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Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors, Inc. and Various Other Employers) and Frank S. Mantell. Case 03–CB–163940

February 7, 2017

DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS
PEARCE AND MCFERRAN

On September 7, 2016, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a brief in reply. The General Counsel filed a cross-exception with supporting argument, the Respondent filed an answering brief,¹ and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.²

We agree with the judge, for the reasons he stated and for the additional reasons set forth below, that the Respondent, in operating its nonexclusive hiring hall, violated Section 8(b)(1)(A) of the Act by removing the Charging Party, Frank S. Mantell, from its out-of-work referral list between October 12 and November 19, 2015.

In *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000), the Board clarified the scope of Section 8(b)(1)(A) by finding that internal union discipline may give rise to a violation only if the union's conduct: (1) affects the employment relationship, (2) impairs access to the Board's processes, (3) pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or (4) otherwise impairs policies imbedded in the Act. *Id.*

¹ The Respondent's answer to the General Counsel's cross-exception was contained in the same document as its reply brief in support of its own exceptions.

² We shall modify the judge's recommended Order in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

The General Counsel seeks a make-whole remedy that includes consequential damages incurred as a result of the Respondent's unfair labor practice. The relief sought would require a change in Board law. Having duly considered the matter, we are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time.

at 1418, 1424. If the union's discipline is found to be within the scope of Section 8(b)(1)(A), the Board then weighs the Section 7 rights of the union member against the legitimate interests of the union to determine whether the discipline violates the Act. See *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118, 1122 (2000) (determining whether a violation of Section 8(b)(1)(A) occurred involves balancing the employees' Section 7 rights against the legitimacy of the union interest at issue).

Here, as the judge found, the Respondent's discipline had an impact on the employment relationship. Specifically, by removing Mantell from the out-of-work referral list, the Respondent deprived him of employment opportunities. See *Electrical Workers Local 2321 (Verizon)*, 350 NLRB 258 (2007) (finding union discipline impacted the employment relationship where it resulted in less opportunity to work overtime).

Next, under *Sandia*, we must balance Mantell's Section 7 rights against the legitimacy of the union interests at stake. At issue is Mantell's posting of statements on Facebook that criticized the Respondent's Business Manager Richard Palladino for failing to apply established union policies by giving Glen Choolokian, a Niagara Falls city councilman running in the Democratic primary for mayor, a journeyman's book without having him go through the required apprenticeship program. Mantell's Facebook posts raised issues concerning the efficacy and fairness of the Respondent's operations and procedures. As the Board has recognized, it is "elementary" that "an employee's right to engage in intraunion activities in opposition to the incumbent leadership of his union is concerted activity protected by Section 7." *Steelworkers Local 1397 (U.S. Steel Corp.)*, 240 NLRB 848, 849 (1979); accord *Laborers Local 836 (Corbet Construction)*, 307 NLRB 801, 803 (1992) (members have a statutory right to object to the way officers operate the union); *Plasterers Local 121*, 264 NLRB 192 (1982) (individual's criticism of union leadership is protected by the Act). Accordingly, we adopt the judge's finding that Mantell engaged in protected, concerted activity by posting his criticisms of the Respondent and its business manager on Facebook.³

We next examine the Union's interests at stake in this case. The Respondent contends that Mantell's Facebook posts damaged both its reputation in general as well as the reputation of Palladino as business manager, the lat-

³ Citing *MasTec Advanced Technologies*, 357 NLRB 103, 107 (2011), the judge rejected the Respondent's assertion that Mantell lost the protection of the Act by maliciously defaming the Union and its Business Manager Palladino. In adopting the judge's finding, we note that no party has excepted to the judge's application of *MasTec*.

ter of which adversely affected Palladino's ability to effectively perform his leadership responsibilities. We find that Mantell's Section 7 right to press the union to change its policies, especially those policies affecting members' employment opportunities, outweighs the Respondent's vague claim that its reputation was damaged. See *Electrical Workers Local 2321 (Verizon)*, 350 NLRB at 262–263 (although the union had a legitimate interest in maintaining the loyalty and solidarity of its members, this interest did not outweigh the interest of its members to engage in their Section 7 rights to work voluntary overtime contrary to the union's request). Therefore, we agree with the judge that the Respondent violated Section 8(b)(1)(A) of the Act by removing Mantell from its out-of-work referral list between October 12 and November 19, 2015.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(b)(1)(A) by removing the Charging Party, Frank S. Mantell, from its out-of-work referral list between October 12 and November 19, 2015, we shall also order the Respondent to make Mantell whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, we shall order the Respondent to compensate Frank S. Mantell for any adverse tax consequences of receiving a lump-sum backpay award and to file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate Mantell for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, com-

pounded daily as prescribed in *Kentucky River Medical Center*, supra.⁴

Further, the Respondent shall be required to remove from its files any reference to the removal of Mantrell from its out-of-work list, and notify him in writing that this has been done and that his removal from the list will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Laborers' International Union of North America, Local Union No. 91, Niagara Falls, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Removing employees from its out-of-work referral list in retaliation for activity protected by Section 7 of the Act, including criticizing the Union or any of its decisions.

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

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

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

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

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

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

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all hiring hall and refer-

⁴ For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 9–16, Acting Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

ral records, and any other records and documents, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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

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

Dated, Washington, D.C. February 7, 2017

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT remove any of you from our out-of-work referral list in retaliation for activity protected by Section 7 of the Act, including criticizing the Union or any of its decisions.

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

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

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

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

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

LABORERS LOCAL UNION No. 91

The Board's decision can be found at www.nlr.gov/case/03-CB-163940 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Re-

lations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Linda Leslie, Esq., for the General Counsel.
Robert Boreanaz, Esq. (Lipsitz, Green, Scime, Cambria LLP),
of Buffalo, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Buffalo, New York, on June 29, 2016. Frank S. Mantell filed the charge in this matter on November 12, 2015. The General Counsel issued the complaint on March 30, 2016, which was amended twice, but not in any material respect.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

The Respondent Union, Laborers Local Union 91, is a labor organization within the meaning of Section 2(5) of the Act. It represents employees who work for construction employers who are subject to the Act and who are members of employer associations which are subject to the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent, in operating its nonexclusive hiring hall, violated Section 8(b)(1)(A) of the Act by removing the Charging Party, Frank S. Mantell, from its out of work list between October 12 and November 19, 2015.

In late August 2015 Mantell a member of Local 91, posted comments on a Facebook page called *Niagara Falls Uncensored* (GC Exhs. 4, 5, and 6). The comments criticized the Union for allowing Glen Choolokian to obtain a journeyman's book. Choolokian was a Niagara Falls city councilman, running for mayor of Niagara Falls in the Democratic primary against the incumbent. This Facebook page was accessible to about 4,000 people, some of whom were members of Local 91.

Mantell's objection to the Union permitting Choolokian to acquire a journeyman's book was that he did not go through the Union's 5-year apprentice program.

One of Mantell's comments, made in response to a post accusing unions or the Union of corruption was "It's not that we are corrupt. It's just the leader of our union and our small 3 man PAC committee will back any politician who will promise benefits to us even though they are not the best choice for our city or county."

In response to a critic of his posts, Mantell wrote, "I am not running for mayor and receiving gifts from our union. I am just a voice in a rather dictatorship of a union. And I am exposing him for who and what he is. Our union deserves better."

The same critic wrote that the current union leadership had saved the Union and the jobs of all its members. In response, Mantell wrote, "More of a reason not to give a journeyman union book to a politician when we have an apprenticeship program in place. This kind of bad decision making does not help us in the eyes of the International."

Local 91's Business Manager, Richard Palladino filed internal union charges against Mantell in early September 2015. Palladino contended that Mantell's comments damaged his ability to run the local.

On September 23, 2015, the construction project on which Mantell was working came to an end. On that day, he went to the union hall and signed the out-of-work list. He was fifth on the list at that time.

The Union's executive board conducted a trial on Palladino's charges against Mantell on October 5, 2015. The deliberations of the executive board focused on the aforementioned Facebook posts. The seven-member executive board found Mantell guilty of the charges brought by Palladino and made a decision to fine him \$5000 and suspend his membership for 24 months. This decision was ratified at the Union's monthly membership meeting on October 12. The Union removed Mantell from the hiring hall's out-of-work list the next day.¹

Mantell appealed the decision to the International Union. On November 19, the International apprised Local 91 of the appeal and notified it that the decision of the trial board was stayed and ineffective until it may be upheld by the General Executive Board of the International. Thus, Mantell was removed from the Union's out-of-work list from October 12 to November 19. On December 4, 2015, the International informed Local 91 that it dismissed the charges against Mantell.

Analysis

Section 8(b)(1)(A) of the Act states that it shall be an unfair labor practice for a labor organization, or its agents to restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act. Section 8(b)(1)(A), however, also says that this provision "shall not impair the right of a labor organization to prescribe its own rules with respect to acquisition or retention of membership."

Thus, the initial question in this case is whether the Union restrained or coerced Frank Mantell in the exercise of a Section 7 right. This in turn raises the question of whether Mantell engaged in any activity protected by Section 7. Mantell's Facebook posts concerned perceived unfairness affecting apprentices. Mantell was a journeyman, however, not an apprentice.

Section 7 provides that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

¹ Mantell works full time as a firefighter for the city of Niagara Falls. However, he also regularly acquires work through the Union's hiring hall as a laborer.

(Emphasis added.)

One could argue that Mantell did not engage in protected activity because the issuance of a journeyman's book to Choolokian did not affect him, or even if it did, his Facebook posts only complained about the effect on apprentices.

Nevertheless, I find that Mantell's Facebook posts were protected. First of all, issuing a journeyman's book to someone allegedly ineligible to receive one, affected Mantell in that one more journeyman would arguably impact his opportunities for employment. Moreover, as Judge Learned Hand pointed out in *NLRB v. Peter Cailler Kohler Swiss Chocolate Co.*, 130 F.2d 503, 505-506 (2d Cir. 1942), employees making common cause with fellow employees are engaged in protected activity. Even though the immediate quarrel may not concern them they may be assured that if their "turn ever comes," they will have the support of those they are then helping.

I also reject Respondent Union's assertion that Mantell forfeited the protection of the Act by maliciously defaming the Union and Business Manager Palladino. Nothing Mantell said in his Facebook posts was maliciously and knowingly untrue, *MasTec Advance Technologies*, 357 NLRB 103, 107 (2011). The Union takes issue with the fact that Mantell characterized the Union's action as giving Choolokian "a gift." I find that has not been proven to be false despite the fact that Choolokian may have paid for the journeyman's book. Mantell's use of the term "gift" can reasonably be interpreted as arguing that Choolokian was not entitled to a journeyman's book—an assertion that may or may not be true.²

The Union also argues that this case should be dismissed pursuant to the Board's decision in *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000). In that decision the Board held that it would no longer proscribe intraunion discipline under Section 8(b)(1)(A) with does not interfere with the employer-employee relationship or otherwise contravenes a policy of the Act.

I conclude that removal of Mantell from the hiring hall's out-of-work list interferes with the employer-employee relationship and thus violates Section 8(b)(1)(A). By removing him from its out-of-work list, the Union deprived Mantell of employment opportunities and deprived prospective employers of his services. In *Plasterers Local 121*, 264 NLRB 192 (1982), albeit a case predating *Sandia*, the Board found that a union violated Section 8(b)(1)(A) by rescinding a nonexclusive hiring hall referral and refusing to refer an employee in the future. The Union was retaliating against the employee in that case for criticizing the business agent's way of running the Union.³

The Board in *Carpenters Local 370 (eastern Contractors Assn.)*, 332 NLRB 174 (2000) held that a Union operating a nonexclusive hiring hall owed no duty of fair representation to a member. However, despite this, a union violates Section

8(b)(1)(A) when it discriminates against a member for protected activity, *Newspaper & Mail Deliverers (City & Suburban Delivery)*, 332 NLRB 870, 870 fn. 1 (2000); *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 441 fn. 1 (1990).

CONCLUSION OF LAW

Respondent, Laborers Local Union Number 91, violated Section 8(b)(1)(A) by removing the Charging Party, Frank S. Mantell, from its out-of-work list between October 12 and November 19, 2015.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Laborers Local Union No. 91, Niagara Falls, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Removing employees from its out-of-work list in retaliation for activity protected by Section 7 of the Act.

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

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

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

(b) Make Frank Mantell whole for any loss of earnings and or other benefits suffered a result of the discrimination against him.

(c) Compensate Frank Mantell for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its hiring hall in Niagara Falls, New York, copies of the attached

² Similarly, I find that Mantell did not forfeit the protections of the Act by suggesting that the Union awarded Choolokian a journeyman's book because Choolokian promised benefits to the Union if he was elected Mayor. There is no evidence in this record as to the reason the Union allowed Choolokian to acquire a journeyman's book.

³ A recent similar case, involving an exclusive hiring hall is *Stage Employees IATSE Local 15(SMG and the Freeman Cos. d/b/a Freeman Decorating Services)*, 364 NLRB No. 89, slip op. at 22 (2016).

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

notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as my email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current members and employees who were members at any time since October 12, 2015.

(f) Sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by any employers to whom referrals were made between October 12, and November 19, 2015, if willing, at all places or in the same manner as notices to employees are customarily posted.

Dated, Washington, D.C., September 7, 2016

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT remove any of you from our out-of-work list in retaliation for activity protected by Section 7 of the National Labor Relations Act, including criticizing the Union or any of its decisions.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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

WE WILL compensate Frank Mantell for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

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

LABORERS LOCAL UNION No. 91

The Administrative Law Judge's decision can be found at www.nlr.gov/case/03-CB-163940 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."