International Union of Operating Engineers Local 181 (Maxim Crane Works) *and* Rickie J. Vance.
Case 25–CB–150584

January 4, 2017

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On July 13, 2016, Administrative Law Judge David I. Goldman issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering 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,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. January 4, 2017

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Raifael Williams, Esq. (NLRB Region 25), of Indianapolis, Indiana, for the General Counsel.
Charles L. Berger, Esq. (Berger & Berger, LLP), of Evansville, Indiana, for the Respondent.

[1] In dismissing the 8(b)(1)(A) allegations, Members Miscimarra and McFerran observe that the Respondent Union was in the midst of defending the Charging Party's unfair labor practice charge when it required him to make an appointment to view exclusive hiring hall lists so that union counsel could be present. They express no view on whether such a requirement lawfully could be imposed in other circumstances.

DECISION

Introduction

DAVID I. GOLDMAN, Administrative Law Judge. In this case an employee registered with a union's exclusive hiring hall requests that the union show him the hiring hall's "out-of-work" list. The union refuses to let him see the list at its district office in Evansville, Indiana, but offers to have the union's business manager show it to him at the main district office in Henderson, Kentucky, a 10–15 minute farther drive for the employee. The business manager explains that he wants to make sure that in showing the list negative comments made by contractors about employees are not disclosed. The employee refuses the offer to view the list in Henderson and files charges with the National Labor Relations Board (Board).

A couple of months later, in an effort to settle the dispute, the union's attorney writes to the Board's investigating agent and offers to let the employee view the out-of-work list in Evansville by making an appointment with the office. The investigating Board agent and the union's attorney tell the Evansville staff representative that for this meeting the employee will need to make an appointment so that the union's attorney can be present. A few weeks later the employee shows up at the Evansville office unannounced and requests to view and copy the records. The union representative denies the request because he has been instructed that there has to be an appointment so that the union attorney can be present when the charging party-employee reviews the records.

On these facts, the government alleges that the union has unlawfully refused to allow the employee to view and copy the out-of-work lists in breach of the union's duty of fair representation. The question is whether under the circumstances the union's rationales for, first, requiring the employee to go to Henderson to view the list, and second, requiring an appointment so that counsel could be present at Evansville, are arbitrary and irrational. I conclude that they are not. Further, I reject as unsupported by any evidence the suggestion that the union's actions toward the employee were motivated by hostility toward him because of his union political activities. Finally, given my resolution, I do not reach the issue of whether evidence of the second incident at the Evansville office should be barred by Federal Rule of Evidence 408 as contended by the Union at trial. I recommend dismissal of the complaint.

STATEMENT OF THE CASE

On April 22, 2015, Rickie J. Vance (Vance) filed an unfair labor practice charge alleging violations of the Act by the International Union of Operating Engineers Local 181 (Union) docketed by Region 25 of the National Labor Relations Board (Board) as Case 25–CB–150584. Based on an investigation into the charge, on August 31, 2015, the Board's General Counsel, by the Regional Director for Region 9 of the Board, issued a complaint and notice of hearing alleging that the Union had violated the National Labor Relations Act. On September 10, 2015, the Union filed an answer denying all alleged violations of the Act. The Union filed an amended answer December 14, 2015. A trial was conducted in this matter on January 28, 2016, in Evansville, Indiana. Counsel for the General

Counsel and counsel for the Union filed briefs in support of their positions by April 6, 2016. On the entire record, I make the following findings, conclusions of law, and recommendations.

Jurisdiction

The Union is a labor organization within the meaning of Section 2(5) of the Act. Maxim Crane Works (Maxim) is a limited partnership that has, at all material times, been engaged in the business of providing cranes and other lifting equipment nationwide. Maxim has an office and place of business in Indianapolis, Indiana. At all material times, Maxim has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Indiana Contractors Association, Inc. (ICA) is a multiemployer bargaining association. At all material times the Union has been the exclusive collective-bargaining representative of the following employees, including employees of Maxim:

> The employees described in Article I and II of the collective bargaining agreement between Respondent and the Building Division–ICA, Inc. which was effective from March 13, 2012 to March 31, 2015.

Charging Party Vance is a member of the Union, and at various times worked for employers, including Maxim, under terms and conditions established by the labor agreements bargained by the Union and ICA. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Factual Findings

Background

The Union is the recognized collective-bargaining representative for, among others, the employees of employers who are members of, or otherwise abide by the terms and conditions negotiated by the multiemployer bargaining association known as the building division of the ICA.

The Union's jurisdiction includes all the counties in Kentucky (except for four Kentucky counties just to the south of Cincinnati, Ohio) and 28 counties in Indiana. Within this jurisdiction the Union maintains six district offices throughout the jurisdiction.

Howard Hughes is the Union's elected business manager. He oversees the Union's operations for all districts. His office is in District 1, in Henderson, Kentucky. District representatives and business agents are located in all of the district offices except for District 1.

Business agents in these districts report to the district representatives. The district representatives report to Business Manager Hughes. But, as Hughes, explained, "they all work for me." The district 2 office is in Evansville, Indiana. Hughes testified that the driving distance from the Henderson office to the Evansville office is 12.8 miles and that it took him 13 minutes to drive it. Driving distance from the center of Henderson to the center of Evansville is 10.7 miles.[1]

For many years, the Union has operated an exclusive hiring hall. Pursuant to the collectively-bargained agreement between ICA and the Union, ICA-affiliated contractors needing operators notify the Union and the Union has 24 hours to refer qualified employees. After 24 hours the contractor can hire from any source. The contractor has the right to determine the competency and qualifications of union-referred employees and to decide whether to hire the referred employees.

The Union maintains an out-of-work list of all members (and nonmembers who have worked within the jurisdiction) listing the last date that they registered as out-of-work. The Union's out-of-work list tracks all reporting employees who are laid off and want to be contacted when the Union has received contractor requests for employee referrals. An employee or applicant can register with one district, or all six, depending on their willingness to travel for work.

The Union's out-of-work list is maintained through a computer program developed by a company named Benassist. As maintained by this computer program, the list contains not only the names of employees, their address, telephone, self-reported job skills, and out-of-work date, but also contractor comments about employees that amount to negative reviews of the employees' work skills or refer to their having failed a drug test. Applicants registering for the out-of-work list self-identify which (of approximately 150 possible) job skills they possess. If the applicant has overstated his or her qualifications and the contractor finds the employee deficient, the contractor will contact the union and reference the problem. Those show up in comments and they are considered in future referrals.

The out-of-work list is updated in the computer system on a daily basis by secretaries working in the Henderson office, who receive reports and input the information from the district offices each morning. The districts get their information from employees who, after being laid off, will call in to the district office that referred them to the job and report how many days they worked and that they are now laid off. Sometimes there is as many as 500–600 calls are logged in the system for one day. While each district office has access to the list through the computer system, only the Henderson office has authority to make changes or updates to the out-of-work list. District representatives can print out an out-of-work list for their district, but also for other districts as well.

When a contractor request for employees is made, the Union contacts applicants in order of the out-of-work list (longest out-of-work first, of course) out of those registered applicants listed as possessing the skills, certifications, and drug-testing approvals required by the contractor for the referral. Typically the contact is made by a phone call from a union representative to the applicant to telephone numbers supplied by the applicant. There is some discretion in how long a union representative waits to hear back, but given the 24-hour referral mandate, essentially the first applicants contacted who respond to the calls are referred to the jobs.

[1] I take administrative notice of this fact, based on Google Maps. *Bud Antle, Inc.*, 359 NLRB 1257, 1257 fn. 3 (2013), reaffd. 361 NLRB No. 87 (2014).

Applicants referred out to a job that lasts more than 20 days go to the bottom of the list when they are laid off and then reestablish themselves on the out-of-work list. If the applicant works five days or less, he or she retains the existing out-of-work date. After five days (but less than 21 days) one day is added to the employee's out-of-work date for each day beyond five days worked but less than 21.

Vance's dispute with Hughes about whether he views the out-of-work list in Evansville or Henderson

Vance is a 37-year member of the Union. He had an out-of-work date of September 9, 2014. Although union records submitted into evidence, and admissions on cross-examination convincingly demonstrated otherwise, Vance claimed in his direct testimony that "I had been laid off for six months and hadn't received any phone calls for work that I'm aware of. That's why I asked to see the out-of-work list."[2]

In mid-to-late March 2015 (the testimony varies on the specific date) Vance telephoned the Union's district 2 (Evansville) district representative Tom Litkenhus and asked to see the out-of-work list. Litkenhus told Vance that he "couldn't show him the out-of-work list," and that he would have to go to Henderson and let Business Manager Hughes show it to him. Vance insisted "I have a right to see the out-of-work list in Evansville." After debating the matter for a few minutes, Litkenhus told Vance that "You're not going to get the answer you want out of me."

The conversation with Litkenhus included accusations by Vance that the Union had referred an employee out of order in front of Vance. Vance told Litkenhus, "I've got you now"—however, Vance admitted at trial that soon thereafter he learned that his accusation was incorrect, and, indeed, he had no evidence of any employee being referred out of order. Vance admitted that he had no evidence at all that he has been treated unfairly with regard to referrals, although those remain his "feelings."

A few days later, the morning of April 2, Vance called the Union's business manager, Hughes, in Henderson. After some small talk about a labor agreement Hughes was negotiating, and discussion of union elections, Vance told Hughes that he "felt like [he'd] been overlooked several times on the out-of-work list," and that he had been told by district 2 that he would have to go to Henderson to see the out-of-work list. Vance told Hughes that he believed he had a right to see the out-of-work list without going to Henderson: "Why I would have to go to Henderson to see it is beyond me and that's the question I am presenting to you."

Hughes indicated that district representatives such as Litkenhus were not to show the list to applicants. Hughes told him, "let me explain something Rick. There's more—on the out-of-work list[,] there's more information than what . . . you think there is. Okay. Let's just say there's comments under everybody's name in the file that a contractor will not hire somebody, that's under his name."

Vance noted that other locals have "dispatch" out-of-work systems where "you can get on your smart phone 24/7 and see where you are at on the list, see who is in front of you, see who is behind you." Hughes countered that "the day may be coming that [ ] this Local does that, but we've got a lot of redoing to do to do that." Hughes contended that with a dispatch system there needs to be a more rigorous certification system for every job classification so that qualified applicants can be automatically chosen and dispatched to jobs—under the Union's system the union agent reviews the list, the applicant's work history, and the applicant's self-identification of skills, to determine who has the skills for the job to make sure that qualified employees are sent out.

Hughes told Vance, "Come over here and I'll show you where you're at." Vance said, "I shouldn't have to come over." Hughes insisted that "there's too much liability for the [district] agents to go hanging around the out-of-work list," and that he, Hughes, knew how to show employees the list without exposing the Union to liability. Vance argued that if the problem was that certain information on the list could not be shown, then that information should be removed and a list made that didn't show other people's information. They reiterated their positions a couple of times, at one point Hughes told Vance "I'm getting tired of your bullshit." The conversation ended with Hughes reiterating his "invitation" to Vance to come to Henderson to see where he was on the list. "If you want to see the list, I know how to show you where you're at, if you want to see it."

Later that morning Vance called an international union representative, Todd Smart, to consult about his right to the out-of-work list. Although it is disputed what Smart told Vance, after their conversation Vance called Hughes back and told Hughes that Smart had told him he had a right to see the out-of-work list without having to travel to Henderson. Vance also told Hughes that Smart told him it was an issue for the "Labor Relations Board."

Hughes responded, "I tell you what you do. I've offered to show you the list over here . . . . you call the [National] Labor Relations Board." Vance said, "We're not doing that." [i.e., coming to Henderson to view the list]. Then Vance told Hughes that Smart had agreed that it was unbecoming for Hughes to have told Vance in their earlier call that "I am tired of your goddman shit"—apparently Vance told Smart that Hughes had said that. Hughes told him, "I didn't say those words." The conversation devolved. As to the issue of the out-of-work list, Hughes essentially reiterated his position that he would show the list to Vance in Henderson. Vance reiterated that if the issue was "liabilities" related to information on the list, then such information should be removed.

Minutes after this call, Hughes connected a call with Smart

[2] Vance also testified that the Union did not "start calling me [for jobs] until they had notice that I had filed [unfair labor practice] charges." However, on cross-examination he nonchalantly admitted that it was "possible" that this was inaccurate, admitted that he told the Board agent, as reflected in his affidavit, that he turned down job offers because he wanted longer jobs, he remembered receiving a message for work on October 1, 2014, and did not remember eight other jobs for which the Union's records convincingly demonstrated he received calls (for multiple calls for each job in most instances) between September 9, 2014, and March 19, 2015. My resolution of this case does not turn on Vance's credibility, but his testimony about not being called for six months was thoroughly discredited.

and Vance on the line. Smart accused Vance of misrepresenting their conversation and denied that he told Vance that he had a right to see the out-of-work list. The two (literally) had a "he said"—"he did not say" conversation. Then Hughes and Vance argued again about whether Hughes had told Vance that he was "tired of your goddman shit." At some point, Hughes and Smart realized that Vance was no longer on the line.

Hughes testified that for as long as he had been a member (i.e., 43 years) the procedures carried out in response to Vance's (late March or) April 2015 request had been in place. That is, in asking that Vance come to Henderson so that Hughes could show him the list in a manner that did not reveal negative comments from contractors about other employees, Hughes believed he was carrying out a practice long in effect. He testified that subsequently, as of December 2015, in response to this case, he had a meeting with the union's agents and, along with an office secretary, Susan Prichard, who "understands Benassist better than anybody" showed the agents how to print the list and manually remove "personal comments" from the list and then recopy the list for applicants to view. Essentially, in December 2015, Hughes showed the agents how to do the work that previously he had trusted only himself to do. Hughes also testified that the Union still, after December 2015, does not permit applicants to copy the list.

Vance files an unfair labor practice charge; the Union offers to resolve it

On April 22, 2015, Vance filed the unfair labor practice charge that is at issue in this case. During the pendency of the investigation, on May 28, 2015, the Union's attorney Charles Berger, sent a letter to the Board's investigating agent, Rebekah Ramirez, in which he announced that "Mr. Vance does not need to go to Henderson to see the out-of-work list . . ." The letter states:

> Thank you for your correspondence of May 20, 2015. Mr. Vance does not need to go to Henderson to see the out-of-work list he is permitted to see. We are willing to show him where he is located on the out-of-work list including who is above and below him and their corresponding out-of-work dates. Our out-of-work list contains a great deal of confidential, private information including drug testing results, discipline, contractor comments, and other information including telephone numbers.
>
> Members are not restricted nor required to go to Mr. Hughes' office to view the list. Mr. Vance was difficult and not willing to discuss the matter with Mr. Litkenhus and made inaccurate, false accusations. Mr. Litkenhus directed him to Henderson due to Mr. Vance's demeanor and actions. Mr. Vance will need to make an appointment for when he wishes to visit and view the out-of-work list and we will see that the meeting occurs. Please advise if this will resolve the matter.

Vance shows up at the Evansville office unannounced

Some weeks later, in the latter part of June, Vance returned to the Evansville district 2 office, accompanied by Fred Blaylock, a longtime union member and former business manager, who came as a witness for Vance. Vance testified that "I was told by the National Labor Relations Board to go there and ask to see the out-of-work list and after I got done looking at it to have copies made." Vance attributed this directive to the investigating Board agent, Ramirez.

District Representative Litkenhus greeted Vance and Blaylock in the lobby. Vance "asked to see the out-of-work list, I also asked to have copies made after I looked at it." Litkenhus refused to allow Vance to review the list, stating that the last message he had gotten from counsel was that Vance "would need to make an appointment and Charlie Berger would have to be present" for him to view the list. Litkenhus testified that "I was told from Ramirez and my attorney that they had to have an appointment and my attorney present." Vance was not permitted to view the out-of-work list.

I note that a backdrop to all these witnesses' interactions was union politics. When Hughes ran and won the election for business manager in 2011, he defeated the incumbent business manager, Fred Blaylock, in a close race. Blaylock accompanied Vance to the union hall as a witness when he sought the out-of-work list in June. In 2011, Hughes also defeated a third candidate in the race, by a larger margin, Vance's uncle, Don Cooper. Vance campaigned for his uncle. In 2014 Hughes ran again and won reelection over Steve Manning. Vance campaigned for Manning.

Analysis

The General Counsel contends the Respondent breached its duty of fair representation, in violation of Section 8(b)(1)(A) of the Act, by refusing to permit Vance to view or make copies of the out-of-work list information.

The duty of fair representation is a judicially-created cause of action implied from a union's statutory grant of exclusive bargaining rights under the Railway Labor Act (RLA). *Steele v. Louisville & Nashville Railway Co*., 323 U.S. 192 (1944). The concept reflects that "when Congress empowered unions under the RLA to bargain exclusively for all employees in a particular bargaining unit, and thereby subordinated individual interests to the unit as a whole, it imposed on unions a correlative duty, inseparable from the power of representation, to exercise that authority fairly." *California Saw & Knife*, 320 NLRB 224, 228 (1995), enfd. 133 F.3d 1012 (7th Cir. 1998).

In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the Supreme Court confirmed that these principles extended to unions recognized under the Act. See also, United Steelworkers v. Rawson, 495 U.S. 362, 373 (1990) ("The Union's duty of fair representation arises from the National Labor Relations Act itself").

In *Miranda Fuel Co*., 140 NLRB 181 (1962), enf'd. denied 326 F.2d 172 (2d Cir. 1963), a Board majority adopted and applied the duty of fair representation as it had been developed by federal courts. The Board held that breaches of a union's duty of fair representation constitute unfair labor practices under 8(b)(1)(A) or 8(b)(2):

> we are of the opinion that Section 7 [of the Act] gives employees the right to be free from unfair or irrelevant invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we

> conclude that Section 8(b) (1) (A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.[3]

At the same time, the Supreme Court has established that, whether before the Board or in federal court, "[a] breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Thus, in considering, the duty of fair representation, "the Supreme Court-mandated standards . . . require deference to a union's rational, good-faith, nondiscriminatory decision-making." *Operating Engineers, Local 18*, 362 NLRB No. 176, slip op. at 9 (2015).

This standard "applies to all union activity." *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991); *Plumbers Local Union No. 342 (Contra Costa Electric),* 329 NLRB 688 (1999), enf'd. denied, 233 F.3d 611 (D.C. Cir. 2000). And that includes, as here, the operation of an exclusive hiring hall. *Air Line Pilots v. O'Neill*, 499 U.S. at 77 ("none of our opinions has suggested that the duty is governed by a double standard. Indeed, we have repeatedly noted that the *Vaca v. Sipes* standard applies to challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well. We have also held that the duty applies in other instances in which a union is acting in its representative role such as when the union operates a hiring hall") (internal citations and quotations omitted); *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 88 (1989); *Plumbers Local Union No. 342*, supra.[4]

More specifically, the Board has long held that "inherent in a union's duty of fair representation is an obligation to deal fairly with an employee's request for information as to his relative position on the out-of-work register for purposes of job referral through an exclusive hiring hall." *Local Union No. 324, Operating Engineers*, 226 NLRB 587, 587 (1976). Thus, the issue in this case is whether the Union has acted arbitrarily, discriminatorily, or in bad faith towards Vance with regard to his requests for the out-of-work lists. *IATSE, Local 720, 363 NLRB No. 148*, slip op. at 6 (2016) ("Therefore, a union violates the Act when it arbitrarily denies a request for job referral information if the request is reasonably directed toward ascertaining whether the user has been treated fairly"); *Local 324, Operating Engineers*, 226 NLRB at 587 ("We therefore agree with the Administrative Law Judge that Respondent's arbitrary refusal to comply with Carson's reasonable and manageable request for job-referral information breached its duty of fair representation and thereby violated Section 8(b)(1)(A) of the Act").[5]

The Respondent contends (R. Br. at 15–16) that the fact that Vance did not have a reasonable belief of discriminatory treatment undercuts any claim that Vance was entitled to view the out-of work lists. Board precedent is unsettled as to whether an applicant must demonstrate "a reasonable belief" that he was treated unfairly as a prerequisite to proving a union's breach of the duty of fair representation for failing to provide him referral hall records, or whether an applicant's mere desire to see the information is enough to require the union to have a nonarbitrary reason for its response to the request for information. See, *IATSE, Local 720*, 363 NLRB No. 148, slip op. at 1 fn. 1 (2016); *Operating Engineers, Local Union No. 12*, 344 NLRB 1066, 1066 fn. 1 (2005); See, *Carpenters Local Union No. 35*, 317 NLRB 18, 18 fn. 1 (1995) (discussion of Member Browning's agreement with majority).

Given my resolution of this case, I need not resolve that issue here. However, I do find that clearly, in this case, Vance did not have a reasonable belief, and there is no record evidence of, discriminatory or bad faith treatment directed towards him. His assertions that he had not been called for work for six months were thoroughly discredited. He admitted that he had no evidence at all that he had been singled out or subjected to discriminatory treatment. Neither does the General Counsel. Contrary to the claim of the General Counsel (GC Br. at 19), the fact that Vance campaigned against Business Manager Hughes in two elections provides no basis to infer that the Respondent's actions were motivated by hostility to Vance. The mere fact that Vance had supported candidates other than

[3] The Second Circuit Court of Appeals refused to enforce the Board's decision in *Miranda Fuel*, rejecting the Board's effort "to read into Section 7 and Section 8 of the duty of fair representation implicit in Section 9." *NLRB v. Miranda Fuel Co.*, 326 F.2d at 176. However, since *Miranda Fuel*, the Board has developed an extensive unfair labor practice jurisprudence considering breaches of the duty of fair representation to be 8(b) violations.

[4] Some courts have applied a "heightened" standard of fair representation to unions in the operation of exclusive hiring halls. See, e.g., *Jacoby v. NLRB,* 325 F.3d 301 (D.C. Cir. 2003). *Lucas v. NLRB*, 333 F.3d 927, 934–935 (9th Cir. 2003). In addition to the arbitrary, discriminatory, and bad-faith standard, under this "heightened standard, a breach of the duty of fair representation will be found where a union operates a hiring hall "without reference to objective criteria and thereby affects the employment status the employment status of those it is expected to represent" (*Boilermakers, Local No. 374 v. NLRB,* 852 F.2d 1353, 1353 (D.C. Cir. 1988), cited in *Jacoby*, supra at 308). See also, *Lucas v. NLRB*, 333 F.3d 927, 934–935 (9th Cir. 2003). Although my analysis follows the Supreme Court and Board accepted duty-of-fair-representation standard set forth above, I note that application of a heightened standard would make no difference to the outcome here. There is no effect on Vance's employment status alleged much less found, and no failure to operate without reference to objective criteria.

[5] In conflict with this Supreme Court-mandated standard, the General Counsel's arguments seem to proceed from the assumption that Vance has an absolute right to view and copy the out-of-work lists where and how he likes without regard to the union's concerns. But "the Act does not impose an absolute obligation to comply with requests for hiring hall information in all circumstances." *Carpenters Local 608*, 279 NLRB 747, 755 (1986). Rather, "a Union must merely 'deal fairly with an employee's request for information.'" Id. (quoting, *Local 324*, supra at 587). I note that even Board cases that express the belief that an applicant "ought to be entitled, as a matter of right, to inspect hiring hall records," retreat for their holding to the formulation that defers to the union's rational and good-faith reason for its actions. See, e.g., *Local Union No. 513, Operating Engineers*, 308 NLRB 1300, 1303 (1992) ("in the absence of some good reason advanced by Respondent for withholding the information, it should be made available without the necessity of laying a foundation"); *Teamsters Local 282*, 280 NLRB 733, 735 (1986) ("Accordingly, we find that the Respondent has not established reason for its refusal to provide the information sought and accordingly this refusal violated Section 8(b)(1)(A)").

Hughes is evidence of nothing (other than, perhaps, a vibrant union democracy). But without more, there is no basis in law or logic to presume that the supporters of a candidate that lost an election are being discriminated against, in the face of other explanations for the union's conduct. See, *Trnka v. Local Union No. 688*, 30 F.3d 60, 63 (7th Cir. 1994) (employee's two decades of criticism of union leadership and policies provides no basis for reasonable conclusion that employee's grievance was dropped by union in retaliation); *Construction, Production & Maintenance Laborers Local 383*, 266 NLRB 934, 939 (1983) ("Clearly it may not be simply assumed that Union reform advocates, howsoever active and even strident they are, inevitably engender sufficient animus on the part of trade union officers to stimulate illegal discrimination").

Lacking evidence that the Union's actions toward Vance were motivated by discrimination or bad faith, the inquiry in this case is whether the Union acted arbitrarily toward Vance and his request for the out-of-work list. And the threshold difficulty with the General Counsel's case is that the allegation that the "Respondent has refused to provide Rickie Vance with hiring hall information maintained by Respondent" is not an accurate account of what happened here.

In his first round of requests to view the out-of-work list, in March and/or early April 2015, the Respondent did not refuse to show Vance the out-of-work list. Rather, it repeatedly offered to show it to him in the Henderson office. Vance refused. ("We're not doing that").

Thus, the question is whether requiring Vance to come to Henderson was an arbitrary condition by the Union. In considering this prong of the duty, "[s]o long as the union's conduct

. . . is not wholly irrational or arbitrary . . . there is no breach of its duty of fair representation." *Firemen & Oilers Local 320 (Phillip Morris, U.S.A.),* 323 NLRB 89, 91 (1997).

The Union's articulated concern for wanting to show Vance the records in Henderson was so that Business Manager Hughes—the elected head of the Union—could be in charge and involved in the process. He was concerned that the records be shown in a way that would not reveal negative comments by contractors about individual employees' drug tests or lack of skills asserted by the employee. The determination was made that he would show the list to Vance.

I might agree that it would be easier if the out-of-work lists were simply scrubbed clean of sensitive information, and then it would not matter who showed the list or where they showed it. However, the testimony is that other than doing this manually—which is what Hughes testified he intended to do—the software program used by the Union was not conducive to that. Whether or not the General Counsel believes this to be a weighty enough reason for asking Vance to travel to Henderson, Hughes' explanation is far from an arbitrary or irrational one, even if the General Counsel and the Charging Party would have the union follow a different policy, were they in charge of formulating union policy.

Moreover, and equally to the point here, there is no argument to be made that the Union's requirement that Vance come to Henderson posed an undue—much less, arbitrary—burden on Vance's efforts to investigate his standing on the out-of-work list. In this case, Vance was not asked to travel from Ashland, or Lexington, or even Louisville, to view the records and meet Hugh's concerns. From Dale, Indiana, where he lived, he was asked to travel to Henderson, which by the fastest route is 56 minutes and 57 miles, while it is 51 minutes and 53 miles to Evansville from Dale. (Based on Google Maps, see fn. 1, supra.) In other words in the circumstances presented, the Union's rationale for wanting Vance to come to Henderson to view the records is counterbalanced by virtually nothing, other than Vance's desire "to see the out-of-work list in Evansville." The Union's dealings with Vance imposed no material hardship on his inquiry.[6]

Hughes was willing to show Vance the out-of-work list as requested by Vance. Hughes, who had won two elections to be business manager of the union, felt that he was the most appropriate official to show the information to Vance, so that he could be sure that it was done without disclosing negative comments on individual employees that Vance did not need in order to assure himself that he was being referred fairly. In these circumstances it is simply beyond the legitimate purview of the government to tell a union that it must show out-of-work lists to an employee in the particular union office the employee desires, and not in an office minutes away. Contrary to the claims of the General Counsel, Vance was not denied the right to view the out-of-work list in March and/or early April. Rather, he chose not to accept the Union's invitation for him to view the list in Henderson. There can be no violation of the duty of fair representation in such circumstances.

In late June, Vance appeared at the Evansville office and demanded to see the out-of-work list. This occurred in the midst of the Region's investigation into the unfair labor practice charge filed by Vance over the union's insistence in April that he go to Henderson to see the out-of-work list. As part of the defense in the case, on May 28, the Union's counsel, Charles Berger, had written to the investigating Board agent and indicated that Vance could view the out-of-work list at the Evansville office:

> Mr. Vance will need to make an appointment for when he wishes to visit and view the out-of-work list and we will see that the meeting occurs. Please advise if this will resolve the matter.[7]

Vance testified that after this letter was sent, he was told by Board Agent Ramirez "to go there [to Evansville] and ask to

[6] Vance testified on direct that "I have the right to see the out-of-work list without having to drive over an hour to see it" in Henderson. However, on cross-examination he admitted that it took him "45 to 50 minutes, up to maybe right at an hour" to get to Evansville, and agreed that the substance of his objection to going to Henderson was having to drive "ten more minutes to see the list."

[7] The Respondent initially objected to the introduction of this letter—indeed, to evidence of the entire incident when Vance showed up at the Evansville office in late June—based on Federal Rule of Evidence 408. I overruled the objection. The letter was not offered (and is not being relied upon) "either to prove or disapprove the validity . . . of a disputed claim." F.R.E. 408. Thus this letter to the investigating Board agent, which is an effort to settle the unfair labor practice claim by offering to let Vance view the out-of-work list at Evansville, is not relied upon as evidence of the validity of the claim that Vance should have been able to see the records in Evansville from the start.

see the out-of-work list and after I got done looking at it to have copies made." However, as the Union's Evansville district 2 representative Litkenhus credibly testified: "I was told from Ramirez and my attorney that they [i.e., Vance] had to have an appointment and my attorney present." Vance arrived to see the list without an appointment or any advance notice. Litkenhus explained to Vance his understanding that an appointment needed to be made so union counsel could be present, and he refused to allow Vance to see the list. Again, the necessary inquiry is whether the Union's refusal to allow Vance to see the list on that day in June, without an appointment and without counsel present, was arbitrary. Even in the absence of litigation, asking an applicant to call ahead and make an appointment to review records is a reasonable and justifiable convention. It assures that someone is available to print out the list, available to copy it, and that there is an office and space set aside for review of the list. There is no "right" to show up unannounced, at a time of the applicant's choosing, and require the union's staff to drop whatever else they are engaged in and accommodate the applicant's request. Moreover, in the context here, where Vance had a pending unfair labor practice charge filed against the Union, it is entirely appropriate for the Respondent to insist that Vance arrange in advance to review the out-of-work list so that the Respondent could arrange to have counsel present. Indeed, Board Agent Ramirez told Litkenhus that Vance was to make an appointment. Parties have counsel handle such matters when they relate to litigation, and they have every reason to do so. That is the union's rationale for its actions. It is hard to imagine the General Counsel's rationale for alleging that a respondent commits an unfair labor practice by conditioning the furnishing of records to resolve a pending unfair labor practice on the presence of its counsel.

Moreover, as with the requirement that Vance come to Evansville, it is worth pointing out that the Union's insistence that Vance make an appointment did not burden Vance, or pose a barrier to Vance's review. This is a case where a little cooperation would have gone a long way, assuming, as I do, that Vance's desire was to review the out-of-work list.[8]

As to Vance's request in June that after viewing the list he be allowed to copy it, the General Counsel points out that Hughes testified that the Union's policy was and has remained that the Union does not permit applicants to copy the list. The contention is that Vance *would* have been denied the right to copy the out-of-work list, even if he had complied with the Respondent's conditions for reviewing the list. However, I do not reach the issue of whether, had Vance complied with the Union's conditions for reviewing the out-of-work list, and had union counsel been in charge of providing Vance access to the records that day in June, and had union counsel, after Vance completed his review, refused to permit Vance to copy the information, that would have been a duty of fair representation violation. This issue is not presented by the facts here, which involve the Union's denial of Vance's request to have access to the records because he arrived unannounced so that the union's counsel could not be present. In an effort to resolve this case, the Respondent had agreed to Vance's request to review the out-of-work list in Evansville, but with the condition that he make an appointment so that counsel could be present. Vance's refusal to comply does not turn the Union's actions into a new breach of the duty of fair representation. Accordingly, the complaint should be dismissed.

Finally, as noted, the Respondent contended at trial that the entire incident when Vance showed up at the Evansville office in late June should have been inadmissible pursuant to F.R.E. 408. I overruled this objection at trial, although, in light of the evidence presented, it is a close call.

The General Counsel prosecuted the June incident as an independent unfair labor practice—an independent refusal to allow Vance to review the out-of-work list. The June evidence is not used (and I have not relied upon it) as evidence of the validity of the March/April alleged unfair labor practice. Of course, Rule 408 does not apply to an alleged wrong committed in the course of settlement discussions, and it does not apply to a statement relevant to claims other than those being settled in the discussions. *Uforma/Shelby Inc. v. NLRB*, 111 F.3d 1284, 1293–1294 (1997). On the other hand, the June incident was the very same type of unfair labor practice alleged in March/April, the complaint does not distinguish them, and the only charge on record is Vance's April 22 charge, never amended. Even more to the point, the June incident was part of an effort by the Union to settle the outstanding unfair labor practice filed by Vance over the events in March/April. This may be an instance where the events comprising the unfair labor practice alleged in June "were so intertwined with the unfair labor practices [from March/April] under discussion that they cannot be separated therefrom" and evidence of the events in June should have been barred. *Contee Sand and Gravel Co*., 274 NLRB 574, 574 fn. 1 (1985). Given my resolution of the events, I need not resolve the Rule 408 issue. Thus, I do not reach the Rule 408 argument, and I do not rely on my ruling at trial rejecting the Rule 408 objection.

CONCLUSIONS OF LAW

The Respondent did not violate the Act as alleged in the complaint. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

[8] The General Counsel also argues (GC Br. 18) that the Respondent's rationale for requiring Vance to come to Henderson, and later, for not allowing him to view the notes without an appointment was "pretextual and disingenuous." But he bases this on the false assertion that Hughes testified that there was a rule maintained prohibiting applicants from seeing the out-of-work list, which was only changed in December 2015 to permit viewing. Contrary to the General Counsel's claim, Hughes testified and I credit, that prior to December 2015, the process he proposed in April to Vance—i.e., coming to Henderson to view the list—had been in place for many years. Hughes testified that in December 2015, in response to this case, he changed the procedures—showing agents in the district offices how to prepare the list for applicants. None of this provides a basis to infer that the April demand that Vance came to Henderson, or the June demand that Vance make an appointment, was pretextual or disingenuous.

[9] If no exceptions are filed as provided by Sec. 102.48 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.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 13, 2016