

19-2861 & 19-3009

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of the Laborers' International Union of North America, Local Union No. 91 ("the Union") for review, and the cross-application of the National Labor Relations Board ("the Board") for enforcement, of a Board Decision and Order issued against the Union on August

12, 2019, and reported at 368 NLRB No. 40. (A. 388-405.)¹ The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. § 151, 160(a). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). Venue is proper because the unfair labor practices occurred in Niagara Falls, New York. The petition and cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its Order remedying the Union’s four violations of Section 8(b)(1)(A) of the Act, specifically: its threat to bring internal charges against Ronald Mantell if he contacted the Board; its refusal to show Mantell the current out-of-work list in retaliation for his protected concerted activity; the change it made to its practice of making the most current list available to members on request; and its refusal to refer Mantell to jobs because his brother engaged in protected criticism of union leadership.

¹ “A.” references are to the joint appendix, “SA.” to the supplemental appendix, and “Br.” to the Union’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Whether, in the event the Union's forfeited arguments were properly before the Court, substantial evidence supports the Board's finding that the Union violated Section 8(b)(1)(A) by refusing to refer Mantell to jobs.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. The Union's Hiring Hall and Out-of-Work List

The Union has approximately 240 members and operates a non-exclusive hiring hall in Niagara Falls, New York. The Union refers members to jobs from its hiring hall's out-of-work list. But because the hall is non-exclusive, members remain free to obtain work directly from any contractor-employers that are signatories to the governing collective-bargaining agreement. (A. 388, 395; A. 225-26, 276, 327 ¶ 6(a), 333 ¶ 6.)

Under the hiring hall's rules, the Union generally refers members to jobs in the order that they are registered on the out-of-work list. (A. 388, 395; A. 225, 246-49, 380 ¶ 4.) Notwithstanding that "first in, first out" rule of thumb, the Union may refer a member out of order under certain circumstances. The exceptions include where a member: is specifically requested by a contractor-employer; possesses necessary qualifications or certifications that individuals higher on the list lack; is referred as a steward or foreman; or needs additional hours to attain (or retain) eligibility for unemployment or other benefits. (A. 388, 395; A. 246-49,

380-81 ¶ 4(A), ¶ (4)(A)(1)-(3), ¶ 4(B).) Members must re-register for the out-of-work list every 90 days and advise the Union if they independently secure work lasting 5 or more days, in which case they are removed from the list. (A. 388 n.3, 395; A. 245-46, 380 ¶ 3(C), ¶ 3(F).) As the Union's business manager, Richard Palladino is primarily responsible for selecting which members to refer from the out-of-work list when filling contractor-employers' requests for labor. (A. 388, 395; A. 238-39, 247, 307.) Mario Neri, the Union's job dispatcher, maintains the out-of-work list. (A. 388, 395; A. 221.)

B. For Years, the Union Regularly Refers Mantell to Jobs; After His Brother Files an Unfair-Labor-Practice Charge Against the Union, Mantell Receives No Further Referrals

Prior to November 2015, the Union referred Ronald Mantell, a 27-year member, to jobs on a regular basis. (A. 388, 395; A. 33, 35, 159.) The hours Mantell worked ranged from a low of 54 in fiscal year 1990, his first year on the out-of-work list, to a high of 2,063.5 hours in fiscal year 2006.² (A. 388; A. 342-43.) He worked 755 hours in fiscal year 2014 and 1,121 hours in fiscal year 2015. (A. 395 & n.5; A. 342-43.) In the first six months of fiscal year 2016 (June-November 2015), Mantell worked 734.25 hours, meeting or exceeding his pace

² The Union's fiscal year runs from June 1 of the prior year through May 31 of the nominal year. So, for example, fiscal year 2015 ran from June 1, 2014, through May 31, 2015. (A. 395; A. 37.)

from prior years. (A. 388, 395; A. 342-44.) In the second half of fiscal year 2015 and the first half of fiscal year 2016 (January-November 2015), the Union referred Mantell to jobs 11 times. (A. 388; SA. 1-7.) His final referral was on November 4, 2015. (A. 389, 395; A. 82, SA. 6.)

Meanwhile, in October 2015, the Union punished Mantell's brother, Frank Mantell, by removing Frank's name from the out-of-work list after he posted comments on Facebook that were critical of Palladino and the Union. (A. 389 (citing *Laborers Int'l Union of N. Am., Local Union No. 91 (Council of Utility Contractors, Inc. & Various Other Emp'rs)*, 365 NLRB No. 28, 2017 WL 680501 (Feb. 7, 2017)).) In response, Frank filed an unfair-labor-practice charge against the Union on November 12, and the Board subsequently found that the removal of Frank's name was unlawful retaliation by the Union for his prior protected comments. (A. 389.) *See Local Union No. 91*, 2017 WL 680501, at *1, *5.

The job Mantell received from his November 4 referral lasted three or four weeks. (A. 389, 395; A. 36, 344.) From the conclusion of that job in December 2015, through May 31, 2016, Mantell worked only one seven-hour job, which he obtained himself rather than through a referral. (A. 389; A. 42-43, 344.) Similarly, from January 1 through September 25, 2017, Mantell worked just one

six-hour job, which he obtained on his own.³ (A. 389; A. 55-57, 343, 374.) After his November 4, 2015 referral, Mantell never received another referral from the Union. (A. 389, 395; A. 82, SA. 1-7.)

Meanwhile, the Union made a total of 75 referrals to 15 individual members in 2015. Mantell was the second most-referred member that calendar year. In 2016, the Union made 37 referrals to 13 individual members—11 of whom had also received referrals in 2015. (A. 389; SA. 1-7.) Mantell received no referrals in calendar year 2016. In November 2016, he ranked second on the out-of-work list. (A. 389 & n.6; A. 48, SA. 1-7.) From January 1 to October 1, 2017, the Union made 36 referrals to 14 individual members—including the same 11 members who had received referrals in 2015 and 2016. (A. 389; SA. 1-7.) Mantell received no referrals during that nine-month period. In June 2017, he ranked seventh on the Union's out-of-work list. (A. 389; A. 375, SA. 1-7.)

C. Palladino Says He Will File Internal Charges Against Mantell if Mantell Contacts the Board

In early November 2016, Mantell spoke with Palladino at the hiring hall, questioning why he had not received a referral from the Union in the past year even though he was then ranked second on the out-of-work list. Mantell

³ The record does not show how many hours, if any, Mantell worked from June 1 through December 31, 2016. (A. 389.)

emphasized that he had not had any work and needed to work, explaining that he was no longer eligible for supplemental unemployment benefits. Palladino ridiculed Mantell's brother, Frank. (A. 389, 398; A. 46-48.) Mantell asserted he was "Ron Mantell, not Frank Mantell," and that he had come to ask for a job. (A. 389; A. 48.) Palladino replied that no contractor-employers had requested Mantell by name, Mantell could find his own work, and it was not Palladino's job to find work for him. Palladino further stated that he knew Mantell planned to contact the Board and threatened to file internal union charges against Mantell if he did. (A. 389; A. 48-49.)

D. The Union Refuses Mantell's Request To Review the Out-of-Work List and Changes Its Practice of Allowing Members To View the Most Current List upon Request

On June 26, 2017, Mantell went to the hiring hall and asked to see the current out-of-work list. (A. 389; A. 83.) At the time, the Union's policy allowed members to view the current list upon request. The list was updated daily, but no revisions were made unless there were changes that altered members' rankings. (A. 389; A. 81-82, 235-36, 253-60.) In response to Mantell's request, Neri showed him the most current list, noting that two members had just been referred to jobs. (A. 389; A. 84.) Those members ranked 10 and 18 on the list—Mantell was ranked 7. (A. 389; A. 375.) To explain the out-of-order referrals, Neri claimed they had been referred as stewards. (A. 389; A. 84.)

To assess Neri's claim, Mantell drove to the jobsite where the two members had been referred. After viewing the site and speaking with employees, he concluded that the members were not serving as stewards. The following day, June 27, Mantell returned to the hiring hall and again asked to see the out-of-work list. (A. 389; A. 85-89, 152-53.) Neri refused, stating that Mantell could not view the list "[b]ecause of what happened yesterday," meaning Mantell's visit to the jobsite. (A. 389; A. 89-90.)

Shortly thereafter, in late June or early July 2017, the Union began posting a copy of the out-of-work list on a weekly basis and stopped making the list available whenever a member requested. The Union continued to update the list daily for its internal records, but members no longer had access to that most up-to-date version. (A. 389; A. 93-94, 253-60.)

II. PROCEDURAL HISTORY

After investigating charges and amended charges filed by Mantell, the Board's General Counsel issued a consolidated complaint, subsequently amended, alleging that the Union had committed multiple violations of Section 8(b)(1)(A) of the Act. (A. 394; A. 19-20, 325-32, 336-38.) Following a hearing, an administrative law judge found that the Union unlawfully threatened to bring internal charges against Mantell if he contacted the Board, and unlawfully refused to show Mantell the current out-of-work list in retaliation for his protected

concerted activity. (A. 394, 398-99, 402-03.) The judge, however, dismissed the remaining allegations, including that the Union violated Section 8(b)(1)(A) by refusing to refer Mantell from the out-of-work list because his brother engaged in protected criticism of union leadership, and by changing its practice of making the most current out-of-work list available to members on request. (A. 394, 396-403.) The General Counsel filed exceptions to the judge's dismissal of those allegations; the Union filed no responsive pleading. (A. 388; A. 386-87.) The Union did not file exceptions with the Board to any aspect of the judge's recommended decision. (A. 388.)

III. THE BOARD'S CONCLUSIONS AND ORDER

In the absence of exceptions, the Board (Chairman Ring and Members Kaplan and Emanuel) adopted the administrative law judge's findings that the Union violated Section 8(b)(1)(A) of the Act by threatening to bring internal charges against Mantell if he contacted the Board, and by refusing to show Mantell the current out-of-work list in retaliation for his protected concerted activity. (A. 388.) Further, addressing the General Counsel's exceptions, the Board found, contrary to the judge, that the Union also violated Section 8(b)(1)(A) by refusing to refer Mantell from the out-of-work list because his brother engaged in protected criticism of union leadership, and by changing its practice of making the most current out-of-work list available to members upon request. (A. 388.) The Board

otherwise affirmed the judge's rulings, findings, and conclusions to the extent consistent with its Decision and Order. (A. 388 & nn.1-2.)

The Board's Order requires the Union to cease and desist from the unfair labor practices found and from, in any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. Affirmatively, the Order requires the Union to notify Mantell that it will refer him from its out-of-work list in his rightful order of priority, without regard to his or his brother's exercise of Section 7 rights. The Union must also remove from its files any references to its refusals to refer Mantell since October 12, 2016, notifying him in writing of the expungement and that the refusals will not be used against him in any way.⁴ The Order further requires the Union to make Mantell whole for any loss of earnings and other benefits suffered as a result of its unlawful refusal to refer him. Finally, the Union must permit Mantell to review the out-of-work list as it existed on June 27, 2017, if it is still available, restore its practice of

⁴ Because of the statutory six-month limitation period, the Board limited the violations and remedy to refusals to refer Mantell starting on October 12, 2016, six months before he filed his April 12, 2017 unfair-labor-practice charge. (A. 390 n.12 (citing 29 U.S.C. § 160(b)).) In finding that the Union unlawfully refused to refer Mantell starting in October 2016, the Board properly considered some evidence outside that six-month period. (A. 390 n.12 (citing *Grimmway Farms*, 314 NLRB 73, 74 (1994)).)

making the most current out-of-work list available for review by members upon request, and post a remedial notice. (A. 392.)

The Union did not file a motion for reconsideration of the Board's decision.

SUMMARY OF ARGUMENT

1. The Board is entitled to summary enforcement of its Order remedying the Union's four violations of Section 8(b)(1)(A) of the Act. Simply put, the Union did not challenge any of the violations before the Board—it filed no exceptions to the judge's decision, no pleading in response to the General Counsel's exceptions, and no motion for reconsideration. Therefore, under Section 10(e) of the Act, the Court lacks jurisdiction to review any aspect of the Board's Order. Moreover, even if the Union's challenges were not jurisdictionally barred, the Union has waived its opportunity to contest three of the four violations by failing to do so in its opening brief. Accordingly, the Court should summarily enforce the Board's Order in full.

2. Even if the sole violation the Union belatedly contests were properly before the Court, substantial evidence supports the Board's finding that the Union unlawfully refused to refer Mantell to jobs because his brother engaged in protected activity. Ample evidence also supports the Board's determination that the Union failed to establish its affirmative defense both because its asserted reasons were mere pretext for its discrimination against Mantell, and because it did

not prove that, in the absence of protected activity, Mantell would have received no referrals after November 2015. Finally, the Union's defensive contentions are meritless because they are either based on inapplicable cases or a misapprehension of relevant precedent.

STANDARD OF REVIEW

The Court's "review of Board orders is quite limited." *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996). The Board's factual findings are "conclusive" when supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Cibao Meat Prod., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008). The Court will reverse a factual finding "only . . . if, after looking at the record as a whole, [it is] left with the impression that no rational trier of fact could reach the conclusion drawn by the Board." *Katz's Delicatessen*, 80 F.3d at 763 (quoting *NLRB v. Albany Steel, Inc.*, 17 F.3d 564, 568 (2d Cir. 1994)). The Board's legal determinations will be upheld if they have "a reasonable basis in law." *Cibao Meat*, 547 F.3d at 339 (internal quotation marks omitted). The "Court's standard of review does not change where the Board disagrees with the ALJ" and reaches a different legal conclusion. *Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 175 (2d Cir. 1998).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS ORDER REMEDYING THE UNION'S VIOLATIONS OF SECTION 8(b)(1)(A) OF THE ACT

The Court will summarily enforce the portions of a Board order addressing uncontested—or uncontestable—violations. *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009). In this case, that is the entirety of the Board's Order.

As noted, the Board found that the Union violated Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), by: (1) threatening to bring internal charges against Mantell if he contacted the Board; (2) refusing to show Mantell the current out-of-work list in retaliation for his protected concerted activity; (3) changing the on-demand availability of the out-of-work list; and (4) refusing to refer Mantell from the out-of-work list because his brother engaged in protected criticism of union leadership. The Court lacks jurisdiction to review any challenges to those findings because the Union failed to raise any objections to them before the Board. The Union, moreover, has waived any challenge to the first three unfair-labor-practice findings by failing to address them in its opening brief.

A. To preserve the Court's jurisdiction to review an argument, a party must first raise the argument before the Board

It is settled law that a party must first raise a challenge before the Board in order to preserve it for subsequent consideration by a court of appeals. Thus,

Section 10(e) of the Act unambiguously states that “[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court,” absent “extraordinary circumstances.” 29 U.S.C. § 160(e). As the Supreme Court has made clear, Section 10(e)’s requirement is jurisdictional: a “[c]ourt of [a]ppeals lacks jurisdiction to review objections that were not urged before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982). *Accord Consol. Bus Transit*, 577 F.3d at 474 n.2 (citing *Woelke*).

To comply with Section 10(e), a party must urge its objection before the Board, according to the Board’s own procedures. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). After an administrative law judge issues a recommended decision, the Board’s Rules require parties to file exceptions raising any and all objections they may have to the judge’s decision. *See* 29 C.F.R. § 102.46(f) (“Matters not included in exceptions . . . may not thereafter be urged before the Board, or in any further proceeding”). If a party fails to do so, then the Court lacks jurisdiction to consider the party’s challenges to the Board’s decision and its findings. *See, e.g., KBI Sec. Serv., Inc. v. NLRB*, 91 F.3d 291, 294 (2d Cir. 1996).

The statutory requirement that a party first raise an objection before the Board encompasses situations where the party initially prevailed before the judge. Thus, if a judge dismisses a complaint allegation against a party and the General

Counsel files exceptions to that dismissal, then the party must raise any and all of its arguments to the Board—either in an answering brief to the General Counsel’s exceptions or in its own cross-exceptions—to preserve them for subsequent judicial review.⁵ *See* 29 C.F.R. § 102.46(f) (“Matters not included in . . . cross-exceptions may not thereafter be urged before the Board, or in any further proceeding”); *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (remedial challenge not preserved where not raised in party’s answering brief to General Counsel’s exceptions seeking violation and remedy); *NLRB v. Monson Trucking, Inc.*, 204 F.3d 822, 825-27 (8th Cir. 2000) (challenge forfeited where party failed to raise it in answering brief to General Counsel’s exceptions); *NLRB v. DeBartelo*, 241 F.3d 207, 211 n.6 (2d Cir. 2001) (prevailing before the judge did not preserve challenge where the party never filed cross-exceptions to adverse portion of judge’s decision, which the Board relied on in finding violation); *NLRB v. Graphic Arts Int’l Union Local 13-B*, 682 F.2d 304,

⁵ In an answering brief, the party may present arguments in response to the General Counsel’s exceptions and defend the judge’s favorable decision. *See* 29 C.F.R. § 102.46(b). In cross-exceptions, it may contest any adverse points within the otherwise favorable judge’s decision in the event that the Board relies on them in ultimately finding the violation. *See* 29 C.F.R. § 102.46(c).

311-12 (2d Cir. 1982) (although party prevailed before the judge, it forfeited objections to the judge's adverse rulings not preserved through cross-exceptions).⁶

The statutory purpose underlying Section 10(e) is to provide the Board with adequate notice of the basis of a party's objection, and thus the opportunity to respond, before the party may pursue the objection in court. *See NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 460 (1st Cir. 2005); *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999); *Local 13-B*, 682 F.2d at 311-12. And as the Court has made clear, the requirement that a party first urge its objection before the Board is not satisfied by the Board's own discussion of the issue. *Nat'l Mar. Union of Am. v. NLRB*, 867 F.2d 767, 775 (2d Cir. 1989) ("Discussion of an issue by the Board does not save the issue for appeal when the issue was not raised before the Board."). *See also Alwin Mfg.*, 192 F.3d at 143 ("[S]ection 10(e) bars

⁶ The Court's older decisions in *NLRB v. Local 138, International Union of Operating Engineers*, 293 F.2d 187, 191-92 (2d Cir. 1961), and *NLRB v. Local 282, International Brotherhood of Teamsters*, 412 F.2d 334, 337 n.2 (2d Cir. 1969), stating that a prevailing party need not except to an otherwise favorable judge's decision to preserve an objection, are not to the contrary. *Local 138* (upon which *Local 282* relied) preceded the Board's subsequent amendment to its rules and regulations specifically permitting parties, for the first time, to file cross-exceptions. *See Rules and Regulations of the National Labor Relations Board*, 28 Fed. Reg. 7,972, 7,973 (Aug. 6, 1963) (specifying that amended § 102.46, adding cross-exceptions, "shall apply only to those cases in which a trial examiner's decision issues on or after September 3, 1963"); 29 C.F.R. § 102.46 (1963) (then-existing rule not providing for filing of cross-exceptions).

review of any issue not presented to the Board, even where the Board has discussed and decided the issue.”).

B. The Court lacks jurisdiction to consider challenges to the Board’s Order

The only unfair labor practice the Union challenges in its opening brief is the violation based on its refusal to refer Mantell. (*See* Br. 3-31.) But, under Section 10(e) of the Act and pursuant to the principles just detailed, the Court does not have jurisdiction to consider the Union’s arguments contesting that violation—or any arguments it might belatedly make regarding the other violations.

The Board found merit in the General Counsel’s exceptions to the judge’s failure to find both the refusal-to-refer violation and the violation for changing the out-of-work list’s availability, with the Union having waived all objections to the latter, *see* p. 19. (A. 388.) Significantly, the Union failed to file an answering brief to the General Counsel’s exceptions, to defend the judge’s reasons for dismissing the allegations or rebut the General Counsel’s arguments in favor of finding the two unfair labor practices. Likewise, the Union failed to file cross-exceptions to any portion of the judge’s decision, including those the Board

ultimately relied on in finding the two additional violations.⁷ (A. 388.) And, finally, the Union did not file exceptions before the Board to the violations based on its threat against Mantell and its failure to show him the out-of-work list, both of which the judge recommended finding unlawful in his underlying decision. (A. 388.)

In other words, when the case reached the Board for it to review the judge's recommended decision, the Union had ostensibly given up. The Union neither contested the violations found by judge nor disputed the General Counsel's reasons why the Board should find the two additional violations. Compounding its failure to raise any challenges *before* the Board decided the case, the Union also failed to file a motion for reconsideration *after* the Board issued its decision finding that the Union committed all four unfair labor practices. *See* 29 C.F.R. § 102.48(c) (party may file motion for reconsideration raising any purported legal or factual errors in

⁷ Discussing *Wright Line*, and presaging the Board's own analysis, the judge stated that the Union's undisputably unlawful retaliation against Frank "would support the inference that Mantell's failure to be referred was motivated by additional retaliation for his brother's protected and concerted activity." (A. 397.) "Most significantly," the judge noted, the Union's "abrupt cessation of referrals" of Mantell after November 2015, the same month Frank filed his charge, supported the inference that the Union's failure to refer Mantell was unlawfully motivated because "unexplained timing can be indicative of animus." (A. 397.)

Board’s decision).⁸ Because the Union utterly failed to raise any objections before the Board, much less the arguments it now presents, it has forfeited—and the Court lacks jurisdiction to consider—any challenges to the Board’s findings, decision, and Order.⁹ *See* pp. 13-17. Accordingly, the Board is entitled to summary enforcement of its Order. *See Consol. Bus Transit*, 577 F.3d at 474 n.2.

In addition to that jurisdictional bar, the Union has waived any objections to three of the four violations—threatening Mantell, refusing to show him the list, and changing the list’s on-demand availability—by failing to assert them (Br. 3-31) in its opening brief. *See* Fed. R. App. P. 28(a)(8)(A) (appellant’s opening brief must contain its arguments and supporting reasons); *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) (arguments not made in opening brief are waived, even if belatedly raised in reply brief). And to the extent the Court nonetheless considers the Union’s sole challenge, to the

⁸ Although the Union would not have necessarily successfully preserved its challenges by belatedly raising them in a motion for reconsideration, *see Parkwood*, 521 F.3d at 410 (motion for reconsideration did not preserve claim that could have been raised in answering brief), its failure to avail itself of that final opportunity to urge them before the Board forecloses its ability to assert them now, *see, e.g., Monson Trucking*, 204 F.3d at 825-27 (challenge forfeited where not raised prior to Board decision or, “[a]t the very least,” in a motion for reconsideration afterward); *Local 13-B*, 682 F.2d at 311-12 (same).

⁹ The Union has not suggested, much less argued, that “extraordinary circumstances” within the meaning of Section 10(e) justified its failure to present any of its arguments to the Board. 29 U.S.C. § 160(e).

refusal-to-refer violation addressed below, it is worth noting that the three uncontested violations do not disappear from the case. They remain, lending their aroma to the context in which the remaining, contested unfair labor practice is considered. *See, e.g., NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000); *Torrington Extend-A-Care Emps. Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991).

II. IN ANY EVENT, SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY REFUSING TO REFER RONALD MANTELL

A. The Act Prohibits a Union from Refusing To Refer a Member Because of Protected Activity

Among other rights, Section 7 of the Act protects the right of employees to “engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection” 29 U.S.C. § 157. In turn, Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union “to restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(b)(1)(A). Consistent with that statutory prohibition, a union operating a non-exclusive hiring hall violates Section 8(b)(1)(A) when it refuses to refer an

employee-member because of protected activity.¹⁰ *See, e.g., Operating Eng'rs Local 137 (Various Emp'rs)*, 317 NLRB 909, 909-10 & n.5, 923 (1995); *Local No. 121, Operative Plasterers' & Cement Masons' Int'l Ass'n (Associated Bldg. Contractors of Lafayette, Inc.)*, 264 NLRB 192, 192-93 (1982).

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases, articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Although created in the context of employer discrimination, the Board has long "applie[d] the analytical framework laid out in *Wright Line* to cases in which a union is alleged to have discriminated against . . . an employee in violation of Section 8(b)(1)(A)" *Int'l Bhd. of Elec. Workers, Local 429*, 347 NLRB 513, 515 (2006), *remanded on other grounds*, 514 F.3d 646 (6th Cir. 2008). *See, e.g., NLRB v. Local 46, Metallic Lathers Union*, 149 F.3d 93, 102-03 (2d Cir. 1998) (applying *Wright Line* in refusal-to-refer case); *Local 340, Int'l Ass'n of Bridge*,

¹⁰ Taking an adverse action because of protected activity is unlawful even if the adversely affected employee is not the employee who engaged in the activity. *See, e.g., Tasty Baking Co.*, 330 NLRB 560, 560 n.2, 578-83 (2000) (employer's adverse actions against supervisory employee motivated by animus toward her union-activist husband), *enforced*, 254 F.3d 114 (D.C. Cir. 2001).

Structural & Ornamental Ironworkers (Consumers Energy Co.), 347 NLRB 578, 578-79 (2006) (same).

Consistent with that test, if substantial evidence supports the Board's finding that protected activity was a "motivating factor" in the union's decision, the adverse action is unlawful unless the record as a whole compels acceptance of the union's affirmative defense that it would have taken the same action in the absence of protected activity. *Transp. Mgmt.*, 462 U.S. at 395, 401-04; *Local 46*, 149 F.3d at 102-03; *Local 340*, 347 NLRB at 578-79.

The Board may appropriately rely on circumstantial evidence to infer an unlawful motive because direct evidence of motivation is often unavailable. *Bozzuto's Inc. v. NLRB*, 927 F.3d 672, 683 (2d Cir. 2019). For example, the Board, with this Court's approval, has found that knowledge of protected activity, close timing between protected activity and the adverse action, and hostility towards the protected activity may all provide evidence of unlawful motivation. *See Bozzuto's*, 927 F.3d at 683; *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982). Moreover, if the reasons advanced by the union for its action are pretextual—that is, if they either did not exist or were not in fact relied upon—the union necessarily fails to meet its defensive burden, and the inquiry is logically at an end. *See Am. Geri-Care*, 697 F.2d at 62-65; *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

In assessing the Board's motive finding, the Court engages in a particularly deferential review, because motive is a question of fact and "the Act vests primary responsibility in the Board to resolve [such] critical issues of fact." *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 956 (2d Cir. 1988). *See also Am. Geri-Care*, 697 F.2d at 59.

B. The Union Unlawfully Refused To Refer Mantell Because of His Brother's Protected Activity

"Applying *Wright Line*," the Board reasonably found that "Frank Mantell's protected Facebook criticism of union leadership was a motivating factor in the [Union's] sudden and simultaneous cessation of referrals of" Mantell. (A. 390.) That finding is supported by substantial evidence in the record, as the Board explained.

To begin, the Board observed that there was "no dispute" over two essential facts—that Frank Mantell engaged in protected activity and the Union knew about it. (A. 390.) As the Board reasoned, those two facts were definitively proven in earlier litigation finding that the Union had also unlawfully retaliated against Frank himself for that protected activity. (A. 389-90, 397 (citing *Local Union No. 91*, 2017 WL 680501, at *1-2, *5).) Next, the Board found that its decision in Frank's case also "firmly establish[ed] that the [Union] harbored unlawful animus against that protected activity." (A. 390.) *See Local Union No. 91*, 2017 WL 680501, at *2, *5 (Union removed Frank from out-of-work list because he posted comments

critical of Palladino). That the Union’s hostility towards the protected activity persisted even after it retaliated against Frank, and that the hostility motivated the Union’s treatment of Mantell, is demonstrated by Palladino’s own statement. As the Board found, “Palladino ridiculed Frank Mantell when [Mantell] approached Palladino in early November 2016 to discuss his nonreferrals and his desire for work.”¹¹ (A. 390.) As shown, after Palladino’s revealing remark, the Union continued its blanket refusal to refer Mantell.

Lastly, and “[m]ost tellingly,” the Board found the suspicious timing of the Union’s abrupt cessation of all referrals of Mantell highly probative of unlawful motivation. (A. 390.) As the Board noted, there is “no dispute that [Mantell] was regularly referred to jobs before his brother criticized the Union and filed his NLRB charge and that, beginning immediately afterward, [Mantell] never received another referral.” (A. 390.) Specifically, the Union referred Mantell to a several-week job on November 4. While Mantell was working that job, Frank filed his November 12 unfair-labor-practice charge contesting the Union’s retaliation against him for his prior protected activity—taking his previously internal dispute

¹¹ Although the Board did not resolve the factual dispute over whether Mantell or Palladino first mentioned Frank, that detail is immaterial, contrary to the Union’s argument (Br. 29-30). The operative, uncontested fact remains that Palladino ridiculed Frank during a discussion focused on Mantell’s lack of work. (A. 389 & n.7; A. 48.)

with the Union to a new level.¹² Thereafter, the Union never again referred Mantell to jobs. The Board, with judicial approval, regularly relies on such suspicious timing as evidence of unlawful motivation. *See Am. Geri-Care*, 697 F.2d at 60 (unlawful motive is properly inferred when timing of adverse actions is “stunningly obvious”). *See, e.g., Airgas USA, LLC v. NLRB*, 916 F.3d 555, 563-64 (6th Cir. 2019) (timing supported finding of unlawful motivation where adverse discipline occurred “just under a month after” protected activity); *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 105 (D.C. Cir. 2003) (two employees unlawfully discharged “just weeks” after engaging in protected activity); *Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (timing of employees’ discharges—three weeks after first contacting union and four days after a union meeting—and abruptness of discharges constituted “persuasive evidence” of unlawful motivation).¹³

¹² Filing a charge with the Board is unquestionably a protected activity. *See NLRB v. Local Lodge No. 707, Int’l. Ass’n of Machinists*, 817 F.2d 235, 237 (2d Cir. 1987).

¹³ The Union’s effort to diminish the import of this timing falls flat. (Br. 28-30.) It points to the delay between when it learned of Frank’s protected Facebook posts, in late August or early September, and when it ceased referring Mantell. But the Union disregards that it did not retaliate against Frank until October 12, and that Frank continued his protected activity—contesting the Union’s retaliatory actions before the Board on November 12 and in an appeal to the international union, which intervened on November 19. *See Local Union No. 91*, 2017 WL 680501, at *5. It also disregards precedent finding comparable time intervals sufficient to support findings of unlawful motivation. *See, e.g., Charter Commc’ns, Inc. v.*

In sum, as the Board reasonably concluded, the record evidence establishes a “strong” case under *Wright Line* that the Union was unlawfully motivated when it ceased referring Mantell from the out-of-work list. (A. 390.) Turning to the Union’s affirmative defense, the Board reasonably rejected the Union’s proffered non-discriminatory reasons for its failure to refer Mantell—even once—since November 2015, finding them to be pretextual. (A. 390.) Based on the same evidence, or lack thereof, the Board further found, in the alternative, that the Union “failed to prove that [Mantell’s] referrals would have completely stopped even absent his brother Frank’s protected activity.” (A. 390.)

The Union asserted (before the judge) that it had stopped referring Mantell because he had objected to one- or two-day referrals and because he possessed insufficient qualifications. Those two constraints prevented referrals, the Union maintained, because it was becoming more common for employers to request laborers for just one or two days and to require qualifications Mantell lacked. As the Board found, however, the Union “offered no specifics in support of these assertions and no explanation of how they could have accounted for the lack of *any*

NLRB, 939 F.3d 798, 815 (6th Cir. 2019) (three-month period between union activity and discharge “a temporal proximity that alone may raise concerns”); *Dish Network, LLC*, 363 NLRB No. 141, slip op. 13, 2016 WL 850920 (Mar. 3, 2016) (employee’s protected activities and eventual discharge “all occurred within 3 months”), *enforced*, 725 F. App’x 682 (10th Cir. 2018).

referrals over a 2-year period.”¹⁴ (A. 390.) Under Board precedent, “such unspecific, conclusory testimony does not suffice to sustain a party’s *Wright Line* defense burden.” (A. 390 (citing *A.P.A Warehouse, Inc.*, 302 NLRB 110, 115 (1991)).) *See also NLRB v. Homer D. Bronson Co.*, 273 F. App’x 32, 38 (2d Cir. 2008) (employer failed to support asserted defense with “conclusory statement” that was “entirely unsupported by the record”); *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 874 (6th Cir. 1995) (unsupported, conclusory testimony insufficient to establish affirmative defense). In this case, the Board found the “complete absence” of referrals “especially probative,” aptly observing that “the federal courts have been highly skeptical of efforts to explain away the ‘inexorable zero’” in unlawful discrimination cases, a skepticism equally applicable here. (A. 390 n.11 (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977)).

Regarding the Union’s articulated rationales, the Board specifically rejected the contention that Mantell categorically refused all short-term jobs, citing his

¹⁴ There is undeniably little evidence in the record regarding the lengths of available jobs, the certifications contractor-employers may have required of referred laborers, and the relative qualifications and rankings of other members referred from the out-of-work list during that period. Indeed, as the judge outlined (A. 396), and the Union acknowledges (Br. 21), the parties chose not to develop the record in that respect. In other words, the Union failed to adduce evidence to prove—as was its burden—the negative effect that Mantell’s alleged limitations had on his eligibility for post-November 2015 referrals.

adamant denial that he ever told the Union he was not interested in one- or two-day jobs.¹⁵ (A. 390; A. 142-44, 319-22.) The Board further observed that Mantell possessed “the same qualifications both before and after November 2015, and the same holds true for his purported preference for multi-day jobs.” (A. 390; A. 140-42, 158-59, 321.) Thus, the Board found that “[a]s far as this record shows, Frank Mantell’s protected activity was the only factor that changed between the decades during which [Mantell] was given regular referrals and the 2-year period during which he received none.”¹⁶ (A. 390.)

In light of those evidentiary deficiencies, the Board reasonably found that the Union’s “stated reasons for failing to refer [Mantell were] pretextual,”

¹⁵ In citing Mantell’s denial of any restriction on short jobs, the Board implicitly credited him over Neri, who claimed that Mantell said he did not want any one- or two-day referrals in 2013. (A. 261-64.) But even assuming Mantell did register such a preference in 2013, Neri did not plausibly explain how Mantell continued to regularly receive referrals despite such restriction until November 2015. (A. 264-65, 267-68, 270-72.)

¹⁶ The Union now attempts to justify that absolute cessation of referrals by pointing to an economic slump that reduced available work in fiscal year 2016. (Br. 5, 12, 23-24, 28.) But as the Union essentially concedes (Br. 23), a mere decline in work does not prove that *none* would have gone to Mantell in the absence of Frank’s protected activity. To the contrary, the evidence suggests the opposite. Despite having over 200 members, the hiring hall sent the same small cadre of 11 members to cover most jobs in 2015-2017. *See* p. 6. Even assuming Mantell was less qualified or more selective than some, an overall reduction in work fails to explain his total lack of referrals after November 2015 when he was among the small group regularly referred before then.

obviating the need to perform the second part of the *Wright Line* analysis. (A. 390 (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)).) But the Board further reasonably found that, “even assuming the second part of the *Wright Line* analysis is reached,” the Union failed, as just demonstrated, to carry its burden of proving Mantell “would have received no referrals for 2 years even absent his brother’s protected activity.” (A. 390.)

C. The Union’s Forfeited Challenges to the Board’s Legal Standard Are Meritless

As discussed (pp. 13-20), the Court lacks jurisdiction to entertain any of the Union’s appellate challenges because the Union failed to first raise them before the Board. In any event, the forfeited challenges are without merit—particularly the Union’s twofold challenge to the Board’s application of *Wright Line*. (Br. 15-31.)

Citing *FES*, 331 NLRB 9 (2000), the Union first asserts that the Board erred by not requiring the General Counsel to establish Mantell’s eligibility for any specific referral that he did not receive. (Br. 15-24.) But *FES* does not apply to refusal-to-refer cases involving union discrimination. As the Board explained, it “has consistently adhered to the *Wright Line* test in hiring hall discrimination cases” and applying *FES* in such cases, as the judge did here, is therefore “incorrect.” (A. 389 n.8.) Instead, *FES* governs cases where an employer

allegedly refuses to hire an applicant because of his protected activity. *See* 331 NLRB at 12.¹⁷

The cases cited by the Union do not compel a different conclusion. (Br. 18-20.) *Local 340*, relied on by the Board (A. 389-90), and cited above (pp. 21-22), applied a traditional *Wright Line* analysis, like the one the Board applied here, to analyze a refusal-to-refer allegation. *See* 347 NLRB at 578-79, 583-84. It did not, contrary to the Union's assertion (Br. 19), apply *FES* or impose any similar eligibility requirement. *See id.* The same holds true for *Theatre & Amusement Janitors Union Local 9 (Am. Bldg. Maint. Co.)*, 303 NLRB 735, 735, 741 & n.10, 742-46 (1991) (applying traditional *Wright Line* analysis to assess allegedly discriminatory motive in refusal-to-refer allegations).

The Union's remaining cases did not address refusal-to-refer allegations under Section 8(b)(1)(A), the provision at issue here, but under Section 8(b)(2) of

¹⁷ In applying *FES*, the judge did not cite any Board decision resolving a refusal-to-refer allegation against a union. Instead, he reasoned that such cases are, as the Union argues (Br. 17-18), analogous to cases involving refusal-to-hire allegations against employers. (A. 397-98.) As described, the Board has determined otherwise and followed its established precedent here.

the Act, 29 U.S.C. §158(b)(2).¹⁸ In *Local No. 299*, the Board found that the union had not arbitrarily judged an employee ineligible for priority referral from its *exclusive* hiring hall as a “journeyman,” in violation of its duty of fair representation (a duty not relevant in non-exclusive hiring-hall cases like this one). *Operative Plasterers & Cement Masons, Local No. 299 (Wyo. Contractors Ass’n, Inc.)*, 257 NLRB 1386, 1386-87, 1393-96 (1981).¹⁹ Having determined that there was no allegation of discriminatory treatment, and finding no evidence of hostility in any event, the Board never applied any version of *Wright Line*’s motivation test, with or without an eligibility inquiry. *Id.* at 1394. Similarly, the Board in *Local 304* did not apply any version of *Wright Line*, finding instead a violation under Section 8(b)(2) where the union admittedly failed on one occasion to refer the next employee on its out-of-work list because he had not completed a qualification form

¹⁸ Section 8(b)(2) makes it an unfair labor practice for a union “to cause or attempt to cause an employer to discriminate against an employee in violation of [Section 8(a)(3)] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.” 29 U.S.C. §158(b)(2).

¹⁹ The footnote that the Union block quotes (Br. 19) is *dicta*. While the judge speculates, admittedly in tension with controlling law, that the General Counsel should show that an employee was eligible for a job he did not receive to prove a violation, such specific eligibility was not at issue in the case. The allegation under consideration, and the remainder of the footnote, focused on whether the employee was “entitled to referral from a priority category.” *Local No. 299*, 257 NLRB at 1396 n.38.

containing an unlawful waiver. *Constr. & Gen. Laborers, Local 304 (Associated Gen. Contractors of Cal., Inc.)*, 265 NLRB 602, 602, 604, 609-11 (1982).²⁰

The Union similarly gains no ground with its second legal challenge, that the Board erred by not requiring the General Counsel to demonstrate a more specific “nexus” between Frank’s protected activity and its adverse treatment of Mantell. (Br. 25-27.) As the Board clarified in the very decision the Union relies on, “*Wright Line* is inherently a causation test” and, therefore, “identification of a causal nexus as a separate element that the General Counsel must establish to sustain his burden of proof is superfluous because ‘[t]he ultimate inquiry’ is whether there is a nexus between the employee’s protected activity and the challenged adverse employment action.” *Tschiggfrie Props., Ltd.*, 368 NLRB No. 120, 2019 WL 6320585, at *10 (Nov. 22, 2019) (quoting *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1328 (D.C. Cir. 2012)).

As demonstrated above, the Board performed that “ultimate inquiry” and found that the Union ceased referring Mantell because of his brother’s protected activity. That finding is supported by ample evidence in addition to the Union’s

²⁰ Although *Local 304* and *Local 299* also involved allegations under Section 8(b)(1)(A), they were not refusal-to-refer allegations like the one at issue here. Instead, they involved challenges to specific hiring-hall procedures. See *Local 304*, 256 NLRB at 602 (waiver language in registration form); *Local No. 299*, 257 NLRB at 1386, 1393 (“sham” referral lists).

undisputed animus towards Frank's protected activity, notably the suspiciously close timing between that protected activity and Mantell's last referral, Palladino's negative comment about Frank during a discussion addressing the Union's ongoing refusal to refer Mantell, and the Union's failure to prove it would have ceased referring Mantell in the absence of the protected activity. The strength of the evidence readily distinguishes this case from those cited (Br. 26-27) by the Union. *See Sheet Metal Workers' Int'l Ass'n, Local Union No. 27*, 316 NLRB 419, 422 (1995) ("no evidence" union had any animus toward member denied referrals); *Brand Mid-Atl., Inc.*, 304 NLRB 853, 845-55 (1991) (although union had animus toward member, no evidence connected animus to denial of referral).

CONCLUSION

As detailed above, the Court lacks jurisdiction to entertain any of the Union's challenges which are, in any event, without merit. Accordingly, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

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June 2020

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

LABORERS' INTERNATIONAL UNION OF NORTH :
AMERICA, LOCAL UNION NO. 91 :
: :
: :
Petitioner/Cross-Respondent :
: :
v. : Nos. 19-2861 &
: 19-3009
: :
NATIONAL LABOR RELATIONS BOARD :
: :
: :
Respondent/Cross-Petitioner :

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,943 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC
this 5th day of June 2020

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2020, I electronically filed the foregoing brief 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 further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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