of questioning.
JUDGE LOCKE: What is the relevance?
MR. BOREANAZ: Well, he's engaged in protected activity here. We're demonstrating he's permitted and allowed to engage in protected activity.
JUDGE LOCKE: I'll allow it. Overruled.
MS. CACACCIO: May I be heard, Your Honor? May I be heard?
JUDGE LOCKE: Yeah, sure.
MS. CACACCIO: The General Counsel isn't arguing that his engagement in Union meetings is the protective activity that's at issue here. So it's not relevant, if that's their relevance

1 argument, according to General Counsel.
2 MR. BOREANAZ: General Counsel --
3 JUDGE LOCKE: The objection is noted.
4 MR. BOREANAZ: Sorry.
5 JUDGE LOCKE: Overruled.
6 Q BY MR. BOREANAZ: So I'm not sure your answer was heard,
7 at least on the record, but you've been able to come to Union
8 meetings regularly, except for those occasions when you're not
9 able to as a result of a finding that you violated the Union
10 rules and bylaws?
11 A Correct.
12 Q And is there a significance to whether or not you're
13 working at the calling in connection with how you participate
14 in the membership meetings?
15 A I'm not understanding the question.
16 Q Okay.
17 A Can you repeat it?
18 Q Do you know if your status as a firefighter for the
19 Niagara Falls Fire Department, in that you're not working at
20 the calling, does that have any impact on the way in which you
21 can participate in Union meetings as a member?
22 MS. CACACCIO: Your Honor, I'm going to object to the
23 compound nature of that question.
24 MR. BOREANAZ: I'll break it down.
25 JUDGE LOCKE: Yeah, would you please? It's a little

1 confusing, to me anyway.
2 MR. BOREANAZ: Sure.
3 Q BY MR. BOREANAZ: You've been recognized not only attended
4 Union meetings, right, correct?
5 A I attend them, yes.
6 Q You've recorded Union meetings, right?
7 A I've recorded Union meetings.
8 Q And the recording of Union meeting was held to be in
9 violation of the Union rules, right?
10 A Correct.
11 Q And were you brought up on charges for that?
12 A Yes.
13 Q And were you punished for that?
14 A Yes.
15 Q Did you pay your punishment?
16 A Yes.
17 Q And serve your penalty?
18 A Yes.
19 Q Okay. So at least with respect to recording Union
20 meetings, you've violated that rule, right?
21 A Yes.
22 Q And that occurred after your August 15th Facebook post,
23 right?
24 A Correct.
25 Q So if a member is not working at the calling, can he or

she speak at Union meetings, according to the Union's constitution and bylaws, if you know?

A I'm not sure what you mean by at the calling --

Q Okay.

A -- what you're -- what you're saying.

Q Okay. Well, you mentioned it here in your letter, reflected in Union Exhibit 1, that, my position in the Niagara Falls Fire Department should not, and does not, disqualify me not only from attending Union meetings but participating in them like any other member, correct?

A Correct.

Q Those are your words to the International Union, right?

A Yes.

Q All right.

MR. BOREANAZ: One second, please. I just had it. Where did it go? Would like to mark Union Exhibit number 2.

(Employer Exhibit Number 2 Marked for Identification)

Q BY MR. BOREANAZ: Draw your attention to section 6 in the middle of the page. Read it and let me know when you're done reading it.

A Okay.

Q All right. This is -- Union 2 is a copy of page 100 of the Union constitution that you've read before, correct?

A Yes.

Q And, particular section 6, on page 100, states, "Any

1 member who is not working at the calling, or who is engaged in
2 independent enterprise, shall not have a voice or vote at
3 meetings of the local Union." Correct?
4 A Yep.
5 MS. CACACCIO: Your Honor, that's not the entirety of
6 section 6. So if he's going to read it in part, he should read
7 it in whole.
8 MR. BOREANAZ: I'll read it in whole.
9 Q BY MR. BOREANAZ: Section 6, does it not, Mr. Mantell,
10 read, "Any member who is not working at the calling, or who is
11 engaged in any independent enterprise, shall not have a voice
12 or vote at meetings of the local Union. A retired member
13 should have a voice and a vote at local Union meetings only on
14 matters of direct concern or interest to retired members." Did
15 I read that correctly, Mr. Mantell?
16 A Yes.
17 Q Are you a retired member?
18 A I am not a retired member.
19 Q Are you a member working at the calling?
20 A Yes.
21 Q All right. And have you always been a member working at
22 the calling?
23 A Yes.
24 Q Has the International Union ever determined that you are
25 not working at the calling as a result of your employment as a

full-time firefighter in the Niagara Falls Fire Department??
A No.
Q So is it your opinion, based upon your 20 plus years of membership of Local 91 and based upon your reading and understanding of the uniform constitution, that this section 6 under Union Exhibit number 2 does not apply to you?
A No, it does not.
Q And never has applied to you?
A Never has.
Q And you address that in this letter, Union Exhibit number 1, on the second page, correct? I just read it. "My position in the Niagara Falls Fire Department should not, and does not, disqualify me from not only attending Union meetings, but participating in them like any other member, right?
A Yes.
Q So that's what you're saying. This section in uniform constitution Union's 2 does not apply to you, right?
A Correct, does not apply to me.
Q And you go on in your letter to state, I'm at the calling every year, and have yet to receive a call to go to work in over a year. Do you see that?
A Yes.
Q I answer the call faithfully since 1994 and consistently average 800 annual hours throughout -- while a number of -- while a member of Niagara Falls Fire Department. See that?

A Yes.
Q Earlier today, you testified about 600 to 800, right?
A Yes.
Q Is this letter an exaggeration --
A No.
Q -- saying 800?
A I just said 800, because some years I worked 1,000.
Q You say that you use vacation, compensatory, and personal days and switch shifts with other firefighters in order to answer the call of the Union, right --
A I've done that consistently, yes.
Q -- proving that my loyalty to Union has always been my first professional priority, correct?
A Yes.
Q So is it your testimony that working for Local 91 is your first professional priority?
A I've -- well, it's my first one, yes, my first professional priority was that was my first job as being a laborer.
Q At the time that you wrote this letter, was working as a laborer your first professional priority?
A I always -- I've always enjoyed being a laborer, and I never manipulated my labor schedule to be a fireman. It was the other way around. I manipulated my --
Q Was it your first professional priority to be a laborer --

A I would -- if I --
Q -- let me finish the question -- the time that you wrote this letter?
A I showed a priority. My first -- I showed my priority.
Q Do you not understand my question?
A I'm answering it. I showed my priority by answering the call --
Q Okay.
A -- all these years.
Q But you indicate here in your letter that --
MS. CACACCIO: Your Honor, I'm going to, again, object to the relevance of this letter from 2016 as to whether or not in 2016 his first professional priority was the Local. This case deals with whether or not Respondent unlawfully removed him from the list in 2018. And I'm, again, going to renew my objection to relevance on this line of questioning.
JUDGE LOCKE: And the response?
MR. BOREANAZ: And the response is General Counsel has indicated that the animus has been continuous from 2015 to the present time. And Mr. Mantell has indicated that he felt that animus. And I'm drawing out testimony with respect to things that occurred that relate to the application of the bylaws and the rules of the Union that Mr. Mantell, obviously, doesn't agree to or doesn't like to, which may color his impression that he's been -- that he's been retaliated against for just

his protected activity.

And so he's made statements about benefits of membership. You got testimony what he's entitled to. And it impacts his credibility about what he thinks he should get and how he testifies about what work he should have got and how the rules operate. You're testing all of that credibility.

And in going through this with him, I think you'll find that he doesn't have a firm grasp on some of these things that he's testifying to. And I'd like to draw that to your attention.

MS. CACACCIO: He didn't testify about these issues. These are not issues that he testified about it. Specifically what I'm objecting to here is this issue as to whether or not -- what his priority was in 2016 with respect to what he was doing for work. So I'm going to --

JUDGE LOCKE: Well, there's great latitude in cross-examination, so overruled. Please proceed. You have continuing objection.

MS. CACACCIO: Yes, Your Honor.

Q BY MR. BOREANAZ: In this letter, you said, "My loyalty to the Union has always been my first professional priority." Did you write those words?

A Yes.

Q Was that an exaggeration?

A I'm a professional, and I prioritized how to work out of

1 Local 91.
2 Q Okay. So in your mind, that was not an exaggeration,
3 correct?
4 A No.
5 Q Was it accurate when you stated, in 2016, that your first
6 professional priority has always been with the Union, right?
7 A I've always -- that's what I said in there.
8 Q Okay. But you also testified, and you wrote in your
9 letter, that you get Local 91 jobs by working around your
10 firefighter job, right?
11 A Yes.
12 Q Okay. Do you get a pension from the firefighter job?
13 A Yes.
14 Q Do you get health insurance from the firefighter job?
15 A Yes.
16 Q Do you get a vacation?
17 A I get vacation.
18 Q Do you get benefits, including time off?
19 A Yep. Yes.
20 Q And raises, right?
21 A Yes.
22 Q And how many hours a year do you work for the fire
23 department?
24 A Probably 2,300, 2,400.
25 Q Okay. So on average, is that over the last several years

1 you've been working 2,200 to 2,300 hours on behalf of the
2 Niagara Falls Fire Department, correct?
3 A I said 2,300 to 2,400 hours.
4 Q 2,300 to 2,400 hours. And yet, you still maintain that,
5 even today, your first professional priority is working for
6 Local 91?
7 A My -- what I said was --
8 Q I'm asking you the question.
9 MS. CACACCIO: I'm going to object to the characterization
10 of the question, because that's not what he testified to.
11 MR. BOREANAZ: Then he can answer that way.
12 MS. CACACCIO: Well, he tried, but you stopped him, so I'm
13 going to object.
14 JUDGE LOCKE: Would you rephrase the question, please?
15 Q BY MR. BOREANAZ: Mr. Mantell, as you sit here today, not
16 when you wrote this letter, is it your testimony that your
17 first professional priority is to work for Local 91?
18 A My goal is to work for Local 91. It's a priority.
19 Q You don't want to answer my question?
20 MS. CACACCIO: Objection, argumentative.
21 JUDGE LOCKE: Overruled.
22 Q BY MR. BOREANAZ: Do you understand my question?
23 A No, I don't.
24 Q Okay. Would you like me to ask it again?
25 A If you want a correct answer.

Q Okay. As you sit here today, Mr. Mantell, is it your testimony that working for Local 91 is your first professional priority?
A It is not my first professional -- if you compare it to -- are you comparing to someone -- something?
Q You don't understand my question?
A No.
Q Okay. I'll ask it a different way. Mr. Mantell, you have a full-time job with the Niagara Falls Fire Department, right?
A Yes.
Q And you seek work from Local 91, right?
A Correct.
Q And as you sit here today, do you prioritize which work that you would get --
A Yes.
Q -- either work from the fire department or work from Local 91? Which do you prioritize?
A And as of --
Q As of today, sir.
A As of today?
Q As of today.
A Local 91.
Q Okay. So your first priority is Local 91?
A I would like that to be, yes.
Q That's because you already have the City of Niagara Falls

1 job, right?
2 A It's because I can retire tomorrow if I want to.
3 Q Okay. I'm handing you what's been marked as -- excuse
4 me -- Union Exhibit number 3. This is a letter dated May 24th,
5 2016, addressed to you, from the Laborers' International Union
6 of North America regarding a decision regarding
7 disqualification from nomination for president. Do you see
8 that, sir?
9 A Yes.
10 Q Did you, in fact, receive this letter?
11 A Yes.
12 Q Did you receive it in and around the time of May 24th,
13 2016?
14 A Yes.
15 Q Now looking again back at Union Exhibit number 1, right --
16 you see that?
17 A Yeah.
18 Q That's your letter to the general president, Armand
19 Sabitoni, dated September 15th, 2016, right?
20 A Yes.
21 Q All right. So Union Exhibit number 1 came after Union
22 exhibit 3, right?
23 A Correct.
24 Q So after the International Union issued a ruling regarding
25 you're not being eligible to run for Union office, you had

1 written this letter to Mr. Sabitoni containing Union Exhibit
2 number 1, correct?
3 A Correct.
4 Q All right. Now you testified, just a little while ago,
5 that the International Union did not determine that you were
6 not eligible to work -- not eligible to hold office at Local 91
7 because you were not working at the calling. Do you remember
8 that testimony?
9 A They didn't use the words at the calling.
10 Q Do you remember that testimony a little while ago?
11 A Yes.
12 Q All right. And in this letter, you had -- you had
13 attempted to run for Union office at Local 91, right?
14 A Yes.
15 Q And the Union has a procedure in how it runs Union
16 elections, right?
17 A Yes.
18 Q Spelled out in the constitution, correct?
19 A Yes.
20 Q Constitution that's overseen by the International Union,
21 right?
22 A Yes.
23 Q And at the local level, it was determined that you were
24 not eligible to run for office, correct?
25 A There was a -- yes. Yes.

1 Q The local union election board, pursuant to the election
2 procedures laid out in the constitution as formed, right?
3 A Yes.
4 Q And you intended to run for office, and you were declared
5 by the local union election board not to be eligible, right?
6 A Not to be eligible.
7 Q Okay. And you challenged that, right?
8 A Yes.
9 Q And did you agree with the International Union's
10 determination that you were not eligible to run for office, or
11 you disagree with it?
12 A I disagree with it, but that's their final ruling on it.
13 Q Okay. Now, in connection with rendering the decision, the
14 International Union gave you and the local trial board an
15 opportunity to be heard, right?
16 A Yes.
17 Q There was a scheduled telephone conference call, right?
18 A Yes.
19 Q You made certain representations to this International
20 Union delegation who render this decision, right?
21 A Yes.
22 Q As did the local union election board, right?
23 A Yes.
24 Q And drawing your attention to the second page of Union
25 Exhibit Number 3, the question of your ultimate eligibility

1 must be determined, according to this letter, correct?
2 A Yes.
3 Q And the reference to your work as a full-time firefighter
4 was, in fact, a significant portion of the dialogue at this
5 hearing with the International Union, correct?
6 A Correct.
7 Q And you represented, as part of this hearing to determine
8 your qualifications to run for office, that you take vacation
9 days and comp days and alter your schedule as a firefighter
10 during the time period, roughly, Memorial Day to Thanksgiving
11 each year, so that you can accept work as a laborer, right?
12 A Correct.
13 Q All right. Now, that's been your practice for a long,
14 long time, right?
15 A Yes, it has been.
16 Q For years and years, right?
17 A Yes, it's --
18 Q That's currently practice, right?
19 A Up until 2015, yes.
20 Q Well, it's your practice now, right?
21 A No, I'm not being called to go to work.
22 Q And why is it that you don't seek work after Thanksgiving
23 and through and until Memorial Day?
24 A Because construction slows way down. Can't pour concrete
25 in the cold. Can't do blacktop. So construction season,

1 basically, winds down. Most laborers are on unemployment. So
2 I don't -- I don't pursue any work. I take my name off the --
3 off the list, usually.
4 Q And you state here -- or you stated to the International
5 Union -- that you don't put yourself on the autowork list
6 during the winter months out of respect for others' need to
7 obtain work during those months. Did you make that
8 representation to the International board as part of this
9 determination of your eligibility for union office?
10 A Yes, I did, because the work was not so scarce in the
11 winter months around here.
12 Q Well, was it true at the time that you made that
13 representation to the International?
14 A It's been true every year. Every year, it's like that.
15 Every winter.
16 Q So out of respect for others' need to obtain work during
17 those months, you do not solicit work during those months,
18 correct?
19 A That's one of the reasons, yes.
20 Q And the second to last paragraph of the second page here,
21 of Union Exhibit number 3, the letter to you says: "The
22 central focus in determining whether one is working at the
23 calling is the individual's primary or full-time employment."
24 Do you see that?
25 Q Yes.

Q And then there's a reference to a case, Matter of Local 135, and a number, and October 2005; do you see that?
A Yes.
Q And so you understood that in the International's determination of your eligibility to run for office, the central focus was determining whether or not you're working at the calling is your primary or full-time employment, right?
A Can you repeat that, please?
Q You understood that the central focus of determining whether or not you're working at the calling in order to be eligible to run for office, was going to term on your primary or full-time employment, right?
A That's what it says in here.
Q Did you understand that was the focus of the International in determining your eligibility to run for union office at Local 91?
A Yes.
Q The International told you, in this letter: "A member whose primary employment does not meet the term's definition is not working at the calling, even where his or her part-time work does meet the term's definition." Do you see that?
A Yes.
Q And there's another reference to a Matter of Local 447, May of 2001, right?
A That's -- that's the case, yes.

Q Did you get this letter and read it and understand it?
MS. CACACCIO: Objection. Asked and answered.
Q BY MR. BOREANAZ: Did you understand the letter when you got it?
JUDGE LOCKE: Overruled. Overruled.
THE WITNESS: Yes. That's why I didn't run for president.
Q BY MR. BOREANAZ: It says here that the testimony received by the International --
MS. CACACCIO: I'm going to object. If Respondent's going to be offering this exhibit, he doesn't need to keep reading it. If it's going to be in the record, then it's in the record.
JUDGE LOCKE: I don't think he completed his question.
Had you?
MR. BOREANAZ: I had not completed my question.
JUDGE LOCKE: I'll let you finish your question.
Q BY MR. BOREANAZ: The International informed you that your primary occupation was a firefighter, right?
A Yes.
Q And that you admitted that, and said you didn't want to deprive others of work opportunities during the winter months, right?
A As of 2016, yes.
Q And you told them that, right?
A Yeah.

Q And the testimony was that by contrast, you depend upon your work as a firefighter for your primary employment, and your work as a laborer may fairly be described as supplemental or part time, correct?
A That's what the International said, yes.
Q And did you agree with that assessment?
A I had no choice.
Q Did you agree with that assessment at the time it was made and as listed here in this Union Exhibit 3?
A No.
Q Do you think the International Union misinterpreted their constitution and their rules in rendering this opinion that your work --
A I think they're --
Q -- as a firefighter can fairly be described as supplemental or part time?
A I think they're stretching the -- the rules by citing cases.
Q You think the International is stretching rules?
A To cite the case, yes -- by citing cases, yeah.
Q Okay. And did you read the cases?
A No.
Q So how can you testify that the International was stretching the rules by citing the cases if you didn't read the cases?

A I just -- I just explained to you, that's what I believe.
Q Okay. But my question is more to what forms the basis of that belief? You didn't not read --
A Knowing --
Q -- the cases, right?
A Knowing what -- knowing the job of an executive board officer in Local 91, it doesn't matter what job you have.
Q Okay. The International Union rendered this decision, right?
A They did.
Q And the International concluded that your work as a laborer may fairly be described as "supplemental" or part time, right?
A Yes.
Q Meaning it wasn't your primary work, right?
A Right.
Q And therefore, you are not working at the calling, correct?
A That's the way they interpreted it, I believe.
Q And you are testifying here today that the International Union is stretching their rules by citing cases, right?
A Yeah.
MS. CACACCIO: Objection. Asked and answered.
MR. BOREANAZ: The question is --
MS. CACACCIO: He's answered this --

1 JUDGE LOCKE: Overruled.
2 MS. CACACCIO: -- three times now.
3 Q BY MR. BOREANAZ: The question is what forms the basis of
4 your opinion that the International Union is stretching their
5 rules by citing cases, if you never even read the case that
6 they're citing?
7 A Because I know what it takes to be an executive board
8 officer and I don't -- I don't believe that the amount of hours
9 I work for one job compared to another should matter.
10 Q Is it that you just don't believe in the rule, or you
11 don't believe in the Union's interpretation of the rule?
12 A Either.
13 Q Okay. So this concept of working at the calling, as of
14 May of 2016, was not new to you, right?
15 A As far as running for office, it was new for me, yes.
16 Q Okay. Now, go back to Union Exhibit number 1 -- or number
17 2. This is one of the rules that talks about any member who is
18 not working at the calling shall not have a voice or vote at
19 meetings of the local union, right?
20 A That's what it says, yes.
21 Q Okay. So the International Union, in 2016, had already
22 determined, based upon their rules, that based upon your full-
23 time work at a fire department, that you were not working at
24 the calling, and therefore ineligible to run for office, right?
25 A Yes.

Q And what about this particular section? If you're not working at the calling because of your full-time work as a firefighter, that means, does it not, that you are not able to engage in having a voice or vote at meetings of the local union, right?

A No.

Q Okay. So again, you feel like the rule in Union Exhibit Number 2, again, even though the International determined you were not working at the calling, Union Exhibit Number 2 still doesn't apply to you, right?

A No.

Q And what forms your basis of opinion and testimony, now, that Union Exhibit number 2, the rule in Section 6, does not apply to you? What forms your basis for your opinion?

A That between Memorial Day through Thanksgiving, I'm available to work 8 to 10 hours a day, Monday to Friday, those shifts -- that shift.

Q Is that the basis of your opinion?

A Yes.

MS. CACACCIO: Objection. He just said it was.

Q BY MR. BOREANAZ: And was that fact given or considered by the International Union when they rendered their opinion in Union Exhibit Number 3, right?

MS. CACACCIO: Objection. Speculation.

JUDGE LOCKE: Sustained.

1 Q BY MR. BOREANAZ: Mr. Mantell, was the International Union
2 aware that you worked from -- strike that. The International,
3 in fact, was aware of your work pattern from Memorial Day to
4 Thanksgiving when they rendered their opinion that you are not
5 working at the calling, nonetheless, correct?
6 MS. CACACCIO: Your Honor, I'm going to, again, renew my
7 objection with respect to this line of questioning. I realize
8 we've done this, but I'm doing it again. Whether or not he
9 could run for union office isn't the same thing as to whether
10 or not he can get work as a member. So I'm going to, again,
11 object to this as not relevant.
12 JUDGE LOCKE: Do you have a response?
13 MR. BOREANAZ: I'd like to make a response outside the
14 presence of the witness so that he doesn't pick up on my
15 argument and then fashion his testimony in such a way --
16 JUDGE LOCKE: I'll overrule it. But it seems to me like
17 we're not progressing very quickly, so proceed at a pace, I'll
18 overrule the objection.
19 Q BY MR. BOREANAZ: So Union Exhibit number 2, the rule that
20 says any member who is not working at the calling shall not
21 have a voice or vote at the local union, does not apply to you,
22 in your opinion, because you are available to work eight hours
23 a day between Memorial Day and Thanksgiving, correct?
24 A Correct.
25 Q Okay. And when you had this hearing with the

1 International Union, did you make that same point to the
2 International Union that you're available to work between
3 Memorial Day and Thanksgiving, eight hours a day, for Local 91?
4 A I -- I don't know if I said eight hours a day, but I did
5 say -- I did give them those kind of dates, that general -- the
6 busy months here in Western New York, yes.
7 Q Okay. You said this during direct examination, Mr.
8 Palladino was the business manager, you said, since
9 approximately 2007, right?
10 A Yes.
11 Q And before him, who was the business manager?
12 A Rob Connley.
13 Q And before Rob Connley, who was the business manager?
14 A Michael Corsini.
15 Q And was Michael Corsini a business manager for a lengthy
16 period of time?
17 A Yes.
18 Q And was he criminally charged in connection with his
19 function as a business manager of Local 91?
20 MS. CACACCIO: I'm going to object to the relevance of two
21 business managers ago -- his criminal --
22 JUDGE LOCKE: What is the relevance?
23 MS. CACACCIO: -- proceedings.
24 MR. BOREANAZ: My client will tie the relevance into --
25 JUDGE LOCKE: Subject to that, I will allow it. And

subject to motion to strike, in case you don't tie it.

Q BY MR. BOREANAZ: Was Michael Corsini, while he was in office of Local 91 business manager, charged with a crime in connection with his functions as a business manager of Local 91?

A Yeah, he was charged. Yes.

Q He wasn't convicted though, right?

A No.

Q He died before he got convicted, right?

A Correct.

Q Were there other union officials charged at the same time as Mr. Corsini?

A Yes.

Q Were they convicted?

A Yes.

Q Did Local 91, as a result of those criminal convictions, have a good or poor reputation in the construction community?

MS. CACACCIO: Objection. Speculation as to what the --

JUDGE LOCKE: Can you rephrase the question?

Q BY MR. BOREANAZ: Mr. Mantell, are you familiar with whether or not Local 91, as a result of those convictions -- criminal convictions, Local 91 had a good or poor reputation in the construction industry community?

A At that time, I thought we had a good -- good reputation in the construction industry.

Q So at the time of the criminal convictions of union officials of Local 91, you thought that criminal convictions did not impact Local 91's reputation in the construction industry community, correct?

A No, we were strong as ever. We -- no.

Q Okay. You testified that you filed your first charge in November of 2015, right?

A Yes.

Q So just to be clear, your Facebook posts were in August of 2015, correct?

A Yes.

Q Your first charge regarding the Facebook post was November of 2015, right?

A My first charge with NLRB?

Q First charge with the NLRB --

A Yes.

Q -- based upon the Facebook charges, was November 2015, correct?

A Yes.

Q And you testified that there were another charge that you made, right, and that was in December of 2017; you have the documents in front of you?

A Yes.

Q You filed those two charges, right?

A Yes.

Q And there was two other charges filed by somebody else that were combined in your charge from December 13th, 2017, where there was a hearing last June, right?
A Yes.
Q So from the period of time that you engaged in Facebook posts to the time that you filed your charge and ran your hearing in June of last year, 2018, okay, had you been able to attend union meetings when you weren't suspended -- when your membership wasn't suspended; yes or no?
A Yes.
Q Did you, in fact, speak at union membership meetings between the time that you put your Facebook posts up and the time last June when the hearing was on the combined case? Did you speak at union meetings during that period of time?
A Sometimes.
Q Okay. And during that period of time, did you, in fact, receive job referrals from the Union hall?
A I think, two.
Q Okay. And did you pay your union dues during that period of time?
A Every month.
Q And so you're allowed to earn a pension when you did work, right?
A I've acquired -- I've worked enough hours to get a pension, yes.

Q Okay. In fact, not only did you attend union meetings, you talked with other union members at union meetings, right --
A Yes.
Q -- during this period of time?
A Yes.
Q And also during this period of time, you broke union rules, right?
A Yes.
Q Do you remember the rules that you broke?
A I broke one rule.
Q What was the rule that you broke?
A The recording.
Q Okay. And you were punished -- during this period of time, you were punished for that, right?
A Yes.
Q Do you remember the occasion that you forged your brother's name on the out-of-work list?
A Yes.
Q Okay. And you did that in a period of time where your brother was out of the country on vacation, right?
MS. CACACCIO: I'm going to object to the relevance of this.
JUDGE LOCKE: Overruled.
Q BY MR. BOREANAZ: You forged your brother's name on the out-of-work list at a point in time when he was out of the

country on vacation, right?
A Correct.
Q And the purpose of signing the out-of-work list is to demonstrate to the Union that you're ready, willing, and able to work, right?
A It was a 90-day list.
Q And signing the 90-day list is a way of notifying the Union that you're ready, willing, and able to work, right?
A I'm not sure if -- if that's what it's for or not. I think it's just a requirement. I don't know if that's what it means.
Q You don't know what the requirement is?
A No.
Q Did you know at the time --
A The requirement is to sign the 90-day list, and people did it for each other all the time. It was -- it was a common practice.
Q Okay.
A The office people did it for us.
Q Okay. And so you signed your brother's name, right?
A Yeah.
Q And were you punished for that?
A No.
Q You weren't punished for that?
A No.

Q Did you have an altercation at a union meeting and receive punishment for that?
A It was not an altercation.
Q Okay.
A It was a lie.
Q All right. So you say that you went to a union meeting, and somebody made up a lie against you that you had an altercation with somebody, right?
A Yes.
Q Okay. So how many people were at the Union meeting that you claim a lie was made up that you had an altercation with somebody? How many union members were there?
A Probably 30 or 40.
Q Okay. And some of the members, the 30 or 40 members at that meeting, you're familiar with, right?
A Yes.
Q You work with from time to time, correct?
A Yep.
Q Were you disciplined by the Union for violating any union rules as a result of your conduct at that particular meeting?
A Erroneously, yes.
Q Okay. And did you, then, appeal to the International Union, like you had in your election procedure?
A Yes.
Q Claiming that the allegation that you interrupted the

Union meeting was false or a lie, right?
A Yes.
Q And did you get an opportunity with the International Union to state your case as to why the claim that you interrupted that meeting was a lie or false?
A Yes.
Q And which of the members did you bring to that meeting with the International Union to help state your case that the charges that you interrupted the Union meeting were a lie or false?
A I didn't involve anybody.
Q Okay. Were you prevented from doing that?
A Yeah, I was prevented.
Q Okay. Did Mr. Palladino prevent you from calling a union member to that -- to your defense in front of the International Union?
A Yes.
Q Okay. Did he tell you that you could not bring a union member?
A No.
Q Did he tell other union members they couldn't come to you -- to help with you -- make a case to the International Union that the allegations you interrupted a meeting were false or a lie?
A I don't know. I don't know what he's told people.

Q Okay. Yet, you're willing to sit here and testify that Mr. Palladino prevented members from coming and testifying on your behalf?
A For sure.
Q You're testifying that under oath?
A Yes.
MS. CACACCIO: Objection. Argumentative.
Q BY MR. BOREANAZ: And your basis for --
MS. CACACCIO: Objection. Argumentative. Please don't keep --
JUDGE LOCKE: Overruled.
MS. CACACCIO: -- asking questions while I've objected.
Q BY MR. BOREANAZ: And your basis for stating that Mr. Palladino caused people, members, not to come and speak at your behalf is because of a feeling you have, right?
A It's based on his actions that he's done over the years, with people that have -- that have backed me up. He starved them out where they had to leave the Union hall because they can't support their families no more.
Q You've made that --
A I would never do that to another member.
Q You've made that claim before, haven't you?
A I'll always make that claim.
Q Okay. And has somebody agreed with you on that claim?
A A lot of people agree with me.

Q Okay. Yet, Mr. Palladino has permitted you to speak at the floor at union meetings after you made the Facebook post and during periods of time that you were filing board charges, despite the fact that you had not been working at the calling as a result of your full-time job in the Niagara Falls Fire Department, correct?

A Incorrect. He has stopped me from talking many times.

Q He stopped you from talking many times --

A He stopped me when I --

Q -- but you've been able to

A -- had the floor.

Q -- talk for many times.

A No.

Q Never?

A When I'm on the floor, when I have the floor, he has interrupted me, rudely, to the point where it gets into a screaming match because he doesn't know how to control himself.

Q Or because you argue with him based upon --

A I'm -- I'm talking. I have the floor.

MS. CACACCIO: Objection. Argumentative.

JUDGE LOCKE: Sustained.

Q BY MR. BOREANAZ: So you have the floor. You mentioned that term twice now.

A Yes.

Q You have the floor, right?

1 A Yes.
2 Q In a union meeting --
3 MS. CACACCIO: Your Honor, I'm going to, again, object to
4 the relevance of this line of questioning. Unless Respondent's
5 claiming that somehow this has impacted their interpretation of
6 the rule with respect to him being a fireman, I'm going to
7 again object to the relevance of this.
8 That's the allegation in this case. The allegation in --
9 we already talked about not relitigating the other four cases
10 that have -- three cases that have come before this one.
11 JUDGE LOCKE: It seems to me, it's focused on animus.
12 MR. BOREANAZ: It is.
13 JUDGE LOCKE: Overruled. Please proceed.
14 Q BY MR. BOREANAZ: You mentioned you had the floor twice,
15 right?
16 A I mentioned it today --
17 Q Just now, in testifying.
18 A -- twice, yes.
19 Q Yes. How do you get the floor?
20 A By raising your hand.
21 MS. CACACCIO: Your Honor, I'm sorry. Can I understand
22 your ruling? Is Respondent's argument that it harbors animus
23 for Mr. Mantell for other reasons, and that's why they're
24 interpreting the rule in this way? Because the General Counsel
25 isn't making an animus argument with respect to his conduct at

1 union meetings, and it hasn't in his direct examination or
2 ever, at this point.
3 MR. BOREANAZ: No, what the General Counsel's office has
4 said is that there's been a perpetual pattern of animus. And
5 they say it start in August of 2015, and has continued to this
6 very day. And the fact of the matter is that Mr. Mantell has
7 violated union rules and he has suffered consequences as a
8 result of that, and he doesn't like that.
9 And he's also enjoyed benefits that would suggest
10 otherwise; that there isn't this pattern or harbored feeling
11 with respect to animus. And I'm merely eliciting that. He
12 testified that he got the floor. You don't get the floor at a
13 union meeting unless your recognized and unless you're given an
14 opportunity to speak by the person running the Union meeting.
15 Q BY MR. BOREANAZ: Isn't that true, Mr. Mantell?
16 MS. CACACCIO: Your Honor, may I be heard?
17 JUDGE LOCKE: Yeah, please do.
18 MS. CACACCIO: That's, sort of, besides the point.
19 Whether or not they allow him to discuss or didn't discuss at
20 union meetings has no impact -- well -- has no impact on
21 whether or not they were referring him to work. That's an
22 entirely separate issue, which is the issue with this case.
23 Whether or not he was allowed to be on the referral list
24 and being referred for work. Whether or not they let him talk
25 at meeting, whether or not he wrote the International four

1 years ago, isn't relevant to this proceeding. This proceeding
2 is whether or not Respondent, on July 5th, removed Mr. Mantell
3 from the out-of-work list because of his Facebook comments.
4 JUDGE LOCKE: Well, if they didn't allow him to talk at
5 meetings, would that be relevant to the issue of animus?
6 MS. CACACCIO: I suppose, potentially.
7 JUDGE LOCKE: I'm sorry, what?
8 MS. CACACCIO: Potentially.
9 JUDGE LOCKE: Very well. Well, I'll allow it then.
10 Overruled. You have a continuing objection.
11 MS. CACACCIO: Yes, Your Honor.
12 Q BY MR. BOREANAZ: Isn't it true, in order to gain the
13 floor at Local 91, you have to be recognized by the person
14 running the Union meeting?
15 A Correct.
16 Q And did you, in fact, get recognized and gain the floor on
17 more than one occasion, from the time that you ran the Facebook
18 post to the time that you testified at the last hearing in June
19 of 2018?
20 A I was recognized sometimes; other times, I was disallowed.
21 Other times, I was rudely interrupted.
22 Q Okay.
23 A It's never just allowing me to be heard.
24 Q Right. Did you ever lie at union meetings?
25 A No.

Q Would you ever be accused of lying at union meetings?
A No.
Q Did you ever get accused of interrupting or disrupting union meetings?
A No.
Q Did you ever have a union meeting stop because of arguments that you started at union meetings?
A I've never started arguing.
Q Okay.
A Matter of fact, there's tapes of him starting the arguing.
Q Tapes? Okay.
A Yeah.
Q So you recorded more than one union meeting?
A No, I just recorded one.
Q Okay.
A But there's been a couple other people that recorded them.
Q Okay. All right. And you're familiar with this, right?
A Yeah, very familiar.
Q Did you get a referral of work after you filed your December 2017 board charge?
A One -- one referral.
Q Okay. You testified that you got referred out in June of 2018?
A The only time in 2018, yes.
Q Okay. And in June of 2018, you got referred out to a job

1 on the Niagara Falls Power Authority, correct, for a company
2 called Scrufari?
3 A No.
4 Q What did you get referred out to in June of 2018?
5 A For meter construction.
6 Q When did you get referred out to for the Scrufari job?
7 When was that?
8 A That was in 2017.
9 Q Okay. So in 2017, you got referred out to a job, right?
10 And that was after you filed your Facebook charges, right?
11 A Two years -- two years later, yes.
12 Q And after your filed other board charges in connection
13 with your partner, Duane (phonetic) Korpolinski, right?
14 A Yes.
15 Q And you went out to the Scrufari job, right?
16 A Yes.
17 Q You were there for one day?
18 A Correct.
19 Q Do you recognize that the Union was upset that you quit
20 the job to Scrufari after one day? Do you recognize that?
21 A I don't know how. I -- I don't know if he was upset or
22 not.
23 Q Okay. Do you know that the contractor who you were sent
24 to by the Union was upset that you quit the job after one day?
25 MS. CACACCIO: Your Honor, I'm going to object to this

1 testimony. This was the subject of the last hearing. This was
2 the entire subject of the last hearing.
3 JUDGE LOCKE: I think we're getting far afield here, but
4 there's no foundation that he would know what the contractor
5 said. Anyway, sustained.
6 MR. BOREANAZ: Well, he would know what the contractor
7 said, Your Honor. He had a conversation with the contractor.
8 JUDGE LOCKE: Oh, possibly. But it is getting far afield,
9 so --
10 MS. CACACCIO: Which we only know because we had an entire
11 other hearing about this, so --
12 JUDGE LOCKE: Anyway, sustained.
13 Q BY MR. BOREANAZ: So what happens when you get referred
14 out to a job, Mr. Mantell, and you work there for two days, 16
15 hours, and then get laid off? What happens to your position on
16 the out-of-work list?
17 A You get put back to the top, I believe --
18 Q Well, right to the top?
19 A No, no. To the position where you were at --
20 Q Okay.
21 A -- or the person was at. I believe that's what happens.
22 Q And what happens if you get a job referral, and you quit
23 after one day?
24 MS. CACACCIO: Your Honor, I'm again going to object.
25 This is, again, the subject of the last hearing. That was a

1 whole thing.
2 JUDGE LOCKE: I'll allow it. Overruled.
3 Q BY MR. BOREANAZ: It -- do you know that?
4 MS. CACACCIO: Are we, Your Honor --
5 THE WITNESS: I --
6 MS. CACACCIO: -- just so I'm clear, are we going to
7 relitigate the last hearing? Because then, I have a bunch more
8 witnesses I need to make sure come here and testify.
9 MR. BOREANAZ: All right, look, we're not relitigating the
10 whole thing. Otherwise, we'd have Glen Chalopean (phonetic) in
11 here, who ran --
12 MS. CACACCIO: Maybe we should.
13 MR. BOREANAZ: -- who ran for Democratic primary that Mr.
14 Mantell wasn't happy about.
15 MS. CACACCIO: But that was the first hearing, which has
16 already been decided by the Board.
17 Q BY MR. BOREANAZ: So you testified that you didn't get
18 work for two years, right?
19 A Basically, yeah. I went from 800 to, what, 8?
20 Q Okay.
21 A Yeah.
22 Q So you worked in late 2015, right?
23 A Up until September.
24 Q Later 2015 up to September, right?
25 A Mid -- it was all summer long, until September of 2015.

Q Okay. And then, what happens in November and Thanksgiving, things slow down, right?
A Yes.
Q Okay. And you testified that your next job came in June of 2017, right?
A Two -- two whole seasons later, yeah.
Q Okay. So you missed the winter months. You didn't get a referral out of the winter months, from 2000 -- late 2015 through early 2016, right?
A Correct.
Q And so, ordinarily, you're not even looking for work during that period of time, right?
A Correct.
Q And so you missed work, really, from Memorial Day of 2016 until June of 2017 or approximately one year, right?
A Yes.
Q Now you have testified that you're getting one referral during that period of time is evidence of animus against you, because you filed your Facebook charge. Isn't that your argument?
A Definitely, yeah.
Q Okay. And you were really familiar with the hiring hall rules, right?
A I'm pretty familiar, yes.
Q And when did you become, like, an expert in the referral

1 hall rules?
2 MS. CACACCIO: Objection. Argumentative, and it
3 mischaracterizes --
4 JUDGE LOCKE: Can you rephrase that, please?
5 Q BY MR. BOREANAZ: Are you an expert in the referral hall
6 rules?
7 A I wouldn't consider myself an expert.
8 Q Okay. Isn't it true, Mr. Mantell, that you gained your
9 knowledge of the hiring hall rules just by talking to other
10 members?
11 A No, I read the rules.
12 Q Okay. You testified at the last hearing in June of 2018
13 that you learned about the rules by talking to other union
14 members, didn't you?
15 A I -- I don't remember if I said that, but I'm sure if --
16 if I said it, yeah, by -- by talking to other union members, or
17 by reading it.
18 Q Okay.
19 A I'd become familiar with it.
20 Q You did provide some direct testimony about how the Union
21 rules -- how the referral hall rules work, right?
22 A Yes.
23 Q And as you sit here today, do you have any evidence that
24 you were passed over on the Union referral hall list and that
25 there was any particular violations of the Union hall rules in

1 connection with your assignment of work during the period of
2 time you claimed you didn't get work because of Adams
3 (phonetic)?
4 MS. CACACCIO: Your Honor, I'm going to object, because
5 that's, again, the basis of the last hearing and also this
6 hearing.
7 JUDGE LOCKE: That seems to me to be the whole thing here,
8 is there any evidence, so --
9 MS. CACACCIO: Right.
10 JUDGE LOCKE: -- sustained.
11 Q BY MR. BOREANAZ: Well, isn't it true that contractors,
12 when they call up and they ask for a particular member,
13 somebody doesn't get pulled off the list, right?
14 A Somebody gets pulled if they ask for that member that's
15 available, correct?
16 Q Okay. So the list, the Union hall list, has numbers,
17 right?
18 A Yes.
19 Q And when somebody's on the list, they might have a number,
20 whatever, 20 or 40 or 50 or 80, right?
21 A Yes.
22 Q And if somebody calls for a cement finisher, then the
23 contractor can get somebody off the list regardless of their
24 order, correct?
25 A Yes.

Q If a contractor calls for a job steward, the person goes off the list regardless of order, right?
A Picked by the business manager.
Q And if the contractor requests an employee that previously worked for them, they go to that contractor regardless of their position on the list, correct?
A Correct.
Q Your position on the list alters if you fail to sign the 90-day out-of-work list, right?
A I believe so, yes. Yeah.
Q Okay. You go to the bottom.
A Yeah.
Q And during this period of time that you claim there was animus against you, did you ever forget to sign the 90-day out-of-work list?
A I don't think I did, no.
Q Do you know one way or the other?
A No, I don't.
Q And do you know what people were called ahead of you for what various reasons?
A No, I'm not privy to that information.
Q You were referred out in June of 2018, right?
A Yes.
Q You testified that it was a three-day job?
A Yes.

Q And by the way, was that referral to that three-day job, what was the contractor?

MS. CACACCIO: Objection. Asked and answered.

JUDGE LOCKE: I'll allow it. Overruled.

THE WITNESS: Mader Construction.

Q BY MR. BOREANAZ: Okay. And do you remember the day that that occurred? Late June?

A June 28th.

Q Okay. And by the way, that was after your hearing last year, right?

A It was -- it was, like, yeah. Like, the next week or a couple days.

Q So a couple days or a couple weeks after your hearing right here in this same room, you got referred out?

A Yes.

Q You said you went to the Union hall on June 27th, 2018, paid your dues, right?

MS. CACACCIO: Objection.

THE WITNESS: July 27th.

Q BY MR. BOREANAZ: July 27th. My bad. July 27, 2018, you went to the Union hall to pay your dues, right?

A Yes.

Q You testified they took your money, right?

A Yeah.

Q What do you mean by that?

A We have to pay monthly dues, and they -- they took my check, just like every other member that has to pay.

Q Okay. So was it your expectation, because you were taken off the list prior to that, they should not have taken your union dues?

A I don't know. I -- I mean, if I don't get all the same benefits as every other working member in Local 91, then why should I have to pay dues like that?

Q Okay, do you think you should have to pay lesser dues if you're not on the work list because you're not working at the calling?

A I am working at the calling. They won't put me on the out-of-work list.

Q Okay. So if you're not on the out-of-work list, you think you should have to pay lesser dues?

A If I'm not on the out-of-call list because it's their choice, I shouldn't have to pay dues on it. Why should -- why should I?

Q So is that why you testified here today that they took your money on that day to pay your dues?

MS. CACACCIO: Objection. Argumentative.

JUDGE LOCKE: Sustained.

Q BY MR. BOREANAZ: You discovered that your name was not on the list, right?

A Yes.

Q On July 27th, 2018, right?
A Correct.
Q And you also testified that nobody sent you any notice that you weren't on the list, right?
A Right.
Q And you've read the rules, right?
A Yes.
Q And is there a requirement of providing written notice or notifying union member when they're not on the list or taken off the list or fall off the list or move on the list?
A No, but they -- maybe -- maybe they should have those rules.
Q Okay. But they're not in the rules, right?
A They're not in the rules.
Q How many members are there in Local 91?
A One-hundred-fifty workers.
Q How many members are there in Local 91?
A I don't know how many retirees there are.
Q So you think there's about 150 --
A Active.
Q -- laborers that actively work?
A Yes.
Q Okay. And that's based upon your 20-plus years as a member, right?
A Yes.

Q You said you had a conversation with Palladino on July 27th, right?
A Yes.
Q Was your conversation respectful?
A Yes.
Q Was it professional?
A Yes.
Q Were there any voices that were raised?
A No.
Q Your voice wasn't raised?
A No.
Q Palladino's voice wasn't raised?
A No.
Q Were you argumentative?
A No.
Q Now you testified today that you asked Palladino why he was not put on the list, right?
A Why -- yeah. Why I was taken off the list, yes.
Q And was that the only question that you asked him?
A Yes.
Q In that polite, professional way, right?
A Yes.
Q Have you ever represented your discussion or your question of Mr. Palladino in a different way to anybody else?
A No.

MR. BOREANAZ: Can you copy this for me?

MS. CACACCIO: You can show it to him.

MR. BOREANAZ: I'd rather copy him, so I can see it at the same time he does. This is the Jencks material.

Q BY MR. BOREANAZ: So I downloaded a copy for you. Let me show you what's been marked as Union Exhibit Number 4.

MR. BOREANAZ: This is the Jencks material, Your Honor.

JUDGE LOCKE: Okay. Do I have a copy of that?

MR. BOREANAZ: Pardon me?

JUDGE LOCKE: Do I have a copy of that?

MR. BOREANAZ: This is the Jencks material. You don't. I'm going to give you a copy. General Counsel made a copy for us.

JUDGE LOCKE: Thank you.

MR. BOREANAZ: Union 4.

Q BY MR. BOREANAZ: Union 4 is a letter that you wrote in your own hand to the International Union, correct?

A For about the seventh time, yes.

Q Have I asked you questions about this letter before?

A I'm talking about -- about the seventh time I wrote the International.

Q Oh, okay. And did you describe to the International Union your conversation with Palladino and the question that you asked him?

A Yes.

Q Now you testified today that you merely asked him why he was not on the list, both under direct examination and under cross-examination. You testified under cross-examination that you weren't confrontational, right?

A Right.

Q Yet in your letter to the International Union, you describe a different question that you posed to Palladino as you allege during your meeting on July 27th, 2018. Correct?

A No, the same thing.

Q All right. So drawing your attention to the second paragraph of your letter, Union Exhibit number 4, starting with, "I respectfully approached him". Do you see that?

A Yeah.

Q In that particular paragraph, did you not state in your letter to Mr. Sabitoni, "I respectfully approached him and asked him why he would do such a thing, since he is defending a current NLRB charge brought on by myself and another member for removing our names from the out-of-work list."

MS. CACACCIO: It says, "out-of-work referral list".

Q BY MR. BOREANAZ: Okay. Yeah. Did you pose that question to Palladino?

A I -- if I wrote that like that, yes, I did, and I --

Q Okay. So your --

A -- in not so many -- in not the exact same words, but yeah.

Q So your testimony today, what was -- what's accurate? Your testimony today as you described the question that you asked Palladino, or the question that you describe in your letter to Mr. Sabitoni contained in Exhibit 4?

A To me, it's the same question. I mean, I don't know why he's removed me from the list.

Q Okay. You view the question that you describe in 4 as the same question you describe in your testimony today?

A One might be in more detail, but yeah. Same question. Same -- same result.

Q Okay. Do you understand the importance of providing details and accurate testimony in these proceedings?

A And that's what I'm doing. I'm giving you accurate -- if I wrote this down, this is what was said. This is what I asked him, why he would do such a thing.

Q Okay. And so if you wrote this down, you weren't exaggerating to the -- Sabitoni, right?

A I don't believe I would be -- I -- no, I don't need to --

Q So your testimony --

A -- elaborate --

Q -- is Exhibit number 4 is accurate, right?

A Yes. Yes.

Q And your testimony today about your description of the question that you asked Palladino was incomplete. Is that your testimony?

A Yeah, it could incomplete. It wouldn't be -- it wouldn't be as detailed as this, yeah.

Q Now your testimony today under direct examination was that Mr. Palladino referenced rule 3-C of the referral hall rules, correct?

A Yes.

Q And you're working at the call, correct?

A Yes.

Q Same term that referenced in connection with your --

MS. CACACCIO: I would --

Q BY MR. BOREANAZ: -- eligibility --

MS. CACACCIO: -- object to -- that wasn't his testimony.

MR. BOREANAZ: Can I finish the question?

MS. CACACCIO: No, because it's improper characterization, based on what you've already said.

JUDGE LOCKE: You're saying he assumes the fact not in evidence?

MS. CACACCIO: I am, Your Honor.

JUDGE LOCKE: Can you rephrase the question?

MR. BOREANAZ: I didn't finish the question.

JUDGE LOCKE: Okay. Start over.

Q BY MR. BOREANAZ: Mr. Palladino referenced the same term when you talked to him on July 27th, 2018, as was referenced in your eligibility to run for union office, determined by the International Union, correct?

1 A No. He didn't mention nothing about running for office.
2 Q Okay. Your testimony today is that he referenced rule 3-
3 C, right, in response to your question. Correct?
4 A Yes.
5 Q Your testimony is that he referenced you're not working at
6 the calling --
7 MS. CACACCIO: Objection. Assumes facts not in evidence.
8 JUDGE LOCKE: Objection -- what was the --
9 MS. CACACCIO: Assumes facts not in evidence.
10 MR. BOREANAZ: I'll ask a different question.
11 Q BY MR. BOREANAZ: Is that what your testimony is now, that
12 Mr. Palladino, in response to the question you posed him,
13 mentioned 3-C of the rules, right?
14 A Yes.
15 Q And he mentioned working at the calling, correct?
16 A Yes.
17 Q And working at the calling is the same, or similar, term
18 that was referenced in connection with your eligibility to run
19 for office, right?
20 A I do not know that.
21 Q You testified that, in the past, you would give the Union
22 your schedule and indicate when you were available to work for
23 Laborers' Local 91 with employers, around your work as a local
24 firefighter, correct?
25 A Yes.

Q Where in the hiring hall rules does it indicate that you're permitted to do that?

A There was a -- it was a practice that was -- that was played out throughout the years, since the rules came in 2004.

Q It was a practice before that?

A When they came out with referral rules, they -- I -- I mean, I did it before. I did it since 1998. I --

Q Okay.

A I gave them my schedule. Because that's what a good working relationship does.

MR. BOREANAZ: Can I have a quick break?

JUDGE LOCKE: Very well. Off the record.

(Off the record at 3:06 p.m.)

Q BY MR. BOREANAZ: I'm handing you what's been marked as Union Exhibit Number 5, again, from the uniform local constitution. Will you take a look at that? It's page 90. Will you take a look at that, Mr. Mantell, and let me know when you're done?

MS. CACACCIO: Your Honor, I'm going to object to this being shown to the witness. It's not a complete document, in that even the start of the page where the majority of this comes from is cut off. It's not a complete sentence. So I don't know where it comes from or if it's even applicable to what we're discussing here. And we need the page prior, at least.

1 MR. BOREANAZ: Would you like to take a break?
2 MS. CACACCIO: If you --
3 MR. BOREANAZ: Maybe the witness knows what it is.
4 MS. CACACCIO: Well, it doesn't matter if he knows what it
5 is, because it's not a complete sentence.
6 JUDGE LOCKE: So you're saying that a complete union --
7 uniform local union constitution?
8 MS. CACACCIO: Yeah.
9 JUDGE LOCKE: I think that point's well taken, that --
10 MR. BOREANAZ: Do you want to put the whole union
11 constitution --
12 MS. CACACCIO: I do.
13 MR. BOREANAZ: -- in?
14 MS. CACACCIO: I do.
15 MR. BOREANAZ: Okay. You have a copy of it?
16 MS. CACACCIO: I think you gave me a copy this morning.
17 Did you?
18 MR. BOREANAZ: I don't know.
19 JUDGE LOCKE: Off the record.
20 (Off the record at 3:12 p.m.)
21 Q BY MR. BOREANAZ: I'm handing you what's been marked now
22 as Union 5, which has a two-page document, starting with page
23 89 in the upper right-hand corner and with page 90 in the upper
24 left-hand corner on the second page of Union 5. This
25 references the local union constitution for the Respondent,

1 correct, Mr. Mantell?
2 A Yes.
3 Q And in particular, the qualifications for office, right?
4 A Yes.
5 Q And on the second page, the definition of "working at the
6 calling", correct?
7 A Correct.
8 Q Your testimony earlier about the analysis by the
9 International of its rules and regulations regarding working at
10 the calling, correct?
11 A Yes.
12 Q And this is that wording that the International
13 interpreted in connection with your qualifications to run for
14 office, correct?
15 A Yes.
16 MR. BOREANAZ: I would move 1 through 5 into evidence.
17 JUDGE LOCKE: Let's take it one at a time. Union 1, any
18 objections?
19 MS. CACACCIO: General Counsel remains -- continues to
20 object to relevance.
21 JUDGE LOCKE: Any response?
22 MR. BOREANAZ: That Union 1 is relevant, because it deals
23 with the issue of refuting the General Counsel's claim of a
24 continued animus and sheds light on the interpretation of the
25 words, "being -- working at the calling". It also is relevant

1 to the witness' credibility as to his understanding of the
2 rules and his interpretation of the rules that impact him and
3 his claim, therefore, that he was retaliated against because of
4 protected activities.
5 JUDGE LOCKE: I'll allow it -- I'll receive it over
6 objection. Union 1 is received.
7 **(Union Exhibit Number 1 Received into Evidence)**
8 JUDGE LOCKE: How about Union 2? Any objections?
9 MS. CACACCIO: Yes, Your Honor. General Counsel objects
10 to Union 2, as it isn't complete. It's not the complete -- I
11 mean, obviously, we would prefer the whole constitution, but
12 that feels like a lot. So at a minimum, we'd like all of
13 article 7 to be included in here, and I have the two extra
14 pages I would have to run for that to happen, with your
15 permission, obviously.
16 MR. BOREANAZ: I'm trying to avoid multiple pages of
17 documents. If they want to put more records in, in the
18 constitution, I'm okay with that. So if they're willing to --
19 if they want to give me additional pages, I'll amend Union 2.
20 JUDGE LOCKE: Yes, I appreciate that. I really believe
21 completeness is important, so yes. Off the record.
22 (Off the record at 3:19 p.m.)
23 JUDGE LOCKE: Counsel?
24 MS. CACACCIO: Yes, Judge. Other than the completeness
25 issue, which we've just remedied, the General Counsel has no

1 objection to this admission.
2 JUDGE LOCKE: And again, it's been modified to include the
3 pages that the General Counsel wants?
4 MR. BOREANAZ: Yes, Your Honor. Union Exhibit 2 is a
5 three-page document now, starting with the upper left-hand
6 corner of page 98 and to and including page 100.
7 JUDGE LOCKE: Very well, I'll receive Union 2.
8 **(Union Exhibit Number 2 Received into Evidence)**
9 JUDGE LOCKE: That leads us to Union 3.
10 MR. BOREANAZ: If you want to give me back old Union 2?
11 JUDGE LOCKE: I got it, there it is.
12 MR. BOREANAZ: Give me that right there.
13 JUDGE LOCKE: Let's see, Union 3. There's a letter dated
14 May 24, 2016.
15 MR. BOREANAZ: Do you --
16 MS. CACACCIO: Oh, no, I got it.
17 MR. BOREANAZ: Okay.
18 MS. CACACCIO: Thank you. Sorry, there's a lot of paper
19 shuffling happening over here, Your Honor. Union 3. Sorry.
20 Give me just one second. I have no objection to this document,
21 Your Honor.
22 JUDGE LOCKE: Very well. Union 3 is received.
23 **(Union Exhibit Number 3 Received into Evidence)**
24 JUDGE LOCKE: Union 4?
25 MS. CACACCIO: I would object to this, Your Honor, in that

1 what Mr. Mantell did or didn't tell the International after his
2 conversation with Mr. Palladino isn't relevant to the questions
3 posed here, Your Honor, which is whether or not Respondent
4 removed him from the list for his PCA or any explanation as to
5 why they would have done that, from their perspective. His
6 perspective in this particular scenario doesn't really matter.
7 MR. BOREANAZ: This goes to his --
8 JUDGE LOCKE: Any response?
9 MR. BOREANAZ: -- credibility, Your Honor. In fact, in
10 the -- this was drafted in or around August of 2018.
11 JUDGE LOCKE: Well, I'll allow it, for whatever it's
12 worth.
13 MS. CACACCIO: Yes.
14 JUDGE LOCKE: Union 4 is received.
15 **(Union Exhibit Number 4 Received into Evidence)**
16 JUDGE LOCKE: Union 5?
17 MS. CACACCIO: What is Union 5? I'm sorry.
18 MR. BOREANAZ: We just modified it. Qualifications for
19 office.
20 MS. CACACCIO: With the modification, Your Honor, with the
21 qualification for office, first page, General Counsel doesn't
22 have any objection.
23 JUDGE LOCKE: Very well. Union 5 is received.
24 **(Union Exhibit Number 5 Received into Evidence)**
25 MR. BOREANAZ: I have no other questions at this time,

1 Judge.
2 JUDGE LOCKE: Redirect?
3 MS. CACACCIO: Very briefly, Your Honor.
4 **REDIRECT EXAMINATION**
5 Q BY MS. CACACCIO: Mr. Mantell, can you look at General
6 Counsel Exhibit 2? It's the referral rule. Do you have that
7 in front of you?
8 A Yes.
9 Q Okay. So I want to direct your attention back to the
10 conversation that you had with Mr. Palladino on July 27th. Can
11 you tell the Court, remind the Court, what it is that you
12 remember him saying to you?
13 MR. BOREANAZ: I'm going to object. This is not proper
14 redirect testimony, for him to regurgitate what he already
15 said.
16 MS. CACACCIO: Your --
17 JUDGE LOCKE: Well, I'll allow it. Overruled.
18 THE WITNESS: I remember him explaining to me that he got
19 an understanding from the International that -- that was not
20 able -- that I'm not -- I'm not working at the trade by being a
21 full-time firefighter.
22 Q BY MS. CACACCIO: Was that "at the trade" language used
23 just now what he told you at that time? Did he use the words,
24 "at the trade", to the best of your memory?
25 MR. BOREANAZ: I'm going to object to leading.

1 THE WITNESS: I -- I do not --
2 JUDGE LOCKE: Overruled.
3 THE WITNESS: -- remember if he used those --
4 JUDGE LOCKE: You may answer.
5 THE WITNESS: I -- I --
6 Q BY MS. CACACCIO: Is that what he said?
7 A Can -- can you repeat that question?
8 Q Sure. So you just testified to me that he used the words,
9 "at the trade". Do you remember him using the words "at the
10 trade" to you at that time? Are those the words you remember
11 him saying?
12 A At this time, I don't remember him using those exact
13 words. He did say -- he did refer to the 3-C. I -- yeah, he
14 did say it. He did say, "work in the trade" --
15 Q Okay.
16 A -- being -- being a firefighter.
17 Q So looking at rule 3-C, which is General Counsel's Exhibit
18 2 in front of you -- can you look at that for me?
19 A Which one's that?
20 Q 3-C. General Counsel's 2, the referral rules.
21 A Yeah.
22 Q So rule 3-C, can you read aloud the first sentence of that
23 paragraph?
24 A "Only applicants who are not currently employed at the
25 trade may register their availability for referral."

1 Q Do you see anything in there that talks about working at
2 the calling?
3 MR. BOREANAZ: I'm going to object to the leading nature
4 of the --
5 JUDGE LOCKE: Overruled.
6 THE WITNESS: Nothing.
7 Q BY MS. CACACCIO: To the best of your memory, do you
8 remember Mr. Palladino using the words, "at the calling", in
9 your conversation with him at all?
10 A I'm not a hundred percent sure if he said "at the calling"
11 or not.
12 Q Do you remember giving an affidavit to the General Counsel
13 in this case?
14 A Yes.
15 Q And was the testimony that you gave in there accurate, to
16 the best of your knowledge?
17 A Yes.
18 Q If I showed you that language, would it help refresh your
19 memory?
20 A Yes.
21 MS. CACACCIO: Approaching the witness with his affidavit.
22 Q BY MS. CACACCIO: Let me know when you've had a chance to
23 review your affidavit.
24 A I -- I did.
25 Q Did you ever mention to the General Counsel during this

1 affidavit what Mr. Palladino had told you on the 27th?
2 A Yes.
3 Q To the best of your memory, is this accurate, what's in
4 front of you?
5 A It is accurate.
6 Q Okay. Did you ever mention and hear anything about
7 working at the calling?
8 MR. BOREANAZ: Is she impeaching her own witness?
9 THE WITNESS: I didn't met --
10 MR. BOREANAZ: I'm not sure what's going on here.
11 MS. CACACCIO: I'm refreshing his memory.
12 MR. BOREANAZ: Well, you're not refreshing his memory.
13 You're actually leading questions and trying to impeach him.
14 He either has a refreshed memory by reading this. You can ask
15 him read it, does it refresh your memory, now what your
16 testimony is. You can't just tell him what to say.
17 JUDGE LOCKE: Could you rephrase that, please?
18 MS. CACACCIO: Yes, Judge.
19 Q BY MS. CACACCIO: Based on your memory of what happened on
20 July 27th, what did Mr. Palladino say if anything about working
21 at the calling?
22 A That I was a full time firefighter and I'm not working at
23 the -- I'm not able -- not eligible to be working at the trade.
24 Q Did Mr. Palladino mention the constitution to you at that
25 time?

A No.

Q Based on your now refreshed recollection, did he ever use the words working at the calling?

MR. BOREANAZ: Asked and answer.

THE WITNESS: He never -- he never used the words working at the calling.

Q BY MS. CACACCIO: Okay. Why didn't you bring any members to the International Union on your behalf with respect to an alleged altercation that occurred at the hall?

A Because if anybody shows, and it's been proven before if anybody shows any type of support for me, Mr. Palladino has all the power to send people to work or not send people to work. Well, he proved it to members, many members not to engage in that kind of situation.

Q Why do you think that?

A Because he has the ultimate power to put them to work or not. And they got -- and they got a family to feed.

Q Do you know whether or not the rules for maintaining your membership with Respondent are the same as running for office with Respondent? Do you know?

A No, to me they are not the same rules. They are two totally different rules.

MS. CACACCIO: Your Honor, I have no further questions for this witness at this time.

JUDGE LOCKE: Any recross?

RECROSS-EXAMINATION

Q BY MR. BOREANAZ: Your testimony is Mr. Palladino has the power to put members to work, right?
A Yes.
Q Isn't it true that most members don't get their work out of the referral hall?
A Not at all.
Q Okay, your testimony is that most members get the work out of referral hall?
A Yes.
Q Okay. Isn't it true that the referral hall is a nonexclusive referring hall?
A Yes.
Q And isn't it true that members can go and get their work directly from contractors, whatever they wish, true?
A True.
Q And you had that ability to do that, correct?
A I -- I -- no, I don't.
Q So you're prevented from going and asking a contractor whether or not they'll hire you?
A I'm -- no, I'm not prevented from doing that.
Q So you can do that?
A I can do that.
Q You choose not to.
A I don't know how to get a hold of everybody. And I sent

1 resumes out.
2 Q Okay. When is the last time you sent resumes out?
3 A Last year.
4 Q To how many employers did you send resumes out?
5 A 10.
6 Q When last year?
7 A I'm not sure.
8 Q Summer, winter --
9 A It was spring.
10 Q -- fall?
11 A It would have been spring.
12 Q You know how to use a phone book to find phone numbers for
13 contractors?
14 MS. CACACCIO: Objection, argumentative. As to whether or
15 not Mr. Mantell knows how to use a phone book.
16 MR. BOREANAZ: Is that the only thing? I'll withdraw the
17 question.
18 JUDGE LOCKE: Overruled. Overruled.
19 MR. BOREANAZ: I'll withdraw the question.
20 Q BY MR. BOREANAZ: So do you have any basis in fact for
21 your opinion that most members receive their work through the
22 referral hall?
23 A Yes, the out of work list when it's hundred people deep in
24 there, yes.
25 Q Okay. And people come off the out of work list sometimes

1 because they get their own work, right?
2 A Yes, but most of them get work from work orders.
3 Q And most of them, you mean because you have knowledge of
4 how many work orders are run out of the Union hall, right?
5 A No, I've got 25 years' experience. I know how it kind of
6 works.
7 Q Okay, so based upon your 25 years of experience, what is
8 the percentage of Union members that get their work last year
9 out of the referral hall?
10 MS. CACACCIO: Objection, speculation and also
11 argumentative. And also it's irrelevant. And also it's
12 outside the scope, so.
13 JUDGE LOCKE: And also what was the third thing?
14 MS. CACACCIO: It's outside the scope of the redirect
15 examination.
16 JUDGE LOCKE: Seems to be it is outside of the scope.
17 MR. BOREANAZ: Let me explain.
18 JUDGE LOCKE: Okay.
19 MR. BOREANAZ: So Mr. Mantell testifies that the reason
20 why he didn't bring anyone to his Union appeal was because of
21 Mr. Palladino's power and control to send people to work. And
22 I'm testing his opinion based upon that. His testimony is that
23 he in fact does have power, and that he resists the suggestion
24 that most people get their work on their own. And he says that
25 the basis for his opinion for that is based upon his 24 years

1 of experience as a laborer. And I'm testing his 24 years of
2 experience as a laborer for him to testify here under oath that
3 he can say with certainty that most of the members receive
4 their work through the referral hall.
5 MS. CACACCIO: If I may?
6 JUDGE LOCKE: Yes.
7 MS. CACACCIO: First is 25 years, and second that wasn't
8 his testimony on redirect. His testimony on redirect was
9 simply that the reason he didn't bring members is because in
10 his opinion Mr. Palladino can basically black list them from
11 getting work. This whole rabbit hole is entirely Mr.
12 Boreanaz's making.
13 JUDGE LOCKE: It does seem outside of the scope for me.
14 Sustained.
15 MR. BOREANAZ: No further questions.
16 JUDGE LOCKE: Anything further?
17 MS. CACACCIO: Before I do that, Your Honor, are willing
18 to revisit GC Exhibit 5, your ruling so I know whether or not I
19 have to try to do something about that? GC Exhibit 5 was the
20 letter from the International from 2017, which as I said before
21 at the end, it discusses whose power it is to interpret these
22 rules. If I have to try to enter through this witness, I'll
23 try, but.
24 JUDGE LOCKE: And do you have anything further to say on
25 that?

1 MR. BOREANAZ: Well, if you look at General Counsel's
2 number 3, this is an approval letter by the International Union
3 of the referral hall rules. The referral hall rules themselves
4 indicate that they can't be modified unless approved by the
5 International Union. I can't believe General Counsel would
6 suggest that the International Union plays no role in this.
7 MS. CACACCIO: Your Honor, that's not my suggestion, but
8 the end of this letter reads, however, Local Union 91 is
9 empowered to interpret and amend its own rules consistent with
10 LIUNA code and best practices and applicable law.
11 MR. BOREANAZ: Which means nothing that the Local can't
12 consult the International Union about various things for
13 clarification.
14 MS. CACACCIO: We aren't suggesting that they --
15 JUDGE LOCKE: I'll allow it. Overruled. Let's proceed
16 over that objection.
17 MS. CACACCIO: Your Honor, with that the General Counsel
18 has no more questions for this witness at this time.
19 JUDGE LOCKE: Thank you, sir, you may step down.
20 Appreciate it.
21 MR. BOREANAZ: You didn't ask the witness if he wanted to
22 ask himself any questions.
23 JUDGE LOCKE: Well, no answer to that probably. I think
24 he would --
25 MS. CACACCIO: Want to give a speech first?

THE WITNESS: I'd love to.

MS. CACACCIO: So I don't know if you want to go off the record just for a minute?

JUDGE LOCKE: Okay.

MS. CACACCIO: So I can talk to Rob.

JUDGE LOCKE: Oh, sorry.

(Off the record at 3:34 p.m.)

MS. CACACCIO: Sorry, General Counsel is offering GC Exhibit 10.

JUDGE LOCKE: Any objection? Hold on, tell me what it is first?

MS. CACACCIO: Yes, Judge, so this is an email conversation between Respondent through its Counsel and the International Union regarding these rules. The first email demonstrates that this occurred basically during the last hearing that we held in this -- between these parties. See?

JUDGE LOCKE: Any objections?

MR. BOREANAZ: No, if you look at the upper right hand corner there's a number 7 on the front page that should be disregarded. It relates to a response number and the attached subpoena right hand corner is the GC Exhibit number 10. These were produced pursuant to the subpoena and represent records of the Local Union.

JUDGE LOCKE: So I guess I'm not fine. Did you say you are objecting or not?

MR. BOREANAZ: No.

JUDGE LOCKE: Very well. General Counsel Exhibit 10 is received then.

(General Counsel's Exhibit 10 admitted into evidence)

MS. CACACCIO: May I have his affidavits back before I forget? Judge, before the General Counsel can rest, and I don't know how we go about doing this. We need to know Respondent's answer to our amendment so I know if I have to --

MR. BOREANAZ: Just give me a second to go off the record.

(Off the record at 3:38 p.m.)

JUDGE LOCKE: The last thing we were talking about was the Respondent's answer to the amendment.

MR. BOREANAZ: The amendment that General Counsel's complaint reflected in General Counsel's Exhibit 11 is responded by the Respondent in this way. That the Respondent hereby amends its answer to aver that he admits that on or about July 5th, 2018, the Respondent removed Mr. 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.

MS. CACACCIO: Okay.

JUDGE LOCKE: Very well.

MS. CACACCIO: Okay. And with that, the General Counsel rests its case in chief.

JUDGE LOCKE: Very well. Mr. Mantell, do you have any evidence you want to present? Witnesses or others?

1 THE WITNESS: No, I don't.
2 JUDGE LOCKE: Very well then, Respondents turn.
3 MS. CACACCIO: Judge, I guess before we proceed I have
4 will print right now a motion for reconsideration to take
5 judicial notice of the prior board proceeding. Which I guess
6 I'll print. Is it bad if you have double side? Do you need
7 single sided?
8 MR. BOREANAZ: Yes, single sided --
9 MS. CACACCIO: Single sided?
10 MR. BOREANAZ: -- sided would be better, because I have to
11 mark the exhibits on the back.
12 MS. CACACCIO: Okay.
13 MR. BOREANAZ: The one I need --
14 MS. CACACCIO: Okay.
15 MR. BOREANAZ: Off the record, Judge? Off the record
16 while she's gone?
17 JUDGE LOCKE: Yes, absolutely. I didn't --
18 MS. CACACCIO: Your Honor, I just presented a written
19 motion for reconsideration about taking judicial notice of the
20 prior board proceeding in this matter. I didn't mark it as an
21 exhibit, but I could if that's the best way to go about it.
22 JUDGE LOCKE: Since we're going -- we're on the record,
23 right?
24 MR. BOREANAZ: Yes.
25 JUDGE LOCKE: What would this number be, I think we should

1 decide on an Exhibit number chart?
2 MS. CACACCIO: 12.
3 JUDGE LOCKE: 12. Okay.
4 MS. CACACCIO: Someone correct me if I'm wrong there, but
5 I think we're on 12.
6 JUDGE LOCKE: I assume there's no objection to this
7 receiving?
8 MR. BOREANAZ: Well, we're not receiving as evidence.
9 JUDGE LOCKE: No. Just for convenience I can -- formal
10 documents aren't evidence in the --
11 MR. BOREANAZ: I'm okay with the marked but not entered
12 into evidence.
13 MS. CACACCIO: Right.
14 MR. BOREANAZ: Could be made part of the record for that
15 purpose.
16 JUDGE LOCKE: And I have -- obviously you may want us do a
17 response to it.
18 MR. BOREANAZ: I could probably do a response right now.
19 Would you like to hear my response?
20 JUDGE LOCKE: Yes. Either that or receive it in writing,
21 whichever you prefer.
22 MR. BOREANAZ: I can do it now.
23 JUDGE LOCKE: Okay.
24 MR. BOREANAZ: As Your Honor's already indicated, the
25 introduction of this testimony into this record for purposes of

1 establishing facts would not be appropriate, because Your Honor
2 has not had the opportunity to make observations of the
3 witness's testimony and make assessments of credibility.
4 Similarly the court had already indicated that it would be an
5 untenable position for this court to take into the record and
6 assume the facts that are laid out in these transcript
7 references if in fact an administrative law judge at a later
8 point in time had the opportunity to observe the testimony,
9 determine that some of this testimony was not credible.
10 The plea by General Counsel is rested upon rule 201, the
11 Federal Rules of Evidence which states irrelevant part the
12 scope of the rule governs judicial notice of an adjudicated
13 fact only not of a legislative fact. Kind of facts that may be
14 judicially noticed, the court may judicially notice a fact that
15 is not subject to reasonable dispute because it is, one,
16 generally known within the trial courts territorial
17 jurisdiction, or two, can be accurately and readily determined
18 form sources whose accuracy cannot be reasonably questioned.
19 Neither of those two apply to the references of the trial
20 testimony that are being sought here by General Counsel. They
21 are in dispute.
22 There is no other rule of the Federal Rules of Evidence
23 that would provide for their introduction into evidence in
24 these proceedings. There is no suggestion that any of these
25 witnesses that provided testimony at a prior proceeding are

1 unavailable and could not be called to this proceeding by
2 General Counsel so that you could see and observe those
3 witnesses testimony and judge for yourself the credibility.
4 And that's all I have to say.
5 JUDGE LOCKE: Very well. Well, I want to take a look at
6 these cases that are sided here before I make a determination,
7 so we'll take a recess of about 20 minutes. I see right now it
8 is 3:50, so we'll take a recess until 4:10. Off the record.
9 (Off the record at 3:52 p.m.)
10 JUDGE LOCKE: On the record. I have the option, in fact I
11 took longer than I said I was going to take, but I wanted to
12 carefully review the case authority that the General Counsel
13 has sided in, and the motion for reconsideration to take
14 judicial notice of prior board proceeding. The board will take
15 judicial notice or administrative notice of its own pleading,
16 as the motion point out and decisions. I have no problem
17 taking notice of pleadings, because pleadings generally do not
18 set forth facts or rather allegations to be proven or
19 arguments. Neither of which are facts. The transcripts are
20 another matter. The transcript does not set forth set facts
21 either, but rather a witness's testimony concerning events or
22 utterances. It is up to the finder of fact to assess the
23 reliability of the witness, and from the total record to
24 determine what the facts are. Here I must be careful not to
25 intrude upon the function of some other finder of fact, such as

1 another administrative law judge or the board.
2 It would neither be seemly not reliable for me to use the
3 transcript as a basis for finding facts when I have not
4 observed the witnesses and therefore had no means of assessing
5 the reliability of the testimony. In addition to the
6 inherently shaky nature of supposed findings of facts by a
7 judge who has neither observed the witnesses nor considered a
8 witnesses testimony in the context of the record as a whole, a
9 judge who embarked on such an ill-considered endeavor could sow
10 confusion by making findings of fact which conflicted with
11 those of the judge who actually heard the witnesses.
12 None of the board cases decided on the General Counsel's
13 motion address such a situation. For example, in Metro
14 Demolition 348 NLRB 272 at footnote 3, the board took
15 administrative notice of a Respondent's answer. An answer is a
16 pleading which can result in the finding of fact for an
17 allegation as admitted, but it doesn't substitute for evidence
18 to determining a fact which is disputed. In ITT Federal
19 Service Corp, 335 NLRB 998 note 1, the board declined to take
20 judicial notice of an employee's discharge after the hearing.
21 That asserted fact was neither generally known nor susceptible
22 of accurate and ready determination as regard by rule 301 of
23 the -- I'm sorry, as regard by rule 201 of the Federal Rules of
24 Evidence.
25 When General Counsel's motion urges that I take notice of

1 certain exhibits in the large number of transcript pages,
2 however it does not -- the motion does not set forth what facts
3 I am to find by digging around in that material. Unless the
4 General Counsel identifies the supposed fact that I am supposed
5 to find in the transcript, I have no way of knowing whether the
6 purported fact satisfies the requirements of rule 201-B of the
7 Federal Rules of Evidence. As already mentioned that rule
8 requires that a judicially noticed fact must be, one, not
9 subject to reasonable dispute in that it is either: one,
10 generally known in the territorial jurisdiction of the trail
11 court, or two, capable of accurate and ready determination by
12 resort to sources whose accuracy cannot be reasonably
13 questioned.
14 Because the motion does not identify the punitive facts,
15 which the General Counsel would have me find, it is not
16 possible to determine whether the requirements of rule 201 have
17 been satisfied. Therefore I deny the motion.
18 MS. CACACCIO: Yes, Your Honor. What about the ruling for
19 the prior ALJ decision that you were withholding your ruling
20 on?
21 JUDGE LOCKE: Well, I don't have to -- I'm not going to
22 make a ruling on that. I can't at this time because I want to
23 consider carefully how they -- how I would use that document.
24 And for what purposes, whether it for some purposes it might be
25 perfectly proper to use it. For others it might intrude upon

1 the authority of the judge who actually saw the witnesses. So
2 I'll reserve ruling on that.
3 Anything else before the Respondent begins?
4 MS. CACACCIO: No.
5 MR. BOREANAZ: I'm not sure General Counsel's closed its
6 case.
7 MS. CACACCIO: We close our case. In case we didn't
8 already. I thought I did, but maybe I didn't.
9 MR. BOREANAZ: I'm not sure they did.
10 MS. CACACCIO: Okay.
11 JUDGE LOCKE: I'm sorry, could you --
12 MR. BOREANAZ: I don't know if Mr. Mantell closed his
13 case. I'm inquiring as to whether or not General Counsel's --
14 MS. CACACCIO: Are you done?
15 MR. BOREANAZ: Office has closed its case and rests its
16 case. And I'm also inquiring as to whether or not Mr. Mantell
17 has closed his case. Before I indicate what we --
18 JUDGE LOCKE: Okay, has the General Counsel rested?
19 MS. CACACCIO: Yes, Your Honor.
20 JUDGE LOCKE: That's what I thought.
21 MR. BOREANAZ: Mr. Mantell's not presenting any evidence?
22 MS. CACACCIO: Are you presenting evidence?
23 THE WITNESS: I'm sorry, what?
24 MR. BOREANAZ: And Mr. Mantell is not presenting any
25 evidence on his own?

JUDGE LOCKE: No, and I gave him the opportunity. I recall doing that.

MS. CACACCIO: No.

JUDGE LOCKE: And I'll do it again, and he shook his head again so --

MR. BOREANAZ: We would have one witness, Mr. Palladino. And I want to try and get it done this evening. We can try and get it done this evening. If we have to go into tomorrow, I have a appearance at 9:30 a.m. before US District Court Judge Skretny here in Buffalo.

JUDGE LOCKE: You say it tonight?

MR. BOREANAZ: Tomorrow.

JUDGE LOCKE: Tomorrow.

MR. BOREANAZ: Tomorrow morning at 9:30.

JUDGE LOCKE: At 9:30.

MR. BOREANAZ: So if we start tomorrow then I would ask the court to start tomorrow in a range of 10:30 and we would easily be done.

JUDGE LOCKE: Perhaps it would be good to start on his testimony tonight, and then reach a breaking point to be sure that we've got -- that we'll have time tomorrow.

MR. BOREANAZ: Okay.

JUDGE LOCKE: So why don't we do that and move to a convenient point to break? And then we can resume at 10:30 tomorrow morning.

MR. BOREANAZ: Okay. Or finish?

MS. CACACCIO: Or finish. I believe in you.

MR. BOREANAZ: Mr. Palladino.

JUDGE LOCKE: Can you have a seat, please? Raise your right hand.

Whereupon,

RICHARD PALLADINO

having been duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE LOCKE: Thank you sir, can you please state and spell your full name, and then give us your address?

THE WITNESS: Harry Richard Palladino. P-A-L-L-A-D-I-N-O.

JUDGE LOCKE: I'm sorry, would you spell that name -- it's P-A --

THE WITNESS: P-A-L-L-A-D-I-N-O.

JUDGE LOCKE: Thank you. And your address, please?

THE WITNESS: 7657 Highland Drive H-I-G-H-L-A-N-D.

JUDGE LOCKE: Um-hum.

THE WITNESS: Gasport. G-A-S-P-O-R-T, New York, 14067

JUDGE LOCKE: Thank you, sir. Counsel?

DIRECT EXAMINATION

Q BY MR. BOREANAZ: Mr. Palladino, are you the business manager for Labors Local 91 and the Respondent in this action?

A I am.

Q How long have you been so approximately?

A Nine, ten -- nine, ten years.
Q And how long have you been a member of Local 91?
A Sixty years, since 1959.
Q And there was some testimony today about a former business manager Michael Corsini, do you recall that testimony?
A Yes.
Q And was Michael Corsini and other Union officials charged with a federal criminal indictment?
A Yes, 22 indictments.
Q And at the time that they were charged with an indictment what was Local 91's reputation in the construction industry community in western New York?
A The Local was deemed the most notorious Local in the United States by Wall Street Journal. We acquired a disastrous reputation.
MS. CACACCIO: Objection, relevance.
JUDGE LOCKE: Objection relevance.
MR. BOREANAZ: We have to explain animus, Judge? I'm trying to get to some background information about him.
JUDGE LOCKE: Overruled.
Q BY MR. BOREANAZ: So after the Union officials were charged criminally, did the International Union do anything in connection with the local leadership after their criminal indictment?
A They came in and took over the Local, dismissed everybody

1 and ran it themselves.
2 Q Okay, and approximately how long did the International run
3 Local 91?
4 A Almost three years.
5 Q Okay, you heard testimony about Mr. Connley being a
6 business manager?
7 A Yes.
8 Q Was he elected by the members or was he appointed by the
9 International Union to run Local 91?
10 A He was appointed by the International.
11 Q And did you run for election for business manager?
12 A I did. The second term that I had come back it just
13 wasn't working out so, I did decide to run for office.
14 Q Okay. Mr. Palladino, how old are you?
15 A 69. 79.
16 Q And in addition to being a member of Local 91, did you
17 have any experience as an employer or contractor?
18 A I did.
19 Q What's that --
20 A I own my own -- I owned my own paving business for a long
21 time.
22 Q Okay. And so explain why you came back to be a potential
23 business manager of Local 91?
24 A I had been retired. I retired in '95, and when the
25 justice department came in and preferred all the charges

1 against the officers and the International took it over, the
2 first year I didn't have anything to do with it. I stayed
3 away. The second year the retirees started coming out to my
4 farm because they -- there was a concern about not getting the
5 Local back at all. That the International would just merge it
6 with Rochester and Buffalo. And they were concerned, because
7 if that happened, the pension for all those people would have
8 been disastrous. And at that time we had 360 retirees.
9 So they come out to the farm and they bitch because I
10 wouldn't go back and do something. So about halfway through
11 the second year I went back to the Local and I met the
12 International that was there. I knew two of their fathers that
13 had been years ago. And I was successful in convincing them
14 that the Local could still be prosperous and do what we were
15 supposed to do. It took about eight months, and part of the
16 reason they gave it back is if I came back as an advisor --
17 because we only had young people. Rob Connley worked for me at
18 Somerset in the 80's.
19 The older guys didn't want anything to do with it. All
20 they wanted was just to get their retirement and get out. So
21 we put together a ticket that the International okayed and the
22 justice department okayed. And I was able to convince them
23 that at least we'd have chance.
24 I came back as an advisor to the executive board. So that
25 worked for about nine or ten months. And the justice -- the

1 FBI came back in and arrested three more people. And it seemed
2 like it hadn't got cleaned up as quickly as everybody thought
3 it was. But that's actually the FBI's fault for not finishing
4 their job, completing their job when they were supposed to. So
5 we -- the International agreed to give us a year and let us see
6 if we couldn't do something. So in the next year, we were able
7 to put everything back together. We didn't solve the issue
8 with the pension at that time because everybody was still
9 relatively new. The third year was up for an election, and the
10 entire slate that we had proposed originally got elected. That
11 was the first election.
12 Q And that's when the first time you became business
13 manager?
14 A No. That was when I supported --
15 Q Somebody else?
16 A The other -- Rob Connley recalled.
17 Q Okay.
18 MS. CACACCIO: Your Honor, I've got an objection to this
19 line of questioning. I still don't see the relevance of the
20 history of Local 91. If he's the business manager now --
21 MR. BOREANAZ: I'll try and speed it up.
22 MS. CACACCIO: Okay.
23 Q BY MR. BOREANAZ: When you became elected business manager
24 approximately nine or ten years ago, were you still seeking to
25 try and approve the image and reputation of the Local?

A Yeah. So what was happening -- and then I started having a conflict with Connley. Connley had his own agenda, him and Rico, and they stopped listening. They didn't -- they didn't need advice anymore. And the pension was going back downhill. They would not hire new apprentices. The apprentice program I instituted when I came back, they refused to put apprentices on, and the pension plan is a renewable pension plan. Without new blood coming in, you can't continue paying retirees as they would retire each month if you couldn't sustain the money that was necessary. So one argument led to another, and I finally had enough, and I said then I'm going to run for office. That's how I got -- that's how I got to run, and I beat him three to one.

Q So throughout the history of your membership with Local 91 before the indictments and after the indictments, had the Local engaged in supporting any political people in and around the community?

A No. We've -- we've been careful. We weren't as forthcoming as we were before. The Local got involved in every election. I'm a little more careful, and the Mayor's race we did get into at that time. John Cirrito, when John wanted to run for legislature, we did get involved in that too. But those are the only two races that we really got involved in.

Q In addition to being a Union member, do you have any background in the military?

1 A I'm a qualified Navy diver.
2 MS. CACACCIO: Objection. Irrelevance to his military
3 background.
4 MR. BOREANAZ: Credibility.
5 THE WITNESS: I'm submarine qualified, 60 years in
6 submarines. I'm a hard head and scuba diver, which is unusual.
7 JUDGE LOCKE: Did you do exclusive ordinance demolition?
8 THE WITNESS: Pardon?
9 JUDGE LOCKE: Did you do exclusive ordinance demolition?
10 THE WITNESS: Yes. I'm a demolitions expert. I actually
11 carry a New York State dynamiter's license --
12 JUDGE LOCKE: Hum.
13 THE WITNESS: -- that I was able to sustain after I got
14 out.
15 JUDGE LOCKE: I see. Excuse me for interrupting. Go
16 ahead, Mr. Boreanaz.
17 Q BY MR. BOREANAZ: Are you currently serving on any boards?
18 A Well, the Governor has appointed me to the Bridge
19 Commission. The Erie -- Erie County has a bridge, the Peace
20 Bridge goes to Canada. They have their own commission.
21 Niagara County has three bridges. So Niagara County has their
22 own bridge commission, and it's partnered the Canadians, and I
23 was appointed to that about six years. But then I just got
24 elected chairman of it that made local news headlines, labor
25 leader elected chairman of the Bridge Commission which is

unusual. There's always a business person.

Q Does that position bring any benefit to Local 91 and its member?

A Absolutely.

Q In what way?

A I sit on every committee that has anything -- right now, the Bridge Commission is spending $200,000,000 on three bridges. I sit on formulation of the contract, formulation of the PLA, selection of the contractors --

Q PLA means what?

A It's a -- it's a contract that is just for that agreement, just for the --

Q Bridge, the project?

A -- for the bridge, yeah. So, you know, I -- there is no such thing as nonunion on that bridge. I can -- I actually formulated with a law firm out of Buffalo the agreement that constructed an influx of new people coming in. So the apprentices had an automatic seat. Minorities had an automatic seat. So it gave me an opportunity to do a whole bunch of things that helped the Local.

Q All right. And let me ask you, for example, you have a good handle on the amount of members that are working because you are part of the use of the hiring hall, correct?

A Yes.

Q Now, there's been testimony about the hiring hall being

1 nonexclusive; that members can go out and get their own work,
2 right?
3 A That's true.
4 Q Can you tell us, based upon your experience, what
5 percentage of members go out and get their own work and don't
6 use the hiring hall to seek work?
7 A Almost 80 percent.
8 Q And if you're a good worker, are you generally able to get
9 work on your own with your contractors?
10 MS. CACACCIO: Objection. Leading.
11 JUDGE LOCKE: I don't think you've established a
12 foundation for that, Mr. Boreanaz.
13 Q BY MR. BOREANAZ: Can you describe -- I mean, how does one
14 get their own work out of the nonexclusive hiring hall?
15 A See when we were an exclusive hiring hall --
16 Q When was that?
17 A From up -- from the time I come in in '59 until the
18 International took over.
19 Q Okay.
20 A Once they did away with that, and a lot of people didn't
21 understand that they thought that it was going to be a great
22 thing to happen. What happens as a result of a nonexclusive
23 hiring hall, friends get jobs for friends the minute that they
24 hear they're laid off. You have to send them if they're
25 requested. So if a contractor calls and asked us for Rob

Boreanaz, by law we had to send him, but you may have just finished a job, but maybe somebody else needed a job. We no longer could shuffle. There's an out-of-work list. The out-of-work list is only used when we get a call for somebody that nobody has requested, is not recalled. So now we have an opportunity to use the out-of-work list, but the members -- it didn't take them long to figure out I can call for my friend. So now, the out-of-work list doesn't move. That's -- that's part of the drawback. So we don't get a chance to help like we used to. We used to be able to get everybody a share of time, their weeks in. That's been taken away. So it has its good points and its bad points.

Q In Niagara County, where your jurisdiction or your Local is, how did the construction work turn out for the year 2015?

A 2015, we didn't have a very good year because we didn't have a lot of work. '16 was relatively short also. We started to come back a little bit in '17. '18 has been a lot better. We still haven't reached the hours that we need to sustain everything that we need to do. That Local really should run on between 350,000 and 400,000 hours a year. The last two years we were around 280, 285, which when you cut it up for the members that work, that's not very many. And right now, our -- our membership working is about 324.

Q So when Mr. Mantell says that you have the power to send people out of the hall, I mean, you are sending people out of

1 the hall based upon those requests by employers that request
2 just a general laborer, right?
3 A Correct.
4 Q And then, you go off the list for that, right?
5 A Correct. But the list is qualified by the licenses that
6 the men have also.
7 Q Explain that.
8 A To work on a DOT job, like the roadway, that's around
9 here, the roadwork, you have to have OSHA 30 now. It used to
10 be OSHA 10. Now you've got to have an OSHA 30. It's got to be
11 updated every five years. Now, DOT is mandating lead and abate
12 -- and asbestos. Even though there's no lead or asbestos
13 removal on the job, DOT can request it. So now to send the
14 next guy in list -- on the list to the next DOT job, he has to
15 have those three valid licenses. Otherwise, we have to skip
16 down the list to get to the next guy that has those licenses.
17 Q Now, there's testimony that Mr. Mantell engaged in
18 Facebook posts back in August of 2015, and those Facebook posts
19 were brought to your attention, correct?
20 A Correct.
21 Q And with respect to a Facebook post that Mr. Mantell
22 questioned the Union's support of Glen Choolokian as a
23 candidate, how did that make you feel as a business manager of
24 Local 91?
25 A The criticism for me personally is not really a big deal,

1 except when they challenge my credibility because my
2 credibility is what allows me to function for the Local. If
3 I'm perceived as another thug, I don't do very well.
4 Q Okay.
5 A So I have to stay clean.
6 Q So you ended proffering charges against Mr. Mantell in
7 connection with the Facebook charges, right?
8 A Yeah, the Local did. The Local did.
9 Q Okay. And the charges related to complaints by Mr.
10 Mantell's claim that the Union did something illegal?
11 A Correct.
12 Q Explain that.
13 A They -- he accused me of making a deal with a politician;
14 that the only reason I gave Glen Choolokian a Union book is
15 because Glen was running for mayor at that time, and the
16 indication was that if Glen got to be mayor, that I would get
17 something in return. That's a crime. Like, you -- you can't
18 do that.
19 Q All right. So there was a board to trial and a board that
20 issued a decision, and you got the decision?
21 A Yup.
22 Q And how did that make you feel when you got the decision?
23 A Part of the process. Not enough to excite me. You know,
24 it's --
25 Q Well, you've been in this business a long time, right?

1 MS. CACACCIO: Objection. Leading.
2 MR. BOREANAZ: All right. That's --
3 JUDGE LOCKE: Overruled.
4 Q BY MR. BOREANAZ: You've -- you've dealt with a lot of
5 different contractors over the years as a Union representative,
6 true?
7 A True.
8 Q You've actually been a foreman on very large jobs, right?
9 MS. CACACCIO: Objection. Leading.
10 Q BY MR. BOREANAZ: Have you had experience -- I'll ask a
11 different question. Have you had experience dealing with
12 managing people throughout your career at Local 91?
13 A Yes.
14 Q Have you had any experience dealing with resolving
15 disputes between people at Local 91?
16 A Certainly.
17 Q Resolving disputes between the Union and the contractor?
18 A Absolutely.
19 Q And disagreements?
20 A All the time.
21 Q And has -- has things changed over the past 20 years on
22 how those disputes get resolved on the workplace?
23 A Since I've been back, we've had not one major problem with
24 contractors. I have more contractor's signatory to Local 91
25 now than we ever had. So we're able to get more people to go

1 to work. We have contractors -- we've not had to picket since
2 I've been back, not one job; haven't had to picket a job. We
3 have signed everybody that we have had conversation with. I
4 have not had -- I have not had a bit of problem -- I just
5 settled five contracts. Never opened our contract, extended
6 them for 60 months at $1.75 a contract. That's unheard of.
7 Not one dispute.
8 Q Now, after the Facebook post in August of 2015, had you
9 been at Union meetings from time to time?
10 A Had you had what?
11 Q Union meetings?
12 A Oh, Union meetings. Okay. Thank you. Yes.
13 Q You've been at all of them?
14 A I've not missed a meeting.
15 Q And from time to time after the Facebook post, did Mr.
16 Mantell show up?
17 A Yes.
18 Q And Mr. Mantell, has he been given the floor at various
19 times during meetings after the Facebook post?
20 A Yes.
21 Q To state various things?
22 A Yes.
23 Q Okay. And has he spoken at Union meetings about things he
24 is critical of what the Union is doing?
25 A We've given him the floor more times than I can count.

Q And have there been occasions where, after the Facebook post, where Mr. Mantell has become disruptive to Union meetings?

A Yeah. He has his own agenda, and usually what ends up happening, he over-extends the conversation and tries to get it into controversial, and that's usually when he gets shut down.

Q Okay. Was there an occasion after the Facebook post and when Mr. Mantell became disruptive in that he came towards the front of the Union hall in an aggressive way?

A Yes. Him and I got into an argument, and he decided that he was going to make it physical and walk down towards me, but the master at arms stepped in and that was the end of that. They threw him out.

Q And was the Union meeting stopped as a result of that?

A It stopped at that point.

Q Now you've -- how's the Union doing financially?

A Better now than we ever have. Our checkbooks are all up.

Q You mean the balances are up?

A All the balances are up. When I came into office, there was only 67,000 in the front office. At this current time, I've got 800,000 in the checkbook, and I've got over a million seven in savings. So I have really made a big difference with that checkbook. We can actually afford to pay our bills.

Q Now, did you run in a contested election for business manager?

A The first time I ran against Connley, I did, yes.
Q Okay. And in 2016, did Mr. Mantell seek nomination for election to the Union office?
A Yes, he wanted to run for president.
Q President of the Union?
A Yeah.
Q That's different than business manager, your position?
A Yeah. There's nine elected positions. President is one of them.
Q And did the Local Union trial board issue a ruling with respect to that?
A Yes.
Q Do you recall what they said?
A Frank is a full-time fireman, and by constitution, you can't -- you can't hold an office as part-time. You've got to be full-time at it.
Q Let me ask you, this relationship between the International and the Local, as you understand it, who wrote the Local Union constitution for Local 91?
A International.
Q And does the Local have the authority to just sort of do whatever it wants in connection with that constitution or rules?
A Absolutely not. It's -- it acts like a franchise. They can come in at any time and take that Local, lock, stock and

1 barrel, every dime in the checkbooks, every car that we buy,
2 they own it all. It's -- the franchise on the wall, that
3 charter, they can walk in and take it off at any time. Being
4 elected is only a privilege. They can come in and say you're
5 now elected; you don't work here anymore and you're out. You'd
6 be lucky if they let you take your personal stuff out of the
7 office.
8 Q Let me show you Union Exhibit Number 3.
9 JUDGE LOCKE: Oh, what Exhibit number?
10 MR. BOREANAZ: Union Number 3.
11 Q BY MR. BOREANAZ: Are you familiar with the ruling by the
12 International Union?
13 A Yes.
14 Q Mr. Mantell did not qualify for a position of the Union
15 official?
16 A Yes. It's signed by Terry O'Sullivan, the president.
17 Q And the ruling was based, in part, because he was not
18 working at the calling by virtue of his full-time employment as
19 a City Fire Department employee, correct?
20 A That's correct.
21 Q By the way, do you know Mr. Mantell's uncle that was on
22 the executive board?
23 A Yes.
24 Q What's his name?
25 A Sam Mantell.

1 Q Mantell?
2 A Sam Mantell. Yeah.
3 Q And was he on the executive board for a while?
4 A Yes. He was -- he sat on the executive board as vice
5 president, and he was an assistant business manager to Butch.
6 Q To Mr. Corsini?
7 A Yes.
8 Q Now, this Union Exhibit Number 1 ruling by the
9 International came after the Facebook post, correct?
10 A Yes.
11 Q And so was Mr. Mantell's disqualification from running for
12 office have anything to do with the fact that he made Facebook
13 posts --
14 MS. CACACCIO: Objection. Leading.
15 Q BY MR. BOREANAZ: -- in August of 2015?
16 A No, nothing to do with it.
17 MS. CACACCIO: Objection. Leading.
18 JUDGE LOCKE: Overruled.
19 Q BY MR. BOREANAZ: Did the finding by the Local Union
20 election office and then the International that Mr. Mantell was
21 ineligible to run for office because he was not working at the
22 calling have anything to do with Mr. Mantell's filing a board
23 NLRB charges against the Union?
24 A No.
25 Q Now even after Mr. Mantell got this final decision from

1 the International, did he continue to proclaim that he was
2 still eligible to run or that he disagreed with the
3 International interpretation of its rules?
4 A He's never agreed with anything they've sent him. Even
5 the -- even the letters that were sent we've given to him I've
6 allowed him to read them, and he would edit them and there
7 would end up in an argument. If I told him I could -- you've
8 got the floor with all the members. At least read the truth,
9 and that usually ended up in an argument because he would
10 continue to do it his way. You know, I don't have a problem
11 with the members hearing the truth. I have a problem with them
12 being lied to. I have a problem with that, and Frank and I
13 have had several arguments over his lying.
14 JUDGE LOCKE: Over his what?
15 THE WITNESS: Lying.
16 JUDGE LOCKE: Oh, okay. Thank you.
17 Q BY MR. BOREANAZ: All right. I want to show you Exhibit
18 Union 2. I'm showing you Exhibit Union 2. Now after you got
19 that decision in May of 2016 indicating that Frank is not
20 working at the calling because of his full-time job at the
21 Buffalo Fire -- or the Niagara Falls Fire Department, did you
22 have occasion to review the constitution in connection with
23 Frank's participation in the Union meetings as reflected in
24 Union Exhibit 2?
25 A Yes.

Q Drawing your attention to the third page of Union 2, Section 6, it states here that "Any member who is not working at the calling or is engaged in independent enterprise shall not have a voice or vote at meetings of the Local Union". Do you see that?

A Yes.

Q What is your understanding of having a voice at Local meetings?

A We didn't have to let him address the membership. We didn't have to let him complain about whatever he wanted, but we did --

Q Why?

A -- He was still given that privilege.

Q Why?

A You know, it's -- it's not worth the aggravation to have people think that we wouldn't let somebody have a -- a voice. I just -- as long as it was the truth, I didn't have a problem with it.

Q Now with respect to after you get this decision in 2016 from the International Union, were there occasions where despite your having the ability to not allow him to have a voice, did he, in fact, a voice in Union meetings?

A Yes, he still did.

Q Does he to this day?

A We've never prevented him from having anything to say.

Q Now Union Exhibit 5. It looks like I only have the one. Oh, no. Here it is. Union Exhibit Number 5 is the Local Union constitution, the qualification for office which lays out on the second page of the Union Exhibit 5 the terms or the definition of working at the calling. Do you see that?

A Yes.

Q And that's the definition that was interpreted by the International in Union Exhibit 3, correct?

A That's correct.

Q And do you know the rationale behind the rule reflected here in Union Exhibit Number 5 with respect to restricting Union officials to those who are working at the calling? Do you understand what the rationale behind the rule is or the reasons for them?

A Why would you -- why would you elect somebody to lead a Union and make decisions for it that doesn't do the same thing that you do every day. I wouldn't want somebody leading me that was a full-time fireman and made an occasional decision as to how my pension was going to do or my medical expenses, and we negotiate all that. So you've got to work at the calling every day in order to understand and to be a part of the decisions that you make. Otherwise, you could make a decision and affect everybody but you.

Q Mr. Mantell indicated on his testimony that for a long period of time he would give the Union his availability to work

as a construction worker so that it didn't conflict with his work as a firefighter. Do you remember hearing testimony to that effect?

A Yes.

Q Do you know how that came about?

A When his uncle was there, his uncle accommodated whatever he wanted. After Sam left, after Sam retired, nobody ever disputed it and tried to help wherever they could. Nobody -- nobody looked twice at it. So it just continued until Frank reached a point where it became conflicted and then everything changed.

Q So were there occasions where Mr. Mantell was sent out to work that caused some problems for a contractor, at least as far as the Union was concerned?

A Yeah. Frank's obligation to the fire department, we had him on 72nd Street or 73rd Street, and he was working with cement finishers on concrete. Frank had to go to work at 3:30 or 4:00. So he had to leave the job. When he left the job, the hours that the -- a laborer would have gotten, because they usually until at least 6:30, 7:00. So that overtime work that we would have got paid for went to the cement finishers because the cement finishers would just do the work. The contractor is not going to put somebody to work at 3:30 in the afternoon to work for another couple of hours. So we would lose it, and the guys complained about it. But, you know, we let it go for a

1 long time.
2 Q So the hiring hall rules, those came down to the Local
3 Union from the International Union, correct?
4 A Correct.
5 Q Can you explain how that happened? You said they were --
6 the Union was an exclusive hiring hall; then went to a
7 nonexclusive hiring hall, right?
8 A The Justice Department had a lot to do with that because
9 at the same time that the Local was being scrutinized by the
10 Justice Department, so was the International. So the Justice
11 Department was keeping a really close eye on everything and
12 everything that happened in the Locals and from the
13 international. Matter of fact, you know, now that you mention
14 it, I can't remember the attorney's name, but there was an
15 attorney that worked for the justice department that he had to
16 okay everything that happened at 91, even after the justice
17 department allowed them to give it back to the local.
18 Q Does the name Robert Luskin come to --
19 A Yeah, it could be.
20 Q Let me show you General Counsel's Exhibit number 3. Do
21 you have 3?
22 A For myself I do, yeah. I don't have an extra 3 for you.
23 I have my 3.
24 Q Okay. Well, I don't want the one you gave me.
25 A It should be on the stand, I assume.

Q It's not.
A Thank you.
Q Showing you General Counsel's Exhibit number 3. Is this the letter from Robert Luskin to Local 91 with the new nonexclusive hiring hall rules?
A Yeah.
JUDGE LOCKE: I'm sorry what was the answer?
THE WITNESS: Yes.
JUDGE LOCKE: Thank you.
Q BY MR. BOREANAZ: I'm going to show you General Counsel's Exhibit Number 2. Are these the hiring hall rules handed down by the International Union?
A Yes.
Q And since they were handed down in 2004 they've changed to your knowledge?
A Yeah, there's not a date on this one, but the Luskin letter is 2004.
Q Right. Do you know if they've changed since they handed them down in 2004?
A No.
Q Okay.
MS. CACACCIO: No, you don't know, or no, they haven't changed? I'm sorry. I'm just --
UNIDENTIFIED SPEAKER: He doesn't know that they haven't changed.

Q BY MR. BOREANAZ: Now, I want to draw your attention to Rule 4. Rule 4 on General Counsel's Exhibit 2 is the meat of the referral rules or how things get referred out, right?
A Yes.
Q And that would apply only to those people that are actually using the hiring hall and that are requested by a contractor, correct?
A Correct.
Q Drawing your attention to page 3-A -- strike that. To first page of General Counsel 2 to paragraph number 2, effect on hiring house rules.
A Okay.
Q There's a reference to a GEB attorney. Is that a local union person, or is that a person from the International Union?
A No, that's from the International.
Q At the time?
A Actually, he's in Washington.
Q If you look at General Counsel's Exhibit 3, General Counsel's Exhibit 3 is that letter from Robert Luskin.
A Yeah, you can -- back to the office, the GEB office.
Q In 2004 he was actually the GEB attorney, right?
A Correct, and you can see the bottom where they were all sent. That's -- there's nobody there from 91. Those are all the people that ran 91 at that time.
Q And there's a reference here in number 2 that talks about

1 any local union that concludes that these rules conflict with
2 the provincial law or term of a collective bargaining agreement
3 shall apply to the GEB attorney furnishing such information as
4 he shall determination. And then the GEB attorney will
5 determine whether or not there's a conflict, right?
6 A Correct.
7 Q Is that your understanding of --
8 A That's the way it works.
9 Q Now, we're here today with respect to exhibit -- with
10 respect to Rule 3-C as in Charlie and the application of Rules
11 3-C.
12 A Okay.
13 Q Now, I assume you've read these rules from time-to-time,
14 correct?
15 A Lately, yes.
16 Q And what about back in 2005 or 2015, 2016; what was your
17 practice as far as reading these rules?
18 A Not very often.
19 Q Okay, and generally would administer the hiring hall and
20 the referral procedure number 4 in your hall back in 2015,
21 2016, 2017?
22 A That would be between Diana and Mario, but I -- I'm the
23 only one that would send people out like that, unless I wasn't
24 in the office, but then it was usually by phone.
25 Q Okay, and in respect to 3-C as in Charlie, there's a

1 reference here that only applicants who are not currently
2 employed at the trade may register their availability for
3 referral, correct?
4 A Correct.
5 Q And you made a determination that Mr. Mantell was not
6 eligible to register the out of work list because of the
7 application of this particular rule, correct?
8 A That is correct.
9 Q And there has been a lot of testimony about working at the
10 calling, right --
11 A Yes.
12 Q -- in these proceedings, working at the calling and
13 working or employed at the trade. What was your understanding
14 with the respect to the meaning of employment at the trade in
15 connection with allowing somebody to register for the out of
16 work place?
17 A One and the same.
18 Q Okay. And how did you come to that conclusion?
19 A When there was -- when that issue was first brought up,
20 and I think it was brought up by this office, I called the
21 international and asked them if there is a distinction between
22 the two, and I was told that they're one and the same.
23 Q Working at the trade and working at the callings?
24 A Yes, and told them at that time when I called them on the
25 phone, I said send me a letter stipulating that.

Q Did you get the letter?

A A month later or two months later, yeah.

MS. CACACCIO: Your Honor, I'm going to object at this time. I requested an -- that communication and didn't any on that front. So if he got a letter, I should have gotten it with respect to my request.

Q BY MR. BOREANAZ: In fact, didn't you get an email saying no written response was necessary?

A Yeah, Danny -- that's what he wanted, yeah.

Q Danny meaning who?

A Danny Bianco.

Q And Danny Bianco is a union official at Local 91 or at the international?

A International.

MS. CACACCIO: Your Honor, I still have a pending objection. This witness just testified that he got a letter a month or two later.

UNIDENTIFIED SPEAKER: And wasn't produced that person a subpoena?

MS. CACACCIO: Correct.

UNIDENTIFIED SPEAKER: Okay --

MR. BOREANAZ: We don't have a letter, Your Honor.

JUDGE LOCKE: Well, you got the email.

MR. BOREANAZ: Well, the email -- okay, you're right. I'll show you the emails. In fact, they're already in.

MS. CACACCIO: Oh, is he claiming the emails are letters?

MR. BOREANAZ: Let me show the witness emails. General Counsel 11, you said?

MS. CACACCIO: Yeah.

MR. BOREANAZ: Do you have that?

MS. CACACCIO: I mean, I have my copy. Actually, you don't have to keep using my copy.

MR. BOREANAZ: Well, I can't anticipate that you would --

MS. CACACCIO: It's right there.

MR. BOREANAZ: -- flip to General Counsel 11 in.

MS. CACACCIO: It's 10.

JUDGE LOCKE: Because that's not the problem there. The response which is an email rather than a letter is in General Counsel's 11 --

MR. BOREANAZ: Yes, we'll get to that. Okay.

MS. CACACCIO: Okay.

Q BY MR. BOREANAZ: Let me draw your attention to General Counsel's 11. Can you take a look at that?

MS. CACACCIO: It's 10.

MR. BOREANAZ: 10? General Counsel's 10.

THE WITNESS: 10?

Q BY MR. BOREANAZ: Now, General Counsel's 10 -- let me draw your attention to the first page of General Counsel's 10. Do you see that?

A Yes.

Q On June 27th, 2018 I wrote an email to Danny Bianco. Do you see that?
A Yes.
Q And in it Danny is asked that the local has interpreted employment at the trade to be the same as working at the calling.
A Yes.
Q And that you'd appreciate a response if this interpretation is inconsistent with the understanding by the international of those terms? And that was your understanding as of June 27th of 2018?
A Yeah, we had --
Q That was one and the same.
A That just the way he explained it to me.
Q So you ended up speaking with Danny Bianco --
A Yes.
Q -- on the telephone?
A Yes.
Q And let me draw your attention to -- let's just flip through this. Seven pages in on the eighth page. Are you there?
A Yeah.
Q And this is an email by Danny Bianco indicating that he had spoken to you regarding Rule 3-C, and there's no need for a written response?

1 A Okay.
2 Q Correct?
3 A Yeah.
4 Q And then I'm supposed to follow up with you --
5 A Yeah.
6 Q -- regarding your discussion, regarding working at the
7 calling, correct?
8 A Correct.
9 Q Can you recall having more than one conversation with
10 Danny about this subject matter or just the one?
11 A Just the one.
12 Q And based upon that discussion with Danny was the
13 international's interpretation the same as the local union's
14 interpretation? That is --
15 MS. CACACCIO: Objection. Leading.
16 JUDGE LOCKE: Can you rephrase the question?
17 Q BY MR. BOREANAZ: What did Mr. Bianco -- Dan Bianco tell
18 you with respect to your question regarding the union's
19 interpretation of work at the calling being the same as
20 employment at the trade?
21 A That they're one and the same.
22 Q And if you treat that employment at the trade as the same
23 as working at the calling, and you read 3-C, does it make sense
24 to you that that would be the definition of employment at the
25 trade?

A It does to me.
Q And why is that?
A There's no other way you could see that. That is the way it should be.
Q And is there some rational that if somebody has a full-time job that is their primary source, that that person might be on the list and take up a spot on the list from a member who is using the referral list for his or her full-time livelihood?
MS. CACACCIO: Objection. Leading.
JUDGE LOCKE: Can you rephrase that, please?
Q BY MR. BOREANAZ: Do you know if there's any reason behind the rule in connection with treating somebody that has already got a full-time job with pension and benefits with respect to a member who might not have those things and seeking to use the nonexclusive hiring hall?
A It should have been enforced a long time ago.
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

1 the subpoenas that we has to produce the documents for, it made
2 everybody start reading it, and obviously, it speaks for
3 itself, and we should have done something about it a long time
4 ago.
5 Q So to be clear, was it the actual filing of the charge by
6 the NLRB, or was it the hearing that caused you to change your
7 mind. Or was it the reflection of the words and study of the
8 words?
9 A Once you read this, it's hard just to walk away from it
10 and not take care of business like you're supposed to. As long
11 as it wasn't on the tip of my nose, I never paid a lot of
12 attention. But once we had to start, and everybody in the
13 office had to read it. And had to be discussed with the
14 executive board. So you had to do something, and that's what I
15 decided to do.
16 Q Now, again, did your action with respect to enforcing Rule
17 3-C by equating employment at the trade with working at the
18 calling, did that result because Frank Mantell filed the
19 Facebook post?
20 A No.
21 Q Did that result because Frank Mantell had filed more
22 charges making other allegations?
23 A It had nothing to do with it.
24 Q Or because you had to come to a hearing and listen to a
25 hearing for the NLRB?

A Nothing to do with it.

MR. BOREANAZ: I have no further questions.

JUDGE LOCKE: Cross-examine?

MS. CACACCIO: Yes, Judge. I'm going to need a few minutes though. But I suspect we'll be able to finish today if you wanted us to get out of here.

THE COURT REPORTER: Off the record?

JUDGE LOCKE: We might as well. Off the record.

CROSS-EXAMINATION

Q BY MS. CACACCIO: Good evening, Mr. Palladino. You probably remember me.

A I do.

Q My name is Jessica, now, Cacaccio, was Nero. I'm going to be asking you a few questions this evening about your testimony. Who brought the civil defamation charges against Mr. Mantell?

A The union.

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.

Q Do you remember giving a deposition in that case?

A Sure.

Q I'm letting the witness look at the first page of his deposition. Do you see the caption on top of that deposition?

A Yes.

Q Do you see that you're specifically named? It says "Richard Paladino and Laborer's Local 91 Plaintiffs"?
A Yeah, that's correct.
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.
Q All right. When did Sam Mantell retire?
A I don't know.
Q Was it before or after Mr. Mantell became a member of Local 91?
A I don't know. I was retired then.
Q When were you retired?
A '95.
Q So you said that you remember for 60 years, but somewhere in there you retired. When did you retire?
A '95.
Q Until when?
A 2004.
Q And you said that you owned your paving business for a long time. When was that?
A 19 -- all through the 60s and 70s.

Q So you were able to work as a laborer through the 60s and 70s and also owned your own private paving business. Is that right?
A That's correct.
Q So you were still getting work through the hall while you owned your own private business?
A I only worked on the side, so it didn't matter.
Q You only worked doing what on the side?
A Putting in driveways, sidewalks, whatever I could get.
Q Was that the only business that you owned?
A Yeah.
Q You never owned any other business? Did you ever own a farm?
A I own a farm. I bought the farm.
Q When did you buy the farm?
A Sometime in the early 70s.
Q And do you do business with the farm, or is it purely personal?
A Just personal.
Q Okay, do you own any other businesses at all?
A No.
Q So you testified that you had one conversation with Danny. Is that right?
A I had a lot of --
Q About this issue.

A Of the issue, yes.
Q Sorry, that's --
A But I do talk to him quite a bit.
Q But in that conversation he explained to you according to your testimony what the difference is or isn't between working at the trade and working at the calling; is that right?
A He said there was no difference, one and the same.
Q And that conversation occurred on August 14th, 2018; isn't that right?
A I don't know the exact date.
Q I'm going to direct your attention to the email that you have in front of you still. I think it's General Counsel's Exhibit 10.
A Okay.
Q Do you have that in front of you?
A No, but if you say I talked to a him, it doesn't matter what day. I did talk to one at that time --
Q Or when was it -- when was a little bit --
A So in that period of time.
Q Well, let me ask you some questions about it.
MS. CACACCIO: Do you know?
JUDGE LOCKE: Which one do you want; Exhibit 10?
MS. CACACCIO: Yeah, Exhibit 10. Thank you. Yes.
MR. BOREANAZ: It may be the same email I drew his attention to?

1 MS. CACACCIO: It is, indeed.
2 Q BY MS. CACACCIO: Page 8 of 11 on the bottom; do you see
3 that?
4 A I got 10.
5 Q Okay.
6 MS. CACACCIO: Your Honor, may I approach the witness --
7 JUDGE LOCKE: Yes.
8 MS. CACACCIO: -- and provide a form? Save us some time.
9 Thank you.
10 Q BY MS. CACACCIO: Do you see your email at the top of the
11 page?
12 A Yes.
13 Q Okay, and do you see where Dan says that he spoke to you
14 this morning regarding a receipt? Do you see where it says
15 that in the first sentence of that email?
16 A Yes. Yeah, I see it now.
17 Q And do you see that on the top right-hand corner of that
18 page it says the email -- that email was transmitted on August
19 14th, 2018?
20 A Yes.
21 Q So based on that, is it your understanding that this
22 conversation occurred on August 14th, 2018?
23 A It could have.
24 Q Well, do you think that Danny lied in his email?
25 A No, but I don't know if that could be definite, but I

1 don't think he would. But that doesn't necessarily mean that I
2 talked to him on the 14th, and that's what we talked about. I
3 may have talked to him on the 13th.
4 Q Okay, so let's go over this again then. So I'm going to
5 read you this paragraph. It says "Please be advised that we
6 spoke to B Paladino this morning regarding Rule 3-C. There is
7 no need for a written response. Please follow up with B
8 Paladino on an inspection regarding Paul (sic) working at the
9 calling." So is that the conversation you remember having with
10 him about this issue?
11 A I don't remember having that conversation on that day, but
12 if he says it was on the 14th, then it must have been. Because
13 I did have a conversation with him regarding this.
14 Q And Mr. Mantell --
15 MR. BOREANAZ: And can I ask, did you do it on the 13th or
16 14th or --
17 MS. CACACCIO: It matters a little bit.
18 Q BY MS. CACACCIO: Do you remember removing Mr. Mantel from
19 the out of work list on July 5th; is that right?
20 A I don't remember what day it was, but I did. I definitely
21 did.
22 Q I'm going to direct your attention to General Counsel's
23 Exhibit 6. Do you have General Counsel's Exhibit 6?
24 MR. BOREANAZ: He doesn't have 6 in front of him, no. I
25 didn't show him 6.

JUDGE LOCKE: I've got plenty.

MS. CACACCIO: Well, do you have the other copy of 6, please?

MR. BOREANAZ: Well, I have 2 and 3 and 10. I didn't show him 6.

MS. CACACCIO: Judge, can I just stand up here? I think that's a little bit easier. Too close.

THE WITNESS: I'll let you know.

MS. CACACCIO: Thanks.

Q BY MS. CACACCIO: So I've handed General Counsel's Exhibit 6, and I'm directing you to the third page of that exhibit.

A So it's --

Q So that's -- yep.

A The one you had before?

Q Yeah.

A Okay.

Q So it's the third page of the Exhibit.

A Okay, all right.

Q Do you know what this document is?

MR. BOREANAZ: We've actually stipulated that it occurred on July 5th.

JUDGE LOCKE: I'm sorry. I couldn't hear you.

MR. BOREANAZ: We've stipulated that occurred on July 5th. The date is there. The records are there. He testified he just didn't recall off the top of his head.

1 MS. CACACCIO: I'm testing this witness' knowledge --
2 MR. BOREANAZ: Okay.
3 MS. CACACCIO: -- about this issue.
4 Q BY MS. CACACCIO: Do you know what this record is? Can
5 you tell the Court what this record is?
6 A It looks like a copy of one our documents for out of work.
7 Q And do you see the first line of page 3 where it says,
8 "Manually deleted"? Do you see that?
9 A First line of page 3? Yes, I see that.
10 Q And the next column says, "Deleted by", what does that
11 say?
12 A Mario.
13 Q Okay. And who is Mario?
14 A He is -- does a lot of the paperwork in the front office,
15 and he's a dispatcher.
16 Q Okay. And do you see the date of the insertion for that
17 recording?
18 A Looks like about -- what is that? 3:00?
19 Q Yeah -- 8:51, this one right here.
20 A Okay. 8:51.
21 Q Of what day? Do you see it?
22 A July 5th.
23 Q So based on this record is it understanding Mr. Mantell
24 was deleted off the out of work list on July 5th?
25 A Yes.

Q And he hasn't been returned to that list, right, because you're the business manager?
A I would know eventually.
Q Who is Vince Masino?
A I'm sorry, I missed it.
Q Who is Vince Masino?
A He is senior vice president, works out of Providence, Rhode Island.
Q Do you remember receiving a fax from Mr. Masino in October of 2017 that discussed the definition of being "employed at the trade".
A Not offhand, but if you have it, I'll be glad to read it.
Q If I show you a copy of it, would you be able to identify it?
A Sure.
MS. CACACCIO: What number were we on? Are we on 13?
(Counsel confer)
Q BY MS. CACACCIO: So does Mr. Masino work for the International or the Local?
A Works for the International.
Q This was produced to the General counsel in response to a subpoena. And I realize that it says a total of eight pages including the coversheet, but it sort of didn't come with that to me, so if you have the other six pages, let me know. Do you remember receiving this fax?

MR. BOREANAZ: Hold on a second. I'm not sure you're accurately --

MS. CACACCIO: It was produced to me twice like this.

MR. BOREANAZ: All right. Go ahead and ask the questions.

MS. CACACCIO: I mean, if you have some other -- if you have this attached to something else, let me know, because I'm happy to enter it that way.

MR. BOREANAZ: I don't have any of this in front of me. I didn't bring every document that I disclosed to you as part of this subpoena or any other subpoena. I don't have those records with me. So you're taking a piece of paper that shows a fax of eight pages --

MS. CACACCIO: Right.

MR. BOREANAZ: -- and it's got one page attached to it. And we don't even know if this one page attached to it really relates to the eight pages in the fax, so --

MS. CACACCIO: I mean, if you can find it, let me know. This is how it was produced to me. So if there's something else, or there's more, by all means, I'm happy to wait.

MR. BOREANAZ: We produced to you what we were -- what we had.

MS. CACACCIO: No, that's fine. I don't have a problem with the missing six pages. I just want to talk to him about the second page, which is the "employed at the trade" language.

MR. BOREANAZ: Well, you're assuming that the second page

1 came with the first page. I don't know that to be the case.
2 Maybe he knows, I don't know.
3 MS. CACACCIO: I can only assume it, because that's how it
4 was produced to me.
5 MR. BOREANAZ: Well, why don't you ask him that question.
6 Maybe that will clarify my concern.
7 Q BY MS. CACACCIO: Do you remember producing this document?
8 A I don't remember seeing that.
9 Q Okay. Do you know that you were brought here today as the
10 custodian of the records in this case. Do you know what that
11 means?
12 A Yes.
13 Q Okay. You do know that you were brought here as that?
14 A Yes.
15 Q So do you remember finding this document and producing it
16 to me for this hearing today?
17 A I don't remember doing it.
18 Q Okay.
19 MS. CACACCIO: So I don't know what to do, Judge, because
20 this is what I was given and how I was given it. I'm happy to
21 wait if you want to search your computer for whatever -- it was
22 produced in this subpoena today. It wasn't like I found it
23 from something else. And I may even have another copy of it in
24 the other room, because I remember seeing it more than once
25 when I was getting those this morning.

1 MR. BOREANAZ: Why don't you ask him about the document
2 itself, and then maybe we can alleviate the need for --
3 MS. CACACCIO: Well I --
4 MR. BOREANAZ: -- the other records?
5 MS. CACACCIO: -- we sort of need to know where it comes
6 from. Because if it's not from their actual, sort of --
7 Q BY MS. CACACCIO: So look at page 2, Mr. Palladino, of
8 that record. Do you remember receiving this?
9 A I don't. I -- if I got this, I would have remembered
10 reading it. I don't remember reading it.
11 Q Okay.
12 MS. CACACCIO: So now I'm a little bit stuck, Judge. I
13 don't know what it is you want me to do. This is the custodian
14 of recordings. This was how it was produced to me based on my
15 recollection of going over it quick this morning. I'm happy to
16 have more pages, if there are pages to be produced to me, or
17 context for it. I don't know what else to do, but this is --
18 from what I've gathered, based on what was produced to me, the
19 International's 2017 definition of "being employed at the
20 trade."
21 THE WITNESS: We've got documentation all over the place
22 that conflicts with this. So what am I missing? What are you
23 trying to get to --
24 MR. BOREANAZ: That's not -- that's not how this works.
25 So let me take a -- we'll go off the record. Let me look at

1 see if I can -- through email with my office check and see what
2 was produced and how it was produced, and I will tell you this,
3 we're still on the record, we put a lot of effort trying to
4 produce records as part of this subpoena. In fact, there's an
5 office staff person there that Mr. Palladino directs and
6 controls, secretary, you heard her name, Diana.
7 I sent a paralegal down to the Union hall with the
8 subpoena to try and query the Union staff about what documents
9 would come in under the particular definitions of complying
10 with the subpoena. As you know, this is not about just going
11 to the isle and picking something off the isle and saying this
12 meets this particular definition. There are things that need
13 to be resolved with respect to that. We've put a lot of effort
14 into doing that. My paralegal put all the papers together that
15 were produced by the Union, put them in a nice neat package and
16 dropped them off with a cover letter, came an hour beforehand
17 so that the General Counsel would have an opportunity to take a
18 look at this, not at the last second, but brought in an hour
19 beforehand.
20 JUDGE LOCKE: Would this be a good time --
21 MS. CACACCIO: We're not done.
22 JUDGE LOCKE: -- break for the evening and --
23 MS. CACACCIO: We shouldn't have to, Judge. If we can
24 resolve this issue, I'm basically done.
25 JUDGE LOCKE: I'm sorry, what?

1 MS. CACACCIO: If we can resolve this issue, I'm basically
2 done.
3 JUDGE LOCKE: Oh okay.
4 MS. CACACCIO: So I really don't want to do that --
5 JUDGE LOCKE: Okay.
6 MS. CACACCIO: -- for this one problem. And I'm not
7 making any contention that they didn't do a good job for the
8 subpoena. I think they did. But I want this document in the
9 record, and I need to make sure that where it comes from is
10 where it shows me where it came from.
11 JUDGE LOCKE: Why don't we go off the record for a couple
12 minutes then. Off the record.
13 (Off the record at 5:55 p.m.)
14 MS. CACACCIO: Based on the off the record discussion,
15 General Counsel Exhibit 13, the first page and the second page,
16 according to the representations by the Union says that they're
17 not from the same document. I have no way to prove or disprove
18 that so I'm --
19 MR. BOREANAZ: I didn't say that.
20 MS. CACACCIO: -- going to -- no. That --
21 MR. BOREANAZ: I didn't say that.
22 MS. CACACCIO: -- they're not from -- that this was not
23 part of the fax that was sent to Mr. Masino.
24 MR. BOREANAZ: I didn't say that.
25 MS. CACACCIO: Okay. So --

1 MR. BOREANAZ: We don't know that. I can tell you that
2 both of those two pages that you put together as General
3 Counsel's 13, both of those documents came from the Union in
4 response to the subpoena, under Number 11 of your attachment.
5 MS. CACACCIO: Okay.
6 MR. BOREANAZ: Okay, so the process is quite
7 straightforward. There's a search to look for records and
8 documents that are responsive to the subpoena, documents get
9 taken from various locations. They get put into a pile to be
10 produced pursuant to the subpoena. You want to ask a question
11 where they came from, where they were, and you can do that.
12 MS. CACACCIO: And I'd like --
13 MR. BOREANAZ: And if you get answers, you get answers.
14 If you don't, you don't.
15 MS. CACACCIO: Well, it doesn't really work like that
16 either, but --
17 MR. BOREANAZ: But it does work like that.
18 MS. CACACCIO: If I don't get the answers from the
19 custodian of records then we sort of have a problem, so --
20 THE WITNESS: I'm sorry.
21 Q BY MS. CACACCIO: -- on the second page of this document,
22 Mr. Palladino, do you know where this came from?
23 A I don't. I have not seen that. That's what surprises me.
24 That's why I don't know why it got sent to Vince.
25 Q Okay. Well maybe it didn't get sent to Vince. But

other -- pretending that Vince is not in the equation, for the second page of this document, do you know what this document is?

A I don't.

Q Do you know where it came from?

A I don't. That's why I have not read it.

Q Do you know who would know where this came from? Because you were produced as the custodian of these records, so I sort of need to know where this came from.

A We're going to -- when I get back, we're going to have to go through the file drawers --

MR. BOREANAZ: No, just hold on a second. I've already indicated that this record came from the Union. It was produced as part of the subpoena on behalf of the Union. That was produced. It was in the Union records and it was produced, okay?

MS. CACACCIO: Judge, was there an objection? Because I'll respond, if there is one. I mean I think I'm entitled --

JUDGE LOCKE: I don't think there's an objection.

MR. BOREANAZ: I just, you know, we're -- there's -- this is not a --

JUDGE LOCKE: It just sounds more like a statement.

MR. BOREANAZ: This is not a -- it's a simple fact.

MS. CACACCIO: That's great. But I still need to know where this record came from, and what its purpose was and what

it is, so --

MR. BOREANAZ: Okay. Well then that's your purpose and --

MS. CACACCIO: And I did that --

MR. BOREANAZ: -- it is --

MS. CACACCIO: -- and he doesn't know --

MR. BOREANAZ: It's --

MS. CACACCIO: -- so I need to know who will know, because this is the custodian, Judge.

THE WITNESS: Nobody will know what I don't know. I'd have to go look to see where it came from. I mean there are drawers and drawers of records there. And I know that they were diligent in supplying everything the way the subpoena read, but I need to see where that came from.

MS. CACACCIO: Judge, do you have a suggestion as to what I should do?

MR. BOREANAZ: What are you trying to accomplish?

MS. CACACCIO: Well, it's hard to know Rob, because I don't know who wrote this.

MR. BOREANAZ: Okay.

MS. CACACCIO: I don't know if it came from International. I don't know if it came from the Local.

MR. BOREANAZ: I can tell you that every document that has been produced to you, we will not be able to tell you exactly who wrote it, and exactly -- I can't do that for you. That's impossible.

1 MS. CACACCIO: Well, then I don't know how I can enter
2 this exhibit, if you have no witnesses who can tell me where it
3 came from when it was produced to me pursuant to subpoena.
4 MR. BOREANAZ: I'm going to tell you that it came from the
5 Union. You want to put it in as an exhibit, go ahead and put
6 it in as an exhibit. It came from the Union. It was in the
7 Union hall. I'll stipulate to that. I am stipulating to that.
8 MS. CACACCIO: Judge, I offer GC Exhibit 13, the second
9 page of GC 13 -- actually I'm going to -- because we've had so
10 many discussions about it, I'm going to offer both pages.
11 JUDGE LOCKE: You want the second page only, is all you're
12 offering --
13 MS. CACACCIO: I want --
14 JUDGE LOCKE: -- not the coversheet?
15 MS. CACACCIO: I think I want both, Judge, because we've
16 talked about both extensively.
17 MR. BOREANAZ: I think you took my GC 13.
18 MS. CACACCIO: Oh well, you can have this one.
19 JUDGE LOCKE: Now I'm not -- now I'm confused. I --
20 obviously, I can see what the second page is, but the first
21 page here that's the coversheet, you're saying that's not
22 relevant?
23 MS. CACACCIO: Right. It's only relevant because we just
24 had extensive discussions about it, and it might make the
25 record clearer just to show what it is --

MR. BOREANAZ: I'm not convinced that it's related but, it may be, or it may not be. I just don't know.

MS. CACACCIO: Right.

JUDGE LOCKE: So you want me to detach the second page and mark that GC-13?

MS. CACACCIO: I don't. I would like them both together.

JUDGE LOCKE: Yeah, okay.

MS. CACACCIO: The witness has already said that he doesn't know whether or not they were really related or came together, and that's okay. That's -- I mean, in my position that's for you to decide.

JUDGE LOCKE: Well, then that makes it easier if you have both pieces together.

MS. CACACCIO: Right.

JUDGE LOCKE: Any objection?

MR. BOREANAZ: I -- here's my only stipulation. Is that these documents came from the Union. They are Union documents. And so you decide what weight to give them or what import to give them. I'm not sure exactly what it is, but you'll take that into consideration.

JUDGE LOCKE: Well it's interesting, "employed at the trade", that's interesting to see how it's defined. But if there's no objection I'll receive General Counsel's Exhibit 13.

(General Counsel Exhibit Number 13 Received into Evidence)

MS. CACACCIO: Your Honor, I don't have any more questions

for this witness.

JUDGE LOCKE: Any redirect?

MR. BOREANAZ: I have no redirect.

JUDGE LOCKE: Oh, very well. Thank you, sir. You may step down, and we appreciate your help.

THE WITNESS: Thank you.

Does she want this back?

MS. CACACCIO: Oh that's okay. I'll clean it up tomorrow. You can leave it there. I'll clean it up tomorrow, thank you.

MR. BOREANAZ: I have no further witnesses.

JUDGE LOCKE: Very well. The Respondent rests?

MR. BOREANAZ: Yes.

JUDGE LOCKE: Very well.

Any rebuttal?

MS. CACACCIO: Just one second, Your Honor.

(Counsel confer)

MR. BOREANAZ: You know, let me -- can I make a phone call?

JUDGE LOCKE: Sure, I'll go off the record.

MR. BOREANAZ: Let me make a phone call before I finally rest.

JUDGE LOCKE: Okay. That sounds good to me. Off the record.

(Off the record at 6:06 p.m.)

MR. BOREANAZ: We're done.

JUDGE LOCKE: You're resting. Very well and --

MS. CACACCIO: I have an incredibly brief rebuttal.

JUDGE LOCKE: Very well.

MS. CACACCIO: I call Mr. Mantell back to the stand.

JUDGE LOCKE: Mr. Mantell, you're still under oath.

THE WITNESS: Yes, Your Honor.

JUDGE LOCKE: Please proceed.

Whereupon,

FRANK MANTELL

having been previously sworn, was called as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

Q BY MS. CACACCIO: I want to direct your attention to Union's Exhibit 4. Do you have that up there in front of you?

A No, I don't.

Q Okay. I'll show you my copy of it.

A Yes.

Q Did you ever get a response from the International Union --

A Yes, I did.

Q If I showed you a copy of that response, can you identify it for us?

A Yes.

MS. CACACCIO: Approaching the witness with General Counsel Exhibit 14.

1 Q BY MS. CACACCIO: Mr. Mantell, what did I just hand you?
2 A You sent me a letter that Leona (phonetic) sent to myself,
3 Dwayne Korpolinski, and to Local 91, and to the New York
4 Regional Office.
5 Q Okay.
6 MS. CACACCIO: I am now offering General Counsel Exhibit
7 14.
8 JUDGE LOCKE: Any objections?
9 MR. BOREANAZ: What's it being offered for?
10 MS. CACACCIO: The response that the International
11 provided to him based on the handwritten letter that we sent to
12 them.
13 MR. BOREANAZ: I don't object.
14 JUDGE LOCKE: No objection, then General Counsel's Exhibit
15 14 is received.
16 **(General Counsel Exhibit Number 14 Received into Evidence)**
17 MS. CACACCIO: I have no further questions for this
18 witness.
19 JUDGE LOCKE: I'm sorry, what?
20 MS. CACACCIO: I have nothing further.
21 JUDGE LOCKE: Very well.
22 Cross-exam?
23 MR. BOREANAZ: No object -- or no questions.
24 JUDGE LOCKE: Well, I've got one that's not on this, but I
25 need to ask. I want to ask. I noticed that General Counsel's

1 Exhibit 9, 9(a) shows -- 9(a) is the order consolidating cases,
2 consolidated complaint and notice of hearing.
3 MS. CACACCIO: Yes.
4 JUDGE LOCKE: And it identifies the Charging Party in case
5 3-CB-211488 as Frank Mantell. Then 9(b) is the answer and it
6 shows the Charging Party in this case to be Ronald J. Mantell
7 and --
8 MS. CACACCIO: I understand that, I think it was an error
9 on the part of -- I think it was just a typographical error
10 from Respondent's Counsel, but I don't want to -- we got it
11 like that in the first place. That's in the formal papers in
12 the other case. It's just --
13 MR. BOREANAZ: Yeah. It's the same --
14 MS. CACACCIO: -- a typo.
15 MR. BOREANAZ: -- case numbers.
16 MS. CACACCIO: Yeah. It's just a typo.
17 JUDGE LOCKE: Okay. So nothing I need to worry about?
18 MS. CACACCIO: No, Judge.
19 JUDGE LOCKE: Very well.
20 MS. CACACCIO: Sorry.
21 JUDGE LOCKE: Well, then I guess we're at a point where we
22 talk about either briefs or oral argument. What I'd like to do
23 is --
24 MS. CACACCIO: Your Honor --
25 JUDGE LOCKE: -- recess the hearing for like four weeks

1 until a transcript comes in, and then resume my conference call
2 for your oral arguments. And then since this is only a one-day
3 hearing in a simple case, to then issue a bench decision by
4 telephone conference usually the next day. And in fact, how
5 would that be if we say we resume on say Tuesday, July 30th for
6 the -- for oral argument, and then have the conference call for
7 the bench decision on July 31st?
8 MR. BOREANAZ: Judge, I just ask -- I'm going to be -- I
9 haven't taken a vacation in two and a half years, and I'm going
10 to be on an extended vacation from like the 16th to the Sunday
11 before that, the -- like the 28th or something like that --
12 JUDGE LOCKE: 16 -- well, the nice thing about doing it
13 this way rather than doing briefs, I can only give you 35 days
14 on briefs, but I can give you more than that if we --
15 MR. BOREANAZ: right.
16 JUDGE LOCKE: -- obviously if we just adjourn the hearing.
17 So let me grab my calendar here.
18 MR. BOREANAZ: So maybe just an extra week.
19 MS. CACACCIO: So the 5th and the 6th then?
20 JUDGE LOCKE: Okay. Yeah, why don't we resume on the 6th
21 for the oral argument, and then do the bench decision on the
22 7th, would say 11 in the morning Eastern time be convenient for
23 everyone?
24 MS. CACACCIO: Yes, Judge.
25 MR. BOREANAZ: On the 6th?

JUDGE LOCKE: Yeah. Uh-huh.

MR. BOREANAZ: Okay. 11 a.m. Is that enough time to get the transcripts?

UNIDENTIFIED SPEAKER: Yeah. It's a one-dayer, we'll get it real soon.

JUDGE LOCKE: Then we will resume on the 6th at 11 a.m. for oral argument, and then on the 7th at 11 a.m. Eastern for the bench decision --

MR. BOREANAZ: Can we do a later time --

JUDGE LOCKE: -- by telephone conference.

MR. BOREANAZ: -- I do have a conference at 9:30 on the 7th with multiple parties coming from different locations that generally goes to about noon.

JUDGE LOCKE: Well, why don't we make it for 2. How would that be? Would that be --

MR. BOREANAZ: That works fine.

JUDGE LOCKE: One other thing I'd like to ask you to do, and I should have asked it at the start of the hearing, is if you would fill out -- maybe you have already, but I haven't received it, an appearance sheet, so I can take it with me.

MS. CACACCIO: And I apologize I don't have one of those.

JUDGE LOCKE: Oh, sir, you may step down, if you like. I'm sorry.

MS. CACACCIO: That's what I was going to stay earlier, but I was like he's -- he looks comfortable up there, I'm not

1 going to --

2 JUDGE LOCKE: You can stay there if you like, whatever.

3 (Counsel confer)

4 JUDGE LOCKE: Just one other thing, I've looked all

5 over -- I can't find a copy of General Counsel's Exhibit 3.

6 Perhaps you can --

7 MS. CACACCIO: I will produce for you, Judge.

8 (Counsel confer)

9 MR. BOREANAZ: So as far as filing the appearance, I think

10 we've already filed one with the Board, but you want this filed

11 with the Judge's --

12 JUDGE LOCKE: Yeah. It would be helpful if you could,

13 yeah. If you don't mind.

14 Thank you very much for the exhibit.

15 MR. BOREANAZ: Is that all right if we do this tomorrow?

16 JUDGE LOCKE: Beg your pardon?

17 MR. BOREANAZ: You want it done now or you want it done

18 tomorrow?

19 JUDGE LOCKE: Yeah, just fill it out now.

20 MR. BOREANAZ: Okay.

21 JUDGE LOCKE: That's what I think would be best.

22 MS. CACACCIO: Judge, I think that there's still the open

23 issue of the judicial notice of that other proceeding. Do --

24 are you going to rule on that later then?

25 JUDGE LOCKE: Yeah, I'll rule on that in the --

1 MS. CACACCIO: In the final --
2 JUDGE LOCKE: Right. Yes.
3 MS. CACACCIO: Okay. Understood.
4 Will I know before I make my closing argument, so I'll
5 know if I can rely on it in that argument or not?
6 JUDGE LOCKE: Well, that's a good question. Well, I'll
7 see what I can get out, I'll see what I can do about issuing an
8 order.
9 MS. CACACCIO: Thank you, Judge.
10 JUDGE LOCKE: Yeah.
11 MR. BOREANAZ: Thank Your Honor.
12 (Counsel confer)
13 JUDGE LOCKE: Very well, the hearing will be in recess
14 until August the 6th at 11:00 Eastern, and we'll resume by
15 telephone conference call for oral argument. And then it will
16 resume again on August 7th at 2 p.m. Eastern for the bench
17 decision. So until then off the record.
18 **(Whereupon, the hearing in the above-entitled matter was**
19 **recessed at 6:24 p.m. until Tuesday, August 6, 2019 at 11:00**
20 **a.m.)**
21
22
23
24
25

1 **C E R T I F I C A T I O N**

2 This is to certify that the attached proceedings before the
3 National Labor Relations Board, Region 3, 03-CB-225477, Labors'
4 International Union of North America, Local 91, (Mader
5 Construction Co. Inc., and Frank S. Mantell at 130 South
6 Elmwood Avenue, Buffalo, New York 14202, on Tuesday, June 25,
7 2019, 10:09 a.m. was held according to the record, and that
8 this is the original, complete, and true and accurate
9 transcript that has been compared to the reporting or
10 recording, accomplished at the hearing, that the exhibit files
11 have been checked for completeness and no exhibits received in
12 evidence or in the rejected exhibit files are missing.
13
14 *Thomas Baker*
15
16 _____
17 THOMAS BAKER
18 Official Reporter
19
20
21
22
23
24
25

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 3

In the Matter of:

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION 91, (MADER CONSTRUCTION CO., INC.),

Case No. 03-CB-225477

and

FRANK S. MANTELL, AN INDIVIDUAL.

_____

_____

GENERAL COUNSEL EXHIBITS

Place: Buffalo, New York

Dates: June 25, 2019

OFFICIAL REPORTERS
eScribers, LLC
E-Reporting and E-Transcription
7227 North 16th Street, Suite 207
Phoenix, AZ 85020
(602) 263-0885

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

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

and

Case: 03-CB-225477

FRANK S. MANTELL, AN INDIVIDUAL

INDEX AND DESCRIPTION OF FORMAL DOCUMENTS

GC Exhibit 1 (a) Original Charge Filed in Case 03-CB-225477 dated, 08/13/2018

(b) Affidavit of Service of 1(a), dated 08/13/2018

(c) Complaint and Notice of Hearing in Case 03-CB-225477, dated 11/15/2018

(d) Affidavit of Service on 1(c), dated 11/15/2018

(e) Order Granting Extension of Time to File Answer in Case 03-CB-225477, dated 11/30/2018

(f) Affidavit of Service on 1(e), dated 11/30/2018

(g) Respondent's Answer to Complaint and Notice of Hearing in Case 03-CB-225477 with Certificate of Service, dated 12/06/2018

(h) Order Rescheduling Hearing in Case 03-CB-225477, dated 02/05/2019

(i) Affidavit of Service on 1(h), dated 02/05/2019

(j) Order Referring the Respondent's Petition to Revoke General Counsel's Subpoena Duces Tecum to Administrative Law Judge in Case 03-CB-225477, dated 05/31/2019

Exh. No: GC1 Received X Rejected ____
Case No.: 03-CB-225477
Case Name: Laborers Int'l Union N. America
No. Pgs: 33 Date: 6/25/19 Rep.: JB

(k) Affidavit of Service on 1(j), dated 05/31/2019

(l) Index and Description of Formal Documents

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

AFFIDAVIT OF SERVICE OF ORDER REFERRING THE RESPODENT'S PETITION TO REVOKE GENERAL COUNSEL'S SUBPOENA DUCES TECUM TO ADMINISTRATIVE LAW JUDEGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **May 30, 2019,** I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

Frank S. Mantell 6811 Kies Street Niagara Falls, NY 14304	FIRST CLASS MAIL
Mader Construction Co., Inc. 970 Bullis Rd Elma, NY 14059-9638	FIRST CLASS MAIL
Robert L. Boreanaz , ESQ. Lipsitz Green Scime Cambria LLP 42 Delaware Avenue, Suite 120 Buffalo, NY 14202-3924	FIRST CLASS MAIL

May 31, 2019
Date

JULIO GONZALEZ, Designated Agent of NLRB
Name
/S/JULIO GONZALEZ
Signature

General Counsel's Exhibit J(k)

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

ORDER REFERRING THE RESPONDENT'S PETITION TO REVOKE GENERAL COUNSEL'S SUBPOENA DUCES TECUM TO ADMINISTRATIVE LAW JUDGE

The undersigned, Regional Director for Region Three of the National Labor Relations Board, pursuant to Section 102.31(b) of the Board's Rules and Regulations, as amended, hereby refers the below-referenced petition to revoke subpoena duces tecum to the Administrative Law Judge, as follows:

1. On or about May 21, 2019, Counsel for the General Counsel caused subpoena duces tecum B-1-158670J to be served on Respondent, in relation to the above-captioned case.

2. On or about May 29, 2019, the Respondent filed with the undersigned a petition to revoke the subpoena duces tecum served on Respondent. The petition to revoke is attached as Exhibit 1.

Accordingly, pursuant to Section 102.31(b) of the Board's Rules and Regulations, as amended,

General Counsel's Exhibit J(J)

IT IS HEREBY ORDERED that the petition to revoke the subpoena duces tecum is referred to the Administrative Law Judge, for consideration and an appropriate ruling.

DATED at Buffalo, New York, this 31st day of May 2019.

PAUL J. MURPHY, Regional Director
National Labor Relations Board – Region 3
Niagara Center Building
130 S. Elmwood Avenue, Suite 630
Buffalo, New York 14202

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and

FRANK S. MANTELL, an Individual

Petition to Revoke Subpoena

Case 3-CB-225477

PETITION TO REVOKE SUBPOENA DUCE TECUM

Respondent, Laborers International Union of North America, Local Union No. 91 ("Laborers Local 91) by its attorneys, Lipsitz Green Scime Cambria LLP (Robert L. Boreanaz, Esq.) and pursuant to the National Labor Relations Board's ("Board") Rules and Regulations Section 102.31(b) hereby petitions to revoke a subpoena *duces tecum* served upon it as follows:

1. Robert L. Boreanaz, Esq., Lipsitz Green Scime Cambria LLP, attorneys for Respondent, hereby petitions to revoke the subpoena as described below.

2. On May 21, 2019, the Board issued a subpoena to Custodian of Records to produce certain documents as reflected in an attachment. (Attached hereto as Exhibit "A")

3. Given the holiday, the undersigned had limited opportunity to speak with opposing counsel regarding cases of withdrawals of certain items which are the subject of this Petition.

4. Respondent, Laborers Local 91, hereby petitions to revoke the subpoena on the following basis:

(a) the subpoena does not describe with sufficient particularity the evidence whose production is requested;

(b) the subpoena is vague and overbroad;

Exhibit 1

(c) the subpoena is unduly burdensome and would seriously disrupt the normal business operations of the Respondent to comply; and

(d) the subpoena seeks previously requested documents.

RELIEF REQUESTED

Respondent requests that the Board order that the subpoena be revoked in its entirety.

Respectfully submitted,

/s/ Robert L. Boreanaz

Robert L. Boreanaz, Esq.
Lipsitz Green Scime Cambria LLP
Attorneys for Respondent
Buffalo, NY 14202-3924
(716) 849-1333 Ext. 343
rboreanaz@lglaw.com

To: Paul J. Murphy, Regional Director
National Labor Relations Board
Region Three
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, NY 14202

Jessica L. Cacaccio
Counsel for General Counsel
130 S. Elmwood Ave, Suite 630
Buffalo, NY 14202-2465

Exhibit A

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records, Laborers' International Union of North, America, Local Union 91, 4500 Witmer Industrial Estates, Niagara Falls, NY 14305

As requested by Jessica L. Cacaccio, Counsel for General Counsel

whose address is 130 S Elmwood Ave Ste 630, Buffalo, NY 14202-2465
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge of the National Labor Relations Board

at Buffalo Hearing Room, 130 S Elmwood Ave, Suite 630

in the City of Buffalo, NY

on Tuesday, June 25, 2019 at 10:00 AM or any adjourned or rescheduled date to testify in Laborers' International Union of North America, Local Union No. 91 (Mader Construction Co., Inc.) 03-CB-225477
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-158670J

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Buffalo, NY

Dated: May 21, 2019

John Ring, Chairman

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

Laborers' International Union of North America, Local Union No. 91
(Mader Construction)
Case 03-CB-225477

Subpoena Duces Tecum

DEFINITIONS AND INSTRUCTIONS

1. As used herein, the term "document" means any written, recorded or graphic matter, or matter existing on computer software or hardware, whether previously erased or not, including but not limited to memoranda, notes, minutes, business records, telephone contacts, correspondence, memorializations of oral communications, telegrams, diaries, bookkeeping entries, receipts, work orders, contracts, financial statements, tax returns, checks, check stubs, reports, records, summaries, lists, charts, tables of organization, compilations, graphs, statements, affidavits, declarations, notebooks, handwritten notes, bargaining notes, applications, agreements, files, addenda, books, pamphlets, manuals, periodicals, articles, scripts, speeches, slide shows, Power Point presentations, appointment calendars, recordings of oral conversations, video recordings, voice mail messages and electronic mail.

2. "Respondent" refers to "Laborers' International Union of North America, Local Union No. 91" or any entity bearing similar designation, its officers, employees, agents, representatives, accountants, attorneys, trustees, successors and assigns, and the officers, employees, agents, representatives, accountants, attorneys, trustees, successors and assigns of any entity that it owns, controls or manages.

3. "Employer" refers to "Mader Construction" or any entity bearing similar designation, its officers, employees, agents, representatives, accountants, attorneys, trustees, predecessors, successors and assigns, and the officers, employees, agents, representatives, accountants, attorneys, trustees, successors and assigns of any entity that it owns, controls or manages.

4. "Any," "each," and "all" shall be read to be all inclusive and to require the production of each and every document responsive to the request in which such terms appear.

5. "And" and "or" and any other conjunctions or disjunctions used herein shall be read both conjunctively and disjunctively, so as to make the request inclusive rather than exclusive, and to require the enumeration of all information responsive to all or any part of each request in which any conjunction or disjunction appears.

6. Whenever used herein, the singular shall be deemed to include the plural, and vice versa; the present tense shall be deemed to include the past tense and vice versa; the masculine shall be deemed to include the feminine and vice versa.

7. The term "person" means any natural person, corporation, partnership, proprietorship, association, organization, trust, joint venture, or group of natural persons or other organizations.

8. The terms "copy" or "copies" shall refer to exact and complete copies of original documents.

9. Copies may be produced in lieu of originals, provided that such copies are exact and complete copies of original documents and that the original documents be made available at the time of production for the purposes of verifying the accuracy of such copies. Any copies of original documents which are different in any way from the original, whether by interlineation, receipt, stamp, notations, indication of copies sent or received, or otherwise, shall themselves be considered original documents and must be produced separately from the originals or copies of originals.

10. Documents subpoenaed shall include all documents in your physical possession, custody or control, your present or former supervisors, agents, attorneys, accountants, advisors, investigators, and any other persons and companies directly or indirectly employed by, or connected with you.

11. This request contemplates production of responsive documents in their entirety, without abbreviation or expurgation.

12. Electronically stored information and e-mails should be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

13. If any document responsive to any request herein was withheld from production of the asserted ground that it is privileged, identify and describe:

a. the author;
b. the recipient;
c. the date of the original document;
d. the subject matter of the document.

14. If any document responsive to any request herein was, but no longer is, in your possession, custody or control, identify the document (stating its date, author, subject, recipients and intended recipients); explain the circumstances by which the document ceased to be in your possession, custody or control, and identify (stating the person's name, employer title, business address and telephone number, and home address and telephone number) all persons known or believed to have the document or a copy thereof in their possession, custody or control.

15. If any document responsive to any request herein was destroyed, discarded, or otherwise disposed of for whatever reasons, identify the document (stating its date, author, addressee(s), receipts and intended recipients, title and subject matter); explain the circumstances surrounding the destruction, discarding or disposal of the documents, including the timing of the destruction, discharging or disposal of the document, and identify all persons known or believed to have the document or a copy thereof in their possession, custody or control.

16. This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

17. For the purpose of reducing delay and expense, an agent of the National Labor Relations Board will be available to meet with you, or your designated or legal representative, at a mutually agreed-upon time and place, prior to the return date of the subpoena, for the purpose of examining and/or copying the documents subpoenaed, and/or to enter into stipulations concerning the contents of the subpoenaed documents.

18. All the documents produced in connection with this subpoena shall be organized by the paragraph number to which the documents are responsive with labels referring to that subpoena paragraph to be affixed to each document or set of documents and the documents shall also be arranged chronologically within each separate packet, and shall not be commingled with documents that are responsive to other paragraphs.

Laborers' International Union of North America, Local Union No. 91
(Mader Construction)

Case 03-CB-225477

SUBPOENA ATTACHMENT FOR SECOND SUBPOENA

1. All documents that describe or relate to Respondent's Referral Rules in effect from January 1, 2018 to present.

2. Copies of Respondent's constitution and by-laws in effect from January 1, 2018 to present.

3. All internal Respondent communications regarding Frank Mantell from January 1, 2018 to present.

4. Documents, including but not limited to records, logs, and notes that describe, relate, or refer to journeymen notifying or reporting to Respondent about the work they have obtained from June 1, 2018 to present.

5. Documents that describe, relate, or refer to journeymen out of work sign-in sheets from June 1, 2018 to the present.

6. Documents that describe, relate, or refer to the out of work lists and referral lists for journeymen from June 1, 2018 to the present.

7. Documents that describe, relate, or refer to communications between Respondent and Respondent's International regarding Frank Mantell and/or Respondent's referral rules, including but not limited to the Uniform Constitution's "working at the calling" language and/or Rule 3C.

8. Documents that describe, relate, or refer to names of Respondent's members impacted by Rule 3C and/or Respondent's Uniform Constitution's "working at the calling" language, including but not limited to, when they were informed of the rule interpretation, how they were informed, and when they were removed from the list.

9. Documents that identify the "other members" referred to in Respondent's October 26, 2018 email to the NLRB that "are not eligible to sign the out of work list" and any out of work lists that they signed.

10. Documents, including but not limited to records, logs, and notes that identify any members' full or part-time employment that renders them ineligible to sign the out-of-work list from June 1, 2018 to the present.

11. Documents demonstrating the process or procedure Respondent follows when a member is considered ineligible to sign the out of work list or be referred for work under Rule 3C or the "working at the calling" language from the Uniform Constitution.

12. Documents that describe, relate, or refer to the minutes of Respondent's December 2015 Executive Board Meeting.

13. Documents that describe, relate, or refer to Respondent's Affirmative Defenses as listed in its December 6, 2018 Answer.

WITH RESPECT TO THE ABOVE ITEMS, THE BOARD AGENT OFFERS TO MEET WITH YOU AND/OR YOUR LEGAL REPRESENTATIVE AT YOUR PREMISES OR AT ANY OTHER MUTUALLY AGREEABLE LOCATION AT A MUTUALLY AGREEABLE TIME PRIOR TO THE RETURN DATE OF THIS SUBPOENA TO EXAMINE THE DOCUMENTS SUBPOENAED AND/OR TO ENTER INTO STIPULATIONS CONCERNING THE CONTENTS OF THE SUBPOENAED DOCUMENTS.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and

FRANK S. MANTELL, an Individual

CERTIFICATE OF SERVICE

Case 3-CB-225477

I, Angela F. Borkowksi, hereby certify that on May 29, 2019, I electronically filed the foregoing **PETITION TO REVOKE SUBPOENA** with the National Labor Relations Board and a copy was served upon:

Paul J. Murphy, Regional Director
National Labor Relations Board
Region Three
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, NY 14202

Jessica L. Cacaccio
Counsel for General Counsel
130 S. Elmwood Ave, Suite 630
Buffalo, NY 14202-2465

by depositing a true copy of same enclosed in a postage-paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

/s/Angela F. Borkowksi
Angela F. Borkowski

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

AFFIDAVIT OF SERVICE OF ORDER RESCHDEULING HEARING

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **February 5, 2019,** I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

Frank S. Mantell 6811 Kies Street Niagara Falls, NY 14304	FIRST CLASS MAIL
Robert L. Boreanaz , ESQ. Lipsitz Green Scime Cambria LLP 42 Delaware Avenue, Suite 120 Buffalo, NY 14202-3924	FIRST CLASS MAIL

February 5, 2019
Date

JULIO GONZALEZ, Designated Agent of NLRB
Name

/S/JULIO GONZALEZ
Signature

General Counsel's Exhibit 1(f)

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that, upon the request of the Charging Party, Frank S. Mantell, with good cause shown, the hearing in the above-entitled matter, which is currently scheduled to commence on April 2, 2019, at 10:00 a.m., is rescheduled to commence on June 25, 2019 at 10:00 a.m. and continue consecutive days thereafter until concluded.

DATED at Buffalo, New York this 5th day of February 2019.

Paul J. Murphy, Regional Director
National Labor Relations Board
Region Three
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202

General Counsel's Exhibit 1(h)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and

FRANK S. MANTELL, an Individual

ANSWER

Case 3-CB-225477

Respondent, Laborers' International Union of North America, Local Union No. 91, by its attorneys, Lipsitz Green Scime Cambria LLP, Robert L. Boreanaz, of counsel, answers the Complaint as follows:

1. Admits the allegations set forth in paragraph 1;

2. Admits the allegations set forth in paragraphs 2(a) and 2(b) and further denies knowledge and information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2(c);

3. Denies knowledge and information sufficient to form a belief as to the truth of the allegations set forth in paragraph 3;

4. Admits the allegations set forth in paragraph 4;

5. Admits the allegations set forth in paragraph 5;

6. Admits the allegations set forth in paragraphs 6(a) and 6(b) and further denies the allegations set forth in paragraphs 6(c), 6(d) and 6(e);

7. Denies the allegations set forth in paragraph 7; and

8. Denies the allegations set forth in paragraph 8.

3476821, 1, 053330.0033

General Counsel's Exhibit 1(g)

FIRST AFFIRMATIVE DEFENSE

The charges in the Complaint are barred by the Statute of Limitations.

SECOND AFFIRMATIVE DEFENSE

The Charging Party has engaged in misconduct.

THIRD AFFIRMATIVE DEFENSE

There has been inadequate investigation and compliance with the case handling manual.

FOURTH AFFIRMATIVE DEFENSE

The Complaint lacks the required clarity and description of the acts claimed to constitute unfair labor practices as required by Board rules.

WHEREFORE, Respondent respectfully requests that the Complaint be dismissed in its entirety.

Dated: December 6, 2018
Buffalo, New York

Respectfully submitted,

Robert L. Boreanaz, Esq.
Lipsitz Green Scime Cambria LLP
Attorneys for Respondent
42 Delaware Avenue, Suite 120
Buffalo, NY 14202-3924
(716) 849-1333 ext. 343
rboreanaz@lglaw.com

3476821, 1, 053330.0033

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and

FRANK S. MANTELL, an Individual

CERTIFICATE OF SERVICE

Case 3-CB-225477

I, Shirley J. Darin, hereby certify that on December 6, 2018, I electronically filed the foregoing Amended Answer with the National Labor Relations Board and a copy was served upon:

Frank S. Mantell
6811 Kies Street
Niagara Falls, NY 14304

Mader Construction Co., Inc.
970 Bullis Road
Elma, NY 14059-9638

by depositing a true copy of same enclosed in a postage-paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Shirley J. Darin

Shirley J. Darin

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and

FRANK S. MANTELL, an Individual

ANSWER

Case 3-CB-225477

Respondent, Laborers' International Union of North America, Local Union No. 91, by its attorneys, Lipsitz Green Scime Cambria LLP, Robert L. Boreanaz, of counsel, answers the Complaint as follows:

1. Admits the allegations set forth in paragraph 1;

2. Admits the allegations set forth in paragraphs 2(a) and 2(b) and further denies knowledge and information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2(c);

3. Denies knowledge and information sufficient to form a belief as to the truth of the allegations set forth in paragraph 3;

4. Admits the allegations set forth in paragraph 4;

5. Admits the allegations set forth in paragraph 5;

6. Admits the allegations set forth in paragraphs 6(a) and 6(b) and further denies the allegations set forth in paragraphs 6(c), 6(d) and 6(e);

7. Denies the allegations set forth in paragraph 7; and

8. Denies the allegations set forth in paragraph 8.

FIRST AFFIRMATIVE DEFENSE

The charges in the Complaint are barred by the Statute of Limitations.

SECOND AFFIRMATIVE DEFENSE

The Charging Party has engaged in misconduct.

THIRD AFFIRMATIVE DEFENSE

There has been inadequate investigation and compliance with the case handling manual.

FOURTH AFFIRMATIVE DEFENSE

The Complaint lacks the required clarity and description of the acts claimed to constitute unfair labor practices as required by Board rules.

WHEREFORE, Respondent respectfully requests that the Complaint be dismissed in its entirety.

Dated: December 6, 2018
Buffalo, New York

Respectfully submitted,

Robert L. Boreanaz, Esq.
Lipsitz Green Scime Cambria LLP
Attorneys for Respondent
42 Delaware Avenue, Suite 120
Buffalo, NY 14202-3924
(716) 849-1333 ext. 343
rboreanaz@lglaw.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and

FRANK S. MANTELL, an Individual

CERTIFICATE OF SERVICE

Case 3-CB-225477

I, Shirley J. Darin, hereby certify that on December 6, 2018, I electronically filed the foregoing Amended Answer with the National Labor Relations Board and a copy was served upon:

Frank S. Mantell
6811 Kies Street
Niagara Falls, NY 14304

Mader Construction Co., Inc.
970 Bullis Road
Elma, NY 14059-9638

by depositing a true copy of same enclosed in a postage-paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Shirley J. Darin

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

AFFIDAVIT OF SERVICE OF ORDER GRANTING EXTENSION OF TIME TO FILE ANSWER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on November 30, 2018, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

Frank S. Mantell 6811 Kies Street Niagara Falls, NY 14304	FIRST CLASS MAIL
Richard Paladino , Business Agent 4500 Witmer Rd Industrial Estates Niagara Falls, NY 14305-1342	FIRST CLASS MAIL
Robert L. Boreanaz , ESQ. Lipsitz Green Scime Cambria LLP 42 Delaware Avenue, Suite 120 Buffalo, NY 14202-3924	FIRST CLASS MAIL

November 30, 2018
Date

JULIO GONZALEZ, Designated Agent of NLRB
Name
/S/JULIO GONZALEZ
Signature

General Counsel's Exhibit 1(f)

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

ORDER GRANTING EXTENSION OF TIME TO FILE ANSWER

On November 29, Respondent's Counsel requested an extension of time to file its answer in this matter.

Having duly considered Respondent's request and the reasons advanced therefore,

IT IS HEREBY ORDERED that the time for filing of Respondent's answer is extended to December 6, 2018, only. No further extensions will be granted.

DATED: November 30, 2018.

PAUL J. MURPHY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

General Counsel's Exhibit 1(c)

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing (with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on November 15, 2018, I served the above-entitled document(s) by **certified or regular mail,** as noted below, upon the following persons, addressed to them at the following addresses:

Richard Paladino , Business Agent 4500 Witmer Rd Industrial Estates Niagara Falls, NY 14305-1342	**CERTIFIED MAIL** **7014-1820-0000-6579-6837** **RETURN RECEIPT REQUESTED**
Robert L. Boreanaz , ESQ. Lipsitz Green Scime Cambria LLP 42 Delaware Avenue, Suite 120 Buffalo, NY 14202-3924	**FIRST CLASS MAIL**
Frank S. Mantell 6811 Kies Street Niagara Falls, NY 14304	**CERTIFIED MAIL** **7014-1820-0000-6579-6844** **RETURN RECEIPT REQUESTED**
Mader Construction Co., Inc. 970 Bullis Rd Elma, NY 14059-9638	**FIRST CLASS MAIL**

November 15, 2018
Date

JULIO GONZALEZ, Designated Agent of NLRB
Name
/S/JULIO GONZALEZ
Signature

General Counsel's Exhibit JCd)

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

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

and **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Frank S. Mantell, an Individual (Mantell). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Laborers' International Union of North America, Local Union No. 91 (Respondent) has violated the Act as described below.

1.

The charge in this proceeding was filed by Mantell on August 13, 2018, and a copy was served on Respondent by U.S. mail on the same date.

2.

(a) At all material times, Mader Construction Co., Inc. (the Employer), has been a corporation with an office and place of business in Elma, New York (the Employer's facility), and has been a general contractor in the construction industry doing commercial construction.

(b) At all material times, Council of Utility Contractors, Inc.; The Independent Builders of Niagara County; Associated General Contractors of America, New York State

r

General Counsel's Exhibit 1(c)

Chapter, Inc.; and The Building Industry Employer's Association of Niagara County New York, Inc., collectively referred to as the Associations, have been organizations composed of various employers, including the Employer, 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.

(c) Annually, the employer-members of each of the Associations, in the course of their business operations described above in paragraph 2(a), collectively, purchase and receive goods valued in excess of $50,000 directly from points outside the States wherein the employer-members are located.

3.

At all material times, the Employer and the employer-members of the Associations have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4.

At all material times, Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

5.

At all material times, Richard Palladino has held the position of Respondent's Business Manager and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

6.

(a) 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 non-exclusive source of referrals of employees for employment with employer-members of each of the Associations.

(b) On February 7, 2017, the National Labor Relations Board issued a decision finding that Respondent violated Section 8(b)(1)(A) of the Act by removing employee-member Mantell from Respondent's out-of work referral list from October 8, 2015 through November 19, 2015 due to his protected concerted activity.

(c) Since about July 27, 2018, Respondent, by operation of its non-exclusive hiring hall, has refused to place Mantell on its out-of-work referral list.

(d) Respondent engaged in the conduct described above in paragraph 6(c) because Mantell engaged in the protected concerted activity described in the Board decision referred to above in paragraph 6(b).

(e) Respondent engaged in the conduct described above in paragraph 6(c) because Mantell engaged in protected conduct by utilizing the Board's processes by filing Board charges.

7.

By the conduct described above in paragraph 6(c), (d), and (e), Respondent has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

8.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 6 and 7, the General Counsel seeks an order requiring Respondent, inter alia, to preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in

electronic form, necessary to analyze the amount of backpay due under the terms of such Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before November 29, 2018, or postmarked on or before November 28, 2018.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a

pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on April 2, 2019, at 10:00 a.m., in the Hearing Room at the Niagara Center Building, 130 South Elmwood Avenue, Suite 630, Buffalo, New York, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED: November 15, 2018.

PAUL J. MURPHY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Attachments

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABORERS LOCAL 91 (MADER CONSTRUCTION) Charged Party and **FRANK S. MANTELL** Charging Party	**Case 03-CB-225477**

AFFIDAVIT OF SERVICE OF CHARGE AGAINST LABOR ORGANIZATION

I, the undersigned employee of the National Labor Relations Board, state under oath that on August 13, 2018, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Frank S. Mantell
6811 Kies Street
Niagara Falls, NY 14304

Dick Paladino, Business Agent
4500 Witmer Rd Industrial Estate
Niagara Falls, NY 14305-1342

Laborers Local 91
4500 Witmer Rd Industrial Estates
Niagara Falls, NY 14305-1342

August 13,\, 2018

Date

Viola Mathis, Designated Agent of NLRB
Name

/s/ Viola Mathis
Signature

General Counsel's Exhibit 1(b)

INTERNET
FORM NLRB-508
(2-08)

Case 1:20-cv-00199, Document 47, 03/05/2020, 2794215, Page267 of 463

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

FORM EXEMPT UNDER 44 U.S.C 3512

DO NOT WRITE IN THIS SPACE

Case	Date Filed
03-CB-225477	8/13/18

LIUNA 0262

INSTRUCTIONS: File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name
Laborers Local 91

b. Union Representative to contact
Richard Palladino, Business Agent

c. Address *(Street, city, state, and ZIP code)*
4500 Witmer Industrial Estate
Niagara Falls, New York 14305

d. Tel. No.
716 297-6441

e. Cell No.

f. Fax No.

g. e-Mail

h. The above-named organization(s) or its agents has *(have)* engaged in and is *(are)* engaging in unfair labor practices within the meaning of section 8(b), subsection(s) *(list subsections)* 1(A) ____ of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Since on or about July 27, 2018, and continuously thereafter, it, a labor organization, by its officers, agents, and representatives, restrained and coerced and is restraining and coercing Frank Mantell, an employee of Mader Construction, in the exercise of (his) (their) rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, which rights are guaranteed in Section 7 of the said Act by removing him from the union's referral list.

3. Name of Employer
Mader Construction

4a. Tel. No.
716 655-3400

b. Cell No.

c. Fax No.

d. e-Mail

5. Location of plant involved *(street, city, state and ZIP code)*
970 Bullis Road Elma, New York 14059

6. Employer representative to contact

7. Type of establishment *(factory, mine, wholesaler, etc.)*
construction

8. Identify principal product or service

9. Number of workers employed

10. Full name of party filing charge
Frank S. Mantell

11a. Tel. No.
716 471-6824

b. Cell No.

c. Fax No.

d. e-Mail

11. Address of party filing charge *(street, city, state and ZIP code.)*
6811 Kies Street Niagara Falls, New York 14304

12. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By [signature] *(signature of representative or person making charge)* Frank S. Mantell *(Print/type name and title or office, if any)*

Address 6811 Kies St, Niagara Falls, NY 14304 *(date)* 8/10/18

Tel. No.

Cell No. 716 471-6824

Fax No.

e-Mail nffirell91@yahoo.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

General Counsel's Exhibit 1(a)

LOCAL UNION NO. 91, LIUNA, AMENDED JOB REFERRAL RULES

In order for the Laborers' International Union of North America (LIUNA) and its subordinate local unions to maintain and administer a processing system for referral of applicants to employment in a fair and equitable manner, and to establish records and procedures which will be adequate to disclose fully the basis on which each referral is made, the following amended rules have been promulgated and shall be adopted and implemented by each LIUNA Local Union.

1. Non-Discrimination in Job Referrals: Referrals to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, race, gender, national origin, sexual orientation, disability, religion, or lawful union-related activity.

2. Effect on Hiring Hall Rules: All referrals by a Local Union to jobs within its jurisdiction shall be made in accordance with these rules except to the extent that any rule contained herein conflicts with either provincial law or with a term of collective bargaining agreement or in accordance with a variance granted under § 8 below. Any Local Union that concludes that these rules conflict with provincial law or the term of a collective bargaining agreement shall apply to the GEB Attorney, furnishing such information as he shall determine. The GEB Attorney shall advise the Local Union in writing whether such a conflict exists. In cases where a term of a collective bargaining agreement conflicts with these rules, the Local Union or district council shall use its best efforts to modify that term in any successor agreement in order to fully conform to these rules. All newly negotiated agreements should include these rules and, where applicable, the Local Union or district council shall use its best efforts to include an exclusive hiring hall provision in all successor or newly negotiated collective bargaining agreements.

3. Registration of Availability for Referral:

A. An applicant seeking referral to a job must file with Local 91 a signed and dated referral form providing name, telephone number and social security number, and stating any skills the applicant possesses, the jobs the applicant is able to perform, including any relevant licenses or certifications or a designation as elderly and/or disabled, and the geographical locations in which the applicant is willing to work. Blank referral forms will be available at Local 91. Local 91 will compile an out-of-work list, consisting of the applicants who have registered their availability for referral. The Local Union may confirm any prior employment, licenses, or certifications listed by an applicant. Local 91 has five business days from the time a member places his name on the out-of-work list to challenge an applicant's representations concerning his prior employment, licenses, or certifications. If Local 91 makes a timely challenge, it must promptly notify the applicant in writing, who shall have five business days from the receipt of this notice in which to respond and to submit any relevant information. Any applicant who remains aggrieved by a final decision of Local 91 may file a protest with the Independent Hearing Officer, who shall finally resolve all such disputes in accordance with procedures that he shall establish.

GC Ex. 2

Exh. No: 2 Received X Rejected ____
Case No.: Laborers Int'l Union N. America
Case Name: 03-CB-225477
No. Pgs: 7 Date: 4/26/11 Rep.: JB

B. Apprentices shall be referred under a separate out-of-work list, and shall be listed according to their apprenticeship year.

C. Only applicants who are not currently employed at the trade may register their availability for referral. 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.

D. Applicants shall be removed from the out-of-work list upon receiving a job referral, subject to the provisions of §4C on short-term referrals. An applicant who is laid off or discharged from a job must again register his or her availability in order to be included on the out-of-work list.

E. Once an applicant has registered his or her availability for referral, by filing a signed referral form with the Local Union, the applicant may afterward register his or her availability by telephone to the Local Union.

F. An applicant's registration of availability for referral shall be in effect for ninety (90) days. An applicant must again register his or her availability before the expiration of that period in order to retain his or her position on the out-of-work list.

4. Referral Procedure:

A. Subject to the following variances and exceptions, Applicants on the out-of-work list shall be referred to jobs in the order in which they have registered their availability for referral, with the first registered applicant referred first, provided that the applicant has the qualifications requested by the employer, except that:

1. The first applicant referred to any job shall be a Shop Steward who shall be selected by the Business Manager without regard to position on the out-of-work list.

2. Applicants who require additional hours of employment in order to qualify for Federal, State, or Union Trust Fund benefit eligibility shall be referred prior to applicants who already qualify for such benefits, with the applicants who require such additional hours being referred in order of their position on the out-of-work list.

3. Requests for foremen shall be referred at the discretion of the Business Manager from the list of certified foremen without regard to position on the out-of-work list.

4. In the event Local 91 is manning a picket line at the time it receives a request for a worker, the applicant who is on the picket line who is highest on the list and has the qualifications requested by the employer shall be referred to the job, subject to the provisions of § §4(A)(1), (2), and (3), above. Local 91shall provide notice of all picket lines both through an announcement on radio station WJJL, 1440 AM, between the hours of 6:00 a.m. and 9:00 a.m. and through notices posted on both the outside door of the offices of Local 91 and on the inside bulletin board in the offices of Local 91.

Comments

In the event Local 91 is manning a picket line at the time it receives a request for a worker, the local union must record the attendance of every applicant at the picket line and the outcome of each attempted referral.

B. Requests by an employer for specific applicants employed by the employer within the previous year, applicants who have been recently laid off by the employer, applicants who have worked for signatory contractors for not less than one year from the time of the request for hiring, and applicants ho have lived in the geographic area covered by the collective bargaining agreement for a period of not less than two years, shall be fulfilled, as required by applicable collective bargaining agreements.

C. A referral to a job that lasts 16 hours or less will not be counted as a referral, and the applicant will return to his or her position on the out-of-work list prior to being sent to the job. In addition, a referral to a job at the convention center will not be counted as referral, and the applicant will return to his or her position on the out-of-work list prior to being sent to the job at the convention center. An applicant who is referred to a job which, lasts five (5) working days or less either because (1) the job is terminated or (2) the applicant is laid off or discharged will return to his or her position on the out-of-work list prior to receiving the referral. However, after receiving a job referral immediately following such a short-term referral, regardless of its length, that individual must again register in order to be included on the out-of-work list. The short term referral provisions herein are 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.

D. To notify an applicant of a job referral, Local 91 shall call the applicant at the telephone number on the file. Local 91 shall record the date and time of the call, the person making the call, the name of the employer, the location of the job, the

start date of the job, and the results of the call, including whether the call was answered, by whom and what response, if any, was made.

E. In the event an employer makes a request for employees to be filled on the same day as the request, Local 91 will go down the out-of-work list making one telephone call to each applicant who has all of the qualification requested by the employer until the job is filled. The failure to accept such a short-notice referral, for whatever reason, shall not be treated as a refusal or as being unavailable under the provisions of § 4(F).

Comments
In these emergency situations, the urgent nature of the request must be documented in detail.

F. Any applicant who refused or is unavailable for two consecutive referrals shall be moved to the bottom of the out-of-work list. However, the refusal to take a job at the convention center will not be counted as a refusal. An applicant must be unavailable on two separate days before he/she can be moved to the bottom of the out-of-work list. An applicant will be considered unavailable if he or she cannot be reached after three calls have been placed to the telephone number provided by the applicant, unless the applicant has given Local 91 notice in writing of unavailability for a period not to exceed thirty (30) days. The three calls must be separated by intervals of no less than thirty (30) minutes.

G. When Local 91 determines that the applicant who is first on the out-of-work list cannot be referred because of refusal, unavailability, or lack of required skills, Local 91 shall then refer the next applicant on the out-of-work list who is willing, available, and has the required skills.

H. An applicant shall not be referred to an employer if the applicant was previously discharged for cause by the same employer. Applicants who are twice lawfully rejected by an employer for lack of skills, after referral by Local 91, shall not be eligible for referral to a job requiring the same skills without first providing Local 91 with references from two previous employers, showing the applicant has demonstrated the skills required.

5. Dissemination of the Referral Rules: All rules and referral policies must be in writing. These Guidelines and all local union referral rules and policies must be posted conspicuously in the office and hiring hall of each local union, where they are available for review at all times in which the local union is open. Additional copies of these Guidelines and all local union referral rules shall be made available to members upon request, subject to the payment of reasonable copying costs. New members shall receive a copy of the job referral rules upon admission to membership.

6. Job Referral Information: Local 91 shall maintain accurate and current records of all job referrals. The records shall be preserved for a period of three (3) years from the making of each record. The records shall include the following information:

   A. All registration by applicants of their availability for referral, including the date of each applicant's registration;

   B. A current out-of-work list, including all applicants whose registrations of availability for referral are then in effect, and the date of each applicant's registration, organized according to seniority;

   C. All requests from employers for workers, including the date of each request, the location of the job site, the length of the job, if known, and any request by the employer for applicants with special skills, licenses, or certifications, or an applicant employed by the employer pursuant to 4(D), above.

Comments
The reference to 4(D) above should be 4(B).

   D. All instances where a job referral is not made because an applicant (1) refuses the referral, (2) is unavailable, or (3) lacks the required skills, including (where applicable) the date and time of the call(s), the person making the call(s), the name of the employer, the location of the job site, the start date of the job, the basis for not making the referral, the results of the call, including whether the call was answered and by whom, and what response, if any, was made,

   E. All job referrals made, including the applicant referred, the date on which the applicant registered his or her availability for employment, the date of the referral, the employer, the location of the job site, the date the applicant was hired, and the date any employment terminated, and

   F. All referral attempts, including the date and time of the call(s), the name of the person making the call(s), and the outcome of the call.

7. Access to Job Referral Information:

   A. Any applicant can inspect or copy any record containing the job referral information described in § 6. An appointment for inspection shall be scheduled for within five (5) days of request. Copies of 500 pages or less shall be provided within ten (10) days of request. Copies of more than 500 pages shall be provided within (30) days of a request. Local 91 may charge $.50 per page to copy the first twenty (20) pages, and $.25 per page thereafter.

B. Lists containing the information described in § 6(A) and (B) shall be conspicuously posted, or otherwise immediately available for inspection, at the offices of Local 91 on a weekly basis, so that the previous week is posted or immediately available by the close of business on the following Monday. The information shall remain posted or immediately available for at least two weeks.

8. Application for a variance from a provision(s) of these Uniform Job Referral Rules may be made in writing to the General Executive Board Attorney. The General Executive Board Attorney may grant such an application provided he determines that the variance is consistent with the LIUNA Ethical Practices Code, with applicable law, and is intended to further a legitimate purpose. Any such variance shall be effective for a period of one year and shall be subject to further application to the General Executive Board Attorney in order to continue beyond one year. Further, a variance shall be subject to any condition imposed by the General Executive Board Attorney.

9. Any complaints or concerns regarding alleged violations of the Code of Ethics and/or Uniform Job Referral Rules to discriminate, punish, retaliate or reward members for their Union political or election activity should be promptly addressed to Inspector General W. Douglas Gow, (202) 942-2360.

Office of the GEB Attorney
Laborers' International Union of North America

Robert D. Luskin
GEB Attorney

2550 M Street, N.W.
Washington D.C. 20037-1350
Phone: (202) 457-6190
Fax: (202) 457-6315

June 10, 2004

Michael J. Vollbrecht
Gorlick, Kravitz & Listhaus, P.C.
17 State Street, 4th Floor
New York, NY 10004-1501

Dear Mr. Vollbrecht:

We are in receipt of the proposed hiring hall rules you submitted on behalf of Laborers' Local Union No. 91. After careful review, we have concluded that these rules, as illuminated in the attached document, conform with the basic principles of fair referral set out in the Hiring Hall Guidelines and may be implemented immediately. This response should be prominently posted with all of Local 91's hiring hall rules, so members will understand all of the rules applicable in their local.

If, in light of the decisions or suggestions contained herein, Local 91 wishes to make further modifications to their job referral rules, we will welcome the request. As always, please feel free to call with any questions.

Yours sincerely,

Robert D. Luskin

cc: Armand Sabitoni, General Secretary-Treasurer
and New England Regional Manager
Michael S. Bearse, General Counsel
Stephanie McCarthy, Associate General Counsel
W. Douglas Gow, Inspector General

GC Ex 2

Exh. No: GC3 Received ✓ Rejected ____
Case No.: 03-CB-225477
Case Name: Laborers Local Union
No. Pgs: 2 Date: 6/25/15 Rep.: JB

MINUTES OF MEETING (OCT/2015)

The Executive Board Meetings was held on Oct 8, 2015 and our regular monthly Meeting was held on Oct. 11, 2015 at Laborer's Local # 91 Union Hall, 4500 Witmer Ind. Est., NF, NY 14305.

The meeting was called to order by Pres. Schiavi.

All Officers, E-Board Members and Auditors were present for the Oct/2015 meeting.

There were 70 members present at the Oct/2015 meeting.

PREVIOUS MINUTES

The minutes from the previous meeting were read and ordered accepted as read on a motion by Vinny Mameli, 2nd by Joe Sardina and carried.

COMMUNICATIONS AND BILLS

All Communication and Bills for Oct/2015 were read and ordered accepted as read on a motion by Joe Gambino 2nd by Nick Perry and carried..

EXECUTIVE BOARD REPORT

The Executive Board Report for Oct/2015 was read and ordered accepted as read on motion by John Wynn, 2nd by Paul Tiberi and carried.
The verdict for Frank Mantell was read to the membership for charges filed against him by Bs. Mgr. Palladino. Per constitution, the membership voted and approved the fine and suspension of Frank Mantell. Members Pete Reese, Ronny Mantell, Duane Korpolinski and Rich Martinez voted no against the fine and suspension.

STEWARDS REPORTS

The Stewards Reports for Oct/2015 were read and ordered accepted as read on motion by Frank Barile, 2nd by Bob Horne and carried.

DODGE REPORTS

The Dodge Reports for Oct/2015 were read and ordered accepted as read on motion by Kevin Haseley, 2nd by James Caiazza and carried.

Exh. No: GC4 Received ✓ Rejected ____
Case No.: 03-CB-225477
Case Name: Laborers Int'l Union
No. Pgs: 3 Date: 6/26/19 Rep.: JB

FINANCIAL REPORT

The Financial Reports for Sept/2015 were read and ordered accepted as read on motions by Angelo Congi, 2nd by Scott Monkelbaan and carried.

BUSINESS MANAGERS REPORT(Oct/2015)

Dick spoke on the following:

1 .The doors are always open to anyone who has questions about how this union is ran. They always have and always will be. We are audited every year by State, Federal and Union entities and the outcome has always shown transparency and honesty.

2. We are backing Incumbent Mayor Paul Dyster as well as Bob Anderson for Niagara Falls City Council. We are asking the membership to get involved and help us get these men elected. Make sure you're registered to vote. Please get your family and friends out to the polls.

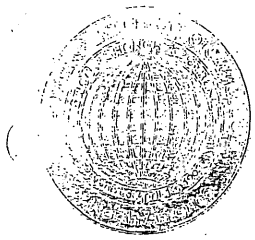
3. Work is going strong. The apprenticeship program is going strong and is truly the future for this union, our retiree's and future retiree's to come.

Carl Schul made a motion at accept the Business Mgr's. Report, 2nd by Dan Pilletiere and carried.

Seeing that there was no further business, Brett Blanchard made a motion to adjourn the Oct/ 2015 Meeting, 2nd by John Jarezewski and carried

Respectfully submitted

William M. Grace
Recording Secretary



LIUNA!

November 14, 2017

TERRY O'SULLIVAN
General President

ARMAND E. SABITONI
General Secretary-Treasurer

Vice Presidents:

TERRENCE M. HEALY
RAYMOND M. POCINO
JOSEPH S. MANCINELLI
ROCCO DAVIS
Special Assistant to the General President
VINCENT R. MASINO
DENNIS L. MARTIRE
ROBERT E. RICHARDSON
RALPH E. COLE
JOHN F. PENN
OSCAR DE LA TORRE
SERGIO RASCON
ROBERT F. ABBOTT
SAMUEL STATEN, JR.
PAUL V. HOGROGIAN

THEODORE T. GREEN
General Counsel

HEADQUARTERS:
905 16th Street, NW
Washington, DC
20006-1765
202-737-8320
Fax: 202-737-2754
www.liuna.org

Mr. Richard Palladino
Business Manager
Local Union 91
4500 Witmer Ind. Estates
Niagara Falls, NY 14305

Mr. Frank Mantell
6811 Kies Street
Niagara Falls, NY 14304

Re: Referral Rules
Local Union 91, Niagara Falls, New York

Dear Sirs and Brothers:

Through different channels, you have both inquired about the interpretation of certain language in the Local Union 91 referral rules. It is our understanding that the language was adopted years ago and there is now uncertainty about how the language should be applied. Ordinarily, the interpretation of a Local Union's referral rules is within the Local Union's discretion. However, under the circumstances, it makes sense for me to advise you of the Local Union's experience with such language.

The language at issue is found in several provisions of the rules relating to short-term referrals. One such provision addresses applicants finding their own work resulting in employment lasting five days or more. (Section 3C.) Another deals with a failure to advise the Local of such employment. (Same.) A third addresses multiple short-term referrals or referrals lasting more than five days. And a fourth addresses actions by an applicant to end a referral prematurely to avoid the five-day rule (Section 4C.)

All of these provisions result in the same consequence: "the applicant will be removed from the out-of-work list." The question posed is when can such an applicant be restored to the bottom of the list? In the case of the application of the third provision (dealing with multiple short referrals and referrals longer than five days) the answer is spelled out in the rules: "that individual must again register in order to be included on the out-of-work list."

Normally, the same result should apply wherever the language "removed from the out-of-work list" is found. Accordingly, applicants who are removed from the list for any of the cited reasons should be restored to the bottom of the list upon registering again.

Exh. No: GC5 Received X Rejected ____
Case No.: 03-CB- 225477
Case Name: Laborers Int'l Union
No. Pgs: 3 Date: 6/25/19 Rep.: JB

I trust this assists you in answering the questions you have posed. However, Local Union 91 is empowered to interpret and amend its own rules consistent with the LIUNA Code of Best Practices and applicable law.

With kind regards, I am

Fraternally yours,

Terry O'Sullivan

TERRY O'SULLIVAN
General President

/mop

cc: New England Regional Office

Unemployment | Click to select a tab. | 150% | Statement

SSN: [redacted] | Alert: | No Rehire: | Card Number: 0003336085 | Archived:

Name(First, MI, Last): FRANK | MANTELL | Card Lost

Address: 6811 KIES ST | Application Date:

City, St/Prov, Postal/Zip: NIAGARA FALLS | NY | 14304 | Application Number: [None]

County, Country: NIAGARA | [None] | Non Member:

Phone: 716-471-6824 | Address Changed | Membership Type: LABORERS

Misc Ph. and Mobile Ph.: | 716-471-6824 | Status: ACTIVE

Birth Date: 4/14/1968 | Permit SMS | Local: 0091

NO PHOTO

Special Dispensation

Death Benefit Contributor

Dates | Tracking/Balances Due | Payment History | Invoice History | Paid Thru Dates | Comments | Skills | Contractor Hours | Voter History | Referral Calls | Referral History | Health & Welfare | Contractor Ban List | Referral List | Phone Calls | Dues Chec

Referral History

	List	Pos at De	Comments
	JO...	30	MANUALLY DELETED
	JO...	2	FRANK WAS ON 7/22/2018 SAID HE SHOULD NOT HEQUALIFIED FOR 6-18 NO 90 DAY HOURS SHIFT 7DAYS 2 MANTOPAIS ONE COULD SAY YES OR NO 7/26/2018 BECAUSE FRANK NOT WORKING AT THE TRADE WAS TAKEN
	JO...	3	CHECKED IN ON 3/8/2018 BY MARIOCHECKED IN ON 6/8/2018 BY MARIODISPATCHED ON 6/18/2018
	JO...	1	CHECKED IN ON 3/8/2017 BY DLRCHECKED IN ON 6/9/2017 BY MARIODISPATCHED ON 6/20/2017
	JO...	42	DID NOT SIGN 90 DAYMANUALLY DELETED
	JO...	11	MANUALLY DELETED
	JO...	21	REMOVE FOR 6 MONTHSMANUALLY DELETED
	JO...	6	CHECKED IN ON 12/14/2015 BY MARIOCHECKED IN ON 3/14/2016 BY DLRCHECKED IN ON 6/13/2016 BY MARIOMANUALLY DELETED

Dispatches

GC 6

Exh. No: CC 6 Received ✓ Rejected ____
Case No.: 63-CB-225477
Case Name: Laborers Int'l Union
No. Pgs: 4 Date: 6/25/18 Rep.: SB

Unemployment | Click to select a tab... | 150% | Statement

SSN: [redacted] | Alert: | No Rehire: ○ | Card Number: 0003336085 | Archived: ○

Name(First, MI, Last): FRANK | MANTELL | ☐ Card Lost

Address: 6811 KIES ST | Application Date:

City, St/Prov, Postal/Zip: NIAGARA FALLS | NY | 14304 | Application Number: [None]

County, Country: NIAGARA | [None] | Non Member: ○

Phone: 716-471-6824 | ☐ Address Changed | Membership Type: LABORERS

Misc Ph. and Mobile Ph.: | 716-471-6824 | Status: ACTIVE

Birth Date: 4/14/1968 | ☑ Permit SMS | Local: 0091

NO PHOTO

☐ Special Dispensation

☐ Death Benefit Contributor

Dates | Tracking/Balances Due | Payment History | Invoice History | Paid Thru Dates | Comments | Skills | Contractor Hours | Voter History | Referral Calls | Referral History | Health & Welfare | Contractor Ban List | Referral List | Phone Calls | Dues Chec...

Referral History

	Deleted By	Deletion Date/Time	Inserted By	Insertion Date/Time
	MARIO	7/5/2018 8:51 AM	MARIO	7/5/2018 8:51 AM
FOR HE COULD SAY YES OR NO 07/05/2018 DEC ALISE FRANK NOT WORKING SAY THE TRADE WAS TAKEN OFF THE LIST AND HE WOULD REFUSE MANUALLY DELETED	MARIO	7/5/2018 8:45 AM	MARIO	1/17/2018 2:43 PM
	MARIO	6/18/2018 7:49 AM	DLR	1/17/2018 2:43 PM
	MARIO	6/20/2017 7:40 AM	MARIO	10/20/2016 7:17 PM
	MARIO	2/21/2017 3:19 PM	MARIO	12/9/2015 8:25 AM
	MARIO	12/8/2016 8:09 AM	NES	9/13/2016 11:35 AM
	MARIO	10/14/2016 8:14 AM	MARIO	9/13/2016 11:29 AM
UALLY DELETED	MARIO	9/13/2016 11:16 AM	DLR	11/30/2015 2:17 PM

Dispatches

Unemployment | Click to select a tab... | 150% | Statement

SSN: [redacted] | Alert: | No Rehire: ○ | Card Number: 0003336085 | Archived: ○

Name(First, MI, Last): FRANK | MANTELL | Card Lost

Dates | Tracking/Balances Due | Payment History | Invoice History | Paid Thru Dates | Comments | Skills | Contractor Hours | Voter History | Referral Calls | Referral History | Health & Welfare | Contractor Ban List | Referral List | Phone Calls | Dues Chec

Referral History

	List	Position at Delete	Comments	Deleted By	Deletion Date/Time	Inserted By	Insertion Date/Time	1st Reg Date
	JOURNEYMEN	30	MANUALLY DELETED	MARIO	7/5/2018 8:51 AM	MARIO	7/5/2018 8:51 AM	7/5/2018
▶	JOURNEYMEN	2	FRANK WAS IN 7/2/2018 AND HE SHOULD HAVE BEEN CALLED FOR CHSINO JOB 12 HOUR SHI	MARIO	7/2/2018 8:45 AM	MARIO	1/17/2019 2:43 PM	7/17/2018
	JOURNEYMEN	3	CHECKED IN ON 3/8/2018 BY MARIOCHECKED IN ON 6/8/2018 BY MARIODISPATCHED ON 6/...	MARIO	6/18/2018 7:49 AM	DLR	1/17/2019 2:43 PM	1/17/2019
	JOURNEYMEN	1	CHECKED IN ON 3/8/2017 BY DLRCHECKED IN ON 6/9/2017 BY MARIODISPATCHED ON 6/20...	MARIO	6/20/2017 7:40 AM	MARIO	10/20/2016 7:17 PM	10/20/2016
	JOURNEYMEN	42	DID NOT SIGN 90 DAYMANUALLY DELETED	MARIO	2/21/2017 3:19 PM	MARIO	12/8/2016 8:25 AM	12/8/2016
	JOURNEYMEN	11	MANUALLY DELETED	MARIO	12/8/2016 8:09 AM	NES	9/13/2016 11:35 AM	9/13/2016
	JOURNEYMEN	21	REMOVE FOR 6 MONTHSMANUALLY DELETED	MARIO	10/14/2016 8:14 AM	MARIO	9/13/2016 11:29 AM	9/13/2016
	JOURNEYMEN	6	CHECKED IN ON 12/14/2015 BY MARIOCHECKED IN ON 3/14/2016 BY DLRCHECKED IN ON 6/...	MARIO	9/13/2016 11:16 AM	DLR	11/30/2015 2:17 PM	11/30/2015
	JOURNEYMEN	20	MANUALLY DELETED -- REASON GIVEN: SIGNED LIST ON 11/30 10 AM	DLR	11/30/2015 2:26 PM	MARIO	11/5/2015 9:28 AM	11/5/2015
	JOURNEYMEN	13	MANUALLY DELETED	MARIO	11/5/2015 9:27 AM	MARIO	10/23/2015 8:42 AM	10/23/2015
	JOURNEYMEN	13	MANUALLY DELETED -- REASON GIVEN: SUSPENDED FOR 24 MONTHS	DLR	10/14/2015 2:40 PM	DLR	9/22/2015 3:22 PM	9/22/2015
	JOURNEYMEN	3	CHECKED IN ON 12/8/2014 BY MARIOCHECKED IN ON 3/9/2015 BY DLRDISPATCHED ON 6/8...	MARIO	6/8/2015 8:40 AM	NES	10/24/2014 2:50 PM	10/24/2014
	JOURNEYMEN	15	DISPATCHED ON 10/28/2014	NES	10/28/2014 4:12 PM	NES	10/24/2014 3:12 PM	10/24/2014
	JOURNEYMEN	6	DISPATCHED ON 5/29/2014	CAS	5/29/2014 7:34 AM	CAS	5/23/2014 1:29 PM	5/23/2014
	JOURNEYMEN	4	DISPATCHED ON 5/20/2014	CAS	5/20/2014 7:58 AM	CAS	5/16/2014 3:44 PM	
	JOURNEYMEN	8	DISPATCHED ON 5/9/2014	CAS	5/9/2014 1:08 PM	CAS	5/2/2014 12:30 PM	5/2/2014
	JOURNEYMEN	16	DISPATCHED ON 4/11/2014	CAS	4/11/2014 1:07 PM	CAS	3/27/2014 2:30 PM	3/27/2014
	JOURNEYMEN	35	MANUALLY DELETED	CAS	3/10/2014 2:25 PM	CAS	2/24/2014 9:14 AM	2/24/2014

Dispatches

Dispatch Date	Contractor Name	Days/Hours

LABORERS INTERNATIONAL UNION OF NORTH AMERICA

Rollover Report

LOCAL 91

For Referral List JOURNEYMEN

Position	Name	Date & Time Inserted	Card Num.	S	Signature
16	CHARLES BURRELL	6/12/2018 3:16 PM	0004914068	A	
25	WALTER W. CENTNER IV	6/28/2018 7:57 AM	0003844819	A	
21	CARMEN CRAPSI	6/26/2018 7:08 AM	0004920929	N	
14	DAMON C. CROISDALE	6/8/2018 7:11 AM	0003773470	A	
19	JAMIE C. DRABCZYK	6/21/2018 8:24 AM	0003148589	A	
27	MARVIN D. DYE	7/2/2018 8:07 AM	0003475311	A	
24	GLENN F. FARISS	6/27/2018 7:46 AM	0003560797	A	
10	ROGER HEDLUND JR	6/8/2018 6:59 AM	0003680239	A	
9	TIMOTHY HERTEL	6/8/2018 6:37 AM	0003523461	A	
6	VINCENT MAMELI	3/8/2018 10:32 AM	0003554131	A	
15	RONALD J. MANTELL	6/8/2018 7:11 AM	0003121593	A	
3	PETER J. MORREALE	3/5/2018 2:59 PM	0002813805	A	
2	EDMUND PASSERO	1/19/2018 10:43 AM	0004118769	A	
11	ADAM K. PATTERSON	6/8/2018 7:08 AM	0003329441	A	
20	MARK J. PERRY	6/26/2018 7:01 AM	0003148568	A	
4	NICHOLAS J. PERRY	3/7/2018 3:00 PM	0002492796	A	
26	MICHAEL PITARRESI	6/28/2018 7:57 AM	0003420139	A	
22	LOUIS ROTELLA	6/26/2018 7:09 AM	0003149240	A	
13	ROBERT J. RUSSO	6/8/2018 7:10 AM	0003790022	A	
28	JOSEPH D. SARDINA	7/2/2018 8:07 AM	0003149243	A	
8	BRUCE SPIRA	6/6/2018 8:52 AM	0002585694	A	
7	BRUCE G. STENZEL	3/12/2018 7:21 AM	0001774378	A	
23	PAUL F. TIBERI	6/26/2018 9:31 AM	0003483426	A	
1	CHRISTOPHER VAN EVERY	3/8/2017 12:32 PM	0002892847	A	
18	ANTHONY A. VENTURA JR	6/20/2018 9:18 AM	0002524590	A	
5	KARL WALKER	3/8/2018 10:16 AM	0003824576	A	
17	JOHN W. WINN	6/14/2018 2:58 PM	0004572876	A	
12	GLENN P. ZIENTARA	6/8/2018 7:09 AM	0002949653	A	

GC 7

Exh. No: GC7 Received X Rejected ____
Case No.: 05-CB-225477
Case Name: Laborers Int'l Union
No. Pgs: 3 Date: 6/25/ Rep.: JB

LABORERS INTERNATIONAL UNION OF NORTH AMERICA

Rollover Report

LOCAL 91

For Referral List JOURNEYMEN

Position	Name	Date & Time Inserted	Card Num.	S	Signature
20	CHARLES BURRELL	6/12/2018 3:16 PM	0004914068	A	
32	WALTER W. CENTNER IV	6/28/2018 7:57 AM	0003844819	A	
26	CARMEN CRAPSI	6/26/2018 7:08 AM	0004920929	N	
18	DAMON C. CROISDALE	6/8/2018 7:11 AM	0003773470	A	
24	JAMIE C. DRABCZYK	6/21/2018 8:24 AM	0003148589	A	
35	MARVIN D. DYE	7/2/2018 8:07 AM	0003475311	A	
31	GLENN F. FARISS	6/27/2018 7:46 AM	0003560797	A	
13	ROGER HEDLUND JR	6/8/2018 6:59 AM	0003680239	A	
12	TIMOTHY HERTEL	6/8/2018 6:37 AM	0003523461	A	
10	DUANE R. KORPOLINSKI	3/27/2018 9:28 AM	0003336088	A	
29	ALEX M. LOTTERIO	6/26/2018 7:11 AM	0003386628	A	
8	VINCENT MAMELI	3/8/2018 10:32 AM	0003554131	A	
2	FRANK MANTELL	1/17/2018 2:43 PM	0003336085	A	
19	RONALD J. MANTELL	6/8/2018 7:11 AM	0003121593	A	
7	JOSEPH A. MAROTTA	3/8/2018 10:30 AM	0004797839	A	
14	PETER, JR. M. MONTANTE	6/8/2018 7:04 AM	0003148583	A	
4	PETER J. MORREALE	3/5/2018 2:59 PM	0002813805	A	
22	JOHN M. PANATTONI	6/15/2018 7:07 AM	0003148566	A	
3	EDMUND PASSERO	1/19/2018 10:43 AM	0004118769	A	
15	ADAM K. PATTERSON	6/8/2018 7:08 AM	0003329441	A	
25	MARK J. PERRY	6/26/2018 7:01 AM	0003148568	A	
5	NICHOLAS J. PERRY	3/7/2018 3:00 PM	0002492796	A	
33	MICHAEL PITARRESI	6/28/2018 7:57 AM	0003420139	A	
34	JUSTIN RICKARD	6/29/2018 7:31 AM	0004766903	A	
27	LOUIS ROTELLA	6/26/2018 7:09 AM	0003149240	A	
17	ROBERT J. RUSSO	6/8/2018 7:10 AM	0003790022	A	
36	JOSEPH D. SARDINA	7/2/2018 8:07 AM	0003149243	A	
28	CARL E. SCHUL	6/26/2018 7:10 AM	0003424829	A	
11	BRUCE SPIRA	6/6/2018 8:52 AM	0002585694	A	
9	BRUCE G. STENZEL	3/12/2018 7:21 AM	0001774378	A	
30	PAUL F. TIBERI	6/26/2018 9:31 AM	0003483426	A	
1	CHRISTOPHER VAN EVERY	3/8/2017 12:32 PM	0002892847	A	
23	ANTHONY A. VENTURA JR	6/20/2018 9:18 AM	0002524590	A	

UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD	DO NOT WRITE IN THIS SPACE	
CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS	Case 03-CB-211488	Date filed 12/13/2017

INSTRUCTIONS: File an original of this charge with the NLRB Regional Director of the region in which the alleged unfair labor practice occurred or is occurring.

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name Laborers Local 91	b. Union Representative to Contact Dick Paladino Business Agent	
c. Address 4500 Witmer Rd, Niagara Falls, NY 14305-1342	d. Tel. No. (716)297-6441	e.. Cell No.
	f. Fax No.	g. e-Mail

h. The above-named labor organization or its agents have engaged in and are engaging in unfair labor practices within the meaning of section 8(b)(1)(A) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act, or are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (*set forth a clear and concise statement of the facts constituting the alleged unfair labor practices*)

Since about June 27, 2017 and thereafter, the above-named labor organization has restrained and coerced employees in the exercise of rights protected by Section 7 of the Act by failing to put Frank Mantell on the out-of-work list for reasons that are arbitrary, discriminatory or in bad faith although the International Union has instructed them to do so.

3. Name of Employer Scrufari	4a. Tel. No. 716-282-1225	4b. Cell No.
	4c. Fax No.	4d. e-Mail
5. Location of Plant involved (*street, city, state, and ZIP code*) 3925 Hyde Park Blvd, Niagara Falls, NY 14305-1701	6. Employer representative to contact	

7. Type of Establishment (*factory, mine, wholesaler*) Contractor	8. Principal product or service construction	9. Number of Workers employed 10
10. Full name of party filing charge Frank Mantell	11a. Tel. No. (716)471-6824	11b. Cell No.
	11c. Fax No.	11d e-Mail nffirell91@yahoo.com

11. Address of party filing charge (*street, city, state, and ZIP code*)
6811 Kies St, Niagara Falls, NY 14304-3245

12. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: Frank D. Mantell (*signature of representative or person making charge*)	Frank Mantell An Individual Print/type name and title or office, if any	Tel No. (716)471-6824 Cell No.
Address: 6811 Kies St, Niagara Falls, NY 14304-3245	Date: 12/9/17	Fax No. e-Mail nffirell91@yahoo.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes. 1-2132955951

GC 8

Exh. No: GC8 Received ✓ Rejected ____
Case No.: 03-CB-225477
Case Name: Laborers Intl Union
No. Pgs: 2 Date: 6/25/15 Rep.: JB

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**

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT Case 03-CB-202698, Case 03-CB-207801 and Case 03-CB-211488 which are based on charges filed by Duane Korpolinski, an Individual (Korpolinski) and a charge filed by Frank Mantell, an Individual (Mantell), respectively, against Laborers' International Union of North America, Local Union No. 91 (Respondent) are consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Board's Rules and Regulations, and alleges Respondent has violated the Act as described below.

9(a)

General Counsel's Exhibit

Exh. No: GC9A Received X Rejected ____
Case No.: 03-CB-225477
Case Name: Laborers Intl Union
No. Pgs: 10 Date: 6/23/11 Rep.: SB

1.

(a) The charge in Case 03-CB-202698 was filed by Korpolinski on July 20, 2017, and a copy was served on Respondent by U.S. mail on the same date.

(b) The charge in Case 03-CB-207801 was filed by Korpolinski on October 12, 2017, and a copy was served on Respondent by U.S. mail on the same date.

(c) The charge in Case 03-CB-211488 was filed by Mantell on December 13, 2017, and a copy was served on Respondent by U.S. mail on the same date.

2.

(a) At all material times, Scrufari Construction Co. Inc. (the Employer), has been a corporation with an office and place of business in Niagara Falls, New York (the Employer's facility), and has been a general contractor in the construction industry doing commercial construction.

(b) At all material times, Council of Utility Contractors, Inc.; The Independent Builders of Niagara County; Associated General Contractors of America, New York State Chapter, Inc.; and The Building Industry Employer's Association of Niagara County New York, Inc., collectively referred to as the Associations, have been organizations composed of various employers, including the Employer, 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.

(c) Annually, the employer-members of each of the Associations, in the course of their business operations described above in paragraph 2(a), collectively, purchase and receive goods valued in excess of $50,000 directly from points outside the States wherein the employer-members are located.

3.

At all material times, the Employer and the employer-members of the Associations have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4.

At all material times, Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

5.

(a) At all material times, the following individuals held the positions set forth opposite their respective names and have been agents of Respondent within the meaning of Section 2(13) of the Act:

Richard Palladino	–	Business Manager
Merio Neri	–	Respondent Employee

(b) At all material times, Respondent's unnamed legal representative has been an agent of Respondent within the meaning of Section 2(13) of the Act.

6.

(a) 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 non-exclusive source of referrals of employees for employment with employer-members of each of the Associations.

(b) About October 11, 2015, at a monthly membership meeting, Respondent's employee-member Duane Korpolinski engaged in protected concerted activity by voting against Respondent fining and suspending employee-member Frank Mantell for conduct that the

National Labor Relations Board found in a decision dated February 7, 2017 to be protected concerted activity.

(c) From about November 2015, a more precise date unknown to General Counsel but within the knowledge of Respondent, and continuing thereafter, Respondent, by operation of its non-exclusive hiring hall, has refused to refer Korpolinski from its out-of-work referral list.

(d) From about May 31, 2017, and continuing thereafter, Respondent, by operation of its non-exclusive hiring hall, has removed Korpolinski from its out-of-work referral list without providing a mechanism for Korpolinski to return to the out-of-work list.

(e) From about July 10, 2017, and continuing thereafter, Respondent, by operation of its non-exclusive hiring hall, kept Korpolinski from its out-of-work referral list without providing a mechanism for him to return to the out-of-work list.

(f) Respondent engaged in the conduct described above in paragraph 6(c) and (d) because Korpolinski engaged in the protected concerted conduct described above in paragraph 6(b).

(g) Respondent engaged in the conduct described above in paragraph 6(e) because Korpolinski engaged in protected conduct by filing a Board charge.

7.

(a) In about September 2017, a more precise date unknown to the General Counsel but within the knowledge of Respondent, Respondent, by Richard Palladino, at Respondent's hiring hall, threatened Korpolinski that if he lost his Board case, Respondent would sue him to recover legal fees and time lost by Respondent in handling the case.

(b) Respondent engaged in the conduct described above in paragraph 7(a) because Korpolinski engaged in protected conduct by filing a Board charge.

8.

(a) On February 7, 2017, the National Labor Relations Board issued a decision finding that Respondent violated Section 8(b)(1)(A) of the Act by removing employee-member Mantell from Respondent's out-of work referral list from October 8, 2015 through November 19, 2015 due to his protected concerted activity.

(b) From about November 20, 2017 to January 19, 2018, Respondent, by operation of its non-exclusive hiring hall, refused to place Mantell on its out-of-work referral list.

(c) Respondent engaged in the conduct described above in paragraph 8(b) because Mantell engaged in the protected concerted conduct described above in paragraph 8(a).

(d) Respondent engaged in the conduct described above in paragraph 8(b) because Mantell engaged in protected conduct by utilizing the Board's processes by filing Board charges.

9.

By the conduct described above in paragraphs 6(c) through (g), 7, and 8(b) through (d), Respondent has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

10.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 6 and 8, the General Counsel seeks an order requiring Respondent, inter alia, to preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in

electronic form, necessary to analyze the amount of backpay due under the terms of such Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be **received by this office on or before April 4, 2018, or postmarked on or before April 3, 2018.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a consolidated

complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on June 12, 2018 at 10:00 a.m., in the Hearing Room at the Niagara Center Building, 130 South Elmwood Avenue, Suite 630, Buffalo, New York, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this consolidated complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED: March 21, 2018.

PAUL J. MURPHY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Attachments

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

and

FRANK MANTELL, an Individual

Cases 03-CB-202698
03-CB-207801
03-CB-211488

AFFIDAVIT OF SERVICE OF: Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on March 21, 2018, I served the above-entitled document(s) by **certified or regular mail,** as noted below, upon the following persons, addressed to them at the following addresses:

Richard Palladino , Business Agent Laborers' International Union of North America, Local Union No. 91 4500 Witmer Industrial Estates Niagara Falls, NY 14305	**CERTIFIED MAIL** **7011-3500-0000-8314-1431** **RETURN RECEIPT REQUESTED**
Duane Korpolinski 2636 North Ave Niagara Falls, NY 14305-3244	**CERTIFIED MAIL** **7011-3500-0000-8314-1448** **RETURN RECEIPT REQUESTED**
Frank Mantell , An Individual 6811 Kies St Niagara Falls, NY 14304-3245	**CERTIFIED MAIL** **7011-3500-0000-8314-1127** **RETURN RECEIPT REQUESTED**
Philip Weeper , Supervisor Scrufari 3925 Hyde Park Blvd Niagara Falls, NY 14305-1701	**FIRST CLASS MAIL**

General Counsel's Exhibit

Scrufari
3925 Hyde Park Blvd
Niagara Falls, NY 14305-1701

FIRST CLASS MAIL

Robert L. Boreanaz , ESQ.
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue, Suite 120
Buffalo, NY 14202-3924

FIRST CLASS MAIL

March 21, 2018

Date

JULIO GONZALEZ, Designated Agent of NLRB

Name

/S/JULIO GONZALEZ

Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and

ANSWER

DUANE KORPOLINSKI, an Individual

Cases 03-CB-202698; 03-CB-207801

and

RONALD J. MANTELL, an Individual

Case 03-CB-211488

Respondent, Laborers' International Union of North America, Local Union No. 91, by its attorneys, Lipsitz Green Scime Cambria LLP, Robert L. Boreanaz, of counsel, answers the Complaint as follows:

1. Admits the allegations set forth in paragraphs 1(a) and 1(b) and 1(c);

2. Admits the allegations set forth in paragraphs 2(a), 2(b) and 2(c);

3. Admits the allegations set forth in paragraph 3;

4. Admits the allegations set forth in paragraph 4;

5. Admits the allegations set forth in paragraph 5(a); denies knowledge and information sufficient to form a belief as to the truth of the allegations set forth in paragraph 5(b);

6. Admits the allegations set forth in paragraph 6(a); denies the allegations set forth in paragraphs 6(b), 6(c), 6(d), 6(e), 6(f) and 6(g);

7. Denies the allegations set forth in paragraph 7(a) and 7(b); and

8. Admits the allegations set forth in paragraph 8(a); denies the allegations set forth in paragraphs 8(b), 8(c), and 8(d);

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53330.0029

9(b)

General Counsel's Exhibit 1(ccc)

Exh. No: 9B Received X Rejected ____
Case No.: 03-CB-225477
Case Name: Laborers Int'l Union
No. Pgs: 4 Date: 6/25/6 Rep.: JB

9. Denies the allegations set forth in paragraph 9;

10. Denies the allegations set forth in paragraph 10.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The charges in the Complaint are barred by the Statute of Limitations.

SECOND AFFIRMATIVE DEFENSE

The actions of both the Charging Party and the Respondent are subject to and involve an entirely internal union matter as such that the Labor-Management Reporting and Disclosure Act or LMRDA (see 29 U.S.C. § 260-401) applies and the National Labor Relations Act does not.

THIRD AFFIRMATIVE DEFENSE

The Charging Party violated the Respondent's Constitution and Hiring Hall Rules, together with his obligations as a member, and as a result, was properly penalized, including suspension of his membership and removal from the hiring hall referral list.

WHEREFORE, Respondent respectfully requests that the Complaint be dismissed in its entirety.

Dated: April 4, 2018
Buffalo, New York

Respectfully submitted,

Robert L. Boreanaz, Esq.
Lipsitz Green Scime Cambria LLP
Attorneys for Respondent
42 Delaware Avenue, Suite 120
Buffalo, NY 14202-3924
(716) 849-1333 ext. 343
rboreanaz@lglaw.com

#2441447.v1
53330.0029

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

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

and

DUANE KORPOLINSKI, an Individual

and

RONALD J. MANTELL, an Individual

CERTIFICATE OF SERVICE

Cases 03-CB-202698; 03-CB-207801

Case 03-CB-211488

I, Lynn M. Lombard, hereby certify that on April 4, 2018, I electronically filed the foregoing Answer with the National Labor Relations Board and a copy was served upon:

Duane Korpolinski
2636 North Avenue
Niagara Falls, NY 14305-3244

Frank Mantell
6811 Kies Street
Niagara Falls, NY 14304-3245

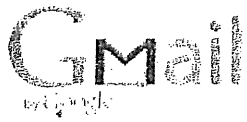
Philip Weeper
Scrufari Construction, Inc.
3925 Hyde Park Blvd.
Niagara Falls, NY 14304

by depositing a true copy of same enclosed in a postage-paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Lynn M. Lombard

#2441927.v1
53330.0029

LIUNA 0302



Dianna Rulli <dianna.rulli@laborerslocal91.org>

Local 91 language in referral rules meaning

11 messages

Rob Boreanaz <rboreanaz@lglaw.com> Wed, Jun 27, 2018 at 4:06 PM
To: "dbianco@neliuna.org" <dbianco@neliuna.org>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>

Danny,

Rule 3C of the Local 91 hiring hall rules states: "Only applicants who are not currently employed at the trade may register their availability for referral."

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. Thank you. Robert

Robert L. Boreanaz
Attorney at Law

42 Delaware Ave | Suite 120 | Buffalo, NY 14202
TEL 716 849 1333 x343 | FAX 716 855 1580 | MOBILE 716 609 1144
email | profile | website | map | vCard

NOTICE: This message contains privileged and confidential information intended only for the use of the persons named above. If you are not the intended recipient, you are hereby notified that any distribution or copying of this message is prohibited.

Dan Bianco <dbianco@neliuna.org> Fri, Jun 29, 2018 at 10:46 AM
To: Rob Boreanaz <rboreanaz@lglaw.com>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>

Rob:
I spoke to Ted Green, LIUNA Legal Counsel and he will be contacting you on this matter. I hope you have a nice weekend and 4th of July Holiday.

Dan

GC Ex 10

EXHIBIT NO. GC10 RECEIVED X REJECTED

CASE NO. 03-CA-225477 CASE NAME: Laborers Int'l Union

NO. OF PAGES: 12 DATE: 6/25/19 REPORTER: TB

LIUNA!
Dan A. Bianco, Jr.
International Representative
Laborers' International Union of North America
New England Regional Office
226 South Main Street
Providence, Rhode Island 02903
Phone: (401) 751-8010
Fax: (401) 861-3340
email: dbianco@neliuna.com
website: http://www.liuna.org
[Quoted text hidden]

Dianna Rulli <dianna.rulli@laborerslocal91.org> Wed, Aug 8, 2018 at 10:24 AM
To: Rob Boreanaz <rboreanaz@lglaw.com>

[redacted]

On Wed, Jun 27, 2018 at 4:06 PM, Rob Boreanaz <rboreanaz@lglaw.com> wrote:
[Quoted text hidden]

--
Dianna Dominguez
Office Manager
Laborers' Local No. 91
4500 Witmer Industrial Estates
Niagara Falls, NY 14305
Phone: office (716) 297-6441
Fax:(716) 297-3414
Email: dianna.rulli@laborerslocal91.org
WWW.LABORERSLOCAL91.ORG

Rob Boreanaz <rboreanaz@lglaw.com> Wed, Aug 8, 2018 at 10:27 AM
To: Dianna Rulli <dianna.rulli@laborerslocal91.org>

[redacted]

Lipsitz Green
Scime Cambria...

Robert L. Boreanaz
Attorney at Law

42 Delaware Ave | Suite 120 | Buffalo, NY 14202
TEL 716 849 1333 x343 | FAX 716 855 1580 | MOBILE 716 609 1144
email | profile | website | map | vCard

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From: Dianna Rulli [mailto:dianna.rulli@laborerslocal91.org]
Sent: Wednesday, August 08, 2018 10:24 AM
To: Rob Boreanaz <rboreanaz@lglaw.com>
Subject: Re: Local 91 language in referral rules meaning

[redacted]

Virus-free. www.avast.com

On Wed, Jun 27, 2018 at 4:06 PM, Rob Boreanaz <rboreanaz@lglaw.com> wrote:

Danny,

Rule 3C of the Local 91 hiring hall rules states: "Only applicants who are not currently employed at the trade may register their availability for referral."

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. Thank you. Robert

Dianna Dominguez

[Quoted text hidden]

Lipsitz Green Scime Cambria... image001.png 22K

Dianna Rulli <dianna.rulli@laborerslocal91.org> Wed, Aug 8, 2018 at 10:29 AM
To: Rob Boreanaz <rboreanaz@lglaw.com>

Ok, what was the verbal response?

[Quoted text hidden]
--
[Quoted text hidden]

Rob Boreanaz <rboreanaz@lglaw.com> Wed, Aug 8, 2018 at 10:29 AM
To: Dan Bianco <dbianco@neliuna.org>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>

Dan,

Ted did call me on this but it would be helpful if we had something in writing from the International that is responsive to the question.

Please advise.

Rob

Lipsitz Green Scime Cambria

Robert L. Boreanaz
Attorney at Law

42 Delaware Ave | Suite 120 | Buffalo, NY 14202
TEL 716 849 1333 x343 | FAX 716 855 1580 | MOBILE 716 609 1144
email | profile | website | map | vCard

NOTICE: This message contains privileged and confidential information intended only for the use of the persons named above. If you are not the intended recipient, you are hereby notified that any distribution or copying of this message is prohibited.

From: Dan Bianco [mailto:dbianco@neliuna.org]
Sent: Friday, June 29, 2018 10:47 AM
To: Rob Boreanaz <rboreanaz@lglaw.com>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>
Subject: Re: Local 91 language in referral rules meaning

Rob:

I spoke to Ted Green, LIUNA Legal Counsel and he will be contacting you on this matter. I hope you have a nice weekend and 4th of July Holiday.

Dan

[Quoted text hidden]

Lipsitz Green Scime Cambria... image001.png 22K

Dan Bianco <dbianco@neliuna.org> Wed, Aug 8, 2018 at 12:34 PM
To: Rob Boreanaz <rboreanaz@lglaw.com>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>

Rob:
I am out of town until next week, traveling for work. Let me connect with my office and either I or someone from the Regional Office will circle back with you.

Dan

LiUNA!
Dan A. Bianco, Jr.
International Representative
Laborers' Int'l Union of N.A.
New England Regional Office
226 South Main Street 02903
Providence, RI 02903
Phone: (401) 751-8010
Fax: (401) 861-3340
e-mail: dbianco@neliuna.com
website: liuna.org
sent via my iPhone

On Aug 8, 2018, at 7:29 AM, Rob Boreanaz <rboreanaz@lglaw.com> wrote:

Dan,

Ted did call me on this but it would be helpful if we had something in writing from the International that is responsive to the question.

Please advise.

Rob

<emailsignature_b34f7ced-651e-4ccb-b792-3ea575a5e3d81111.png>

[Quoted text hidden]

Case 19-3699, Document 47, 03/05/2020, 2794215, Page313 of 463
LIUNA 0308

Rob Boreanaz <rboreanaz@lglaw.com> Mon, Aug 13, 2018 at 8:42 AM
To: Dan Bianco <dbianco@neliuna.org>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>

Dan,

I know you were out of town last week.

I was asked by BM Palladino to follow up on this.

Can we please get a written response to the June 27th email question below.

Thanks,

Rob

Lipsitz Green Scime Cambria...

Robert L. Boreanaz
Attorney at Law

42 Delaware Ave | Suite 120 | Buffalo, NY 14202
TEL 716 849 1333 x343 | **FAX** 716 855 1580 | **MOBILE** 716 609 1144
email | profile | website | map | vCard

NOTICE: This message contains privileged and confidential information intended only for the use of the persons named above. If you are not the intended recipient, you are hereby notified that any distribution or copying of this message is prohibited.

From: Dan Bianco [mailto:dbianco@neliuna.org]
Sent: Wednesday, August 08, 2018 12:34 PM
To: Rob Boreanaz <rboreanaz@lglaw.com>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>
Subject: Re: Local 91 language in referral rules meaning

Rob:

I am out of town until next week, traveling for work. Let me connect with my office and either I or someone from the Regional Office will circle back with you.

Case 19-3699, Document 47, 08/05/2020, 2794315, Page314 of 463
LIUNA 0309

Dan

LiUNA!

Dan A. Bianco, Jr.

International Representative

Laborers' Int'l Union of N.A.

New England Regional Office

226 South Main Street 02903

Providence, RI 02903

Phone: (401) 751-8010

Fax: (401) 861-3340

e-mail: dbianco@neliuna.com

website: liuna.org

sent via my iPhone

On Aug 8, 2018, at 7:29 AM, Rob Boreanaz <rboreanaz@lglaw.com> wrote:

Dan,

Ted did call me on this but it would be helpful if we had something in writing from the International that is responsive to the question.

Please advise.

Rob

<emailsignature_b34f7ced-651e-4ccb-b792-3ea575a5e3d81111.png>

From: Dan Bianco [mailto:dbianco@neliuna.org]
Sent: Friday, June 29, 2018 10:47 AM
To: Rob Boreanaz <rboreanaz@lglaw.com>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>
Subject: Re: Local 91 language in referral rules meaning

[Quoted text hidden]

Case 19-3699, Document 47, 03/05/2020, 2794215, Page315 of 463
LIUNA 0310

Dan Bianco <dbianco@neliuna.org> Tue, Aug 14, 2018 at 10:31 AM
To: Rob Boreanaz <rboreanaz@lglaw.com>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>

Rob:
I hope all is well.

Please be advised that we spoke to BM Palladino this morning regarding Rule 3C, there is no need for a written response. Please follow-up with BM Palladino on our discussion regarding "working at the calling"

Thank you,
Dan

LiUNA!
Dan A. Bianco, Jr.
International Representative
Laborers' International Union of North America
New England Regional Office
226 South Main Street
Providence, Rhode Island 02903
Phone: (401) 751-8010
Fax: (401) 861-3340
email: dbianco@neliuna.com
website: http://www.liuna.org

[Quoted text hidden]

Rob Boreanaz <rboreanaz@lglaw.com> Tue, Aug 14, 2018 at 5:24 PM
To: Dan Bianco <dbianco@neliuna.org>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>

Dan,

Thanks for the email.

Rob

Lipsitz Green Scime Cambria...

Robert L. Boreanaz
Attorney at Law

42 Delaware Ave | Suite 120 | Buffalo, NY 14202
TEL 716 849 1333 x343 | FAX 716 855 1580 | MOBILE 716 609 1144
email | profile | website | map | vCard

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From: Dan Bianco [mailto:dbianco@neliuna.org]
Sent: Tuesday, August 14, 2018 10:31 AM
To: Rob Boreanaz <rboreanaz@lglaw.com>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>
Subject: Re: Local 91 language in referral rules meaning

Rob:

I hope all is well.

Please be advised that we spoke to BM Palladino this morning regarding Rule 3C, there is no need for a written response. Please follow-up with BM Palladino on our discussion regarding "working at the calling"

Thank you,

Dan

LIUNA!

Dan A. Bianco, Jr.
International Representative
Laborers' International Union of North America
New England Regional Office
226 South Main Street
Providence, Rhode Island 02903
Phone: (401) 751-8010
Fax: (401) 861-3340
email: dbianco@neliuna.com
website: http://www.liuna.org

On Wed, Aug 8, 2018 at 10:29 AM, Rob Boreanaz <rboreanaz@lglaw.com> wrote:

Dan,

Ted did call me on this but it would be helpful if we had something in writing from the International that is responsive to the question.

Please advise.

Rob

From: Dan Bianco [mailto:dbianco@neliuna.org]
Sent: Friday, June 29, 2018 10:47 AM
To: Rob Boreanaz <rboreanaz@lglaw.com>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>
Subject: Re: Local 91 language in referral rules meaning

[Quoted text hidden]

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Dan Bianco <dbianco@neliuna.org> Tue, Aug 14, 2018 at 5:27 PM
To: Rob Boreanaz <rboreanaz@lglaw.com>
Cc: Dianna Rulli-Dominguez <Dianna.rulli@laborerslocal91.org>

No problem

LiUNA!
Dan A. Bianco, Jr.
International Representative
Laborers' Int'l Union of N.A.
New England Regional Office
226 South Main Street 02903
Providence, RI 02903
Phone: (401) 751-8010
Fax: (401) 861-3340
e-mail: dbianco@neliuna.com
website: liuna.org
sent via my iPhone

On Aug 14, 2018, at 5:24 PM, Rob Boreanaz <rboreanaz@lglaw.com> wrote:

Dan,

Thanks for the email.

Rob

<emailsignature_b34f7ced-651e-4ccb-b792-3ea575a5e3d81111.png>

Case 19-3699, Document 47, 03/05/2020, 2794215, Page318 of 463
LIUNA 0313

[Quoted text hidden]

6 (c) Since about July 5, 2018, Respondent, by operation of its non-exclusive hiring hall, removed Mantell from its out-of-work referral list and has not restored him to the list.

GC Ex 11

Exh. No: GC11 Received X Rejected ____
Case No.: 03-CB-225477
Case Name: Laborers Local Union
No. Pgs: 2 Date: 6/25/19 Rep.: TB

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

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

And **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

MOTION FOR RECONSIDERATION TO TAKE JUDICIAL NOTICE OF PRIOR BOARD PROCEEDING

Counsel for the General Counsel (GC or General Counsel) moves for Your Honor to reconsider your ruling denying judicial notice of the related, prior Board proceeding in Cases 03-CB-202698 and 03-CB-202801.

The General Counsel requested you take judicial notice of limited portions of the prior transcript, GC Exhibits 1, 5, 18, 9, R. Ex. 13 and transcript pages 99-109, 116, 119-20, 218-225, 261-262, 267-68, 300-03, 317-26,329, 337-40, 361-63, 415-420, 510, 512, 552-60, 563-65, 567-68, 600-01, 651-54, 707-09 and 951-53. As the related proceeding has direct bearing on the instant matter, I urge you to reconsider your ruling. Respondent's actions as fully litigated in the related proceeding demonstrate continued animus towards Frank Mantell because of his protected concerted activity.

Rule 201 of the Federal Rules of Evidence allows administrative notice to be taken. *See* ITT *Federal Service Corporation*, 335 NLRB 998, n. 1 (2001). Rule 201 provides for judicial notice because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Judicial notice may be taken of records and

Exh. No: G-C12 Received X Rejected ___
Case No.: 03-CB-225477
Case Name: Laborers Int'l Union
No. Pgs: 4 Date: 6/25/9 Rep.: TD

filings in federal and state court and administrative bodies. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001), *overruled on other grounds* by *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002) (affirming district court's judicial notice of a prior hearing). Judicial notice may be taken at any stage of the proceeding. Fed. R. Evid. 201(f).

The Board takes administrative notice of its own proceedings. *Massachusetts Laborers' Dist. Council (A. Amorello & Sons, Inc.)*, 314 NLRB 61, 61 n.1 (1994). The Board in *Massachusetts Laborers' Dist. Council (A. Amorello & Sons, Inc.)* took administrative notice of the transcript, exhibits, and briefs in a prior related Board proceeding. *See Metro Demolition Co.*, 348 NLRB 272 n. 3 (2006); *see also*, *Sne Enterprises, Inc.*, 344 NLRB 673, 681 n.7 (2005); *Bryant & Stratton Bus. Ins*t., 321 NLRB 1007, 1007 n.2 (1996) (taking administrative notice of the charge and dismissal letter in related Board proceeding since they are official records of the Board).

The administrative hearing in Case 03-CB-202698 and 03-CB-20280 evidences Respondent's current actions did not occur in isolation rather they are a continuation of Respondent impeding Mantell's employment opportunities. It demonstrates Respondent's continued animus toward Mantell and has a direct bearing on the current proceedings.

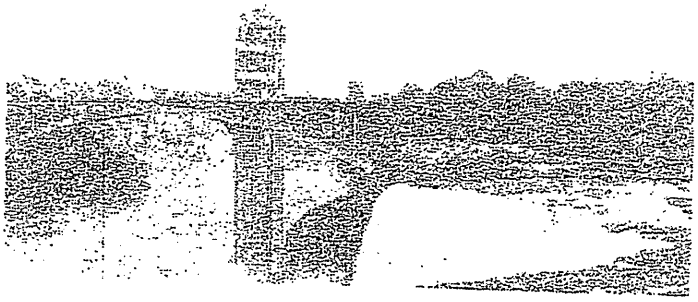
Furthermore, General Counsel has also been prevented from introducing any testimony from her witness concerning Respondent's actions in Case 03-CB-202698 and 03-CB-20280 based on your rulings that you are not relitigating that case. By preventing any evidence concerning Respondent's actions toward Mantell in the prior related case you have prejudiced the General Counsel. Respondent's actions in impeding Mantell's employment opportunities has a direct bearing on its current conduct.

DATED: June 25, 2019

/s/ Jessica Cacaccio

JESSICA CACACCIO
COUNSEL FOR THE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

LABORERS' INTERNATIONAL UNION of North America
Local No. 91
4500 Witmer Industrial Estates
Niagara Falls, NY 14305
Phone: (716) 297-6441
Fax: (716) 297-3414



FACSIMILE COVER SHEET
PHONE # (716) 297-6441
FAX # (716) 297-3414

DATE: 10/18/17

TO: NAME: Vince Masino
FIRM:
PHONE: FAX: 401-861-3340

FROM: NAME: Richard Palladino
RE: Local 91 Hiring Hall Refferral Rules

TOTAL # OF PAGES, INCLUDING COVER SHEET: 8

COMMENTS:

GC 13

Exh. No: GC13 Received X Rejected ___
Case No.: 03-CB-225477
Case Name: Laborers Intl Union
No. Pgs: 3 Date: 6/25/15 Rep.: JB

Job Referral Rule 3C – "Only applicants who are not currently employed at the trade may register their availability for referral."

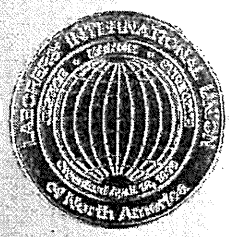
Employed at the Trade

"Employed at the trade" shall be defined to include:

(a) Employment for which the Local Union serves, or is actively seeking to serve, as the exclusive bargaining representative of employees;

(b) Employment in a full-time official capacity for the Local Union;

(c) Employment by the government or the trade union movement in a capacity directly related to the calling and one which would directly benefit the Local Union and its members EXCEPT that employment by the Local Union in a clerical or administrative decision position shall not ne deemed to be "working at the calling."



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TERRY O'SULLIVAN
General President

ARMAND E. SABITONI
General Secretary-Treasurer

Vice Presidents:

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THEODORE T. GREEN
General Counsel

HEADQUARTERS:
905 16th Street, NW
Washington, DC
20006-1765
202-737-8320
Fax: 202-737-2754
www.liuna.org

September 25, 2018

VIA FIRST-CLASS MAIL AND
ELECTRONIC MAIL AS INDICATED

Mr. Frank Mantell
6811 Kies Street
Niagara Falls, NY 14304
nffirell91@yahoo.com

Mr. Duane Korpolinski
2636 North Avenue
Niagara Falls, NY 14305
danelleandduane@yahoo.com

Re: Local Union 91, Niagara Falls, New York

Dear Sirs and Brothers:

We received letters from each of you on August 20 and 21, 2018. Both of you raised complaints regarding operation of the Local Union's Hiring Hall, specifically that you had been improperly denied access to the referral list. We are informed by Local Union 91 that the same complaints were the subject of a proceeding before an Administrative Law Judge of the National Labor Relations Board (NLRB) approximately six weeks ago. Believing it better to allow the agency's process to follow its course without potential interference from the International Union, we will defer any further processing of your complaints until the NLRB has completed its review of this matter.

With kind regards, I am

Fraternally yours,

Terry O'Sullivan

TERRY O'SULLIVAN
General President

/mmt

cc: New England Regional Office
Local Union 91

Feel the Power

GC 14

Exh. No: GC14 Received X Rejected ____
Case No.: 03CB 225477
Case Name: Laborers Int'l Union
No. Pgs: 2 Date: 6/25/19 Rep.: JS

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 3

In the Matter of:

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION 91, (MADER CONSTRUCTION CO., INC.),

Case No. 03-CB-225477

and

FRANK S. MANTELL, AN INDIVIDUAL.

UNION EXHIBITS

Place: Buffalo, New York

Dates: June 25, 2019

OFFICIAL REPORTERS
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7227 North 16th Street, Suite 207
Phoenix, AZ 85020
(602) 263-0885

L-91
Mantell, F.

Frank Mantell Laborer's Union Local 91
6811 Kies Street
Niagara Falls, NY 14304
716-471-6824
Nffirell91@yahoo.com

September 15, 2016

Armand E. Sabintoni, General Secretary – Treasurer
General Executive board of the International Union
LIUNA
Legal Counsel
905-16th Street, Northwest
Washington, DC 20006

By Email (Legal@LIUNA.org) and US Express Mail

Greetings:

On September 12, 2016, I, Frank Mantell, Book #3336085, attended the monthly union meeting of Local #91 Union Hall, 4500 Witmer Rd., Industrial Estates, Niagara Falls NY 14305. President William Grace asked the floor for any old business and I raised my hand to discuss a couple of issues and share my professional opinions. President Grace refused to allow me to speak and said that I am not allowed to. Of the issues I intended to speak to, I am concerned about the amount of non-union work in our jurisdiction. There have been 40-60 members on the out of work list for the entire summer of 2016 and I was and am interested in discussing picket lines as a possible solution. Additionally, it has come to my attention that one of our apprentices unfortunately lost a leg while working on a construction site. As a result he may be pursuing a lawsuit against our Union on the basis that there was no steward on the job site and insufficient training. Lastly, I wanted to explain to the membership about the NLRB verdict (attached herewith) that was decided by the presiding judge in my favor. It is actually a landmark case where my free speech on social media is protected and the Union was at fault for taking me off the out of work list for 5-6 weeks while the International ultimately decided to dismiss the charges against me.

These actions of President Grace on September 12, 2016 are yet **another** act of retribution. Since September 2015, I have been continuously verbally attacked, brought up on numerous bogus charges, found guilty of them by the Local Trial Board, a motion passed where any public employee has to wait to go to work until the out of work list is exhausted, sued civilly for $330 million, starved out of work, denied permission to view the out of work list and now ultimately denied my right as a union member in good standing to speak openly and freely at my union meeting. I fear that my constitutional rights as a union member will continue to be eroded. I ask you, what is next? I won't be able to attend Union meetings? Where does this end?

RCVD 10/03/16 AM11:31

A U. 1

Exh. No: U1 Received X Rejected ____
Case No.: 03-CB-225477
Case Name: Laborers Local Union
No. Pgs: 3 Date: 6/25/6 Rep.: JB

My position in the Niagara Falls Fire Department should not and does not disqualify me from not only attending union meetings, but participating in them like any other member. I am a dues paying member and pay my dues proportionally like any other member. I am at the calling every year and have yet to receive a call to go to work in over a year. I answered the call faithfully since 1994 and consistently averaged 800 annual hours throughout while a member of the Niagara Falls Fire Department. I use vacation, compensatory and personal days and switch shifts with other firefighters in order to answer the call of the Union, proving that my loyalty to the Union has always been my first professional priority. This violation of my right to express my opinions and views at a Union meeting are very uncharacteristic of a union and in direct opposition to the First Amendment rights of both the Constitution of the United States and of our Union.

I would also like to bring to the attention of the International that Local #91 spent nearly $13,000 in legal expenses for representation in the NLRB case I mentioned above. For the months of June, July and August 2016, the union brought in around $10,000 in net revenue. The lack of judgment used that results in financial harm to our Union causes me great concern. There was never a motion passed for Business Manager Pallidino and Local #91 to sue me in civil court or to expend funds on legal representation for the suit. Business Manager Pallidino has subjected Local #91 to litigation concerning the violation of and infringement on my right to free speech.

These actions of my executive board members and Business Manger Pallidino are not going unheard in my eventual federal class action suit. I yet again, as I have before, implore the International to immediately correct this behavior and injustice. The International's lack of corrective action is acceptance of the Local's conduct and only makes the International complicit.

Fraternally,

Frank Mantell
#3336085

Cc: Vincent Masino
Scott DeLuca, Esq.

Attachment: NLRB Case # 03-CB-163940 Decision

tained in the International Union, Local Union, or District Council Constitutions; anyone holding a non-elective position who does not comply with the above requirements shall be subject to discharge.

Section 4. DELEGATES:

(a) All delegates of Local Unions to Conventions of the International Union shall be nominated and elected at the time prescribed in the International Union Constitution. The manner of nominating and electing such delegates to regular Conventions of the International Union, shall be as provided for in Article V, Sections 4 and 9 of the International Union Constitution;

(b) The Business Manager of a Local Union elected in conformity with the provisions of Article VI of the Uniform Local Union Constitution shall, by virtue of such election, serve as a delegate from the Local Union to the appropriate District Council and all other local labor bodies with which the Local Union is affiliated. All other delegates of a Local Union to a District Council shall be nominated and elected in accordance with all the constitutional provisions dealing with qualifications, nominations and election of officers of Local Unions, except that the Executive Board may, in advance of the nomination of officers, determine that either its President or Secretary-Treasurer (but not both) shall, by virtue of the elected office, also serve as a delegate;

(c) Delegates to all other bodies, conventions, meetings or conferences may be either elected by the membership or appointed by the Executive Board of the Local Union, in accordance with the vote of the membership at a meeting or as required by the constitution, rules or regulations of such other body.

Compensation, allowances and reimbursement for expenses may be provided by the Executive Board to such delegates for the performance of their duties and responsibilities.

ARTICLE VII

Meetings

Section 1. Each Local Union shall hold at least one regular meeting each month on such day, time and place as established by vote

Exh. No: U2 Received X Rejected ____
Case No.: 03-CB-225477
Case Name: Laborers Int'l Union
No. Pgs: 4 Date: 4/25/19 Rep.: JB

of the membership of the Local Union. When regular meetings are not held at a fixed and regular time and place each month, notice of such meetings shall be sent to each member in good-standing of the Local Union.

Section 2. Special meetings shall be called by the President of the Local Union when requested to do so by the Executive Board. A notice of such special meeting shall be mailed to all good-standing members of the Local Union, which notice shall specify the purpose for the call of said meeting.

Section 3. It is the intent of this Constitution that all members should attend all meetings of the Local Union and that the Local Union should take such steps as may tend to encourage attendance of members at meetings.

The attendance of ten members at a meeting shall constitute a quorum for the transaction of business in Local Unions of four hundred members or less; and the attendance of fifteen members shall constitute a quorum in Local Unions of more than four hundred. There is no minimum quorum requirement for nomination and election meetings.

Section 4. ORDER OF BUSINESS:

The order of business to be followed at regular meetings of the Local Union shall be as follows:

1. Roll Call of Officers
2. Reading of Minutes of Previous Meetings
3. Communications and Bills
4. Report of Executive Board
5. Report of Business Manager
6. Report of Delegates to District Councils and other Bodies
7. Political Report
8. Organizing Report
9. Report of Other Committees
10. Unfinished Business

11. New Business
12. Financial Reports
13. Good and Welfare
14. Adjournment

Section 5. The President, as presiding officer of all meetings, shall maintain order and decorum at said meetings and shall properly conduct all of the business coming before said meetings; the President shall see to it that all members present comply with and respect the provisions of this Constitution dealing with the attendance of members at meetings and shall have authority to remove from the hall and bring charges against members who improperly obstruct and interfere with the orderly conduct of the business of the meeting.

Section 6. 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.

Section 7. Unless otherwise provided either by this Constitution or by rules and regulations established pursuant thereto, generally accepted parliamentary procedure shall prevail at all meetings of the Local Union.

ARTICLE VIII

Initiation Fees, Readmission Fees, Dues and Assessments

Section 1. The initiation fees and dues to be paid by members and apprentice members to Local Unions affiliated with a District Council, shall be established and regulated by the District Council, in accordance with the provisions of Article II, Section 2(e) and Article VIII, Section 2 of the Uniform District Council Constitution.

Section 2. Where initiation fees and dues are not established by a District Council, the Local Union shall, by secret ballot vote of the membership, establish the initiation fee and dues to be paid by its

U #3

LiUNA!

TERRY O'SULLIVAN
General President

ARMAND E. SABITONI
General Secretary-Treasurer

Vice Presidents:

TERRENCE M. HEALY
RAYMOND M. POCINO
JOSEPH S. MANCINELLI
ROCCO DAVIS
Special Assistant to the General President
VINCENT R. MASINO
DENNIS L. MARTIRE
ROBERT E. RICHARDSON
RALPH E. COLE
JOHN F. PENN
OSCAR DE LA TORRE
SERGIO RASCON
ROBERT F. ABBOTT
PAUL V. HOGROGIAN

THEODORE T. GREEN
General Counsel

May 24, 2016

VIA FIRST CLASS MAIL
AND ELECTRONIC MAIL

Mr. Frank Mantell
3335 Joshua Lane
North Tonawanda, NY 14120
Nffirell91@yahoo.com

Re: Decision re. Disqualification from Nomination for President

Dear Sir and Brother,

This matter came before me upon your written appeal to the General Executive Board dated April 22, 2016. By action taken at its May 12, 2012, meeting, the General Executive Board delegated its authority to me to decide nomination and election protests. I assigned to the Legal Department the responsibility of investigating this matter and holding a hearing to gather information and determine the relevant facts.

A telephonic hearing was held on May 16, 2016. Participating were yourself, Mr. Theodore Green and Ms. Lisa Pau from the Legal Department, as well as Mr. John Bruchue, Mr. Nick Perry, and Mr. Tom Warner, the Judges of Election for Local Union 91. Also in attendance were Mr. Richard Palladino, Business Manager of Local Union 91, Mr. Matt Schiavi, Local Union 91 President and prior Recording Secretary, Mr. William Grace, current Recording Secretary, and Mr. Bruce Stenzel, the Charging Party in the underlying Trial Board case brought against you. General Secretary-Treasurer and New England Regional Manager Armand E. Sabitoni and Vice President and Assistant Regional Manager Vincent Masino appeared on behalf of the New England Regional Office.

The relevant portion of the minutes to the Nomination meeting on April 21, 2016, were read aloud by Brother Green. Local Union 91 stated that it followed the procedure set forth in Uniform Local Union Constitution, Article VI, Section 1 regarding the nomination process, which states:

> All members properly nominated shall be nominated by two (2) other members in good standing and shall be present at the time of nomination, unless absent from the meeting on business for the Local Union, for the District Council, or for the International Union, or excused for just cause by a vote of the membership of the Local Union and shall indicate immediately upon nomination whether it is accepted or declined.

HEADQUARTERS:
905 16th Street, NW
Washington, DC
20006-1765
202-737-8320
Fax: 202-737-2754
www.liuna.org

Feel the Power

Exh. No: U3 Received X Rejected ____
Case No.: 03-CB-225477
Case Name: Laborers Intl Union
No. Pgs: 4 Date: 6/25/15 Rep.: TB

In the absence of your personal appearance, the Local held a membership vote on whether you were excused for just cause. As reflected in the minutes, the vote was 118 to 4 to disqualify you, based upon "your suspension and not being a member in good standing." The suspension was imposed pursuant to Trial Board charges brought by Brother Stenzel and conveyed by written decision dated April 9, 2016, which you timely appealed by letter of April 14, 2016.

ULUC, Article XI, Section 7 states in relevant part that, "If an appeal is seasonably taken, it shall have the effect of staying the decision and sentence of the Trial Board and no fine, suspension or expulsion shall be effective pending the outcome of the appeal..."

There can be no doubt as to the Local's good faith and sincerity in carrying out the procedures set forth in the Constitution. But its position neglected to take into account the automatic stay of Trial Board discipline triggered by timely appeals. ULUC, Article XI, Section 7. It also failed to conform to my April 15, 2016 decision that you would not be disqualified if you submitted your acceptance of nomination in writing, which you did. Accordingly, the vote of the membership at the April 21, 2016 nomination meeting to disqualify you was ineffective.

The question of your ultimate eligibility must be determined, however. Turning to your qualifications, it was raised at the hearing that you work full-time as a firefighter. You stated that you have been a Laborer for 22 years, that you became a firefighter afterwards in 1995. You were, at one point, laid off as a firefighter, and subsequently resumed that work. You stated that, nonetheless, you have never stopped working in construction and worked every year during the construction season since 1994. You stated that you take vacation days and comp days and alter your schedule during the time period from roughly Memorial Day to Thanksgiving each year so that you can accept work as a Laborer, and that you do not put yourself on the out-of-work list during the winter months out of respect for others' need to obtain work during those months.

"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-SEO-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-SEO-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. Indeed, your admission that you do not wish to deprive others of work opportunities during the winter months, while laudable, also recognizes that other

individuals depend upon their work as Laborers for their primary employment. By contrast, you depend upon your work as a firefighter for your primary employment, and your work as a Laborer may fairly be described as "supplemental" or part-time.

The Constitution requires that candidates have worked at the calling "during the entire year prior to nomination" and that during periods of unemployment, they be "available for and continuously and actively [seeking] employment at the calling which shall be understood to require full compliance with the lawful rules of the referral service or hiring hall, if any, operated by the Local Union." ULUC, Art. V, Section 4(d). By your own admission, you worked only half the year prior to nominations and you did not actively seek employment through Local Union 91's hiring hall from Thanksgiving to Memorial Day. Accordingly, on this additional basis, you are not eligible to run for office.

Since you were not "working at the calling" for the entire year prior to nomination, I must affirm the Election Judge's disqualification of you to run for office.

With kind regards, I am

Fraternally yours,

Terry O'Sullivan

TERRY O'SULLIVAN
General President

TMO/lhl

cc: New England Regional Office
Local Union 91

U. 4

Frank S. Martoll, LL #91
6811 Lieu St
Niagara Falls, NY 14304
office LL91@yahoo.com

Armand E. Sabitoni, Gen. Sec. Treasurer
General Executive Board of the Int'l Union
LIUNA
905 16th St. NW
Washington, DC 20006

Greetings:

I am writing to get clarification and correction on my business manager, Richard Palladino, decision to again remove me from the out of work referral list. On July 27, 2018, I went to my union hall to pay my monthly dues and found out that Dick removed me from the list.

I respectfully approached him and asked him why he would do such a thing since he is defending current NLRB charges brought on by myself and another member for removing our names from the out of work referral list. He explained to me that he received information from our International that "at the trade" in 3c of LL #91 Job Referral Rules mean if a member works another job that he/she is not at the trade, and therefore ineligible to be on the out of work referral list.

This decision he has made once again shows the

U 4

Exh. No: U4 Received X Rejected ____
Case No.: 03-CB-225477
Case Name: Laborers Int'l Union
No. Pgs: 3 Date: 6/23/10 Rep.: JB

the past 3 years because of his abuse. I have asked the International to investigate these constant abuses, but to no avail. Does the Attorney General need to be informed of all this to properly investigate these abuses of power by our business manager?

I am again requesting for our International to look into these abuses. He is opening our union up to litigation. Spending our union money on attorney fees against his own members. And alot of it.

I am also requesting to have clarification of Dick's decision to remove me on the out of work referral list because of his belief of "at the trade" definition in 3c of referral rules. I, Frank Martell, book # 3336085, have been a member of Laborers' Local #91 for about 24 years in good standing paying my monthly dues, engaging in monthly union meetings for this entire span. I should not be discriminated against for having another full time job.

Sincerely,
Frank J. Martell

which protects against loss by reason of acts of fraud or dishonesty covering every officer, agent, shop steward, or other representative who handles funds or other property of the Local Union, in an amount not less than the minimum required by the provisions of applicable law, and by any ruling of the General Executive Board.

Section 5. Each Officer, Executive Board Member and Delegate to a District Council, where a Local Union is affiliated with a District Council, shall attend all meetings of the Bodies in which the official functions; and failure to attend two successive meetings or any three meetings in a period of one year, unless excused for just cause by a vote of the Executive Board or membership of the Local Union, shall be deemed sufficient ground for hearing and trial before the Executive Board of the Local Union, why that official should not be removed from said office or position.

Section 6. Upon the termination of office, each Officer shall turn over the books, papers, records and other property which came into the officer's possession, custody and control, to the organization. This provision shall also apply to all other officials or employees of the Local Union.

ARTICLE V

Qualifications for Office

In order to qualify as a candidate for any office in a Local Union, a member:

Section 1. Shall be required to have been in good standing in the International Union for a period of two years and in good standing in the Local Union for a period of two years immediately prior to nomination and to be current in the payment of dues; these requirements shall not apply in cases when Local Unions have been chartered for a period of less than two years prior to the date of nomination.

Section 2. Shall be a lawful permanent resident and shall be lawfully employable under the laws of the United States or Canada.

Section 3. Shall be literate.

Section 4. No one shall be eligible to hold any office in the Local

Exh. No: U5 Received X Rejected ____
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Union if the person has not been regularly working at the calling of the International Union during the entire year immediately prior to nomination. "Working at the calling" shall be defined to include:

(a) Employment for which the Union serves, or is actively seeking to serve, as the exclusive collective bargaining representative of employees;

(b) Employment in a full-time official capacity for the Local Union;

(c) Employment by government or the trade union movement in a capacity directly related to the calling and one which would directly benefit the Local Union and its members except that employment by the Local Union in a clerical or administrative position shall not be deemed to be "working at the calling." Members who are employed in such clerical or administrative positions and are therefore ineligible from being candidates for office shall retain their rights as members to participate in the affairs of the Union, including campaigning activities, to the extent permitted by applicable law;

(d) Periods of unemployment where the member was available for and continuously and actively sought employment at the calling which shall be understood to require full compliance with the lawful rules of the referral service or hiring hall, if any, operated by the Local Union;

(e) Members who can prove they were unable to work because of temporary illness or disability of less than one year so long as that member has a reasonable expectation of returning to work in the foreseeable future.

In examining the circumstances of each particular case, due regard shall be given to the good faith involved.

(f) Periods of employment referred to in paragraphs (b) and (c) while covered by a collective agreement with another union shall not be considered as working at the calling.

Section 5. No person who has been debarred after trial, from holding office, shall be qualified as a candidate during the period of such debarment.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ADMINSTRATIVE LAW JUDGE

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

And **Case 03-CB-225477**

FRANK S. MANTELL, an Individual

MOTION TO TAKE JUDICIAL NOTICE OF ADMINSTRATIVE LAW JUDGE DONNA A. DAWSON'S DECISION

Counsel for the General Counsel (GC or General Counsel) moves for Your Honor to take judicial notice of the decision issued by Administrative Law Judge Donna A. Dawson on June 28, 2019 in the prior related case. (Attached as Exhibit A). The decision of Judge Dawson (ALJD) has a direct bearing on this matter as it further demonstrates Respondent's continued animus toward Frank Mantell because of his protected concerted activity.

Rule 201 of the Federal Rules of Evidence allows administrative notice to be taken at any point in the proceedings. Fed. R. Evid. 201(d); s*ee also, ITT Federal Service Corporation*, 335 NLRB 998, n. 1 (2001). Rule 201 provides for judicial notice because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

The Board is entitled to take administrative notice of its own proceedings. *Roemer Industries,* 367 NLRB No. 122, slip op at 16 (May 23, 2019); *see*, *Farmer Bros. Co.*, 303 NLRB 638 fn. 1 (1991) ("The Board may take administrative notice of its own proceedings."); s*ee also, Metro Demolition Co.,* 348 NLRB 272 n. 3 (2006); *Sne Enterprises, Inc*., 344 NLRB 673, 681

n.7 (2005); *Bryant & Stratton Bus. Ins*t., 321 NLRB 1007, 1007 n.2 (1996) (taking administrative notice of the charge and dismissal letter in related Board proceeding). In *Massachusetts Laborers' Dist. Council (A. Amorello & Sons, Inc.)*, 314 NLRB 61, 61 n.1 (1994), the Board took administrative notice of the transcript, exhibits, and briefs in a prior related Board proceeding.

The Board may also rely on the findings and evidence in a prior case as background in a later case against the same respondent. In *Success Village Apartments, Inc***.**, 348 NLRB 579, 579 fn. 4 (2006), the Board specifically affirmed the judge's reliance on a prior administrative law judge's decision. In *Success Village Apartments, Inc*, the Board affirmed the judge finding substantial background evidence of animus by relying on the prior decision of an NLRB administrative law judge. *See also*, *Stark Electric, Inc***.**, 327 NLRB 518, 518 fn. 1 (1999) (finding that the respondent's animus was further demonstrated by its conduct as found in a prior Board proceeding); *Planned Building Services, Inc.*, 347 NLRB 670, 670 fn. 2 (2006) (affirming that the administrative law judge could rely on prior cases involving the same respondent to find animus in the present case). In *Roemer Industries,* 367 NLRB No. 122, slip op. at 16 (2019), the Administrative Law Judge took administrative notice of a prior Board decision for the employer's history of animus which was considered background evidence of animus for the case at bar. The ALJ noted that such evidence "may be considered to give background on a 'respondent's motivation for conduct within the 10(b) period.'" *Id.* (*citing Grimmway Farms*, 314 NLRB 73,74 (1994)). The ALJ further noted that the prior decision provides "information about the 'true character' of events within the time period here." *Id.* (*citing Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB,* 362 U.S. 411, 416 (1960)).

The true character of Respondent's current actions can only be appreciated by considering its prior conduct. The decision issued by Administrative Law Judge Dawson

demonstrates that Respondent continues to deny Mantell employment opportunities because of its animus for his protected concerted activity.

DATED: July 2, 2019

/s/ Jessica Cacaccio
JESSICA CACACCIO
COUNSEL FOR THE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

EXHIBIT A

JD–53-19
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
(Scrufari Construction Co., Inc.)

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

DUANE KORPOLINSKI, an Individual

and **Case 03-CB-211488**

FRANK MANTELL, an Individual

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

DECISION

STATEMENT OF THE CASE

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

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

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

FINDINGS OF FACT

I. JURISDICTION

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

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

II. ALLEGED UNFAIR LABOR PRACTICES

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

A. Union's Hiring Hall and Referral Rules

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

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

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

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

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

[3] See for example, GC Exh. 3; Tr. 99.

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

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

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

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

> Applicants who, after registering their availability for referral, on their own, obtain one or more jobs at the trade in the aggregate lasting <u>five</u> (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.
>
> 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 Exh. 5, rules 3C, 4C.)

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

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

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

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

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

B. Background of Central Controversies

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

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

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

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

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

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

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

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

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

Penque and Scrufari, vice president, Thomas Warda, informed Palladino about Mantell's inability to complete the job because he could only work2 days. They expressed their frustration with Mantell's taking the job when he knew that he would not be able to work the midnight shift for more than 2 days. Warda also wrote to Palladino on June 23, 2017,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Frank went back on that list at the same time." He said that Mantell "should" have been put back on the list when the first Scrufari crew member was laid off on about January 19, 2018.[15] (Tr. 741–742, 744.) Palladino explained that the Local came to this conclusion to prevent members who think "by taking the job that we have just called you for is going to prevent you from being in a favorable spot on the out-of-work list," to go to a more favorable job, "the easiest thing to do is quit and want your position [on the list] back." (Tr. 742–743.) Palladino was also clearly upset that Mantell had quit the Scrufari job, knowing he would not be able to fulfill the responsibilities and depriving another member of work. He was also concerned about the Local's credibility. (Tr. 725.)

Analysis

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

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

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

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

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

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

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

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

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

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

[16] There is no doubt here that Respondent's actions here constituted discipline.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Korpolinski has not received work from Local 91's out-of-work list

As previously stated, Korpolinski voted against sanctioning Mantell during the monthly union meeting in October 2015. Korpolinski, like Mantell, has been a long-time laborer member of Local 91 (over 20 years). He testified that he realized in early July 2017 that he had not been receiving any work through the Union since November 2015. In the same time frame, he also discovered that since about the end of May 2017, he had been removed from the out-of-work list. The evidence substantiates that when Korpolinski was on the out-of-work referral list, the Union never referred him out to work. This was the case despite the Union on numerous occasions, referring other members positioned below him on the list. Korpolinski claimed that this was the first time in his 20 plus years with the Union that he had not been referred out for work for such an extended period of time.[21] Korpolinski testified that he did not say anything to anyone from the Local about not getting referrals until the summer of 2017 because, "[t]here's a slow time of the year, and I just thought there was no work." (Tr. 554). He claimed that his opinion changed when he talked to one of the Scrufari superintendents, Phil Weipert, in July 2017.[22] He said that when he contacted Weipert to ask if he had any work available, "the first thing out of [Weipert's] mouth was, 'I

[20] This will be discussed further below relating to Korpolinski's allegations.
[21] This testimony was not disputed.
[22] I note that the transcript spelling of Weipert's name is incorrect.

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

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

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

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

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

[24] Korpolinski's July7, 2017 charge allegation that he voted against sanctioning Mantell in October 2015 confirms that he probably spoke to Mantell about his name not appearing on the out-of-work list in early July rather than in August. (GC Exh. 1(a).)

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

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

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

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

Korpolinski testified that prior to his voting against sanctioning Mantell in October 2015, he had received work "pretty steady in the summer," and that winter was usually the slower time of the year, with summer being the busiest.[26] He was last referred out by the Union as a steward in 2014.[27] (Tr. 638–639, 648.) (Tr. 549–550, 567–568.) He admitted that he worked directly (outside of the union referral system) for Scrufari and Patterson-Stevens, both contract employers, in December 2015. He also worked directly for these contractors, as well as contract employer C'errone, at various times in 2016 and for Scrufari in 2017. Therefore, he understood that he would not have been referred off the out-of-work list during these times. (Tr. 624.) Although he knew that the referral hall rules were posted in plain sight for members at the union hall, he testified that he never actually read the rules. He only knew that he was supposed to notify the Union if he received work directly from contractors, sign up for the out-of-work referral list when he was not working for a signatory employer and re-sign for the 90-day list.

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

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

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

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

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

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

a. Review of the General Counsel's Chart A

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

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

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

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

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

b. Review of the General Counsel's Chart B

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

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

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

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

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

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

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

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

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

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

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

It appears that on June 7, 2016, employer American Environmental requested the "same employees" for general labor. The Union referred three employees who held spots below Korpolinski, #37 on the list, during that time: Tracy Russell, #60, Dave Knack, #49, and Nichelson, #40.[28] Palladino testified that when an employer requests the same employees who had previously worked for them, without providing names, the Union has to look in the computer system to see who had been sent in the past. He believed that Winn and Major may have also come up as members who worked for the employer, but they were not available. Since the job order request form indicates that this contractor requested "the same employees," I accept Respondent's explanation in this case. (Tr. 923–926; GC Exhs. 58, 2, pp. 57–58.)

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

c. Additional instances of unexplained reasons for bypassing Korpolinski

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

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

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

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

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

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

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

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

4. Credibility

It is a bit unusual that Korpolinski never questioned Palladino or Neri about why he did not receive any work from the out-of-work referral list between November 2015 and July 2017; however, I credit his testimony that he did not discover or believe that he had not received jobs from the referral list because of his protected activity until July 2017. This is when he heard that he had been blackballed. It is also when Mantell told him he had been removed from the referral list, and that he should file a charge with the NLRB. Korpolinski testified that he did not question Palladino or Neri as to why he was not receiving referrals from Local 91 because work had been slow. He explained that work through Local 91 typically had been slower in the winter and picked up in summer months. Although he did not obtain work through Local 91 in the summer months of 2016, when work should have picked up, Korpolinski continued to work directly for contract employers such as Scrufari and Patterson-Stevens in December 2015, and periodically in 2016, 2017, and 2018. (Tr. 631.) Respondent's records reflect that during the time that Korpolinski did not receive work through Local 91 in 2016 and 2017, he worked directly for contractors for 958.75 hours in 2016, 141.75 hours in 2017, and 739.75 hours in 2018 (through May). In comparison, in 2014, he worked 1637.50 hours and in 2015, he worked 1282.50 hours, with many of those hours from referrals through Local 91. (GC Exh. 20.)[29] Further, the various referral lists do not show how many members were referred by Local 91 or employed directly by employers in the summer versus the winter. Although he did not inquire about why he did not get work from Local 91, there is no evidence to support a finding that he knew or should have known or discovered prior to his conversations with Weipert and Mantell that Respondent stopped sending him out to work because of his support of Mantell in October 2015.[30]

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

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

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

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

5. Palladino threatened Korpolinski

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

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

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

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

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

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

Analysis

1. Korpolinski's allegations fall within the Board's jurisdiction

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

2. Section 10(b)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Respondent violated the Act by threatening Korpolinski

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

REMEDY

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

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

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

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

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

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

1. Cease and desist from

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Donna N. Dawson
Administrative Law Judge

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

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

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

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

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

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

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

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

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

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

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

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

LABORERS' LOCAL UNION NO. 91
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.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 www.nlrb.gov/case/03-CB-202698 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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

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

STATEMENT OF SERVICE

I hereby certify that on July 2, 2019, I electronically filed a Motion to take Administrative Notice of Administrative Law Judge Donna A. Dawson's Decision. I filed this motion in Case 03-CB-225477 with the Division of Judges of the National Labor Relations Board using the NLRB E-Filing System, and I hereby certify that I provided copies of the same document via electronic mail (e-mail) to Robert Boreanaz, counsel for the Respondent (rboreanaz@lglaw.com) and Frank Mantell, the charging party (nffirell91@yahoo.com).

DATED at Buffalo, New York this 2nd day of July, 2019

Respectfully submitted,

/s/ Jessica L. Cacaccio_____

JESSICA L. CACACCIO
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OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 03

In the Matter of:

Laborers International Union of North America, Local No. 91,

Case No. 03-CB-225477

Respondent,

and

Frank S. Mantell,

Charging Party.

_____

_____

Place: Buffalo, New York

Dates: August 6, 2019

Pages: 1 through 30

Volume: 1

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 03

In the Matter of: LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 91, Respondent, and FRANK S. MANTELL, Charging Party.	Case No. 03-CB-225477

The above-entitled matter came on for hearing, pursuant to notice, before **KELTNER LOCKE**, Administrative Law Judge, at 130 Elmwood Avenue, Suite 630, Buffalo, New York 14202, on **Tuesday, August 6, 2019, 11:03 a.m.**

1 **A P P E A R A N C E S**

2 **On behalf of the Employer:**

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7
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8 THE NATIONAL LABOR RELATIONS BOARD, REGION 3
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1 **P R O C E E D I N G S**

2 JUDGE LOCKE: Thank you for coming back today for the oral
3 arguments, which we are doing by telephone conference call.
4 And as I mentioned off the record, I'm asking counsel to re-
5 enter their appearances so that it is clear, because this is an
6 audio-only call, who is speaking.
7 Counsel?
8 MS. CACACCIO: This is Jessica Cacaccio. Last name
9 spelled C-A-C-A-C-C-I-O, counsel for the General Counsel.
10 MR. BOREANAZ: Morning, Your Honor and Jessica. Robert
11 Boreanaz, spelled B-O-R-E-A-N-A-Z, counsel for the Respondent.
12 JUDGE LOCKE: Very well. And as we discussed off the
13 record, we have agreed to resume the hearing on August 9th,
14 2019, at 10 a.m. Eastern, rather than on August 7th, for the
15 delivery of the bench decision. So having said that, if we may
16 proceed with the oral argument, if the General Counsel would
17 proceed.
18 MS. CACACCIO: Yes, Judge. Again, this is Jessica
19 Cacaccio speaking. I'm not sure if that's what I'm supposed to
20 do, but that's what I'm going to do. So I guess I'll begin
21 with my closing argument. Judge, just so I'm clear -- I
22 haven't actually done it in this way before -- am I to give a
23 rebuttal after Mr. Boreanaz gives his closing, or no?
24 JUDGE LOCKE: Ordinarily, no, but --
25 MS. CACACCIO: Okay.

JUDGE LOCKE: -- I'm not real strict about that. If you have something you just got to say, ask for time to rebut, and then I will give the Respondent time to respond to that. But --

MS. CACACCIO: Okay.

JUDGE LOCKE: -- usually, that's not necessary --

MS. CACACCIO: Okay. Thank you, Judge.

JUDGE LOCKE: -- to get the job done. You're welcome.

MS. CACACCIO: We are here because Respondent, Laborers Local 91, is continuing to retaliate against Charging Party Frank Mantell for his protected activities. First we'll discuss what happened, and then we'll discuss why it happened.

So what happened? There are not many disputes in the facts of this case. On July 2nd, 2018, Frank went into the union hall to sign the out-of-work list, so that he could be referred out for work. General Counsel's Exhibit 6 and Respondent's admission by stipulation on page 187 shows that on July 5th, 2018, Respondent removed Frank from the referral list.

Frank, however, was unaware of his removal, until he went back to the union hall at the end of July 2018 to pay his union dues. And when he did, he checked the referral list, only to discover that he, once again, was not on that list.

He approached business manager Richard Palladino, and he asked why he was not put on that list. Palladino told him that

1 the International clarified that, under the rules, he was not
2 at the trade, because he is a full-time firefighter. These
3 facts can be found between pages 42 and 44 of the transcript.
4 In his testimony, Frank explained that this "at the trade"
5 language comes from Referral Rule 3(c), which is found in the
6 Referral Rules. Rule 3(c) states, quote, "Only applicants who
7 are not currently employed at the trade may register their
8 availability for a referral," end quote. The Referral Rules
9 can be found in General Counsel's Exhibit 2. And as General
10 Counsel Exhibit 3 demonstrates, these rules have been unchanged
11 since at least 2004.
12 In applying this rule to restrict Frank from registering
13 for referral, Respondent has distorted this rule beyond
14 recognition. In plain language, the rule states, "Applicants
15 not currently working as a laborer can register." Respondent
16 agrees that Frank, as a fireman, is not currently working as a
17 laborer. If that's true, then Frank should be able to
18 register. And yet, they are refusing to register him on the
19 referral list. Respondent turned this rule around and applied
20 it upside down.
21 This definition is supported by General Counsel Exhibit
22 13, a document produced by Respondent, but one which, as
23 demonstrated by pages 190 to 199 of the transcript, it
24 conveniently could not identify where it came from. In that
25 document, which references Job Referral Rule 3(c) specifically,

1 it states that, quote, "Employed at the trade shall be defined
2 to include employment for which the local union serves or is
3 actively seeking to serve as the exclusive bargaining
4 representative of employees," end quote. By this definition,
5 Frank is not employed at the trade because he works as a
6 fireman. And under this definition, he should be referred out
7 for work.
8 Respondent further ties itself in a knot by arguing that
9 portions of its constitution support its discrimination against
10 Frank. Respondent tries to apply article 7, section 6 of the
11 constitution, which can be found in Union Exhibit 2. This
12 article specifically addresses meetings. That is all. Union
13 meetings. That language has no bearing on whether a member can
14 be referred for work.
15 Similarly, Respondent argues that Article 5 of the Union's
16 constitution somehow has some bearing on whether or not Frank
17 can be referred out for work. Article 5 is Union's Exhibit 5,
18 and again, this article is totally off base. This time, this
19 segment of the constitution addresses qualifications for
20 office. Whether or not an employee can hold union office holds
21 no bearing as to whether they can be referred for work.
22 As Respondent repeatedly brought up during the hearing, it
23 prevented Frank from running for office three years ago,
24 because it found he was not working at the calling.
25 Respondent's counsel stated this perfectly when he led Mr.

1 Palladino, during his direct, about Frank's 2016 attempts to
2 run for union office, on page 164 of the transcript.
3 Counsel stated, quote, "And the ruling was based, in part,
4 because he," being Frank, "was not working at the calling by
5 virtue of his fulltime employment as a city fire department
6 employee, correct?" To which Mr. Palladino responded,
7 "Correct." Which, if Respondent wants to equate working at the
8 calling and being employed at the trade, which it does, and Mr.
9 Palladino repeated that sentiment on pages 174, 178, 179, and
10 184 of the transcript, then they should be absolutely be
11 referring Frank out because, again, the Referral Rules state
12 that an applicant can only be referred out if they are not
13 currently employed at the trade.
14 It is well-established it is unlawful to deny a member a
15 referral in retaliation for participation in protected
16 activities. You can see this in Board decision Teamsters Local
17 460, 300 NLRB 441, note 1, in 1990. This includes failing to
18 assist members in obtaining jobs in retaliation for protected
19 activity. This is found in Board case Carpenters Local 537,
20 303 NLRB 419 in 1991.
21 Thus, Respondent's removal of Frank from the out-of-work
22 list is unlawful, if it was in retaliation for his protected
23 activity, which leads us into the second issue -- why this
24 happened. Respondent removed Frank from the referral list
25 because of Respondent's continued animus toward Frank Mantell

1 for his protected activity. The proper analysis here is that
2 of Wright Line. We have established our prima facie case under
3 the Wright Line standard, while Respondent is unable to
4 overcome its burden that it would have taken the same action,
5 had Frank not engaged in protected concerted activities.
6 Every factor which supports an inference of animus is
7 present in this case. The Board has held that factors which
8 may support an inference of animus include, one, the timing of
9 the adverse action in relation to the protected activity; two,
10 other unfair labor practices committed; three, respondent's
11 reliance on pretextual or shifting reasons to justify the
12 adverse action; four, disparate treatment of members based on
13 protected activity; and five, a respondent's deviation from
14 past practice.
15 This factor analysis can be seen, for example, in the case
16 Farms of North Carolina, Incorporated, 353 NLRB 257 (2008),
17 which cites Robert Orr/Sysco Food Services 343 NLRB 1183 on
18 page 1184 in 2004, which was enforced by the Sixth Circuit in
19 2006.
20 So first, let's look at the factor of timing. And the
21 timing here is critical. Between the June and July 2018
22 sessions of the hearing in front of ALJ Dawson, Respondent
23 reached out to the International to seek clarification on its
24 rules. You can see this in General Counsel's Exhibit 10.
25 While Mr. Palladino first testified that there was a subsequent

1 letter, he later changed his testimony and decided that there
2 was no written record of the result of that discussion, when I
3 had requested that letter. You can see that on page 175 of the
4 transcript.
5 Mr. Palladino even admitted, while pointing at me, who was
6 counsel for the General Counsel in the hearing before ALJ
7 Dawson, that it was, quote, "this office" that gave him the
8 idea, during the 2018 NLRB hearing, of how to continue to
9 discriminate against Mr. Mantell. And you can see that on
10 transcript page 174. Mr. Palladino went on to assert, which
11 can be found on pages 179 to 181 of the transcript, that, even
12 though he had seen the rule before, it was not until the NLRB
13 hearing that he decided something had to be done.
14 Respondent has admitted its own unlawful conduct.
15 Discriminating against Mr. Mantell for the testimony in the
16 hearing is unlawful, and the law is clear. Respondent cannot
17 take adverse action against a member because it engaged with
18 the Board. Some cases supporting this proposition include
19 Graphic Communications Local 22, the Rocky Mountain News, 338
20 NLRB 130 (2002); Local 375 of the International Brotherhood of
21 Teamsters, 317 NLRB 212 in 1995; the International Union of
22 Operating Engineers Local 925, 316 NLRB 441 (1995); and the
23 Auto Workers Local 212 Chrysler Corporation, 257 NLRB 637
24 (1981).
25 The Board has even gone so far as to state that, even if a

1 respondent union's conduct wasn't irregular with respect to the
2 actions it took against the member, the respondent union cannot
3 be insulated if the member's protected action set in motion a
4 chain of events that resulted in the adverse action against
5 that member. You can see that in Sheet Metal Workers
6 International Association Local 18, 314 NLRB 1134, on page
7 1135, and that was decided in 1994.
8 Respondent admits that it knew Frank was a fireman. You
9 can see that in transcript page 169. And Frank testified on
10 pages 46 to 47 that, since the mid-90s, Respondent had never
11 used his fireman status as a reason to refuse to put him on the
12 out-of-work list. It did not get that idea until the 2018 NLRB
13 hearing, as a way to continue to harass Frank in retaliation
14 for his 2015 Facebook post, filing NLRB charges, and testifying
15 at the subsequent hearings.
16 Respondent claims that it was the subpoenas the NLRB
17 issued that made them re-evaluate this rule, which, in and of
18 itself, is problematic, because the reason the subpoena issued
19 is because Mr. Mantell filed a Board charge. But I digress.
20 The timing of what Respondent claims does not comport with the
21 facts of this matter. That's because Respondent didn't reach
22 out to the International for clarification when the subpoenas
23 were issued. In fact, it wasn't until two weeks after the
24 first session of the hearing ended, AKA after Mr. Mantell
25 testified, that it made any attempt to seek clarification about

1 those rules.

2 And let's talk more about timing. Frank was removed from
3 the list July 5th. The hearing in 2018 ended Wednesday, July
4 3rd. Thursday, July 4th was a national holiday. So looking at
5 General Counsel's Exhibit 6, Respondent removed Frank at 8:51
6 a.m. on the next business day after the hearing concluded.

7 According to General Counsel's Exhibit 10, Respondent's
8 counsel received a response from the International on or about
9 August 8th, while Mr. Palladino did not receive that clarifying
10 phone call until August 14th, both of which were over a month
11 after they removed Frank from the list. The International
12 didn't tie their hands, as they claim. The timing shows that
13 Respondent removed Frank from the list because of his protected
14 activity.

15 On to the second factor, other unfair labor practices
16 committed. To analyze this factor, we have to go back to
17 August 2015, when Frank posted comments on Facebook critical of
18 Respondent and its business manager, Richard Palladino. In
19 retaliation, Mr. Palladino filed internal union charges against
20 Frank over the Facebook post, and followed it up with a multi-
21 million-dollar litigation. You can see this on transcript page
22 41.

23 The lawsuit, which, as an aside, Mr. Palladino tried to
24 distance himself from during the hearing, by stating that he
25 didn't personally bring that suit against Frank, when, after

1 faced with irrefutable evidence, he changed his testimony to
2 say that he did bring that lawsuit against Mr. Mantell
3 personally. That exchange can be found on pages 181 and 182 of
4 the transcript.
5 In any event, Respondent's executive board held a trial on
6 Frank's charges, found him guilty, fined him 5,000 dollars, and
7 suspended his membership for 24 months. Frank filed more
8 charges against Respondent over his removal from Respondent's
9 out-of-work list. You can see this on transcript page 35 and
10 41.
11 The General Counsel issued a complaint, the hearing was
12 held, and the ALJ issued a decision finding that Frank's
13 criticism of Respondent and Mr. Palladino on Facebook were
14 protected activity and that Respondent had violated Section
15 8(b)(1)(a) of the Act by removing Frank from the out-of-work
16 referral list because of those protected comments. The Board
17 affirmed the judge's decision on February 7th, 2017.
18 That case and the underlying facts described above can be
19 found at Laborers International Union of North America, Local
20 91, 365 NLRB No. 28 (indiscernible) in 2017, and of course, in
21 the underlying ALJ's decision.
22 But one Board decision wasn't enough to stop Respondent's
23 retaliation. ALJ Goldman found that Respondent harbored animus
24 against Frank's brother Ron (phonetic), who had supported
25 Frank. That case is still pending a Board decision, but the

1 ALJ decision can be found at JD-98-17.
2 Most recently, in December 2017, Frank and another
3 laborer, Dwayne, filed charges against Respondent for removing
4 them from the out-of-work list and refusing to refer them for
5 work. Frank discussed this case on pages 35 to 37 of the
6 transcript. Frank's charge can be found at GC Exhibit 8, and
7 the subsequent complaint can be found at GC Exhibit 9-A. Frank
8 and Dwayne's hearing was held in mid-June and early July of
9 2018.
10 On June 28th, 2019, ALJ Dawson found that Respondent was
11 continuing to harbor animus against Frank and, by proxy,
12 Dwayne, for Frank's August 2015 Facebook comments and the
13 subsequent support that Dwayne provided to Frank. This
14 included a finding that Mr. Palladino unlawfully told Dwayne
15 that he had no right to contact the NLRB and that filing false
16 statements could make him liable for the lawyer's fees. ALJ
17 Dawson's decision can be found at JD-53-19.
18 These previous unfair labor practices, where Respondent
19 tampered with the referral list in retaliation for protected
20 activity and threatened union members for contacting the NLRB,
21 certainly lean toward a finding of animus in this case.
22 The third factor -- Respondent's justification is
23 pretextual. Respondent attempts to rely on an entirely
24 unrelated rule about holding union office to justify its
25 decision to remove Frank from the referral list. It even tried

1 to muddy the transcript with Frank's single attempt three years
2 ago to run for union president as justification for its
3 actions, which doesn't make sense, because that wasn't when it
4 decided to implement this new policy about his fireman status
5 impacting his ability to get referrals from the hall. That
6 didn't happen until after Frank filed charges and testified in
7 the 2018 NLRB hearing.
8 In fact, Respondent's justification is more than
9 pretextual. It's outright unlawful. It openly admitted that
10 it took this action because of what transpired in the last
11 hearing. But even digging deeper into this at-the-trade
12 justification, on its face, that cannot be what that language
13 of the rule means. How is working as a fireman being employed
14 at the trade? On transcript page 47, Frank testified
15 extensively to his duties as a fireman, his duties as a
16 laborer, and how they don't overlap at all. The trades
17 themselves are entirely different.
18 Moreover, on principle, it doesn't make sense that
19 Respondent would want to restrict members working nonlaborer
20 jobs from getting referrals, but not those people already
21 working competing jobs or working jobs that they already
22 received from the hall. Respondent's justifications here are
23 entirely pretextual.
24 The fourth factor, disparate treatment of members.
25 Respondent presented no evidence that it actually applied this

1 new interpretation of its rules to anyone but Frank. It didn't
2 bring any members in to testify, nor did it provide any
3 documentary evidence proving that point. It did not even send
4 its members notice of this brand-new rule interpretation. Why?
5 Because this new rule was meant to target Frank and only Frank.
6 The fifth factor, Respondent's deviation from past
7 practice. Respondent admitted that it didn't take this action
8 until the 2018 NLRB hearing. Frank has been a fireman since
9 the 1990s, and until his protected Facebook comments in 2015,
10 he had no issue being referred for work. Frank's
11 uncontroverted testimony on pages 40 to 41 reveal that, since
12 his 2015 Facebook comments, he has only been referred for work
13 twice, and that, prior to that, he had been referred anywhere
14 between 600 and 800 hours a year.
15 Even in 2015, 2016, 2017, and half of 2018, Respondent
16 didn't use his fireman status to justify removing him from the
17 list. It shows a host of other unlawful reasons. Respondent
18 admitted to deviating from past practice here.
19 In conclusion, there is no debate that Respondent, again,
20 removed Frank from the out-of-work list in July 2018, which was
21 right at the conclusion of the last hearing, and has since
22 refused to return him to the list. Respondent has continued to
23 harbor animus against Frank for his protected activity, and it
24 took this action based on animus for Frank's protected
25 activity.

1 These activities include his 2015 Facebook posts, which
2 the Board already ruled were a protected activity, and previous
3 ALJs have already ruled was the source of Respondent's
4 continued animus; Frank's filing of Board charges, which ALJ
5 Dawson already ruled was something that Mr. Palladino used to
6 intimidate his fellow member; and testifying at the NLRB
7 proceedings arising from those Board charges, which Mr.
8 Palladino admitted was how he got the idea to remove Frank from
9 the list in this case.
10 The facts are clear. Respondent violated Section
11 8(b)(1)(a) of the Act and should be held responsible for having
12 done so. Thank you.
13 JUDGE LOCKE: Does that conclude your oral argument?
14 Hello?
15 MS. CACACCIO: Hello?
16 JUDGE LOCKE: Can you hear me? Hello?
17 MS. CACACCIO: Yeah.
18 MR. BOREANAZ: I can.
19 MS. CACACCIO: Hello?
20 JUDGE LOCKE: Good. Fine. I thought I missed you. Does
21 that conclude your argument?
22 MS. CACACCIO: Yes, Judge.
23 JUDGE LOCKE: Real fine. The Respondent, then.
24 MR. BOREANAZ: Thank you. Robert Boreanaz on behalf of
25 the Respondent. The first thing I want to address is General

1 Counsel's attempt to utilize two ALJ decisions for the purpose
2 of trying to prove their, quote, "continued animus," which is a
3 burden that the General Counsel's office has.
4 First and foremost, the Goldman decision -- exceptions
5 were taken, and the Board has not yet ruled on that. Second,
6 the Dawson decision, which took 12 months to issue, and at this
7 particular time right now today, exceptions have not yet been
8 filed, because they're not yet due to be filed until Friday of
9 this week. I can assure you that exceptions will be filed.
10 And in particular, with the Dawson case, it was a
11 horrendous occasion by which to have practiced before the
12 Board. There were multiple occasions in which the Dawson court
13 flip-flopped on a simple 10(b) issue and engaged Respondent's
14 counsel in an unprofessional, demeaning, and prejudicial way.
15 So exceptions most certainly will be filed.
16 As a result, both decisions are not precedent and should
17 not be used as precedent. And in exercising your discretion
18 whether or not to pull facts or figures or instances from those
19 decisions, it would be likewise prejudicial to the Respondent
20 and unfair. Specifically, the General Counsel's office wants
21 you to extract from those two decisions that are not precedent
22 the actual central factor that they allege in this case, and
23 that is proof of animus. And that's just simply not possible,
24 given the fact that they have not been ruled on by the Board.
25 The ALJ decision in either of those case (sic) is not

1 proof of animus in this case. The theory of the General
2 Counsel's office is the Facebook posts in 2015 were protected
3 activity. The Respondent, according to the Board, after it
4 considered exceptions, engaged in internal union discipline
5 because of those Facebook posts. And therefore, the General
6 Counsel's office theorizes today that there is a perpetual and
7 never-ending animus resulting from those 2015 Facebook posts
8 and then the subsequent charges.
9 That theory is not supported by the evidence. General
10 Counsel's office called one witness to prove its case and to
11 demonstrate that there might have been animus for the July 5th
12 application of the hiring hall rules and a determination that
13 Mantell was not working at the calling or employed at the
14 trade.
15 The General Counsel's office, in its complaint, alleges
16 that this action -- this July 5th, 2018 action -- was taken by
17 the Respondent because of the 2015 Facebook posts, as reflected
18 in paragraph 6(d), as in dog, of the complaint, and the other
19 charges, which is reflected in 6(e), as in Edward, of the
20 complaint.
21 The charges referenced in the complaint were on July 20th,
22 2017, not by Mantell, the Charging Party in this case, but by
23 another individual, Mr. Korpolinski; and an October 12th, 2017
24 charge again filed by Korpolinski -- both of those charges are
25 reflected in General Counsel's Exhibit 9 -- and lastly, because

1 of the December 13th, 2017 charge filed by Mantell that
2 resulted in the hearing conducted in June and July of 2018.
3 General Counsel's office ignores the timeline between the
4 August 2015 Facebook post and the December 13th, 2017 Frank
5 Mantell charge, and there were other events occurring within
6 that period of time that mitigate against any claim of this
7 perpetual or never-ending animus. During that period of time
8 these other events that occurred, Mantell was violating
9 internal union rules and suffered internal union discipline as
10 a result -- page 96 of the transcript.
11 Also during that period of time, Mantell was actually
12 permitted to speak during union meetings, despite his not
13 working at the calling. That certainly mitigates against any
14 potential claim of a perpetual animus. Page 89, 161, and 167
15 of the transcript.
16 Also during this period of time, the other events that
17 occurred, that is ignored by General Counsel, is that Mantell
18 had an altercation with members at a meeting -- page 98 and 162
19 of the transcript. During this period of time, the parent
20 union ruled that Mantell was not eligible to run for union
21 office because he was, quote, "not working at the calling" --
22 Union Exhibit Number 2, transcript page 165 and 167.
23 Also during this period of time, Mantell was actually
24 referred out to work -- page 40 of the transcript. Also during
25 this period of time, Mantell took a job at the 73rd Street job

1 location, where he had to leave early to go to his City of
2 Niagara Falls firefighter job, and other members complained
3 about the lost overtime opportunities as a result of him
4 leaving work early -- page 169 of the transcript.
5 Mantell's testimony alone demonstrates that the July 5th,
6 2018 decision was not the result of any animus from the
7 Facebook post or the filing of these other charges. Mantell
8 describes the conversation with Palladino on or around July
9 27th, 2018, where Palladino provided a reason for the action,
10 that Rule 3(c) was implicated and that he was not working at
11 the calling -- page 44 of the transcript.
12 Further, Mantell's own testimony demonstrates that there
13 was no animus as a result of this decision. He describes the
14 conversation with Palladino as not an argument; a respectful
15 conversation, professional, no raised voices, and not
16 argumentative -- page 116 of the transcript.
17 In contrast, in determining whether or not General
18 Counsel's office has demonstrated some animus, Respondent
19 maintains they have not proven any animus whatsoever.
20 Mantell's testimony did not prove and demonstrate animus. The
21 exhibits entered into evidence by General Counsel's office did
22 not demonstrate any animus as a result of a July 5th, 2018
23 action.
24 In the Wright Line case, Respondent maintains General
25 Counsel hasn't even met its initial burden. But if Your Honor

1 finds that the initial burden has been met, of course, there
2 has to be an analysis of what was the intent. And the only two
3 witnesses Your Honor can deduce what the intent was by
4 analyzing these two witnesses. Necessarily, the demeanor and
5 the testimony of the two witnesses need to be reviewed. I
6 think it's fair to say that Mantell's testimony demonstrated an
7 evasiveness, a propensity to exaggerate or manipulate facts to
8 suit his case.
9 Under cross-examination, Mantell made bold claims that the
10 same people that run the union run the health and welfare fund.
11 And while that may seem to be an inconsequential claim, with
12 respect to the relevant factors in this case, it is indicative
13 of Mr. Mantell's propensity to exaggerate or manipulate the
14 facts. When questioned further, he finally admitted that the
15 health and welfare fund and the union are in fact not the
16 same -- page 59 of the transcript.
17 Even going through that exercise, Mantell stuck to his
18 guns and said the pension fund is the same thing as the union
19 at page 60. He boldly claimed under oath that the union
20 provides paychecks to members -- page 60 and 61 of the
21 transcript. Yet when questioned further, he finally conceded
22 that the contractor or the employer actually provides members
23 the paychecks -- page 61 of the transcript. He boldly claimed
24 that his NLRB Facebook case was a landmark case -- page 62 of
25 the transcript.

1 There was testimony by Mantell with respect to his not
2 being able to hold office due to his fulltime employment as a
3 firefighter for the City of Niagara Falls. He initially denied
4 that, and then, at page 62, he did concede that it was
5 determined by the parent union that in fact that was the
6 ruling. Page 62 and 63, he denied the International Union
7 determined he was not eligible to run for office because he was
8 not working at the calling due to his City of Niagara Falls
9 employment.
10 He, despite the International ruling, demonstrating again
11 his propensity to exaggerate and manipulate, says the
12 International Union got it wrong, because they stretched the
13 rules by citing cases. Mantell maintains that the
14 International Union got their interpretation of their rules,
15 with respect to election eligibility, wrong, because they
16 stretched rules and cited cases. That is a microcosm of
17 Mantell's thought process and his ability to manipulate,
18 exaggerate, and falsify testimony.
19 Mantell conceded he never read the cases but still stuck
20 to his theory -- page 88. He does not believe in the
21 International Union interpretation. He theorized that a member
22 not working at the calling shall not have a voice on the floor
23 is not appropriate, at page 89 of the transcript. He maintains
24 the rule doesn't apply to him, and it shouldn't apply to him,
25 when the International ruled that he was ineligible to run for

1 office, at page 91 of the transcript. Why? Because union
2 officers can have criminal convictions and not impact the local
3 union's reputation in the construction industry -- page 94 of
4 the transcript.
5 Mantell maintained, remarkably, that, when the local union
6 had its officers charged with a federal crime related to their
7 union office, that the reputation of the local in the
8 construction industry was not impacted -- page 94 of the
9 transcript.
10 Now, Mantell was aware of a work rule with respect to the
11 hiring hall rules, whereby, if you work two days or less and
12 then you get laid off, then you get put back on the position of
13 the list that you previously held. That's at page 107 of the
14 transcript. Mantell exaggerated that he didn't get referred
15 out for two years. Yet when cross-examined, he conceded that
16 he doesn't work during the winter months and that he was in
17 fact disciplined by the internal union procedures and
18 ineligible to work, and that he was really just out of work for
19 one year, as far as being referred by the union. That's at
20 page 109.
21 He seemingly testified about the knowledge of how the
22 hiring hall referral process works. Yet when confronted, he's
23 not aware of the contractor requests or even if he forgot to
24 sign the 90-day out-of-work list, which would have made him
25 ineligible for the hiring hall list, at page 112.

1 And lastly, towards the end of his questioning by General
2 Counsel, at page 130, Mantell said, "I'm not 100 percent sure
3 if he used words 'at the calling' in conversation," referring
4 to the late July 2018 conversation. "I'm not 100 percent sure
5 if he used the words 'at the calling' in the conversation," is
6 what his testimony was at page 130.
7 He was then shown a document, a statement made to General
8 Counsel's office in the processing of its charge, and then
9 changed his testimony at page 132 to now apparently saying,
10 quote, "he never used the words 'working at the calling' to
11 describe the conversation with Palladino." This is a strong
12 example of Mantell's propensity to change his testimony to
13 fashion his theory of the case.
14 In contrast, Palladino testified about the former business
15 manager facing a 22-count federal indictment, and that there
16 was a reference in the Wall Street Journal of the local being
17 one of the most notorious local unions in the United States,
18 and that they had a disastrous reputation, at page 149.
19 Contrast that with Mantell's claim that these indictments had
20 no impact on the reputation in the construction industry of
21 Local 91, the Respondent.
22 Palladino talked about his being courted by the
23 International Union to look over the union after the
24 International Union took over the local union, after the
25 indictments -- page 150. He talked about the FBI actually

1 making three additional arrests after the initial 22-count
2 indictment, and then his involvement in the union was sought by
3 the International Union because of his reputation, at page 152.
4 He testified he's an ex-military, certified in demolition.
5 He's testified that he's been appointed by the governor of the
6 State of New York as a bridge commissioner, and in that
7 capacity he was elected as a chairperson in the Bridge
8 Commission. At page 154, he gave straightforward answers
9 regarding 80 percent of the members get their own jobs, because
10 this is not an exclusive hiring hall. At page 156 of the
11 transcript, in contrast, Mantell claimed that the vast majority
12 of members yet there worked through the hiring hall process.
13 Again, Mantell makes statements and comments and provides
14 testimony on information which he has no foundation or basis to
15 do so.
16 Palladino testified that 2015 was not a good year and that
17 '16 was relatively short, and '17 was a little bit of a
18 comeback, at page 156 of the transcript. At page 157, he said,
19 we still have not reached the hours needed, about 350 to
20 400,000 hours, and that they've been averaging around 280 to
21 285,000 hours a year.
22 At page 159, he testified that the Facebook post was not a
23 problem. It was Mantell's claim that he engaged in a crime
24 that caused him concern, at page 159. At 160, he explained
25 that he has extensive experience resolving disputes between

1 unions and contractors, and he hasn't had one major problem
2 with any contractor since being in place.
3 Somebody in that position, Your Honor, has to be able to
4 have a thick skin and deal with different problems. This is
5 not an inexperienced individual who gets criticized and then
6 flies off the handle as a result of such criticism. He's an
7 experienced person in leadership positions that can handle
8 critique and criticism and has actually provided Mantell the
9 ability to speak at union meetings too many times to count, as
10 referenced in page 161.
11 In doing so, Mantell has been critical of what the union's
12 been doing. He theorized that it's just not worth the problem
13 of giving people the impression that you're not letting someone
14 have a voice, at page 167 of the transcript. He testified
15 that, yes, the local union made a ruling that Mantell was not
16 eligible to run for office, because he was not working at the
17 calling, and that it had nothing to do with the 2015 Facebook
18 post.
19 You have to take into account that times have changed,
20 that in 2015 the hours were down, 2016 was just a little
21 better, and 2017 was just a little inch better than that, and
22 that still they're below what they need to do in the range of
23 380,000 hours.
24 He testified that he made the determination that Mantell
25 was not employed at the trade and therefore cannot register.

1 Page 174. He testified that working at the calling and
2 employed at the trade are one and the same. He told you that
3 the International Union verified this, and he asked them to
4 send a letter, which they did not. Page 174 and General
5 Counsel's Number 10. He spoke specifically to Dan Bianco on
6 the phone, and that they were told -- that he was told that
7 they're one and the same; employment at the trade is the same
8 as working at the calling -- page 178 and 184.
9 Now, this interpretation, despite the General Counsel's
10 contortion of its argument with respect to these provisions,
11 makes actually perfect sense. This is a nonexclusive hiring
12 hall. The purpose of providing a preference to the hiring hall
13 process to those individuals who make their living attempting
14 to work at the calling makes perfect sense, as contrasted to
15 the many members, including Frank Mantell, that make their
16 living through other means, such as the City of Niagara Falls
17 Fire Department, and use the nonexclusive hiring hall to
18 supplement their income.
19 In downtimes, it makes perfect sense that the members that
20 need to feed their families, based upon trying to seek work in
21 this industry, are given preference, and that those who have
22 other fulltime jobs can go out and get their work on their own
23 by direct contract with the employer. Palladino indicated that
24 he discussed this with the executive board and that it was not
25 done because of Frank's Facebook post or any of the NLRB

1 charges.

2 Contrasting these two testimonies demonstrates, if you
3 determine that the General Counsel's office has gotten past the
4 first burden of proving some element of animus, there is no
5 inference that can be drawn from any factor in this testimony
6 or the documents provided that there was any harboring animus
7 that motivated this action.

8 Your Honor, the General Counsel's theory of the case is,
9 if you're guilty of an unfair labor practice charge once, you
10 will forever be guilty of an unfair labor practice charge in
11 the future, and your hands are tied in perpetuity from, one,
12 disciplining anybody for any violation of any internal union
13 rules; two, from administering your hiring hall rules in such a
14 manner to provide the best benefit for all of its members; and
15 somehow, the victim of a prior improper practice charge has
16 free rein to violate any rule and to do anything he wants
17 without any repercussion.

18 That simply cannot be the logical conclusion of the Board
19 or this tribunal. General Counsel's office must prove its
20 case. Its reliance on prior, unsupported decisions that are
21 not found by the Board is misplaced. Their reliance on
22 inference is also misplaced. It should not be satisfying the
23 burden that it has to demonstrate. But the reasons offered for
24 the change are not in fact as a result of animus. Thank you.

25 JUDGE LOCKE: Does that conclude your oral argument?

MR. BOREANAZ: Yes, Your Honor.

JUDGE LOCKE: Very well. Anything further?

(No verbal response)

JUDGE LOCKE: Very well. We will recess the hearing at this point and resume on August 9th, 2019, at 10 a.m. Eastern time, at which time I will deliver the bench decision. As we pointed out off the record, please use the same telephone number and access code you did today. I will look forward to talking with you again on August 9th. And until then, the hearing is in recess. Off the record.

(Whereupon, the hearing in the above-entitled matter was recessed at 11:52a.m. until Friday, August 9th, 2019 at 10:00 a.m.)

1 **C E R T I F I C A T I O N**

2 This is to certify that the attached proceedings before the
3 National Labor Relations Board (NLRB), Region 03, Case Number
4 03-CB-225477, Laborers International Union of North America,
5 Local No. 91, and Frank S. Mantrell, at the National Labor
6 Relations Board, Region 3, 130 Elmwood Avenue, Suite 630,
7 Buffalo, New York 14202, on Tuesday, August 6, 2019, 11:03 a.m.
8 was held according to the record, and that this is the
9 original, complete, and true and accurate transcript that has
10 been compared to the reporting or recording, accomplished at
11 the hearing, that the exhibit files have been checked for
12 completeness and no exhibits received in evidence or in the
13 rejected exhibit files are missing.
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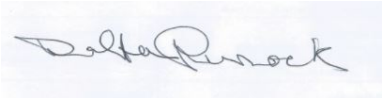
16 
17 BARRINGTON MOXIE
18 Official Reporter
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OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 03

In the Matter of:

Laborers' International Union of North America, Local No. 91 (Mader Construction Co., Inc.), Case No. 03-CB-225477

and

Frank S. Mantell, an Individual.

BENCH OPINION

Place: Telephonic

Dates: August 9, 2019

Pages: 31 through 53

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 03

In the Matter of: LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 91 (MADER CONSTRUCTION CO., INC.), and FRANK S. MANTELL, AN INDIVIDUAL.	Case No. 03-CB-225477 **BENCH OPINION**

The above-entitled matter came on for hearing, pursuant to notice, before **KELTNER W. LOCKE**, Administrative Law Judge, on **Friday, August 9, 2019, 7:22 a.m.**

1 **A P P E A R A N C E S**

2 **On behalf of the General Counsel:**

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1 **P R O C E E D I N G S**

2 JUDGE LOCKE: On the record.

3 THE COURT REPORTER: All set.

4 JUDGE LOCKE: Welcome back. Since we are doing this bench
5 decision by telephone, I would ask for the parties again to
6 enter their appearances or state their presence on the record.

7 MS. CACACCIO: Yes, Judge. This is Jessica Cacaccio,
8 C-A-C-A-C-C-I-O, counsel for the General Counsel.

9 MR. BOREANAZ: Attorney Robert Boreanaz, spelled B like in
10 boy, O-R-E-A-N-A-Z, on behalf of the Respondent. Also on the
11 phone is Richard Palladino, the Respondent.

12 JUDGE LOCKE: Very well. Thank you. So we'll start with
13 the bench decision. This decision is issued pursuant to
14 Section 102.35(a)(10) and Section 102.45 of the Board's Rules
15 and Regulations.

16 The evidence establishes that the Respondent violated
17 Section 8(b)(1)(A) of the Act by removing the Charging Party
18 from its referral list because he engaged in activities
19 protected by the Act.

20 Procedural history: This case began on August 13, 2018
21 when the Charging Party, Frank S. Mantell, an individual, filed
22 an unfair labor practice charge against the Respondent,
23 Laborers' International Union of North America, Local Union
24 Number 91. Staff at the Board's regional office in Buffalo,
25 New York docketed the charge as case 03-CB-225477.

1 On November 15, 2018, after investigation of the charge,
2 the Regional Director for Region 3 of the Board issued a
3 complaint and notice of hearing. In doing so, the Regional
4 Director acted for and with authority delegated by the Board's
5 General Counsel.
6 On June 25, 2019, a hearing opened before me in Buffalo,
7 New York. All parties had the opportunity to call, examine,
8 and cross-examine witnesses, and to introduce evidence into the
9 record. After both the General Counsel and the Respondent had
10 rested, I adjourned the hearing until August 6, 2019, when it
11 resumed by telephone conference call so that Counsel could
12 present oral argument. After oral argument, I recessed the
13 hearing until today, August 9, 2019, when it resumed by
14 telephone for the delivery of this bench decision.
15 Uncontested facts: In his answer, which is amended during
16 the hearing, the Respondent admits to certain allegations.
17 Based upon these admissions, I find that the General Counsel
18 has proven the facts alleged in complaint paragraphs 1, 2a, 2b,
19 2c, 3, 4, 5, 6a, 6b, and 6c as amended. More specifically, I
20 find that the charge was filed and served as alleged in
21 complaint paragraph 1. Further, I find that at all times
22 material, Mader Construction Company has been a corporation
23 with an office and place of business in Elma, New York, and a
24 general contractor in the construction industry, as alleged in
25 complaint paragraph 2a.

As alleged in complaint paragraph 2b, I find that all material times, the counsel 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 Company is a member of those 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 2c. Therefore, I further conclude that at all material times, the employer and the employer members of the Associations have been 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

1 the Act, as alleged in complaint paragraph 5.

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

9 Complaint paragraph 6b alleges, and the Respondent has
10 admitted, that the National Labor Relations Board issued a
11 decision finding that Respondent violated Section 8(b)(1)(A) of
12 the Act by removing the present charging party, Frank S.
13 Mantell, from Respondent's out of work referral list during the
14 period October 8, 2015 to November 19, 2015 due to his
15 protected concerted activities.

16 Based upon the Respondent's admissions and the Board's
17 published opinions, I so find:

18 The Board's decision referred to in complaint paragraph 6b
19 began with a charge filed by Frank S. Mantell, who is also the
20 Charging Party in the present case, and bears the docket number
21 03-CB-163940. The Board's decision in this case may be found
22 at 365 NLRB Number 28, and is dated February 7, 2017.

23 Complaint paragraph 6c, as amended, alleges that since
24 about July 5, 2018, Respondent, by operation of its
25 nonexclusive hiring hall, has refused to place Mantell on its

1 out of work referral list. Respondent's answer, as amended,
2 "admits that on or about July 5th, 2018, the Respondent removed
3 Mr. Mantell from its out of work list by operation of its
4 nonexclusive hiring hall of rules. Since that date, he has not
5 been restored to the list because he remains ineligible for the
6 list". Based on this admission, I find that the Respondent
7 removed Mantell from its referral list on or about July 5,
8 2018.
9 Judicial notice: In addition to filing the unfair labor
10 practice charges in the present case and in case 03-CB-163940,
11 Frank S. Mantell also filed the unfair labor practice charge in
12 case 03-CB-211488. Another individual, Duane Korpolinski, also
13 filed charges docked as cases 03-CB-202698 and 03-CB-207801
14 against the Respondent. These cases were consolidated for
15 hearing, which took place before the Honorable Donna N. Dawson,
16 Administrative Law Judge, on June 12 through 14, 2018 and July
17 2nd and 3rd, 2018.
18 Judge Dawson issued a decision, reported as JD-53-19, on
19 June 28th, 2019. In her decision, Judge Dawson concluded that
20 the Respondent had unlawfully refused to place Charging Party
21 Mantell on its out of work list during the period November 20,
22 2017 to January 19, 2018. And also violated the Act by
23 refusing to refer Charging Party Korpolinski by removing his
24 name from the referral list for certain specified periods and
25 by threatening to sue him if he made false statements or

1 charges.

2 The Respondent has filed exceptions in the case that's now
3 pending before the Board. The General Counsel has moved that I
4 take judicial or administrative notice of Judge Dawson's
5 findings. The Respondent opposes that motion. It certainly is
6 proper to take notice of the fact that Judge Dawson has issued
7 a decision which includes findings and conclusions, and
8 likewise to take notice that she found and concluded certain
9 things. However, taking such notice falls short of considering
10 her findings and conclusions to be res judicata for the
11 purposes of the present case.

12 Because the Respondent has filed exceptions, the Board
13 must decide whether or not to adopt some or all of them. The
14 Act gives us authority and responsibility to the Board, and the
15 Board has not delegated it to its administrative law judges.
16 Rule 201 of the Federal Rules of Evidence governs the taking of
17 judicial notice of adjudicative facts. The rule permits taking
18 judicial notice only if the fact "is either: one, generally
19 known within the territorial jurisdiction of the trial court,
20 or two, capable of accurate and ready determination by resort
21 to sources whose accuracy cannot reasonably be questioned".

22 Applying this standard, I conclude that it is proper to
23 take notice that the present Charging Party, Frank S. Mantell,
24 filed one of the charges in the case heard and decided by Judge
25 Dawson, and that he gave testimony in that proceeding.

1 Certainly, these facts are capable of accurate and ready
2 determination by resort to sources whose accuracy cannot
3 reasonably be questioned. These facts are quite relevant to
4 the present case, because they establish that Charging Party
5 Mantell has engaged in continuing activity protected by the
6 Act. Additionally, they are material to the issue of whether
7 the Respondent's alleged conduct, if proven, violates the act.
8 Legal standard: An office employs Local 251, Sandia
9 National Laboratories, 331 NLRB 1417, 1418 (2000). The Board
10 clarified the scope of Section 8(b)(1)(A) by finding that
11 internal union discipline may give rise to a violation only if
12 the union's conduct: one, affects the employment relationship;
13 two, impairs access to the Board's processes; three, pertains
14 to unacceptable methods of union coercion, such as physical
15 violence in organizational or strike contexts; or four,
16 otherwise impairs policies imbedded in the act. See also,
17 Laborers' International Union of North America, Local Union
18 Number 91, Council of Utility Contractors, Inc. and Various
19 Other Employers, 365 NLRB Number 28 (February 7, 2017).
20 The alleged violation, removing the Charging Party's name
21 from the out of work referral list, most certainly would affect
22 the employment's (sic) relationship, and therefore would fall
23 within the scope of Section 8(b)(1)(A) of the Act. Because the
24 Charging Party's protected activities include filing charges
25 and giving testimony in Board proceedings, retaliation for

1 those activities would directly affect the willingness of union
2 members to use the Board's processes. Therefore, I conclude
3 that the violation alleged in the complaint falls well within
4 the scope of Section 8(b)(1)(A).
5 Animus: The Respondent has admitted the act, which the
6 complaint alleges to violate Section 8(b)(1)(A), namely the
7 removal of Mantell's name from the referral list. However, the
8 Respondent denied that it did so for the unlawful reasons
9 alleged in complaint paragraphs 6d and 6e. More specifically,
10 complaint paragraph 6d alleges that the Respondent removed
11 Mantell's name from the referral list because he had engaged in
12 the protected concerted activities described in the previous
13 Board decision. As discussed, that decision is Laborers'
14 International Union of North America, Local Union Number 91,
15 Council of Utility Contractors, Inc. and Various Other
16 Employers, 365 NLRB Number 28 (February 7, 2017).
17 Complaint paragraph 6e alleges that the Respondent removed
18 Mantell's name from the referral list because he had utilized
19 the Board's processes by filing unfair labor practice charges.
20 These two motivations are not mutually exclusive. Here, I will
21 consider first the motivation alleged in complaint paragraph
22 6d, namely retaliation for Mantell's protected activities
23 discussed in the previous Board decision.
24 He had posted on Facebook serious criticisms of certain
25 Union officers. Reacting to these posts, Local 91 business

1 manager Richard Palladino filed internal Union charges against
2 Mantell. The Local Union's executive board found Mantell
3 guilty of these charges, fined him 5,000 dollars, and suspended
4 his Union membership for 24 months. It also removed him from
5 the hiring hall referral list.
6 The Board's finding of animus in 365 NLRB Number 28 is, of
7 course, res judicata here. However, it warrants discussion
8 because the analytical process applied in that case differs
9 from the framework I will use here. The Union's actions
10 obviously resulted from Mantell's protected activity. The
11 legal analysis, therefore, did not concern whether an asserted
12 reason for the Union's action was a pretext. Rather, the Board
13 weighed the importance of the protected activity, which
14 involved a Union member criticizing Union leadership, against
15 the Union's asserted interest in taking action against a
16 member, an interest in protecting its reputation, and the
17 reputation of its business manager.
18 The Board concluded that the importance of the protected
19 activity outweighed the Union's "vague claim that its
20 reputation was damaged" 365 NLRB Number 28, sys -- 2. In this
21 previous case, the Board found that the Union acted with animus
22 in October 2015. Here, I must decide whether the passage of
23 time has dissipated the animus the way a bad stink would fade
24 into the wind. Judge Dawson's findings in JD-53-19 indicate
25 that the animus which the Union loosed in 2015 was more

1 persistent than a skunk's. But the Board has not yet ruled on
2 the Respondent's exceptions to Judge Dawson's decision, and it
3 is not necessary to rely on it to conclude that more than a
4 whiff of the old animus is still in the air.
5 In addition to the internal Union actions which the
6 Respondent's executive board took against Mantell in October
7 2015, the Union brought a defamation lawsuit against Mantell.
8 Business manager Palladino also is an individual named
9 plaintiff in that lawsuit. Nothing in the present record
10 indicates that either the Union or Palladino has withdrawn or
11 sought to dismiss that lawsuit. The same hostility which
12 motivated the Union's executive board to find and suspend
13 Mantell also prompted the Union and Palladino to sue. Here, I
14 do not consider the merits of the lawsuit, but simply the fact
15 that it continues to exist, which suggests that the old animus
16 lingers as well.
17 Complaint paragraph 6e alleges that the Union removed
18 Mantell from the referral list because he filed charges with
19 the Board and utilized the Board's processes. The Respondent,
20 however, asserts that it took this action because under rules
21 which have been in effect since 2004, Mantell was not eligible
22 to use the hiring hall. Under these rules, the Union argues,
23 Mantell's work as a firefighter disqualifies him from appearing
24 on the referral list.
25 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 asked to produce the documents for, it made everybody start reading it, and obviously it speaks for itself and we should've done something about it a long time ago.

"Q So to be clear, was it the actual filing of the charge by the National Labor Relations Board, 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, it had to be discussed with the executive board. So you had to do something, and that's what I decided to do."

That explanation lives 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 of 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? And

1 it's difficult to believe that Palladino was obsessively
2 punctilious about obeying a previously overlooked Union rule,
3 when he has demonstrated no similar compulsion to observe the
4 labor law.
5 Because the issue concerns whether the Respondent's
6 asserted reasoning is a pretext, it is appropriate to apply
7 principles the Board uses in determining whether an employer's
8 stated reason for discharging or discipling an employee is the
9 true reason or a pretext. See Wright Line, 251 NLRB 1083
10 (1980); and 4662 Fed. 2nd 899 (1st Circuit, 1981); cert. denied
11 455 U.S. 989 (1982). Under the Wright Line test, the General
12 Counsel has the initial burden of establishing that employee's
13 union activity was a motivating factor in the respondent's
14 taking action against them. The General Counsel meets that
15 burden by proving protected activity on the part of employees,
16 a respondent's knowledge of that activity, and unlawful animus
17 on the part of the respondent. See Willamette Industries, 341
18 NLRB 560, 562 (2004).
19 In the present case, Mantell has engaged in protected
20 activity: filing unfair labor practice charges and
21 participating in Board proceedings, which by its very nature
22 placed the Respondent on notice. The record also establishes
23 the third element, animus. And the earlier decision involving
24 this Respondent, found at 365 NLRB Number 28, the evidence
25 clearly established that the Respondent removed Mantell from

1 the referral list and took other action against him because of
2 his protected activity, posting criticism of the Union officers
3 on Facebook. The Respondent's motivation was not in dispute.
4 In the present case, the Respondent again removed
5 Mantell's name from the referral list after he engaged in
6 protected activity within the Respondent's knowledge. In light
7 of the Respondent's past conduct, the sequence of events in the
8 present case raises the possibility that the Respondent again
9 is acting from unlawful motivation.
10 In sum, under the Wright Line framework, I would conclude
11 that the General Counsel has established all three of the
12 initial elements needed to show that an unlawful animus was a
13 substantial or motivating factor. The burden, therefore,
14 shifts to the Respondent to prove with an affirmative defense
15 that it would've taken the same action even if Mantell had not
16 engaged in protected activity. Mano Electric, 321 NLRB 278,
17 280, footnote 12 (1996); see El Paso Electric, 350 NLRB Number
18 14 (June 29, 2007).
19 The Respondent also has offered a nondiscriminatory reason
20 for its action. In essence, in paraphrasing, business manager
21 Palladino testified that because Mantell had filed charges with
22 the Board resulting in Board proceedings, the Respondent's
23 officers had to look through a bunch of Union documents. And
24 that when they did this work, they noticed a hiring hall
25 referral rule which had been overlooked before. Now aware of

1 the rule, they felt obliged to enforce it, and therefore remove
2 Mantell's name from the referral list.
3 On its face, the rule did not quite fit the situation as
4 perfectly as the golden slipper fit Cinderella's foot. To
5 explain the mismatch, it is helpful to begin with some
6 background information. 2016, Mantell had tried to run for
7 local union office. However, he had been disqualified on the
8 basis of Section 6 of the uniform local union constitution,
9 which states "Any member who is not working at the calling, or
10 who is engaged in independent enterprise, shall not have a
11 voice or a vote at meetings of the local union. A retired
12 member shall have voice and vote at local union meetings only
13 on matters of direct concern or interest to retired members".
14 The Respondent, which represents laborers in the
15 construction industry, had concluded that because Mantell
16 worked regularly as a firefighter, he was not "working at the
17 calling". Mantell appealed to the International Union. The
18 legal department at the International Union conducted a hearing
19 by telephone. In a May 24, 2016 letter, General President
20 Terry O'Sullivan informed Mantell that the International Union
21 was upholding the Respondent's decision. The letter stated, in
22 pertinent part:
23 "The central focus in determining whether one is
24 working at the calling is the individual's primary or
25 full-time employment. Matter of Local 135, number

1 05-SAO-15, October 2005. A member whose primary
2 employment does not meet that term's definition is
3 not working at the calling, even where his or her
4 part-time work does not meet the term's definition.
5 Id, citing matter of Local 447, number 01-SAO-13, May
6 2001 (citing similar past decisions). Testimony
7 received at the hearing established that while you
8 have assiduously performed work as a construction
9 laborer for many years, your primary occupation is
10 firefighter".
11 Thus, the International Union had held that Mantell's
12 primary occupation was firefighter, not laborer, and concluded
13 that he was not "working at the calling". However, the hiring
14 hall referral rule which the Respondent asserts is
15 justification for removing Mantell's name from the referral
16 list, the rule which the Respondent's officials noticed in
17 2018, does not use the phrase working at the calling. Instead,
18 it states "only applicants who are not currently employed at
19 the trade may register their availability for research" is how
20 they said.
21 If employed at the trade and working at the calling mean
22 the same thing, the International Union's 2016 decision that
23 Mantell was not working at the calling could be cited in
24 support of a decision to refuse to allow Mantell to sign the
25 referral list. There is some evidence which would indicate

1 that the Respondent's officials had treated the two phrases as
2 meaning the same thing. This evidence is found in an email
3 thread which began when the Respondent's attorney sought
4 information from the International Union concerning whether
5 these two phrases had been treated as identical in meaning.
6 Although a few portions appear to have been redacted, the
7 Respondent did not assert a claim of privilege over the
8 communication and the emails are in evidence.
9 Respondent's counsel sent the first email to the
10 International Union on Wednesday, June 27, 2018. The hearing
11 before Judge Dawson was set to resume the following Monday.
12 The email from Respondent's attorney stated in part, as
13 follows -- spelling and punctuation occurring as in the
14 original:
15 "Local 91 has interpreted employed at the trade to be
16 the same as working at the calling. That is, when an
17 individual is working for a nonunion landscaper
18 (Local 91 has union landscapers that are signatory),
19 that individual may not register the out of work
20 list. Is Local 91's interpretation consistent with
21 the International's understanding of the term
22 'working at the calling' or 'employed at the trade'?
23 A prompt response would be appreciated as our hearing
24 reconvene on Monday morning".
25 There were two charging parties in the consolidated case

being heard by Judge Dawson. One of them 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 the 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

1 within the definition of an applicant "not currently employed
2 at the trade", and therefore would be eligible, not ineligible,
3 to sign the referral list.
4 Even if the rule's language is not interpreted literally
5 but rather in the way advanced by the Respondent, the
6 Respondent's defense falls short. Under the Wright Line
7 framework, once the General Counsel has carried the
8 Government's initial burden, the Respondent must present
9 sufficient evidence to establish more than it could have taken
10 the same action in the absence of protected activity. Rather,
11 the Respondent's evidence must show that it would have taken
12 that action, a burden typically carried by evidence of how it
13 treated other employees in similar situations.
14 And it certainly is not true that a Respondent can prevail
15 only by showing that there were identical situations in which
16 it treated others exactly the same way it treated the alleged
17 discriminatee; Sara Lee d/b/a International Baking Company, 348
18 NLRB Number 76 (November 22, 2006). Nevertheless, to carry its
19 rebuttal burden, the Respondent must present persuasive
20 evidence, typically based upon its past treatment of others in
21 similar if not identical circumstances.
22 The Respondent has not carried that burden here. The
23 Respondent has not presented evidence showing that it removed
24 others from the referral list because such individuals held
25 other jobs as well as doing the work of Laborers'. In other

1 respects, the evidence does not establish that the Respondent
2 would have treated Mantell the same way if he had not engaged
3 in protected activities.
4 Accordingly, I conclude that the General Counsel has
5 proven that the Respondent acted with the unlawful motivation
6 alleged in complaint paragraphs 6d and 6e. Further, I conclude
7 that the Respondent has violated Section 8(b)(1)(A) of the Act,
8 and that this unfair labor practice affects commerce within the
9 meaning of Section 2(2), (6), and (7) of the Act.
10 When the transcript of this proceeding has been prepared,
11 I will issue a certification which attaches as an appendix to
12 the portion of the transcript reporting this bench decision.
13 This certification also will include provisions relating to the
14 findings of fact, conclusions of law, remedy, order, and
15 notice. When that certification is served upon the parties,
16 the time period for filing an appeal will begin to run.
17 The hearing is closed. Off the record.
18 Thank you all very much for your civility and your
19 professionalism. Bye now.
20 MS. CACACCIO: Thanks, Judge.
21 MR. PALLADINO: Thank you.
22 MR. BOREANAZ: Thank you.
23 **(Whereupon, the hearing in the above-entitled matter was closed**
24 **at 7:59 a.m.)**
25

1 **C E R T I F I C A T I O N**

2 This is to certify that the attached proceedings before the
3 National Labor Relations Board, Region 03, 03-CB-225477,
4 Labors' International Union of North America, Local 91, (Mader
5 Construction Co. Inc., and Frank S. Mantell, on Friday, August
6 9, 2019, 7:26 a.m. was held according to the record, and that
7 this is the original, complete, and true and accurate
8 transcript that has been compared to the reporting or
9 recording, accomplished at the hearing, that the exhibit files
10 have been checked for completeness and no exhibits received in
11 evidence or in the rejected exhibit files are missing.
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Official Reporter
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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.

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[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.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 91 (MADER CONSTRUCTION CO., INC.) and FRANK S. MANTELL	Case 03-CB-225477

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., August 26, 2019**.**

By direction of the Board:

/s/ Roxanne L. Rothschild
Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1015 Half Street SE, Washington, DC 20570, on or before **SEPTEMBER 23, 2019.**

United States Government
NATIONAL LABOR RELATIONS BOARD
Office of the Executive Secretary
1015 Half Street, SE
Washington, DC 20570

Telephone: 202-273-1949
Fax: 202-273-4270

farah.qureshi@nlrb.gov
www.nlrb.gov

September 26, 2019

Robert L. Boreanaz
Lipsitz Green Scime Cambria LLP
42 Delaware Ave., Suite 120
Buffalo, New York 14202-3924

Re: LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 91, (MADER CONSTRUCTION CO., INC.)
Case 03-CB-225477

Dear Mr. Boreanaz:

This letter acknowledges receipt of the Respondent Union's Exceptions and Brief in Support of Exceptions, filed with the Board on September 25, 2019.

Section 102.46(a) of the Board's Rules and Regulations provides for the filing of exceptions and briefs in support of exceptions with the Board "within 28 days…from the service of the order transferring the case to the Board." The Order Transferring Proceeding to the National Labor Relations Board was served on the parties on August 26, 2019. See NLRB Rules and Regulations Sec. 102.3. The due date for the filing of exceptions, as stated in that Order, was September 23, 2019. The Respondent Union's exceptions and brief in support was filed at 2:40 p.m. (ET) on September 25, 2019. Accordingly, the Respondent Union's filing is untimely and will not be forwarded to the Board for consideration.

Very truly yours,

/s/ Farah Z. Qureshi
Associate Executive Secretary

Niagara Falls, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

FRANK S. MANTELL

Case 03-CB-225477

ORDER

On August 16, 2019, Administrative Law Judge Keltner W. Locke of the National Labor Relations Board issued his Decision in the above-entitled proceeding and, on the same date, the proceeding was transferred to and continued before the Board in Washington, D.C. The Administrative Law Judge found that the Respondent has engaged in certain unfair labor practices, and recommended that it take specific action to remedy such unfair labor practices.

No timely exceptions having been filed with the Board, and the period allowed for such filing having expired,

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and Section 102.48 of the National Labor Relations Board Rules and Regulations, the Board adopts the findings and conclusions of the Administrative Law Judge as contained in his Decision, and orders that the Respondent, Laborers' International Union of North America, Local Union No. 91, its officers, agents, and assigns, shall take the action set forth in the recommended Order of the Administrative Law Judge.

Dated, Washington, D.C., October 7, 2019.

By direction of the Board:

/s/Leigh A. Reardon

Associate Executive Secretary

Niagara Falls, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

FRANK S. MANTELL

Case 03-CB-225477

CORRECTED ORDER

On August 26, 2019, Administrative Law Judge Keltner W. Locke of the National Labor Relations Board issued his Decision in the above-entitled proceeding, and, on the same date, the proceeding was transferred to and continued before the Board in Washington, D.C. The Administrative Law Judge found that the Respondent has engaged in certain unfair labor practices and recommended that it take specific action to remedy such unfair labor practices.

No timely exceptions having been filed with the Board, and the period allowed for such filing having expired,

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and Section 102.48 of the National Labor Relations Board Rules and Regulations, the Board adopts the findings and conclusions of the Administrative Law Judge as contained in his Decision, and orders that the Respondent, Laborers' International Union of North America, Local Union No. 91, its officers, agents, and assigns, shall take the action set forth in the recommended Order of the Administrative Law Judge.

Dated, Washington, D.C., October 21, 2019.

By direction of the Board:

/s/Leigh A. Reardon

Associate Executive Secretary