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Laborers International Union of North America, Local 872, AFL-CIO (Various Employers, including the Employer-Members of Nevada Contractors Association) and Parnell Colvin and Richard Vela. Cases 28-CB-239339, 28-CB-291889, and 28-CB-292114

May 13, 2026

DECISION AND ORDER¹

BY CHAIRMAN MURPHY AND MEMBERS PROUTY
AND MAYER

On July 11, 2024, Administrative Law Judge Mara-Louise Anzalone issued the attached decision. The Charging Parties each filed exceptions with supporting argument, and the Respondent filed an answering brief.² The Respondent filed cross-exceptions with supporting argument, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The Respondent also filed several additional motions.³

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,⁴

¹ Member Prouty, who is recused, is a member of the panel but took no part in the consideration of this case on the merits. In *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Courts reading of the National Labor Relations Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 560 U.S. at 688; see also, e.g., *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113, 127-128 (3d Cir. 2017); *D. R. Horton, Inc.*, 357 NLRB 2277, 2277 fn. 1 (2012), enfd. in relevant part 737 F.3d 344 (5th Cir. 2013); *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB 1866, 1866 fn. 1 (2011), enfd. sub nom. *1621 Route 22 West Operating Co. v. NLRB*, 725 Fed.Appx. 129 (3d Cir. 2018).

² In its answering brief, the Respondent urges the Board to reject the Charging Parties' exceptions for failing to comply with the Board's Rules and Regulations. We decline to do so. Although the Charging Parties' exceptions do not fully comply with the Board's Rules, they are not so deficient as to warrant striking, particularly in light of the Charging Parties' pro se statuses. See *Governed United Security Professionals (Golden SVCS, LLC)*, 373 NLRB No. 66, slip op. at 1 fn.1 (2024), enfd. 2025 WL 415347 (D.C. Cir. 2025); *Copper River of Boiling Springs, LLC*, 360 NLRB 459, 459 fn. 1 (2014).

³ The Respondent's motion requesting that former Chairman Kaplan recuse himself from this case is denied as moot as he is no longer a member of the Board. Further, the Respondent's request that the Board stay any action in this case until Member Wilcox is reinstated is denied as the Board now has a quorum, and the Respondent provides no argument as to why it is entitled to have Member Wilcox hear the case.

The Respondent also filed five motions requesting that the Board take administrative notice of various documents including photos of the

findings,⁵ 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. May 13, 2026

James R. Murphy,

Chairman

Scott A. Mayer,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Néstor Zárate Mancilla, Esq., for the General Counsel.
David Rosenfeld, Esq. (Weinberg, Riger & Rosenfeld), for the Respondent.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case over the course of 13 days between November 8, 2022,

hiring hall rules posted in English and Spanish and several documents from court proceedings involving the Charging Parties. We deny these requests as the Respondent has failed to show with requisite specificity that taking such notice would assist in reaching a determination on the issues. See *Machinists Lodge No. 160 (SSA Terminals, LLC)*, 373 NLRB No. 39, slip op. at 1 fn. 2 (2024); *Dahl Fish Co.*, 279 NLRB 1084, 1109 (1986), enfd. 813 F.2d 1254 (D.C. Cir. 1987).

⁴ In adopting the judge's dismissal of paras. 6(a)-(c) and 6(e)-(g) of the amended consolidated complaint as a sanction against Charging Party Colvin for his failure to cooperate with the hearing, Chairman Murphy notes that no party argued that because the General Counsel, not the Charging Party, controls the complaint, the judge erred in dismissing the allegations.

⁵ The Charging Parties have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Charging Parties' exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Charging Parties' contentions are without merit.

Lastly, Charging Party Vela's exceptions include a reference to "evidence preservation letters" but do not state any grounds on which the findings related to this issue should be reversed. Therefore, in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, we shall disregard this exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

and July 31, 2023, in Las Vegas, Nevada. This case was tried following the issuance of a first amended consolidated complaint and notice of hearing (the complaint) by the Regional Director for Region 28 of the National Labor Relations Board on September 15, 2020. The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by Charging Parties Parnell Colvin and Richard Vela (collectively, the Charging Parties or the discriminatees). The General Counsel alleges that Respondent Laborers International Union of North America, Local 872, AFL–CIO (Respondent, the Union or Local 872) violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act). Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices alleged against it.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file posthearing briefs.¹ Posthearing briefs and supplemental briefings were filed by the General Counsel and Respondent, and each of these briefs has been carefully considered.² Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following findings of fact and conclusions of law recommending that the complaint be dismissed in its entirety.

FINDINGS OF FACT

I. JURISDICTION

The complaint, as amended, alleges and Respondent admits that the employer-members of Nevada Contractors Association/Associated General Contractors Association (NCA–AGC), purchased and received at their facilities in the State of Nevada goods valued in excess of \$50,000 directly from points outside the States of Nevada. NCA–AGC and its employer-members are thus engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Accordingly, I find that NCA–AGC and its employer-members are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I additionally find that Local 872 Union is a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects

¹ Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh. ___” for General Counsel’s Exhibit; “U Exh. ___” for Local 872’s Exhibit; “Jt. Exh. ___” for Joint Exhibit; “GC Br. at ___” for the General Counsel’s posthearing brief; and “U Br. at ___” for Local 872’s posthearing brief.

² The record contains the following errors: Tr. 66, l. 13 “steps” should read “stips”; 66, l. 24 “step” should read “stip”; 89, “quarters” should read “court reporter”; 104, l. 8, “positive” should read “positive error”; 196, l. 18, “competitor” should read “comparator”; 591, l. 7, “Bella” should read “Vela”; 595, l. 3, “Mr. Davila” should read “Ms. Davila”; 595, l. 6, “reported” should read “recorded”; 615, l. 15, “Jefferson Mechanical” should read, “Jefferson Chemical”; 1105, ll. 18 & 24, “objected” should read “rejected”; ad passim in the transcript from December 14, 2022 in this proceeding, “Mr. Colvin” should read, “Mr. Colvin”; 885, l. 12, “REGLIO” should read “ROGELIO”; During an exchange between the undersigned and Charging Parties Colvin and Vela on December 14, 2022 remarks made by Vela were improperly attributed to

commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

This case involves actions taken by Respondent in its operation of an exclusive hiring hall³ in Las Vegas, Nevada. Specifically, Local 872 is accused of violating its duty of fair representation to hiring hall users by maintaining an arbitrary job referral rule that does not serve any representational function, failing to inform hiring hall users about that rule and additionally by failing to provide Charging Parties with requested information regarding how to register for job referrals. These actions are alleged to violate Section 8(b)(1)(A) of the Act.

The General Counsel alleges that Respondent’s failure to provide Charging Parties with registration information additionally amounts to a violation of Section 8(b)(2), in that it worked to cause contractors using the hall not to employ them. Finally, the General Counsel alleges that Respondent’s attorney violated Section 8(b)(1)(A) of the Act by sending coercive and/or denigrating letters to Charging Parties.

As set forth below, I recommend the complaint be dismissed in its entirety.

A. General Factual Background⁴

1. Respondent’s officers, supervisors and representatives

Tommy White is Respondent’s Business Manager and Secretary-Treasurer; he has held this position for the last 19 years. Marco Hernandez is Vice-President of Local 872. He has held these positions for approximately 19 and 12 years, respectively. (Tr. 28–29, 113–115, 441, 725–726.)

At various times, Hernandez also served as a dispatcher for the Union, as did Rogelio (Roger) Gonzales, Ian Thienes, and Dawn Wilson. White and each of the dispatchers is either an admitted or stipulated agent of Local 872 with respect to its dispatch operations. (Tr. 30, 66, 118, 125–126, 725, 729, 886–887.)

2. The master contract and hiring hall rules

Local 872 is party to a Master Labor Agreement with Nevada Contractors Association (NCA) (effective July 1, 2018 to June 30, 2023), whereby it is recognized as the exclusive bargaining agent for employees performing work within its trade and

counsel for the General Counsel. These occurred at Tr. 856, ll. 3, 5, 7; Tr. 860, l. 10; Tr. 861, l. 1.6

³ An exclusive hiring hall is an arrangement that requires an employer who is signatory to a collective-bargaining agreement with a union to obtain referrals for employees needed to fill bargaining unit positions from the union.

⁴ I have based my credibility resolutions on consideration of a witness’ opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness’ testimony; the quality of the witness’ recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying and the form of questions eliciting responses. Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness’ testimony. *Daikichi Sushii*, 335 NLRB 622, 622 (2001).

geographical jurisdictions. Pursuant to the agreement, Local 872 is charged with referring qualified applicants for employment without discrimination based on union membership or non-membership; maintaining an out-of-work list based on applicant experience and availability; and dispatching in accordance with the Union’s written “Referral Procedure” (i.e., hiring hall rules). (GC Exh. 2.) The agreement also obligates the Union to post at its hall “all provisions related to the functioning of the hiring hall arrangements...” (GC Exh. 2; Tr. 129–130.)

Local 872’s most recent hiring hall rules were implemented in 2002. They specify that those interested in registering for referrals from the hall must submit a completed “Applicant Referral Form” and “Skills Sheet,” which will be made available to applicants at the hiring hall. They further specify that, to become eligible for referrals, Local 872 members must be up to date on their dues and that non-members must have paid “the required fees to be registered.” The rules contain a specific provision covering these fees which states:

Registration Fee: An applicant seeking to register a referral form with Local 872 who is not a member of the Local 872 whose dues are paid up or a person who has paid uniform initiation and agency fees to Local 872 shall pay to Local 872 on registration, and every 3 months thereafter, a \$60 fee to cover the applicant’s share of the reasonable cost of maintaining the applicable out-of-work lists. A fee paid during any three-month period that the applicant is registered shall be effective only until the [end] of the period (i.e., a fee paid during the period February 1 through April 30, is effective only until April 30, and a new three-month period fee must be paid on May 1, which within the effective through July 31).

(R. Exh. 2; Tr. 443.) The hiring hall rules are posted in English and Spanish inside the main area of the hall and have been there for at least 8–9 years. Dispatcher Thienes testified that, at times, individuals have come to the hall and requested a copy of the Hiring Hall Rules and been provided with them. (Tr. 150, 326–328, 380–381.)

3. The hiring hall initiation process

When new Local 872 members initiate with the local, they are issued an “initiation packet,” which includes the Hiring Hall Rules, as well as a “Skill Sheet,” which members complete to indicate their experience performing, as well as skills, certifications and licenses for, specific types of work. This data is entered into Local 872’s computer-based Member Tracking Program (MTP), which generates lists of eligible workers for specific contractor requests. (Tr. 127, 183, 366–374, 674–675; GC Exhs. 9, 10.)

Hiring hall applicants are permitted to take home a copy of the Hiring Hall Rules. The same, however, is not true for Skill Sheets. This is because blank Skill Sheets are considered

inherently valuable, as prior to 2009 there was a practice of “selling jobs.”⁵ Therefore, there is a policy that a blank Skill Sheet may never leave the hall, and hiring hall applicants are permitted a blank copy of the Skill Sheet only when they are actually filling it out, which they are required to do (along with the other initiation paperwork) in person at a designated area in the hall. Long-time dispatcher Thienes, corroborated by Business Manager White, testified that the in-person application process also ensured that members were not being improperly assisted by others in stating their skills and experience. Dispatcher-witnesses testified that filling out the initiation paperwork takes between one and one-half hours. (Tr. 176, 339–340, 374, 376–378, 380, 499–500, 689, 780.)

4. Registration for nonmembers

As discussed, the pursuant to the Hiring Hall Rules, nonmembers may register at the hall if they pay a “registration fee.” According to White, the last time a nonmember (aside from a “traveler”)⁶ was registered was in 1998. At that time, he testified, the process of registering as a non-member was straightforward: an individual who requested nonmember registration would, in addition to completing the usual paperwork, tender the initial \$60 fee and thereby become eligible for dispatch. Consistent with this, Gonzales and Hernandez testified that non-members could register for dispatch by paying a registration fee in lieu of dues and completing all of the paperwork that a member would to register. (Tr. 492–493, 495–496, 751, 927–929, 932–933.)

Other than Charging Party Vela’s efforts to register as a non-member, the record contains only limited evidence of others’ attempt to do so: In May 2016, four women appeared at the dispatch window and inquired how to get referred for work without being “active members.” A Local 872 employee informed them that they could “get on our non-member list” if they paid an “assessment fee” and invited them to return to speak with a business agent the following day for further information. (Tr. 1548; GC Exhs. 54, 60 at 16.)

5. The out-of-work list

Based on the information provided on their Skill Sheets, members are placed on the hall’s out-of-work list. Pursuant to the MLA, the out-of-work list is actually comprised of four separate lists (the A, B and C lists, and the apprentice list) based on the registrant’s hours of experience as a construction laborer. According to White’s un rebutted testimony, nonmembers were historically placed on a fifth list—a “nonmember out-of-work” list—from which they were dispatched based on the registration status dictated by their experience in the construction industry. (GC Exh. 2 at 26; Tr. 458–459, 492–493.)

White was corroborated on this point by Thienes. In a recorded telephone conversation introduced by the General Counsel, Thienes can be heard discussing with a potential hiring hall applicant how to register as a nonmember. Specifically, he asked her, “so you’re going to be on the non-member list?”; when she

various times throughout the record, travelers were referred to as “money follows the man.” (Tr. 925–926, 930.)

⁵ This refers to rogue Local 872 dispatchers selling initiation packets to prospective members outside of the regular hall rules. (Tr. 499–500.)

⁶ Travelers are members of another local who are technically considered nonmembers because they are from a different jurisdiction. At

responded in the affirmative, he informed her that she would need to bring her drivers' license, social security card, OSHA card, any certifications and that she would have to pay a fee of \$60 every 3 months. (Tr. 273–276.) At hearing, counsel for the General Counsel devoted a significant amount of time examining Respondent's witnesses regarding the current existence of a "nonmember out-of-work list." However, considering that (other than travelers) no nonmember has been registered at the hall since 1998, the fact that witnesses who had dispatched only since that time denied familiarity with such a list is hardly surprising.⁷

6. The hiring hall operation and the dispatch process

At Local 872's main office in Las Vegas, Nevada, union agents and officials deal with union business, and dispatchers work at three glass windows handling the dispatch. They also answer hiring hall users' questions, make changes to their "Skill Sheets" and process members' monthly dues remissions. (Tr. 116–118, 142, 144.)

Typically, unless a contractor requests a laborer by name, the dispatch process involves a contractor requesting a worker or workers from the out-of-work list who has specific skills and/or experience. The dispatcher then enters the specifics of the request (including the nature of the work, required skills, starting date and time, any prehire requirements) into the MTS, which generates a list of the registered individuals qualified for the job in order of how long they have been on the list.

Dispatchers then "call-out" the job, meaning they call down the list until the job is filled. Respondent prohibits members from 'cherry picking' sought-after assignments (also referred to as "riding the list") by means of a "strike" system. When a member is telephoned by a dispatcher for a particular job during designated "job-call hours," if he does not answer (considered "unavailable or unreachable") or refuses to take the job, he gets a strike. Three strikes result in the member being dropped to the bottom of the out-of-work list. (Tr. 127, 131–133.)

a. The written dispatch rules

The dispatch procedure is addressed in detail in the Union's Hiring Hall Rules, which have been in effect since 2002. They state, in pertinent part:

E. To notify an applicant about a job referral, Local 872 will call the applicant at the telephone number provided by the applicant. . . . When calling applicants, Local 872 will record the date and time of the call, the person making the call, the name of the employer, the location of the job, the start date of the job, and the results of the call, including whether the call was answered, who answered, and what response, if any, was made. Job referral calling hours are Monday through Friday at 6:30 a.m. to 9:30 a.m. Local 872 will make one attempt to reach the applicant and will allow the telephone to ring ten times during those job call hours. If the Local 872 staff reaches an answering machine, the caller will state: "this is the Local 872 Hiring

Hall calling with the job referral." If the applicant does not pick up the phone during this message, the Local 872 staff will then hang up. *Applicants who cannot be reached will receive a strike and will receive no further referral calls during the period from 6:30 a.m. to 9:30 a.m. on the day the telephone call was made.* If applicants received three strikes, they are moved to the bottom of the respective list.

F. Since the purpose of the Local 872 hiring Hall is to refer to work those applicants who are actively seeking work at the trade, the failure to accept a job that is offered or the failure to be available for a job will cause the applicant to be given a "strike". Any applicant who refuses a referral or is unavailable or unreachable for a referral receives a strike. If applicants receive three strikes for refusing, or being unavailable being unreachable, they shall be moved to the bottom of the applicable out-of-work list that was the basis for the referrals. *To receive three strikes based solely on being unavailable or unreachable, applicants must be unavailable or unreachable on three separate days.* Applicants will be considered unavailable or unreachable if they cannot be reached after one call has been placed to the telephone number provided the applicant, with the telephone being allowed to bring ten times. . . .⁸

(R. Exh. 2; Tr. 194, 326, 358, 465) (italics added).

Since its implementation, the strike rule has undergone certain changes that were announced in writing to the membership. In 2012 and 2017, Local 872 changed its job-call hours; in 2017, the Union announced that members who refused a job falling under certain "categories" would not receive a strike; these categories were listed as "work preservation" and "light commercial and/or residential." (GC Exhs. 4, 6.)

b. The complaint and appeals process

The Hiring Hall rules contain a procedure whereby hiring hall users who are dissatisfied with the hall's operation may complain to a joint labor-management committee and appeal the decision of that body to a joint appeals committee. (R. Exh. 2 at 3.)

c. The rules in practice

Despite the Hiring Hall Rules' relatively detailed description, dispatchers employ a number of unwritten practices in applying the rule day-to-day. Because these practices are not reduced to writing, each new dispatcher is trained on the job by a more senior dispatcher on how they are applied.

Some "non-codified" practices during dispatch reflect the realities of modern telephone technology. For example, if the dispatcher's first call goes "straight to voicemail" (i.e., indicating that the caller is on the other line), the dispatcher will hang up and call a second time before leaving a voicemail message. Likewise, a member who did not answer the phone but managed to call back to accept the job before the dispatcher began dialing

with the fact that a member had, at some point, asked him how to be placed on one.

⁸ The rules also address "short-notice calls" (and how strikes may be received for them) which are not at issue in this case.

⁷ Counsel for the General Counsel's effort to impeach long-term dispatcher Thienes on this point was likewise unavailing; his testimony that there was currently no "non-member out-of-work list," was not at odds

the next number on the list would not get a strike. However, if the dispatcher had already begun calling the next number when the worker called back, the strike would stand. (Tr. 127, 293–294; 653–654.)

Dispatchers also employ unwritten protocols to determine whether a worker is in fact “unavailable” for work. For example, if a worker admits to the dispatcher that they do not in fact possess the experience required for the job, despite their Skill Sheet indicating that they do possess such experience, the dispatcher will consider them “unavailable,” and they will receive a strike. On the other hand, if the contractor’s specifications are not specifically reflected in the Skill Sheet (and therefore the MTP), the worker will not receive a strike. As an example, Thienes described a situation in which a contractor requested someone with at least 2 years’ experience in a particular type of work; in this scenario, he would call registered workers who had the relevant skill indicated on their skill sheet, but if one of them denied having the requisite 2 years’ experience in that skill, they would not receive a strike. (Tr. 210–213.)

Neither of these unwritten practices, which arguably delegate some level of discretion to individual dispatchers, are challenged by the General Counsel. However, two additional aspects of the dispatch process—each involving the application of the “strike rule”—are alleged to be unlawful insofar as they are not reflected in the Union’s Master Labor Agreement and “serve[] no representational function.” The General Counsel alleges that Local 872 has violated its duty of fair representation by maintaining these aspects of the rule, as well as by failing to inform hiring hall users effectively of their existence.

(i) Determination of “same job” versus “different job”

The first aspect of the strike rule challenged by the General Counsel is the discretion exercised by hiring hall officials to determine when a worker should receive a second strike for refusing certain work. The written rules (see italicized portions, above) make clear that, if an applicant is unreachable, they will receive a strike and will receive no further referral calls that day. They also dictate that being unavailable or unreachable will result in no more than one strike per day.

The Referral Rules do not, however, contain similar protections for users who *refuse* work more than once, simply stating that, “the failure to accept a job that is offered” will trigger a strike. As Respondent’s witnesses explained, in practice this means that, if a dispatcher is unable to fill a position and ends up calling same worker about it again, he will not be deemed to have rejected the job. Instead, under these circumstances, the dispatcher would let the worker know that they will not get an additional strike for refusing the job, explaining that the call was for the same job they had already refused. As White explained, this practice overall promoted the employment of hiring hall users while avoiding “over-penalizing” a referent for exercising his right to refuse a single job. (Tr. 199, 437, 439, 503–504.)

Application of this rule becomes more complicated depending on the circumstances; at times, a second call happens not because the dispatcher is calling through the list again for the same position but rather because the contractor has modified or appended its request, meaning that the job being offered is substantially

different from the one the worker previously rejected. According to Respondent’s witnesses, this could happen if the call was for a different type of work, job site, day or shift (i.e., day versus night work) or duration of work, which would all be considered a “different job.” (Tr. 201, 222–224, 470.)

Respondents’ witnesses admitted that whether a contractor’s request constituted one for a “different job” is nuanced and not dictated by any written rule or criteria; as former dispatcher Wilson explained, “there is a lot of moving parts.” Thienes confirmed that what constitutes offering a worker the “same job” is sometimes not “black and white” and gave an example of a contractor calling on the morning of a job to request additional workers for that job. In this scenario, calling a worker who had previously received a strike for refusing the job would not necessarily receive a second strike for refusing to be added to the crew the next day. If the dispatcher is unable to determine whether a second call was for a “different” or “the same” job, they consult with White. According to both White and Thienes, this was a very rare occurrence. White testified that he had only been consulted between 5–6 times within the past 3 years; dispatcher Thienes consistently testified that, in his 13 years with the Union, he had only consulted White “a couple of times.”

Respondent’s witnesses testified that, once a decision was made as to whether a second call for work would involve a “different” or “the same” job, this classification applied to all referents offered the job and dispatchers consistently informed workers called whether or not rejecting the work would garner a second strike. (Tr. 112, 200–208, 224, 240–244, 471–474, 485, 679; GC Exh. 12.)

(ii) Waiver of strikes

While the Referral Rules unequivocally state that “[a]ny applicant who refuses a referral or is unavailable or unreachable for a referral receives a strike,” there an unwritten policy of “waiving” strikes based on extenuating circumstances. In this regard, Respondent’s witnesses consistently testified that individual dispatchers do not have the discretion to “excuse” a strike during the dispatch process.

However, White admitted that a hiring hall user could have a strike “waived” after the fact if they offered extenuating circumstances (sometimes documented). He gave examples of illness, car accidents, a death in the family and child-care duties preventing a hiring hall user from either answering a call or showing up for a job. According to him, waiving a strike for health reasons became common during the COVID-19 pandemic. (Tr. 466, 472, 800, 901, 905.)

The determination to waive a strike appears to be a joint decision (i.e., White described, on multiple occasions, that “we” waived a strike), but it is not clear if this determination is made within the explicit framework of the complaint and appeal procedure outlined in the Hiring Hall rules. (Tr. 466, 472.)

B. Vela’s Information Request Allegations

The General Counsel alleges that Respondent failed and refused to provide discriminatee Vela with “hiring hall information” he requested regarding how to register for its out-of-work list, including an “Applicant Referral Form” and a “Skill

Sheet.” See Compl. ¶ 6(d). In addition to alleging that this action constituted a violation of the Union’s duty of fair representation under Section 8(b)(1)(A), the government also contends that withholding this information also caused employers to fail to hire Vela in violation of Section 8(b)(2).

1. Vela’s protected dissident conduct

Vela first became a member of Local 872 over 28 years ago. He has never held a position with the Union, but, in 2018, he did run unsuccessfully for the Union’s Business Manager position held by then-incumbent White. In October of that year, he became involved in a physical altercation with one of White’s supporters at a Local 872 monthly membership meeting during which he was physically restrained and ejected from the meeting by the Sergeant-of-Arms. (Tr. 986, 1000–1002, 1005–1006, 1025–1033.)

The following month, Vela sent an 11-page letter to Local 872’s executive board complaining about his treatment at the membership meeting. He also accused the Local’s officers of violating their oaths of office, as well as Federal and State laws. He also complained that the Local was excluding members from decision making in favor of White and claimed that the Local’s executive board was misusing union funds. (R. Exh. 15.)

In 2019, Vela and Local 872’s leadership became enmeshed in a dispute over whether he was required, as a condition of membership, to pay supplemental dues. During this dispute, Respondent’s counsel, David Rosenfeld, directed Vela to communicate only with him and not Local 872 itself. In December 2019, he was dropped from the Local’s membership rolls after admittedly failing to pay up supplemental dues arrearages the Union claimed he owed. Vela learned about this action when he was ejected from another membership meeting on January 2, 2020; he subsequently filed internal charges against the Union, which were administratively dismissed. (Tr. 1010–1021; 1034–1035, 1180–1183; GC Exhs. 33–42; R. Exh. 9.)

2. Vela’s 2021 requests for information

At least two times in 2021, Vela attempted to obtain information from Local 872 about registering to work as a nonmember. Neither of these requests is pled in the complaint as an unfulfilled information request.

On June 14, 2021—approximately 16 months after his internal charge was dismissed—Vela called the Local 872 hall and spoke briefly with Thienes. Vela stated that he wanted to get on the out-of-work list, and Thienes responded that he would have to contact the union’s attorneys.⁹ As Thienes explained, he had never personally processed a non-member’s application for the hiring hall. Thienes later consulted with the Union’s Executive Assistant and Agent Coordinator Chelsea Torres, who assisted him in locating the relevant provisions in the Hall Rules. The following day, they spoke again, and Thienes told Vela that he was required to pay \$60 for 3 months in order to register as a nonmember. Vela balked at the idea of paying anything and questioned whether he would actually get referred as a

nonmember. (Tr. 406–408, 432–433, 1087–1088.)¹⁰

On June 17, 2021, Respondent’s counsel Rosenfeld sent Vela a letter stating:

This week you have been calling the hall with questions. I am enclosing the hiring hall rules. You must follow those rules if you want to use the hiring hall.

(R. Exh. 16; Tr. 1290.) Attached was a 2002 union bulletin entitled, “Local 872 Implements New Job Referral Rules” followed by a copy of the Amended Job Referral Rules. As noted above, the Referral Rules contain specific provisions regarding registration for nonmembers and additionally specify that there are two forms required for all registrants: an “Applicant Referral Form” and a “Skills Sheet,” which are available at the hiring hall. (R. Exh. 2.)

3. Vela’s 2022 requests for information

On February 28, 2022, Vela sent Hernandez an email with the subject line, “Registration/out of work list.” His email, which is the basis for the General Counsel’s allegation that Respondent failed to provide information in violation of Section 8(a)(1)(B), stated:

I am requesting the application and all information on how to register as a non-union member. I am looking forward to receiving the requested documents and information so I can register and get on the out of work list.

(GC Exh. 18.) On March 2, 2022, Vela received an emailed letter from Attorney Rosenfeld, stating:

I am responding to your email of February 28, 2022, sent to Local 872. You can find the answer to your question in the Hiring Hall Rules a copy of which has been previously provided to you.

If you have any questions, contact me and not the Local.

(GC Exh. 47.) On March 9, 2022, Attorney Rosenfeld emailed an additional letter to Vela, this time stating:

On March 2, I sent you a letter regarding your request for information about the hiring hall. I have heard nothing from you since then and I assume that you have abandoned your request because you have the hiring hall rules.

(GC Exh. 48.)

On June 16, 2022, Rosenfeld sent Vela an additional emailed letter. In it, he explained that, pursuant to the Hiring Hall Rules, the Applicant Referral Form and Skill sheet must be filled out in person at the hall. He explained that this was the Local’s policy

⁹ Vela also testified that, prior to speaking to Thienes, he spoke with Hernandez who he claimed put him on hold for 3 hours, at which point he hung up. (Tr. 1087.) This testimony on its face appeared rather histrionic and I do not credit it.

¹⁰ I credit Thienes’ version of this exchange. While Vela admitted that Thienes told him about the \$60 fee, his version of this conversation was again exaggerated and I do not credit it.

mailbox, Gmail/Yahoo, Mail/ AOL/Outlook emails, pedometers, etc.

(GC Exhs. 23, 24.)

The letter's recipient is ordered to implement a "litigation hold" on all such materials, including acting to preserve "system and application metadata" and preserve ESI in its native format. The letter also demands each Charging Party to undertake affirmative actions to ensure that ESI is not lost due to the "routine operation" of information systems and devices by modifying or suspending features in individual programs and systems such as "metadata stripper utilities" and "drive or file defragmentation or compression programs." Id.

The letter contains an explicit warning regarding Charging Party's failure to preserve evidence, stating, "such failure could constitute spoliation of evidence, and we will assert remedies under the law." The letter ends with a request that Charging Party, within 15 days, either confirm that he has taken all preservation actions dictated by the letter or alternately, describe any other preservation actions undertaken. Finally, the letter concludes with a "savings"-type clause, stating that nothing in its contents "should be construed to interfere with your rights under Section 7 of the Act" and that it "should be construed in compliance with all legal requirements." Id.

Attorney Rosenfeld has prior experience sending evidence preservation letters to Charging Parties. In fact, the letters sent to Vela and Colvin are nearly identical to letters he was found to have unlawfully sent to a charging party (via his counsel) in *NABET-CWA (American Broadcasting Cos., Inc.)*, 371 NLRB No. 15 (2021). The main difference between the letters is found in the wording of their warnings regarding the consequences of a failure to preserve evidence. In this regard, the letters sent to Vela and Colvin revised the prior, *NABET* letters as follows:

Should you ~~or your client~~ fail to preserve potentially relevant evidence result[ing] in the corruption, loss or delay in production of evidence to which we are entitled, such failure ~~would~~ **could** constitute spoliation of evidence, and we will ~~not hesitate to seek damages, sanctions and other remedies~~ **assert remedies** under the law.

See id., slip op. at 3.¹⁴

ANALYSIS

The Act is designed to "separate membership obligations owed by employees to their bargaining representatives from the employment rights of those employees," *IBEW Local 1547 (Rogers Electric)*, 245 NLRB 716, 717-718 (1979). Section 7 explicitly grants workers "the right to refrain from" forming, joining, or assisting labor organizations (sometimes referred to as "dissident" union conduct), *Miranda Fuel Co., Inc.*, 140 NLRB 181, 185 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). Accordingly, the Act forbids a union from restraining or coercing such

employees in the exercise of such rights, or to cause or attempt to cause employers to take adverse actions against them, based on their lack of support—or outright opposition to—the union. These principles are perhaps of no greater significance than in cases, such as this, involving the operation of an exclusive hiring hall, where workers must retain the right to criticize and even outright oppose those who control their economic fate.

In this matter, the General Counsel alleges that Respondent violated Section 8(b)(1)(A) of the Act by:

- (a) maintaining unwritten rules permitting the waiver of strikes in the case of a second call/"same job" situation, as well as for extenuating circumstances;
- (b) failing to effectively inform its members and hiring hall users of those bases for waiver of a strike;
- (c) by its agent Attorney Rosenfeld, denigrating, restraining, and coercing employees for filing unfair labor practice charges; and
- (d) since about February 28, 2022, refusing to provide Charging Party Vela with "hiring hall information" including, but not limited to, "the application," the Applicant Referral Form and Skills Sheet required to register for work at the Local 872 hiring hall and "all information on how to register as a non-union member."

It is further alleged that Respondent's refusal to provide Vela with the requested information amounted to a violation of Section 8(a)(2) in that it effectively caused unnamed NCA contractor-employers to fail to hire him from the Local 872 hall.

The General Counsel has alleged additional violations based on the Union's treatment of Charging Party Colvin, which I recommend be dismissed as a sanction for his conduct during the hearing, as discussed below.

A. The Union's Legal Duty in Operating an Exclusive Job Referral Service

The United States Supreme Court has long recognized that a union has a statutory duty of fair representation under the NLRA. See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Although the Act does not explicitly articulate this duty, the Supreme Court has held that the duty is implied from Section 9(a)'s grant of the union's exclusive power to represent all employees in a particular bargaining unit." *Breiner v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 87 (1989). The duty is breached whenever "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. at 190.

This standard is heightened in the context of an exclusive hiring hall, where workers' livelihood depends on the integrity and impartiality of the union officials vested with the comprehensive

¹⁴ The only other difference of note between the two letters appears to be a typographical error. The *NABET* letters included a sentence stating "Nothing in this for preservation of ESI should be understood to diminish NABET-CWA, Local 51's concurrent obligation to preserve documents,

tangible things and other potentially relevant evidence." The letters sent to Vela and Colvin replaced the reference to Attorney Rosenfeld's client with the word, "your," rendering the sentence confusing at best.

authority to refer them for work. See *Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988); *Stage Employees IATSE Local 720 (Tropicana Las Vegas, Inc.)*, 363 NLRB 1485, 1490 (2016), enfd. 718 Fed.Appx. 512 (9th Cir. 2017). The Act is designed to impose a statutory “wall...between organizational rights and job opportunities.” See *Lummas Co. v. NLRB*, 339 F.2d 728, 734 (D.C. Cir. 1964). A union that wields its referral power arbitrarily breaches that wall by signaling to workers “that its favor must be curried, thereby encouraging membership and unquestioned adherence to its policies.” *NLRB v. International Assn. of Bridge, Structural & Ornamental Iron Workers, Local 433*, 600 F.2d 770, 777 (9th Cir. 1979), cert. denied 445 U.S. 915 (1980); see also *NLRB v. Ironworkers Local Union No. 505*, 794 F.2d 1474, 1478 (9th Cir. 1986).

Pertinent to this case, the Board has found arbitrary, and therefore unlawful, conduct where a union fails to establish and/or apply objective referral standards in operating an exclusive hall. See *Ironworkers Local 505 (Snelson-Anvil)*, 275 NLRB 1113, 1113–1114 (1985), enfd. 794 F.2d 1474 (9th Cir. 1986); *Teamsters Local 25*, 358 NLRB 54, 66–67 (2012). Because such conduct inherently encourages union membership, it is unlawful even absent proof of specific intent to discriminate on the basis of union membership or activity. *Carpenters Local 25 v. NLRB*, 769 F.2d 574, 580 (9th Cir. 1985); *Laborers Local 394 (Building Contractors Assn. of New Jersey)*, 247 NLRB 97, 97 fn. 2 (1980).

The Board does not require hiring hall rules and procedures to be written. Nor do referral rules, absent contractual agreement, need to be posted or incorporated into a contract. *Iron Workers Local 505 (Snelson-Anvil)*, 275 NLRB 1113 (1985), enfd. 794 F.2d 1474 (9th Cir. 1986). However, the duty of fair representation does require that workers be provided adequate notice of relevant rules and hiring hall procedures governing their dispatch rights and obligations. *Boilermakers Loc. No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988); *Electrical Workers, Local 11 (Los Angeles NECA)*, 270 NLRB 424, 426 (1984), enfd. 772 F.2d 571 (9th Cir. 1985). Where a hiring hall rule is clear and definite—and therefore capable of being communicated precisely—the Board will find a failure to do so a violation of the Act. See, e.g., *Boilermakers Local 667*, 242 NLRB 1153, 1155 (1979) (union’s failure to communicate penalty for shop employee-referents quitting job unlawful where contract clearly spelled out same penalty for construction worker-referents).

B. The Strike Waiver Allegations

The General Counsel argues that Local 872 violated the Act by (1) maintaining an unwritten practice of excusing strikes that serves no representational function, and (2) failing to notify hiring hall users of that practice. I disagree.

As discussed, a union may not deviate from its regular hiring hall procedures in a manner that denies employment opportunities to applicants without inherently encouraging union membership, and thus, violating the Act. *Teamsters Local 631 (Vosburg Equipment)*, 340 NLRB 881, 884 (2003) (citing *NLRB v. Iron Workers Local 433*, 598 F.2d 154 (9th Cir. 1979); *Electrical Workers Local 592 (United Engineers & Construction)*, 223 NLRB 899, 901 (1976)). As a preliminary matter, however, I do

not agree with the General Counsel that Respondent’s practice of excusing strikes constitutes a deviation from, or supplanting of, its written referral rules. The written rules contemplate a referent receiving a one strike per distinct job offer they reject; there is no provision for a worker to be double or triple-penalized for rejecting the same job again. That a determination must be made as to what constitutes a distinct job offer is not inconsistent with this dispatch system. The referral rules also contemplate that users dissatisfied with the hall’s operation have appeal rights; that individuals have successfully appealed strikes—which directly impact their dispatch rights—is entirely consistent with this regime.

In any event, even to the extent that excusing or waiving strikes is considered a “deviation” from Respondent’s written referral rules, I find that Local 872 has established that its practices are necessary to the performance of its representative function. As White explained, not over-penalizing referents for rejecting a job twice promotes the employment of hiring hall users, and waiving strikes for hardship and emergency circumstances obviously benefits all hiring hall users. Certainly, these rationales are worthy of deference under the Board’s standards. See, e.g., *Teamsters Local 492 (Fire & Ice Productions)*, 369 NLRB No. 75, slip op. at 8 (2020) (hiring hall rule lawful when aimed at preserving work for hiring hall users) (citing cases).

Nor do I agree with the General Counsel that Local 872 officials, and White in particular, exercised an arbitrary level of discretion over whether to grant waivers to the strike rule. Local 872’s out-of-work list is automatically generated by its MTP program based on individual contractor job requests. There is no evidence that Local 872 officials have play any role in the design or programming of the MTP, nor is there any evidence that individual dispatchers have the ability to influence its operation, i.e., determine which names will be called for a given job. What they do is add a human touch to the dispatch system.

While the MTP system is not moved by a referent’s personal tragedy or illness, Local 872 officials have waived strikes in such circumstances. Likewise, because the MTP system is not sufficiently nuanced to distinguish and identify “same jobs” from “different jobs,” dispatchers are expected to determine whether to spare a referent a second strike because he is simply rejecting the same job he rejected earlier. Intellectually, these practices are indistinguishable from other unwritten “human protocols” Respondent employs to augment its otherwise automated dispatch, such as calling a referent twice to ensure he did not inadvertently miss the call or by deeming him ineligible for a job based on a factor (such as lack of experience) that the MTP did not catch.

There is no evidence that either of Respondent’s challenged practices have ever been applied—intentionally or unintentionally—in order to prejudice a nonunion member or any other

referent.¹⁵ Under the circumstances, allowing human dispatchers to troubleshoot extraordinary circumstances that arise during an otherwise wholly automated dispatch is a far cry from granting them unfettered discretion in the dispatch process. See *International Brotherhood of Teamsters, Local 385 (Freeman Decorating Services, Inc.)*, 370 NLRB No. 48, slip op. at 5 (2020) (“human intervention” in computerized referral system, without more, is not unlawful per se) (citing *Morrison-Knudsen Co.*, 291 NLRB 250 (1988)).

Finally, I believe that Local 872 met its obligation to inform hiring hall users as to the operation of the strike rule. With respect to the “same job” waiver, the overwhelming evidence indicates that the application of this particular rule necessarily involves a multitude of factors; once it was determined to apply to a particular job, dispatchers notified each referent contacted about the job that they would be spared the strike, providing them with precisely the information he needs to decide whether to accept the job. Notably, the General Counsel makes no effort to describe what precise information would better apprise hiring hall users of all of the permutations that might justify a “same job” designation. Under the circumstances, I find that the Union timely and adequately provided referents with information necessary for them to make informed decisions as to whether to accept a job or take the strike.

Regarding the practice of excusing strikes after-the-fact, while certainly, more explicit language in the Hiring Hall rules would more directly apprise individuals of their right to claim extenuating circumstances a basis for waiving a strike, I do not find the failure of Local 872 to commit the term, “extenuating circumstances” to writing (or to otherwise delineate what might qualify for a waiver) to violate its duty of fair representation. As noted, the Board does not require hiring hall rules to be written, and the record simply does not support the General Counsel’s claim that hiring hall users were unaware that strikes could be excused. The fact that this practice became commonplace during the COVID-19 pandemic further supports this conclusion. Nor is there any indication that any one individual was vested with lone authority to excuse strikes; indeed, in the absence of any persuasive contrary evidence, the Hiring Hall’s complaint mechanism combined with White’s testimony that “we” (plural) excused strikes, suggests that the practice of having a strike excused for extenuating circumstances was well known and routinely applied.

Based on the above, I recommend that the allegations stated at paragraphs 6(i), 6(j), 6(k), 7(a), and 7(b) of the complaint be dismissed.

C. Allegations Related to Vela’s Information Request

The General Counsel contends that Local 872’s refusal to provide Vela’s with information regarding how to register as a nonmember constituted a breach of the Respondent’s duty of fair representation in violation of Section 8(b)(1)(A) of the Act. This same conduct, it is alleged, amounted to a refusal to register him for work in violation of Section 8(b)(2). I disagree and find neither allegation meritorious.

It is well established that a union’s duty of fair representation includes an obligation to provide hiring hall users access to information sufficient to determine whether their referral rights are being protected. This may require providing information regarding relevant rules, practices, standards and procedures of the referral service; the duty is breached when the union arbitrarily denies such a request. Typically, a refusal to provide such documents will be deemed arbitrary unless the union can show the refusal was necessary to vindicate legitimate union interests. See *Operating Engineers Local 627*, 359 NLRB 758, 764 (2013); *Plumbers Local 32 (Anthony Construction Co.)*, 346 NLRB 1095, 1096 (2006); *Operating Engineers Local 12 (Nevada Contractors Assn.)*, 344 NLRB 1066, 1068 (2005); *Operating Engineers Local 3 (Kiewit Pacific Co.)*, 324 NLRB 14, 14 n. 1 (1997); *Electrical Workers IBEW Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109, 110 (1995).

The duty of fair representation also requires the union to refrain from arbitrary refusals to permit registration for a hiring hall, *Boilermakers Loc. No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988), and a union’s failure to register an applicant for work will be found arbitrary and therefore unlawful where the union’s actions cannot be shown to be related to the efficient operation of the hiring hall. See *Plumbers Local 247 (Inland Industrial)*, 332 NLRB 1029 (2000) (citing *Iron Workers Local 118 (California Erectors)*, 309 NLRB 808 (1982)).

While it is true that Vela was a vocal critique of Local 872’s leadership, I do not find any evidence that his information request (in effect, his request to register as a nonmember) was handled other than in a wholly standard manner in accordance with the Union’s established policies and practices, let alone in an arbitrary or irrational manner. To begin with, the contention that Local 872 refused to provide Vela with information regarding how to register as a nonmember is not supported by the record evidence. On February 28, 2022, Vela requested in writing the same information he had requested—and received—from Local 872 eight months earlier. At that time, Thienes informed him of the \$60 fee required and, within days, Local 872’s counsel provided him with a written copy of the Hiring Hall Rules, which echoed that requirement and made clear that, in order to register, he was required to complete an Applicant Referral Form and a Skills Sheet, which were made available at the hall.

When Vela re-requested the same information in February, Attorney Rosenfeld reminded him that it was contained in the Hiring Hall Rules that he had already been provided. He offered to answer any additional questions Vela had. He then followed up with a letter, again explaining that the Hiring Hall rules required the Applicant Referral Form and Skills Sheet to be filled out at the hall. This time, he articulated that in-person access to the documents was required to ensure that the paperwork was accurately completed and to preserve the integrity of the registration system. In other words, Vela was not denied the information he sought but rather informed that he—like all other applicants—must come to the hall to see them.

The question, therefore, is whether requiring Vela to come to

¹⁵ Nor is there any indication that White, who was occasionally called upon to assist dispatchers with a “second strike” determination, was personally responsible for waiving hiring hall rules such that hiring hall

users would be inclined to curry favor with him personally. Cf. *Carpenters Local (Mocon Corp.)*, 270 NLRB 623, 632 fn. 12 (1984) (citations omitted).

the hall to register was an arbitrary condition by the Union. I find that it was not. The un rebutted testimony is that Local 872 had a standing practice of requiring applicants to complete their paperwork in person to ensure that it was completed accurately and moreover that the blank Skill Sheet was forbidden to leave the hall to prevent “job selling.” Attorney Rosenfeld articulated these concerns to Vela. Nor did the requirement pose an undue burden on Vela, who would have had to travel only 15 minutes to complete his registration—like everyone else—in person. Under the circumstances, Local 872’s handling of his request posed no material hardship on his ability to register as a nonmember and cannot be considered a denial of his request. As such, the Union did not fail him in its duty of fair representation. See *Operating Engineers Local 181 (Maxim Crane Works)*, 365 NLRB No. 6 (2017).

D. Conduct by Respondent’s Counsel

The General Counsel alleges that Attorney Rosenfeld, via his communications with Charging Parties, violated 8(b)(1)(A) by restrained and interfered with their resort to the Board’s charge filing process. Specifically, it is alleged that he threatened each of them with legal action via evidence-preservation letters and additionally that he “taunted” Charging Party Colvin by stating “another loss” with respect to the dismissal of one of his charges.

The Act protects employees’ Section 7 rights, including the right to utilize the Board’s processes by filing unfair labor practice charges free from coercion. In this regard, the Board recognizes that, “just as some employers have used the means at their disposal for retaliation, some unions have used their influence and authority to retaliate against employees who displease them.” *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591, 594 (2006) (citations omitted). Accordingly, a union that resorts to restraint and coercion to restrict the right of an employee to file a charge, infringes on the rights of that employee under the Act. “As such conduct by an employer violates Section 8(a)(1), so does a labor organization’s use of restraint or coercion violate Section 8(b)(1)(A).” *Operating Engineers Local 138 (Charles S. Skura)*, 148 NLRB 679, 681–682 (1964).

The General Counsel alleges that Attorney Rosenfeld’s conduct interfered with the Charging Parties’ access to the Board. Such alleged conduct, if proven, is particularly damaging to workers’ rights for two reasons. First, in the context of unfair labor charge litigation, employees are especially susceptible to retaliation and coercion because of the nature of the employer-employee or, sometimes, the union-member relationship. *NABET–CWA (American Broadcasting Cos., Inc.)*, 371 NLRB No. 15, slip op. at 5 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978) (“[D]ue to the peculiar character of labor litigation, the witnesses are especially likely to be inhibited by fear of the employer’s or—in some cases—the union’s capacity for reprisal and harassment.”) (internal quotations omitted)).

Second, and even more fundamentally, charge filing plays a critical role in enforcement of the Act, in that, absent the filing of an unfair labor practice charge, the Board lacks authority to initiate proceedings to enforce the Act. *Id.* at 4 (citing *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967); see also *Operating Engineers Local 138 (Charles S. Skura)*, 148

NLRB at 681 (“The right to file charges is indispensable to the administration of the Act since the Board cannot initiate its own processes and no unfair labor practice complaint can issue in the absence of a valid charge.”). For this reason, Congress intended employees to be “completely free to file charges with the Board, to participate in Board investigations, and to testify at Board hearings.” *Id.* (citing *NLRB v. Scrivener*, 405 U.S. 117, 121–122 (1972)); see also *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968). Based on these standards and as explained below, I find that Attorney Rosenfeld’s March 11 email to Colvin did not violate the Act. I further find that the allegation based on his October 5, 2022 letters sent to Vela and Colvin is subject to dismissal pursuant to Section 10(b) of the Act.

(i) The March 11 email

As discussed above, the Board has explicitly recognized “Congress intended that individuals be completely free to file charges with the Board,” and that “any union conduct that reasonably tends to restrain or coerce employees in filing charges violates Section 8(b)(1)(A)—just as any such conduct by an employer violates Section 8(a)(1).” *NABET*, supra at * 7 (citations omitted).

Indeed, statements by union officials suggesting adverse consequences for members who file Board charges have been found to violate the Act. *Painters Local 558 (Forman-Ford)*, 279 NLRB 150, 150 (1986) (statements made by union officials in the presence of members which suggest unpleasant repercussions if they participate in Board processes, constitute unlawful restraint and coercion). This may be the case even where the threat is merely implied by the surrounding circumstances. For example, in *Pacific Maritime Assn. (ILWU)*, a union official violated 8(b)(1)(A) by telling an employee (who sought the union’s support for a transfer) that he “blew it” by filing unfair labor practice charges against the union. 308 NLRB 39, 46 (1992). Finally, even absent a direct or implied threat, a union official mocking or disparaging a member, before his fellow members, for filing a Board charge, may be found unlawful insofar as it has the reasonable effect of inhibiting employees’ Section 7 rights. *Auto Workers Local 235 (General Motors Corp.)*, 313 NLRB 36, 41 (1993) (official presiding at a union meeting violated Section 8(b)(1)(A) by mocking member who had filed an unfair labor practice charge resulting in the union spending money to defend itself).

This does not mean, however, that every statement made by an employer or union official regarding an employee’s charge filing activity is automatically deemed unlawful. Section 8(c) of the Act, which affords protection to certain employer speech, likewise protects speech by unions. Specifically, it provides that “[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit.” In particular, “[i]ntemperate” remarks that are merely expressions of personal opinion are protected by the free speech provisions of Section 8(c).” *Rogers Elec.*, 346 NLRB 508, 509 (2006) (citing *Sears, Roebuck & Co.*, 305 NLRB 193 (1991)); see also *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004).

General Counsel’s posthearing brief does not cite any legal authority for finding unlawful remarks such as Attorney Rosenfeld’s, nor has my research uncovered any such authority. His two-word missive—“another loss”—contained no threat of reprisal by Respondent and given the circumstances, carried no implication of consequences. Indeed, such “taunting,” while arguably unprofessional, amounted to no more than an accurate statement of fact, colored—at most—with his personal opinion that Colvin had filed another meritless charge.¹⁶ In fact, Board decisions dealing with similar facts have consistently found similar commentary to be protected by Section 8(c).

In *GTE Lenkurt, Inc.*, the Board found lawful a manager who openly questioned an employee’s decision to file what he apparently considered a frivolous charge with the Board, stating that he did not think that filing the charge was “right or reasonable.” 215 NLRB 190, 190 (1974). He added:

Whether or not you file any more charges about things like, about foolish things about the Christmas music is up to you, but I think you would generate a better image if you had filed the charges on those things that are pertinent. If there is something really wrong, then go ahead and file the charge. That’s not up to me to say.

Id. Likewise, in *Rogers Electric, Inc.*, the Board found that, a company president who told a group of employees that knew that one of them had filed a complaint with the state labor board and that “going to L&I” was the “wrong way to make changes” had not violated Section 8(a)(1) because they were protected by Section 8(c) as the president’s own personal opinion, and additionally because, pursuant to established Board law, “disparaging remarks alone are insufficient to constitute a violation of Section 8(a)(1).” 346 NLRB 508, 509–510 (2006).

While it could be argued that Attorney Rosenfeld’s statement reasonably conveyed the futility of filing unfair labor practice charges, I do not find this to be the case. While he may be guilty of taking a cheap jab celebrating his triumph in having one of Colvin’s allegations dismissed, “a crude and vulgar indication of triumph and satisfaction over the outcome of [a Board proceeding]” nonetheless remains protected by 8(c). See, e.g., *Whornton’s Food Mkt.*, 176 NLRB 656, 661 (1969) (finding protected owner’s suggestion, following union’s defeat in election, that union’s observer “take a good look” at the Board’s election notice, take it home with him, and when he “got tired of looking at it [he] could wipe [his] ass with it”). Put another way, 8(c) protection is not reserved for sportsmanlike commentary and accurate statements of fact do not, in and of themselves, suggest futility.

Accordingly, I recommend that the allegations of paragraph 6(n) in the complaint be dismissed.

(ii) The evidence preservation letters

The General Counsel alleges that Attorney Rosenfeld’s letters to Vela and Colvin, like his prior letters in the *NABET* case, constituted conduct on behalf of Respondent that reasonably tended

to restrain or coerce employees in filing unfair labor practice charges in violation of 8(b)(1)(A).¹⁷ Respondent asserts that the letters in this case are materially different from those sent in the *NABET* case and that therefore that their dissemination to the Charging Parties did not amount to restraint or coercion in violation of the Act. Respondent additionally asserts that the allegation, which was amended into the complaint during the hearing, is time barred under Section 10(b) of the Act.

Regardless of whether I agree with Local 872 that Attorney Rosenfeld’s subsequent wordsmithing of the *NABET* letters rendered them lawful communications, I find merit to its statute of limitations defense. Section 10(b) provides that “no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board.” This statutory provision serves “two separate functions.” *Precision Concrete v. NLRB*, 334 F.3d 88, 90 (D.C. Cir. 2003) (quoting *Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 677 (D.C. Cir. 2001) (Randolph, J., concurring)). First, it underscores that the General Counsel and Board lack independent authority to initiate unfair labor practice proceedings in the absence of a charge filed by an outside party. In this respect, Section 10(b) operates as a jurisdictional limitation, under which the Board (through the General Counsel) “may investigate and prosecute conduct only in response to the filing of a ‘charge.’” 334 F.3d at 90. Second, Section 10(b) functions in part as a statute of limitations by prohibiting the issuance of a complaint based on conduct occurring more than six months prior to the filing of a charge.

It is undisputed that no charge was filed alleging the evidence-letter allegations. However, notwithstanding the literal language of Section 10(b), the Supreme Court has long since made clear that Section 10(b) permits litigation of certain unfair labor practice allegations that were not raised in a timely charge. Traditionally, both courts and the Board have permitted litigation of otherwise untimely allegations that are “closely related” to a timely filed charge and involve conduct occurring within 6 months of that timely charge. See, e.g., *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952). The last unfair labor practice charge filed in this case, however, was filed on March 9, 2022, more than 6 months before the date Attorney Rosenfeld’s letters were sent. The evidence-letter allegations, therefore, are time-barred.

Accordingly, I recommend that the allegations of paragraph 6(m) in the complaint be dismissed.

E. Dismissal of allegations related to Charging Party Colvin

At various times throughout the record, Respondent moved to dismiss complaint allegations involving Charging Party Colvin, both orally and in writing. On July 31, 2023, I ruled on the record that I would recommend dismissal of paragraphs 6(a) through 6(c) and 6(e) through 6(g) of the complaint, which involve Colvin’s efforts to obtain information regarding registering for work. I based this decision on Colvin’s demonstrated pattern of delay, abuse of process and other contumacious conduct during

¹⁶ As noted, the charge Case 28–CA–287350 was not the first filed by Charging Party Colvin that had been dismissed by the Region and subsequently denied on appeal.

¹⁷ At hearing, Attorney Rosenfeld cross examined Vela about receiving his letter, asking what “if anything” he did in response to receiving it. (See Tr. 1283–1285.) This was not alleged by the General Counsel as further coercive conduct. (See, e.g., Tr. 607–608.)

the course of these proceedings.

(i) Colvin’s delay tactics and failure to appear

Colvin was responsible for repeated delays during the course of the hearing. During the hearing on December 15, 2022, the General Counsel represented that he would be the government’s next (and likely final) witness; Colvin then suddenly announced that he would be unavailable to testify because the following day, he was scheduled to have lab tests for a planned medical procedure that would take place the following week. He further stated that he would require 2–3 weeks to recover from the procedure. Colvin did not inform the counsel for the General Counsel of his scheduling conflict before announcing it in court. (Tr. 1126–1143, 1153.)

In response to an accusation by Attorney Rosenfeld that he was avoiding testifying, Colvin denied engaging in delay tactics and stated that he was fully prepared to testify. Prior to adjourning, Colvin confirmed that he was available to reconvene on February 7, 2023, and would be available to participate in the hearing from that time until it was concluded. (Tr. 1251, 1338–1340.) During an interim video session held on January 25, 2023 to discuss procedural issues, counsel for the General Counsel confirmed that Colvin would be his next witness on February 7, 2023. (Tr. 1364–1365.)

On February 6, 2023, Colvin filed fifteen separate, single-page jpeg documents with the Division of Judges. The proper order in which these pages were intended to be filed could not be discerned. The following day, Colvin did not appear in court; Attorney Rosenfeld stated that his review of the filing suggested that Colvin’s filing included a claim that he had informed counsel for the General Counsel and Regional management of his intention not to appear. Counsel for the General Counsel, who stated that he had planned to call Colvin as his next witness, directly denied being so informed and represented that Colvin had not responded to attempts to contact him. (Tr. 1453–1454; 1457–1458, 1461–1462, 1469–1470, 1471–1472.)

Colvin’s last minute non-appearances not only significantly delayed the course of the proceeding; they resulted in unnecessary travel to Las Vegas and wasted time on the part of other parties to the case, as well as their counsel. I note in particular that Colvin’s maneuvers prevented Charging Party Vela from having his own claims timely adjudicated.

(ii) Colvin’s failure to produce documents and the Region’s subpoena enforcement effort

Colvin willfully refused to comply with the subpoena duces tecum served on him by Respondent. On the first day of hearing, Colvin initially claimed to have no documents responsive to the subpoena. After being warned that his failure to produce responsive documents might work to harm the government’s case, he retracted his statement, asserting that he had no responsive documents with him at the time. While he appears to have produced

certain documents in response to the subpoena, his failure to appear as a witness left questions unanswered as to whether his production was complete. On February 7, 2023, after Colvin failed to appear, the General Counsel agreed to enforce Respondent’s subpoena against him in district court. Accordingly, the case was adjourned pending such enforcement. (Tr. 49–54, 69, 184–185, 1480–1481.)

On July 5, 2023, I held a video session in order to ascertain the status of subpoena enforcement. Two surprising developments occurred during this session: first, counsel for the General Counsel stated that, in the intervening five months, the Region had not yet filed for subpoena enforcement on Respondent’s behalf. Reasons given for the delay were counsel’s busy trial schedule and personal emergency conflicts. Counsel was unable to explain why another attorney in the Region had been unable to file the enforcement action.¹⁸

The second surprising development at the July 5 video session was that Colvin himself appeared and represented that subpoena enforcement would not be necessary for him to appear at a resumed, in-person hearing on July 31, 2023. Colvin represented that he would appear and testify at the resumed hearing, albeit alluding that his role might be “limited” because he had a lawsuit pending against Local 872 in district court. (Tr. 1883–1885.)

In fact, Colvin had (on November 29, 2021) filed a Federal complaint in the District of Nevada, purportedly on his own and Charging Party Vela’s behalf, against both Local 872 and Business Manager White. See *Colvin et al. v. White et al.*, 2:21-cv-02109-RFB-NJK. The case alleges that White and Local 872 violated the Labor Management and Disclosure Act of 1959 (LMRDA) by retaliating against Colvin and Vela by suspending and expelling them from Local 872 membership. It would become apparent that Colvin considered this litigation, in which he sought punitive damages, to be a more significant and financially lucrative endeavor than the instant proceeding.

(iii) Colvin’s refusal to comply with Board filing requirements

Beginning on November 22, 2022 and throughout the proceedings, Colvin electronically uploaded various pleadings and motions, as well as attachments, by individual page (over 80 in total) to the Agency’s “e-filing” system. This led to significant confusion at the Division of Judges, in that Agency staff was unable to sort out and reconstitute these filings in a reliable manner. Colvin was apprised by both Division of Judges staff and the undersigned that such filings would not be accepted. On July 5, 2023, I apprised Colvin on the record of the Board’s guidelines for electronic filing, which state that any attachments must be converted into electronic form and included as part of the document filed, and that attachments should not be filed separately from the document. I offered that, if electronic filing imposed an undue burden on him, he was permitted to file documents in hard copy in person or by mailing them to the Division of Judges. I also specifically ordered him to review the documents that he

that delay, counsel for the General Counsel diligently presented his case while contending with Charging Party Colvin’s antics. For the same reasons, I deny Respondent’s June 17, 2024 letter-request that the Region be ordered to post a notice an issue an “apology” for pursuing this case. See *Laborers Local 872*, 373 NLRB No. 14 (2024).

¹⁸ While the Region’s delay in seeking enforcement was certainly not what I would consider blue-ribbon worthy prosecution, I do not rely on it (or on the other grounds) urged by Respondent in either its July 12 or July 19, 2023 written motions to dismiss based on failure to prosecute by the General Counsel, which are hereby denied. I find that, aside from

had posted to the electronic filing system on particular dates and to refile these documents (in accordance with the e-filing rules or via hard copy). Despite being warned that these documents were not considered properly filed and would therefore not be accepted, he failed to refile them in the required manner. (Tr. 1899–1903.)

(iv) Colvin’s final failure to appear

On July 21, 2023, in direct violation of my order that he adhere to the Board’s filing requirements, Colvin uploaded to the Board’s e-filing system three, single-page jpeg files that, when reassembled, constituted a letter motion to postpone the hearing. In this missive, he accused the Region and the General Counsel of unspecified unethical conduct and questioned the competence of counsel for the General Counsel, again invoking his pending LMRDA suit. Noting that he was awaiting the appointment of a pro bono attorney in that case, he stated that he did not want to “cause any issues” by participating in the General Counsel’s case. Acknowledging that the two actions involved “a lot” of the same claims, he explained that the district court litigation “will be of more value and with greater consequences.”

On July 28, 2023—one business day before the scheduled resumption, Colvin sent the undersigned an email with the subject line: “MOTION TO POSTPONE.” In this somewhat muddled communication, he accused Respondent’s counsel of committing fraud and lying to the district court judge in the LMRDA action and demanded that, “[u]ntil I have spoken with counsel and get legal advice these proceedings need to be postponed.” (R. Exh. 40.)

On July 31, 2023, Colvin failed to appear at the reconvened hearing.

(v) Colvin’s conduct warrants dismissal of complaint paragraphs 6(a) through 6(c) and 6(e) through 6(g)

Board administrative law judges have broad discretion to “[r]egulate the course of the hearing” as well as to “dismiss complaints or portions thereof.” See § 102.35(a)(6), (8) of the Board’s Rules & Regulations. This includes the authority to impose reasonable sanctions for bad-faith conduct that disrupts or delays unfair labor practice proceedings. As the Board has held:

In unfair labor practice proceedings, the Board’s administrative law judges conduct trials similar to those conducted by judges in Federal district courts. Indeed, the statute itself provides that unfair labor practice proceedings are to “be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts.” 29 U.S.C. § 160(b). Accordingly, it is manifest that, similar to their colleagues in the judiciary, the Board’s administrative law judges must possess the authority to control, and to preserve the integrity of, their proceedings. Indeed, in light of the Act’s express grant of power to the Board

to conduct trials, it cannot be gainsaid that the authority to preserve the integrity of those trials is “necessarily implied” in the grant.

Camelot Terrace, 357 NLRB 1934, 1938 (2011); see also *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629–630 (1962) (district courts have an inherent power to invoke such a sanction “to prevent undue delays in the disposition of pending cases and to avoid congestion in the[ir] calendars”).

In Federal court proceedings, repeated delays or disregard of court orders or deadlines can support dismissal, where the plaintiff acts deliberately rather than negligently. *McKelvey v. AT&T Tech., Inc.*, 789 F.2d 1518, 1520 (11th Cir.1986); see also *United States v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002) (“dismissal is proper if the record demonstrates delay or contumacious conduct”). A plaintiff does not have to completely abandon prosecution of an action to warrant dismissal; in the civil litigation context, dismissal has been upheld even where a plaintiff has conducted discovery and participated in hearings. See, e.g., *State Exch. Bank v. Hartline*, 693 F.2d 1350, 1352 (11th Cir.1982); *Lopez v. Aransas County Indep. Sch. Dist.*, 570 F.2d 541 (5th Cir.1978). While it is preferable to forewarn a plaintiff that dismissal is being considered, advance notice is not necessary. *Link*, 370 U.S. at 632.

Recognizing that dismissal of complaint allegations is an extreme sanction, I find it appropriate here, considering Colvin’s repeated delay of these proceedings, which on multiple occasions caused Respondent and its counsel to expend time and resources unnecessarily. While the first of his delays appears to have been occasioned by his need to undergo a medical procedure, he made no effort to give anything approximating adequate notice of this. His second (February 7th) nonappearance was likewise last-minute, announced only the day prior in an indecipherable series of single-page filings.¹⁹

Despite being warned that his failure to produce subpoenaed documents could endanger the General Counsel’s case, Colvin refused for months to do so and/or appear to explain what efforts he had made to search for them. His refusal to appear in response to Respondent’s subpoena forced a five-month adjournment in order to permit the Region to seek subpoena enforcement on Respondent’s behalf. Aware that no sworn testimony would be taken, Colvin then appeared at a video session where he explicitly agreed that he would produce documents and appear in person at a date certain, only to move to postpone his appearance until he was able to consult with a to-be-appointed attorney in a related Federal court action he considered more significant and potentially profitable than the instant one. Thus, Colvin’s conduct not only prevented Respondent from examining him about his document production; it effectively “froze” these proceedings in place. Lesser sanctions—such as findings of adverse inferences—would not address this forum shopping and abuse of process.

¹⁹ While not especially egregious in and of itself, Colvin’s insistence on uploading documents to the Board’s filing system broken out by page into dozens of single-page documents was another example of his disregard of the Board’s practices and procedures. To the extent I rely on this basis for sanctioning Colvin, Respondent’s October 2, 2023 motion

requesting such sanctions is granted. However, Respondent’s further request that I order the General Counsel to cause such improper filings to be “removed” from the Agency’s electronic filing system is denied; it is appropriate that the record of Colvin’s filing conduct remain intact to allow review of this recommended decision.

“Litigation-ending sanctions are, by their very nature, the last resort.” *Fuqua v. Horizon/CMS Healthcare Corp.*, 199 F.R.D. 200, 204 (N.D. Tex. 2000) (citing *FDIC v. Conner*, 20 F.3d 1376, 1380 (5th Cir. 1994)). “Nevertheless, in certain circumstances, they are justified ‘not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.’” *Id.* (citing *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976)). Not only does the enforcement of the Act rely on workers, unions and employers filing unfair labor practice charges, its effective enforcement requires that those charge filers conduct themselves in good faith and cooperate with the government’s prosecution of their claims both on their behalf and on behalf of the public in general.

In this matter, Colvin repeatedly and willfully delayed these proceedings, relying on the goodwill of the General Counsel and this tribunal, to the prejudice of Respondent. His refusal to appear to produce documents was not occasioned by any good-faith belief that they were privileged from production.²⁰ His engineered delays and gamesmanship squandered precious taxpayer-funded resources, as well as imposed costs and inconvenience on Respondent and its counsel, all apparently in service of his pursuit of a monetary damage award in related litigation. Such conduct demonstrates bad faith warranting dismissal of complaint paragraphs 6(a) through 6(c) and 6(e) through 6(g).

F. Rulings on procedural motions by the parties

Throughout and following the proceedings, I ruled on various oral and written motions on the record. The motions pending resolution are discussed below:

(i) The General Counsel’s Motion to Unseal General Counsel Exhibit 26

On December 13, 2022, I denied the oral request by General Counsel to sanction Attorney Rosenfeld based on his conduct during the proceedings by excluding him from the hearing. On December 14, 2022, filed a written motion for consideration with respect to that denial which, at the request of Respondent, was provisionally filed under seal as General Counsel’s Exhibit 26, subject to Respondent’s showing of good cause for such document to remain sealed permanently. On the final day of hearing (July 31, 2023), the General Counsel moved that its motion for reconsideration be unsealed; in response, Respondent argued that, based on Charging Party Colvin’s conduct, the motion for reconsideration should remain under seal.²¹

A party seeking a protective order with respect to disclosure of subpoenaed documents bears the burden of demonstrating

“good cause” under FRCP 26(c) “or that disclosure would cause clearly defined and serious harm.” *Impremedia*, 29-CA-131066, unpub. Board order issued Jan. 14, 2015 (2015 NLRB LEXIS 19, 2015 WL 193732), at 1 n.2 (denying respondent’s request because it failed to establish either). The motion must be supported by a particular and specific demonstration of fact, as opposed to a mere conclusory or speculative claim of harm. See *Waterbed World*, 289 NLRB 808, 809 (1988) (denying respondent’s motion for a protective order in part because of the “scanty and conclusory nature of the respondent’s averments”). See also *Loomis v. Unum Group Corp.*, 338 F.R.D. 225, 228–229 (E.D. Tenn. 2021); *NLRB v. CEMEX, Inc.*, 2009 U.S. Dist. LEXIS 123404, 2009 WL 5184695 (D. Ariz. Dec. 22, 2009); *Serrano v. Cintas Corp.*, 699 F.3d 884, 901(6th Cir. 2012), cert. denied, 134 S. Ct. 92 (2013); *Shingara v. Skiles*, 420 F.3d 301, 306 (3d Cir. 2005); *Foltz v. State Farm Mutual Automobile Insurance Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003); and *In re Terra International, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998).

Respondent has failed to provide particular and specific facts demonstrating the need to keep the General Counsel’s motion for reconsideration permanently under seal. Accordingly, the General Counsel’s motion is granted and the transcript for this proceeding is corrected and amended to reflect that the document currently contained in the record as General Counsel’s Exhibit 26 under seal, is hereby unsealed.

(ii) The General Counsel’s Motions to Strike Certain Submissions

Following the hearing, Charging Party Colvin continued his practice of uploading single-page jpeg documents to the Board’s filing website. On September 28, 2023, counsel for the General Counsel moved to strike two purported pleadings filed in this manner (on September 15 and 27, 2023). Respondent joined this motion on December 18, 2023. To the extent that Colvin’s submissions failed to comply with the Board’s filing requirements, the General Counsel’s motion to strike them is granted.²²

Following the filing of posthearing briefs, Respondent filed multiple requests for administrative notice. On December 29, 2023 and March 8, 2024, the General Counsel moved to strike two such submissions (filed by Respondent on October 11, 2023 and February 27, 2024, respectively). On January 22, 2024, Charging Party Colvin filed a motion for administrative notice, which the General Counsel moved to strike on February 15, 2024. In each case, the General Counsel’s motion to strike is granted for the reasons stated within. I likewise strike Respondent’s March 8, 2024 request for administrative notice for the same reasons: similar to the prior submissions, it amounts to an untimely effort to reopen the record to admit irrelevant and/or

²⁰ Cf. *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010 (2005).

²¹ The General Counsel argues that Respondent’s opposition motion was procedurally defective and not, in fact, filed with the Division of Judges. While it appears to be to have been properly filed, my ruling on the merits of the General Counsel’s request to unseal obviates a need to make this procedural determination.

²² In its joinder motion, Respondent additionally requested that Colvin be sanctioned for failing to apprise the parties of his current address.

This aspect of Respondent’s joinder motion is denied, in that it is based on Respondent’s unauthenticated hearsay that Colvin’s residence changed. Respondent’s March 26, 2024 motion to dismiss allegations related to Colvin based on an alleged failure to update his address, in pleadings is denied for the same reason, as is Respondent’s September 21, 2023 motion to strike the General Counsel’s posthearing brief for failing to serve Colvin with that document at his “updated” address.

unauthenticated hearsay evidence.

(iii) Respondent's Motion to Stay and Dismiss

On July 2, 2024, Respondent filed a Motion to Stay Proceedings Pending Jury Trial based on the United States Supreme Court's decision in *Securities Exchange Commission v. Jarkesy*, 603 U.S. ___ (2024). On July 3, 2024, Respondent filed a Motion to Dismiss based on the Court's decision in *Loper Bright Enterprises v. Raimondo*, No. 22-241 (S. Ct. Jun. 28, 2024). Considering my disposition of this case, I do not find it necessary to decide either motion.

CONCLUSIONS OF LAW

1. The employer-members of Nevada Contractors Association/Associated General Contractors Association (NCA-AGC) are employers within the meaning of Section 2(5) of the Act.
2. Respondent Laborers International Union of North America, Local 872, AFL-CIO (Local 872) is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent Local 872 did not violate the Act as alleged in the complaint.

ORDER

The complaint is dismissed in its entirety.
Dated, Washington, D.C., July 11, 2024.