19-2861
19-3009

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 91,,
Petitioner-Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner.

PETITION FOR REVIEW OF DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR PETITIONER-CROSS-RESPONDENT LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 91

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PRELIMINARY STATEMENT

The Agency Decision and Order at issue in this petition for review was rendered by the National Labor Relations Board. The Decision and Order was issued by the National Labor Relations Board on August 12, 2019 and is reported at 368 NLRB No. 40 (2019).

JURISDICTIONAL STATEMENT

A. BASIS FOR THE NATIONAL LABOR RELATIONS BOARD'S SUBJECT MATTER JURISDICTION

Respondent-Cross-Petitioner, National Labor Relations Board (the "NLRB" or the "Board"), through its General Counsel ("GC"), issued Complaint on several unfair labor practice charges against Petitioner-Cross-Respondent, Laborers' International Union of North America, Local Union No. 91 ("Local 91" or the "Union") alleging violations of Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158 et al. (the "Act"). The charges were filed on behalf of Local 91 member Ronald Mantell ("RM").

The Board had jurisdiction over this action pursuant to Section 10(a) [29 U.S.C. § 160(a)] of the Act.

Section 10(a) of the Act provides:

> The Board is empowered, as hereafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by

> agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any case in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

B. BASIS FOR THE COURT OF APPEALS' SUBJECT-MATTER JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Section 10(f) of the Act [29 U.S.C. § 160(f)], which provides:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

C. FILING DATES

Following hearings held on October 11 and 12, 2017, NLRB Administrative Law Judge David I. Goldman (the "ALJ") issued his Decision on December 11, 2017. The GC filed exceptions to the ALJ's Decision with the Board on January 8, 2018. The Board issued its Decision and Order on August 12, 2019, amending the ALJ's proposed remedy and modifying his conclusions of law. Petitioner timely filed its Petition for Review on September 10, 2019.

D. FINALITY

Local 91 is petitioning this Court for review of those portions of the NLRB's August 12, 2019 Decision and Order which modify the ALJ's December 11, 2017 Decision. The NLRB's Decision and Order is final pursuant to 5 C.F.R. § 1201.113(c).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

As demonstrated below, those portions of the Board's Decision and Order concluding that Local 91 violated Section 8(b)(1)(A) of the Act by failing to refer RM from its referral hall out-of-work list should be reversed because:

1. The Board's conclusion that Local 91 violated Section 8(b)(1)(A) of the Act by not referring RM is not supported by substantial evidence insofar as the GC failed to establish a *prima facie* case by failing to allege or offer proof that RM was

eligible or otherwise qualified to receive any specific referral during the relevant time period; and

2. The Board's conclusion that Local 91 violated Section 8(b)(1)(A) of the Act by not referring RM is not supported by substantial evidence insofar as the GC failed to establish a *prima facie* case by failing to prove a nexus between RM's lack of referrals beginning in December 2015 and his brother Frank Mantell's ("FM") protected activity in August 2015.

STATEMENT OF THE CASE

Local 91 represents laborers in the building and construction industry throughout the Niagara Falls region of Western New York. Local 91 sponsors a non-exclusive referral hall from which Local 91 members can obtain work. Unlike exclusive hiring halls which require employers to obtain all of their employees through the hiring hall, Local 91's referral hall permits members to obtain work directly with contractors throughout the construction season, without going through the referral hall. The construction industry in Western New York is cyclical, with work typically beginning in spring and winding down during the late fall/early winter months.

Members that desire to be considered for job referrals from the Local 91 referral hall must register on an out-of-work list, per the referral hall rules. While members can be referred based on their place on the list, there are many exceptions

included in the hiring hall rules. For example, contractors are empowered to request members by name, or members with specific skill sets or licenses, regardless of their position on the out-of-work list. Job Stewards, which are the first employees to work on a job, are selected by the Local 91 Business Manager, regardless of the members' positions on the out-of-work list. Similarly, foremen are selected by the Local 91 Business Manager, regardless of the members' positions on the out-of-work list. Referrals from the hiring hall are based on employer requests, which are subject to contractors' labor needs.

In fiscal year 2016 (June 1, 2015 through May 31, 2016), Local 91 experienced a deficit of available man-hours. More specifically, fiscal year 2016 ended with approximately 45,000 less man-hours than fiscal year 2015. This deficit continued through at least fiscal year 2017.

RM is a member of Local 91. While a Local 91 member, RM obtained work both directly with contractors and through the referral hall. In November and December 2015, construction work in the Niagara Falls, New York area wound down, as expected. RM worked in the construction industry as a laborer, including work obtained through the Local 91referral hall, through December 2015.

On April 12, 2017, RM filed the first of a series of unfair labor practice charges against Local 91 alleging various violations of the National Labor Relations Act. Following an investigation of the charges, the General Counsel issued

Complaint on June 29, 2017 alleging, *inter alia*, that Local 91 violated Section 8(b)(1)(A) of the National Labor Relations Act by refusing to refer RM from its referral hall because of his brother's (Frank Mantell's ("FM")) protected Facebook activity in August 2015. Local 91 filed an Answer, in substance denying the allegation, in July 13, 2017. The General Counsel consolidated RM's unfair labor practice charges and issued the consolidated Complaint on August 23, 2017, in response to which Local 91 filed an Answer on September 6, 2017. The consolidated Complaint was amended on September 25, 2017 and at the start of the trial conducted on October 11 and 12, 2017, and an amended Answer was timely filed.

The October 2017 trial was held before Administrative Law Judge David I. Goldman. ALJ Goldman issued his decision on December 11, 2017, finding, *inter alia*, that Local 91 did not violate Section 8(b)(1)(A) of the Act with respect to Ronald Mantell's lack of referrals from the referral hall.

The General Counsel timely filed exceptions to the ALJ's decision with the National Labor Relations Board. On August 12, 2019, the Board issued a Decision and Order which modified ALJ Goldman's conclusions of law and recommended Order. The Decision and Order, *inter alia*, reversed ALJ Goldman's findings and conclusions regarding the referral hall allegations, and held that Local 91 violated Section 8(b)(1)(A) by failing to refer RM from its referral hall because of FM's

August 2015 protected Facebook activity. Following its receipt of the Board's Decision and Order, Local 91 commenced this petition for review.

STATEMENT OF FACTS

A. Local 91 and its Non-Exclusive Referral Hall

Local 91 is a labor organization representing employees working in the building and construction trades throughout the Niagara Falls, New York region – specifically laborers. (A. 345). Local 91 sponsors a non-exclusive hiring hall ("referral hall"), meaning that members have the option of obtaining work through the hall or directly through contractor-employers. (A. 225-227). The Local 91 referral hall has its own set of written referral hall rules, which are posted in the Local 91 union hall and are available for all members to review. (A. 229, 378). Further, a physical copy of the written hiring hall rules were mailed to all Local 91 members when they were last amended in 2004 (A. 222), and new members receive a copy of the rules upon admission to membership (A. 378). The hiring hall rules provide, *inter alia*, that 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." (A. 380).

Local 91 has collective bargaining agreements with numerous area contractors ("CBA"). (A. 345). Like Local 91's hiring hall rules, the CBA requires that the first employee on any job shall be a Shop Steward. (A. 360).

Local 91 employs several staff to work in the front office of the union hall, including Mario Neri, a dispatcher for Local 91's non-exclusive hiring hall. (A. 221-222). Mr. Neri's tasks include, *inter alia*, referring union members to job sites per the hiring hall rules. (A. 226-286). While contractors typically have a group of key laborers that they employ throughout the construction season (obviating the need to make a request through the hall), the contractors still do contact the hall from time-to-time to request employees. *Id.* Contractors can request specific laborers or request laborers with specific sets of skills. *Id.* In the contemporary construction market, laborers with a larger variety of documented skills are more desirable and are requested in lieu of laborers with fewer documented skills. *Id.*

In order to meet contractors' referral requests and to ensure employment of its members where possible, Local 91's non-exclusive hiring hall maintains an out-of-work list. In order to appear on the out-of-work list, a member must register for the list. Registration requires the member to complete a referral form, per the hiring hall rules. (A. 379). Out-of-work members must register for the referral list every 90 days, or they are placed on the bottom of the list. (A. 246, 282-283). While referrals are generally made based on the order in which the applicant was added to the out-of-work list, there are several exceptions that significantly narrow this rule. (A. 226-286, 380-382). First, a member on the out-of-work list must possess the skills required by the requesting contractor. (A. 241-246, 380). Second, the first member

referred to any job must be the Shop Steward, who is selected by the Business Manager without regard to position on the out-of-work list. (A. 246-247, 380). Third, the Business Manager fills requests for foremen without regard to position on the out-of-work list. (A. 381). Fourth, members who require additional hours to qualify for Federal, State or Union Trust Fund eligibility are referred prior to applicants who already qualify for such benefits. (A. 380). Finally, contractors are privileged to request specific members without regard to the members' position on the out-of-work list. (A. 249, 381).

While members may secure work directly through signatory contractors, Local 91 requires members to notify the hall when they have secured work. (A. 245). Further, to protect the integrity of the hiring hall rules and the CBA, Local 91 requires members seeking work directly to determine whether a Shop Steward has been appointed to the job. (A. 293-295). If a Shop Steward has not been appointed to the job, then the member cannot take the work, as to do so would violate the terms of the CBA and the hiring hall rules. (A. 293-295, 360, 380).

Local 91 sponsors numerous training courses, including OSHA classes, asbestos certification courses and other training. (A. 241-244). These courses provide members with the opportunity to increase their documented skills. *Id.* Whenever a member completes a course or certification, Local 91 will document the member's skills upon receiving proof of completion of the course or certification

program. *Id.* The skills are documented in computer files maintained by Local 91's referral hall, enabling dispatchers to identify laborers which possess the skills required by contractors' requests. *Id.* Because contractors routinely request laborers with a greater number of documented skills, it is in the members' interests to keep their skills up to date and to learn new skills when possible. *Id.* Put otherwise, a member with less documented skills is less likely to meet a contractor's skills requirements when a referral request is made.

2016 and 2017 saw a significant downturn in work for Local 91. (A. 317). While Local 91's fiscal year for 2017 had not yet ended at the time of hearing before the ALJ, 2016's man-hours were down by roughly 45,000 from 2015. (A. 282-285).

B. Frank Mantell

In a prior decision, the Board found that Local 91 unlawfully removed a member, Frank Mantell ("FM"), from its out-of-work referral list from October 12 through November 19, 2015, because of FM's Facebook postings critical of Local 91's Business Manager, Richard Palladino. *See Laborers' Int'l Union of N. America, Local Union. No. 91*, 365 NLRB No. 28 (2017). FM made his Facebook posts in August 2015. As found by the Board, Palladino filed internal union charges against FM in early September 2015. A union trial board conducted a trial and found FM guilty on October 5, a decision ratified at the Local's monthly membership meeting on October 12. FM was removed from the out-of-work referral list the next

day. He appealed to the International Union and the International Union apprised Local 91 of the appeal on November 19, 2015, which stated any penalty assessed against FM. On December 4, 2015, the International Union informed Local 91 that it dismissed the charges against FM.

Throughout and after the period during which FM was engaged in what the Board found to be protected activity, RM, FM's brother, continued to obtain work on his own and/or through Local 91's hiring hall. (A. 134-137).

C. Ronald Mantell

RM has been a member of Local 91 for approximately 27 years. (A. 33). Throughout his 27 years of membership in Local 91, RM has acquired work in a variety of ways, including through Local 91's non-exclusive hiring hall and directly through contractor-employers. (A. 35, 42). Despite his long tenure as a member of Local 91, RM has not made efforts to keep his certifications up to date, nor has he made efforts to maintain or enhance his skills through the completion of additional training. (A. 265-272). Indeed, RM has not maintained his asbestos certification card or his drug test certification card; neither has RM acquired a hazmat certification card. *Id.* Additionally, RM has communicated to Local 91's non-exclusive hiring hall (specifically, Mario Neri) that he (RM) does not want to be referred to one- or two-day jobs, and has on at least one occasion refused a referral to a "busting" job. (A. 261-262). Local 91 honored RM's request regarding one-

and two-day jobs by documenting his request in his file. *Id.* Because RM does not possess a hazmat certification card, he is not eligible to work on landfill jobs, for which Local 91 receives a significant number of referral requests. (A. 266). RM also failed to maintain an up-to-date drug test certification. *Id.*

Through late (November/December) 2015, RM worked as a laborer for employer-contractors signatory with Local 91. (A. 342). It is undisputed that beginning in fiscal year 2016, Local 91 experienced a significant downturn with respect to available man-hours (approximately 45,000 hours less than total man-hours worked during the 2015 fiscal year). (A. 285). Indeed, fiscal years 2016 and 2017 were both weak years in terms of available man-hours. (A. 285, 317). The Union's fiscal year runs from June 1 through May 31 of the following year (i.e., the 2016 fiscal year ran from June 1, 2015 through May 31, 2016). (A-37). The reduction in man-hours for the 2016 fiscal year amounted to more than 40 times the number of hours RM worked during the 2015 fiscal year and more than 59 times the number of hours RM worked during the 2013 and 2014 fiscal years, respectively. (*Compare* A. 285 *with* A. 342).

In or about late Fall/early Winter of 2016, RM approached Local 91 Business Manager Richard Palladino, in the presence of retired Local 91 member Matthew Chavi, stating that RM needed work and asking Palladino if he would send him (RM) out to work. (A. 288). Palladino told RM that there were a lot of members who

needed work, but he would see what he could do. (A. 289). Palladino also suggested that RM could find his own work by reaching out to old contacts. *Id.* RM was not satisfied with Palladino's response and angrily raised the topic of his brother, FM, who had previously filed charges against Local 91. (A. 290-291). RM also threatened to file charges with the NLRB. *Id.* Palladino responded by telling RM to "go ahead and do what you have to do." *Id.*

SUMMARY OF THE ARGUMENT

As demonstrated in Point I, the Board lacked substantial evidence to conclude that Local 91 violated Section 8(b)(1)(A) of the Act with respect to RM's lack of job referrals from the Local 91's referral hall during the relevant time period, because the GC failed to meet his burden with respect to RM's eligibility for any referrals.

As demonstrated in Point II, the Board lacked substantial evidence to conclude that Local 91 violated Section 8(b)(1)(A) of the Act with respect to RM's lack of job referrals from Local 91's referral hall during the relevant time period, because the GC failed to demonstrate a sufficient nexus between RM's lack of referrals and FM's 2015 protected activity.

ARGUMENT

STANDARD OF REVIEW

The Court of Appeals' review of a Board Decision and Order "does not function as a mere 'rubber stamp.'" *Laborers' Int'l Union of N. Am. v. NLRB*, 945

F.2d 55, 58 (2d Cir. 1991) (quoting *NLRB v. Local 584, Int'l Bhd. of Teamsters*, 535 F.2d 205, 208 (2d Cir. 1976)). *See also NLRB v. Brown*, 380 U.S. 278, 291-92 (1965) ("Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute"). Rather, this Court reviews the Board's legal conclusions for a "reasonable basis in law," and the Board's application of law to facts *de novo*. *Novelis Corp. v. NLRB*, 885 F.3d 100, 106 (2d Cir. 2018) (internal quotations omitted). Although this Court "afford[s] the Board a degree of legal leeway," it upholds NLRB determinations only "if not arbitrary and capricious." *Long Island Head Start Child Dev. Servs. v. NLRB*, 460 F.3d 254, 257 (2d Cir. 2006) (internal quotations omitted).

In particular, this Court examines whether a Board decision "accurately reflects its own caselaw." *Serv. Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 442 (2d Cir. 2011) (internal quotations and citations omitted). If it "departs from prior interpretations of the Act without explaining why that departure is necessary or appropriate," the Board "exceed[s] the bounds of its discretion." *Id.* *See also ManorCare of Kingston, Pa., LLC v. NLRB*, 823 F.3d 81, 85 (D.C. Cir. 2016) ("we will reverse the Board's decision if it is not reasonable" and is "irreconcilable with the Board's own precedent") (internal quotations omitted). Where the Board's Decision and Order is not supported by substantial evidence in

light of the record as a whole, this Court must deny enforcement. *See NLRB v. Starbucks Corp.*, 679 F.3d 70, 77 (2d Cir. 2012); *Niagara University v. NLRB*, 558 F.2d 1116 (2d Cir. 1977). *See also Trustees of Masonic Hall & Asylum Fund v. NLRB*, 699 F.2d 626, 638 (2d Cir. 1983).

This standard requires "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000). The challenged findings should be viewed in light of the entire record, including evidence that detracts from the Regional Director's determinations. *Id.*

POINT I

CONTRARY TO THE BOARD'S DECISION AND ORDER, THE GENERAL COUNSEL FAILED TO PROFFER EVIDENCE OF RONALD MANTELL'S ELIGIBILITY FOR ANY SPECIFIC JOB REFERRALS AND THEREFORE FAILED TO ESTABLISH A PRIMA FACIE CASE

A. THE GENERAL COUNSEL'S BURDEN OF PROOF

1. THE BOARD'S CAUSATION TEST UNDER *WRIGHT LINE, INC.*

In unfair labor practice cases where a charged party's motivation is at issue, the Board applies the "causation test" outlined in *Wright Line, Inc.*, 251 NLRB 1083 (1980). The *Wright Line* test requires the GC to make a "*prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the [charged party's] decision." *Id.* at 1089. "Once this is established, the burden

will shift to the [charged party] to demonstrate that the same action would have taken place even in the absence of protected conduct." *Id.* While the *Wright Line* test was developed to assess employers' alleged violations of Section 8(a)(3) of the Act (discrimination based on protected activity), the Board has also applied the test in unfair labor practice cases against unions where a union's motivation is at issue, such as unfair labor practice cases alleging violations of Section 8(b)(1)(A) of the Act. *See, e.g., Local 340, Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers*, 347 NLRB 578 (2006). Section 8(b)(1)(A) provides that "[i]t shall be an unfair labor practice for a labor organization or its agents – (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention therein." 29 U.S.C. § 158(b)(1)(A).

2. THE GENERAL COUNSEL'S *PRIMA FACIE* CASE IN REFUSAL-TO-REFER CASES

While *Wright Line, Inc.* outlines the basic causation test for determining a respondent's motivation in discrimination cases under the Act, it does not specify the elements necessary to establish a *prima facie* case. *Wright Line, Inc.*, 251 NLRB 1083. Rather, these elements differ depending on the nature of the case before the Board. For example, in discriminatory discipline and/or discharge cases, the GC must satisfy a three-prong test to prove its *prima facie* case: (1) the employee engaged in protected activity; (2) the respondent had knowledge of that activity; and

(3) animus by the respondent against the employee. *See, e.g., Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); *enfd*. 801 F.3d 767 (7th Cir. 2015).

In discriminatory refusal-to-hire cases (e.g., cases where individuals claim that they would have been hired by an employer but for their protected activity), however, the GC is also required to address the alleged discriminatees' eligibility for the positions for which they allege they should have been hired. *See FES*, 331 NLRB 9, 12 (2000) (holding that, in refusal to hire cases, the GC must prove (1) that the respondent was hiring at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire; and (3) that antiunion animus contributed to the decision not to hire the applicants). "In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits." *Id.*

The element of eligibility for referral or hire is essential in such cases because the goal of *Wright Line* is to determine the relationship, if any, between the refusal to hire and protected conduct. *See Wright Line, Inc.*, 251 NLRB at 1089 (stating that the objective of the causation test "is to determine the relationship, if any, between employer action and protected employee conduct"). Because the charging party in a refusal-to-hire case is not yet employed by the charged party, the GC must show that the charging party was in fact employable before an unlawful motivation on the

part of the charged party can be determined. As the Board explains in its *FES* decision,

> [i]n a discriminatory discharge case, there generally is no question that the alleged discriminate was in the employer's work force. The question centers on why he was removed from the work force…. In contrast, the question in a discriminatory hiring case is why the applicant was not taken into the employer's work force. *That question presupposes that there were appropriate openings in the employer's work force available to the applicant*"

331 NLRB at 12 (emphasis added). Thus, "[i]n a discriminatory hiring case…the General Counsel must show that antiunion animus was a motivating factor in the decision not to hire, and that there was at least one available opening for the applicant. The showing of an available opening entails a showing that the applicant had experience or training relevant to the announced or generally known requirements of the opening." *Id.* Put otherwise, the GC cannot hope to prove that an individual was not hired/referred for work for discriminatory reasons unless he demonstrates that the individual was eligible for hire/referral. "This framework for analysis appropriately allocates the *Wright Line* burdens in a refusal-to-hire case." *Id.* at 12.

Since at least 1981, the Board has recognized the GC's *prima facie* burden to prove alleged discriminatees' eligibility for specific hiring hall referrals in hiring hall cases alleging violations of Section 8(b)(1)(A) of the Act. *See, e.g., Operative Plasterers & Cement Masons, Local No. 299*, 257 NLRB 1386, fn. 38 (1981). As

ALJ Timothy D. Nelson held in the *Operative Plasterers & Cement Masons, Local No. 299* decision (a decision adopted by the Board without modification):

> It is arguable, under a literal reading of the burden-of-proof analysis suggested in *Operating Engineers, Local 18, supra,* that all the General Counsel need show, *prima facie*, is that a union took action which impaired an employee's job tenure or prospects, and that the burden then shifts to the Union to demonstrate that its actions were necessary as part of its representative function. But, in a hiring hall case, it seems to me that the General Counsel should bear an additional *prima facie* burden of showing that the alleged victim of wrongful treatment was at least apparently eligible for referral in whatever category may be applicable. Put another way, it is contrary to practical experience for there to be a presumption that anyone who registers for referral with a union-operated hiring hall is entitled to referral from a priority category; and, therefore, the Union's defensive burden should not be imposed unless and until some showing has been made by the General Counsel that an employee was apparently qualified for, but did not receive, a particular job dispatch.

Id.

And, indeed, in hiring hall case after hiring hall case, the Board has evaluated the GC's *prima facie* burden against a record demonstrating that individuals otherwise eligible for specific job referrals did not receive those referrals. *See, e.g., See, e.g., Local 340, Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers*, 347 NLRB 578 (2006) (finding violation of 8(b)(1)(A) where union failed to refer individual who was otherwise eligible for specific job referrals); *Service Employees Local 9 (American Maintenance)*, 303 NLRB 735 (1991) (finding violation of 8(b)(1)(A) where union failed to refer individual who was otherwise eligible for specific referrals on two separate occasions); *Construction & General Laborers,*

Local 304, 265 NLRB 602, (1982) (finding violation of 8(b)(1)(A) where union failed to refer individual who was otherwise eligible for the specific referral). Put otherwise, the Board's own hiring call case law, both explicitly and implicitly, requires the GC, in order to prove a Section 8(b)(1)(A) violation, to prove that an alleged discriminatee was eligible for specific job referrals and that the union declined to refer him despite his eligibility. The GC does not satisfy his *prima facie* case where he does not prove eligibility. Thus, the necessary elements to prove a *prima facie* case in refusal-to-refer cases under Section 8(b)(1)(A) of the Act mirror the *prima facie* elements in refusal-to-hire cases under Section 8(a)(3) of the Act. *See, e.g., FES*, 331 NLRB 9, 12 (2000).

B. THE GENERAL COUNSEL FAILED TO PROVE ITS *PRIMA FACIE* CASE WITH RESPECT TO RONALD MANTELL'S ELIGIBILITY FOR REFERRAL

Based on the Board's own case law, the GC failed to meet its *Wright Line* burden with respect to the allegation that Local 91 refused to refer RM in violation of Section 8(b)(1)(A) of the Act because the GC failed to adduce substantial evidence regarding RM's eligibility for any specific job referrals that he did not receive from Local 91's referral hall. Indeed, as explained above, in refusal-to-refer cases, the GC must, as an essential part of his *prima facie* case, adduce evidence sufficient to show that the alleged discriminatee (in this case, RM) was refused specific job referrals for which he was otherwise qualified. Here, the GC utterly

failed to proffer such evidence at trial and thus failed to satisfy an essential element of his *prima facie* case. Because the GC failed to carry his initial burden, the Board's conclusion that Local 91 refused to refer RM in violation of Section 8(b)(1)(A) lacks substantial evidence and must be reversed.

As ALJ Goldman stated in his Decision following the hearing:

> Based on the record evidence, we do not know the qualifications, employer requests, or rationale of those chosen for any of the referrals taking place during the nearly two-year time period in which the Local is alleged to have discriminated against [RM]. We do not know [RM's] record of re-registering for the list, or when he was or was not on the list or what place he was on the list. Indeed, an out-of-work list is in evidence for only one day's job referral, a list dated June 21, 2017, used for referrals to a job on June 26, 2017, and there is no evidence as to the type of job or circumstances surrounding the employer's call for labor, and no direct evidence of the basis for referrals made.

(A. 396).

Indeed, the GC failed to demonstrate even a single specific job referral for which RM was eligible and to which he was not referred for discriminatory reasons. (A. 10-324). Such failure of proof is a complete barricade to the GC's allegation that Local 91 violated 8(b)(1)(A) with respect a lack of job referrals for RM. *See, e.g., Operative Plasterers & Cement Masons, Locals No. 299*, 257 NLRB 1386, fn. 38 *and FES*, 331 NLRB at 12.

The particular facts of this case comport with the fact-patterns of the Board's refusal-to-hire and refusal-to-refer cases, and require the application of the *Wright Line* burden appropriate in such cases. Local 91 runs a non-exclusive referral hall,

meaning that signatory contractors are free to hire their own employees without going through the Local 91 referral hall. (A. 225-227). It also means that Local 91 members are free to obtain work directly with employers. *Id.* Further, the CBA and the referral hall rules themselves include many exceptions to following the order of the out-of-work list with respect to issuing job referrals. (A. 241-249, 360, 380-382). Contractors are free to request Local 91 members by name. (A. 249, 381). The Local 91 Business Manager is empowered to select job stewards and foremen without regard to the out-of-work list. (A. 246-247, 380). Further, not all available work is the same, and whether a member is eligible for a particular referral will depend on the nature of the work on the particular job, as well as the members' actual qualifications. (A. 241-246, 380). In addition, members are required to re-register on the out-of-work list every 90 days or they go to the bottom of the out-of-work list. (A. 246, 282-283, 379).

In sum, there are myriad factors that will qualify or disqualify a member for a referral, or allow Local 91 or the requesting contractor to legitimately skip individuals on the out-of-work list. Accordingly, because the GC failed to proffer evidence concerning the actual referrals available during the relevant time period, the Board has no rational means, at the *prima facie* stage, to determine whether a member could have been passed over for reasons that violate the Act. This is why the Board has held that the GC must prove eligibility for referral or hire in such

cases. *See, e.g., Operative Plasterers & Cement Masons, Local No. 299*, 257 NLRB 1386, fn. 38, and *See FES*, 331 NLRB at 12. Here, the GC never made the attempt to show that RM was qualified for even one job referral. Indeed, in its Decision and Order, the Board completely glosses over the absence of any facts in the record with respect to RM's eligibility for specific referrals. (A. 10-324). While the Board emphasized that RM received referrals in the past (A. 390), it failed to acknowledge the many ways in which members may be legitimately skipped on the out-of-work list – from specific contractor requests, to assignment of stewards and foremen, to lack of specifically requested skills.

Further, the Board's Decision and Order is silent with respect to the 45,000 hours deficit in fiscal year 2016 as compared to fiscal year 2015. (A. 282, 285, 317). As explained above, the hours deficit alone was 40 times greater than RM's total hours for the 2015 fiscal year, and 59 times greater than RM's total hours for the 2013 and 2014 fiscal years, respectively. (*Compare* A. 285 *with* A. 342). While a decrease in available man-hours does not necessarily foreclose RM's eligibility for referral, it certainly decreases the number of hours available to members on the out-of-work list, including RM. Importantly, these facts demonstrate that, contrary to the Board's Decision and Order, "Frank Mantell's protected activity" was *not* "the only factor that changed between the decades during which Ron was given regular referrals." (A. 380). Indeed, it remains undisputed that Local 91 suffered the most

severe man-hours shortage of the past 22 years during fiscal years 2016 and 2017 – the same period during which RM alleges he was unlawfully refused referrals. (A. 285, 317). Given these facts, neither the GC nor the Board can simply presume RM's lack of referrals were triggered by any unlawful motivation without putting forth proof of specific unlawful referrals.

As the Board has held, "the Union's defensive burden should not be imposed unless and until some showing has been made by the General Counsel that an employee was apparently qualified for, but did not receive, a particular job dispatch." *Operative Plasterers & Cement Masons, Local No. 299*, 257 NLRB 1386, fn. 38. The GC made no such showing in the instant case, and thus the Board's conclusion that Local 91 violated Section 8(b)(1)(A) by failing to refer RM both disregards the Board's own case law and is not support by substantial evidence.

Accordingly, for these reasons, Local 91 respectfully requests that this Court vacate those portions of the Board's Decision and Order which find and conclude that Local 91 violated Section 8(b)(1)(A) of the Act with respect to RM's lack of referrals.

POINT II

CONTRARY TO THE BOARD'S DECISION AND ORDER, THE GENERAL COUNSEL FAILED TO DEMONSTRATE A NEXUS BETWEEN RONALD MANTELL'S LACK OF REFERRALS AND FRANK MANTELL'S PROTECTED ACTIVITY

A. THE GENERAL COUNSEL MUST DEMONSTRATE A NEXUS BETWEEN ANIMUS AND THE ALLEGED ADVERSE ACTION

The GC's failure to demonstrate RM's eligibility with respect to any referrals should foreclose any finding that Local 91 violated Section 8(b)(1)(A) with respect to RM's lack of referrals. However, even assuming the GC had satisfied his burden with respect to RM's eligibility for referral, the GC still needs to establish a nexus between the alleged failure to refer and FM's protected activity. As explained above, the GC's *Wright Line* burden requires the GC to demonstrate evidence that the Union harbored animus against the charging party. However, the GC must also show a connection between the alleged animus and alleged adverse action. Indeed, without in any way altering the applicable standard, the Board has recently reemphasized that the GC cannot satisfy its *prima facie* burden under *Wright Line, Inc.* by simply adducing facts indicating that the respondent holds some animus against the alleged discriminatee, but must also demonstrate a nexus between the alleged animus and the alleged adverse action. *See Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019). As the Board states in *Tschiggfrie Properties, Ltd.*:

> The framework established by the Board in *Wright Line* is inherently a causation test…The ultimate inquiry is whether there is a nexus between the employee's protected activity and the challenged adverse employment action…The General Counsel does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer's animus or hostility toward union or other protected activity.

Id. at *7 (internal citations and quotations omitted). *See also Roadway Express*, 347 NLRB 1419, fn. 2 (2006) (finding that evidence of animus was insufficient to sustain General Counsel's initial *Wright Line* burden of proof) and *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418-419 (2004) (facts insufficient to show that respondent's animus against employee's union activity was a motivating factor in respondent's decision not to recall employee to work). Importantly, the Board emphasized that "other types of circumstantial evidence – for example, an isolated, one-on-one threat or interrogation directed at someone other than the alleged discriminatee and involving someone else's protected activity – may not be sufficient to give rise to such an inference." *Tschiggfrie Properties, Ltd.*, 368 NLRB at *11.

The Board has not hesitated to reject the GC's allegations where she has failed to prove a nexus between alleged animus and a Union's alleged failure to refer. *See Brand Mid-Atlantic, Inc.*, 304 NLRB 853, 855 (1991) ("Although we agree with the [ALJ] that the General Counsel has established a prima facie case that the Union had strong animus … , we find that the General Counsel has not established any nexus between that animus and the failure to refer"). *See also Sheet Metal Workers' Int'l*

Ass'n, Local Union No. 27, 316 NLRB 419 (1995) (holding that the General Counsel bears the burden of proving that out-of-order referrals are improper, and dismissing the Complaint because the GC failed to establish a nexus between the union's alleged animus and its alleged failure to refer individual).

B. THE GENERAL COUNSEL FAILED TO PROVE A CAUSAL NEXUS BETWEEN THE ALLEGED PROTECTED ACTIVITY AND THE ALLEGED ADVERSE ACTION

In the instant case, the Board places great emphasis on its 2017 Decision and Order wherein it found that Local 91 violated Section 8(b)(1)(A) of the Act by removing FM, RM's brother, from the out-of-work list because of his protected activity on Facebook. (A. 379 (citing *Laborers' Int'l Union of North America, Local Union No. 91*, 365 NLRB No. 28. (2017)). In an effort to connect RM's lack of referrals to FM's protected activity, the Board states, without discussion, that "[Local 91 Business Manager] Palladino ridiculed Frank Mantell when Ron approached Palladino in early November 2016 to discuss his nonreferrals." (A. 380). Using this conversation as its hook, the Board reasons that the GC satisfied his burden of proving a nexus between FM's protected activity and RM's lacked of referrals because "[a]s far as this record shows, Frank Mantell's protected activity was the only factor that changed between the decades during which Ron was given regular referrals and the 2-year period during which he received none." *Id.* Contrary to the Board, however, the record is replete with evidence of the myriad factors

affecting members' eligibility for referral. Thus, the Board's statements ignore both the record and its own case law regarding the GC's burden of proving a nexus between alleged animus and alleged adverse actions.

The record clearly demonstrates that Local 91 continued to refer RM well after it learned of FM's protected Facebook activity. (A. 134-137). While RM did not receive referrals after his last referral ended in late November/December 2015, construction work in Western New York traditionally drops off at that time of the year. (A. 28). Further, fiscal year 2016 concluded with 45,000 less available man-hours than fiscal year 2015. (A. 282, 317, 342). Combined with the myriad factors that come into play with respect to each referral request (contractor requests for specific members, steward and foremen assignments, skills and license requirements (A. 241-249)) – none of which were probed with any specificity by the GC – it is not at all a surprise that RM (and others) would not receive referral requests during the relevant time period. Indeed, the fact that RM waited an entire year without referrals before even raising the issue with Local 91's Business Manager (A. 288-291) demonstrates that not even RM was surprised by the lack of referrals. In fact, when RM finally did approach Business Manager Palladino about his lack of work, Palladino explained that there were many out-of-work members. *Id.* Surely, given that this Court requires the Board's Decision and Order to be supported by substantial evidence on the record as a whole (*see, e.g., NLRB v. Starbucks Corp.*,

679 F.3d 70, 77 (2d Cir. 2012)), these facts should not be discounted on the basis of an unproven and tenuous connection between FM's protected activity in August 2015 and RM's lack of work beginning in January 2016.

Importantly, while the Board's Decision and Order focuses on RM receiving his last referral in November 2015, the same month FM filed an unfair labor practice charge with the Board (A. 389) it fails to acknowledge that the GC has never alleged that FM's filing of Board charges had any bearing on RM's lack of referrals. (A. 325-332, 336-338). Indeed, even after amending the Complaint, the GC has only alleged that FM's protected August 2015 Facebook activity was the reason for RM's lack of referrals. (A. 328, ¶ V(b), 336-338)). Presumably, if the NLRB's investigation yielded proof of a connection between RM's lack of referrals and FM's decision to file Board charges, the GC would have included such allegations in its Complaint. However, the GC declined to include any such allegations, either initially or through amendments to the Complaint. (A. 325-332, 336-338). Accordingly, the GC'S (and the Board's) reliance on the timing of RM's Board charges are not supported by the record, or even the GC's Complaint.

Truly, then, the Board seeks to blame RM's lack of work on the basis of nothing more than a conversation between RM and Local 91's Business Manager that took place approximately one year after RM's last referral. Even if one were to ignore the immense gap in time, the record shows that it was RM – not Palladino –

that brought his brother's protected activity into the conversation. (A. 288-291). In other words, RM attempted to frame his lack of referrals as connected to FM's Facebook activity a year after his last referral from the hall, notwithstanding the Union's legitimate operation of its non-exclusive referral hall. While the GC relies on the conversation between RM and Palladino to allege a connection between RM's lack of referrals and FM's protected activity, the GC never produced evidence to actually prove the connection.

While the Board has found violations of the Act on the basis of protected activity conducted by someone other than the alleged discriminatee (*see, e.g., The Colonial Press, Inc.*, 204 NLRB 852, 858 (1973) (employee's layoff motivated by husband's union activity); *Superior Micro Film*, 201 NLRB 555, fn. 2 (1973) (employee's discharge motivated by wife's suspected union activity)), the GC still must prove a nexus between the protected activity and the alleged adverse act or omission in such cases (*see, e.g., Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120). *See also In re Brown & Root Industrial Services*, 337 NLRB 619 (2002) and *Freightway Corp*., 299 NLRB 531 (1990). However, "an isolated, one-on-one threat or interrogation directed at someone other than the alleged discriminatee and involving someone else's protected activity – may not be sufficient to give rise to such an inference." *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 at *8. Based on these principles, Local 91 contends that a single conversation occurring more

than a year after FM's protected Facebook activity, wherein the protected activity was raised by RM, is insufficient to prove a nexus between RM's lack of referrals and FM's protected activity, based on this record.

Accordingly, in light of the entire record and the Board's prior precedent, the Board's conclusion that a nexus exists between FM's protected activity and RM's lack of referrals such that the GC established a *prima facie* case of an 8(b)(1)(A) violation lacks substantial evidence. Therefore, its conclusion that Local 91 violated Section 8(b)(1)(A) of the Act with respect to RM's lack of referrals must be reversed.

CONCLUSION

Based on the record as a whole, and on the National Labor Relations Board's own precedent, the Board conclusion that Local 91 violated Section 8(b)(1)(A) by not referring Ronald Mantell from its referral hall lacks substantial evidence. Indeed, the General Counsel failed to prove that Ronald Mantell was eligible for even one specific referral, and also failed to prove a sufficient nexus between Ronald Mantell's lack of referrals and Frank Mantell's protected Facebook activity from August 2015. Insofar as the Board concludes otherwise, Local 91 respectfully contends that the Board's Decision and Order should be reversed.

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Respectfully submitted,

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