The Cement League *and* Northeast Regional Council of Carpenters and New York City and Vicinity District Council of Carpenters, Party in Interest. Case 03–CA–126938

February 12, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On May 21, 2015, Administrative Law Judge Raymond P. Green issued the attached decision. The Party in Interest, New York City and Vicinity District Council of Carpenters ("the NYC Council"), filed exceptions and a supporting brief, and the Respondent joined and adopted both filings.[1] The General Counsel and the Charging Party, Northeast Regional Council of Carpenters, filed answering briefs. The NYC Council filed a reply brief that the Respondent also adopted. The General Counsel additionally filed a cross-exception.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

The only allegation before us is that the Respondent, an association of employers in the construction industry, violated Section 8(a)(1) of the Act by maintaining and giving effect to hiring provisions in its 2011–2015 collective-bargaining agreement with the NYC Council, a labor organization, that encouraged union membership.[4] These so-called "full mobility" provisions allowed employers in the Respondent association to hire anyone they wished without having to hire individuals referred from the out-of-work list maintained by the NYC Council, provided the hires were *members* of the NYC Council.[5] Any nonmember hire had to be matched with an individual referred from the out-of-work list. The judge found that there was no evidence that the NYC Council discriminated based on union membership with regard to the out-of-work list or that the list was otherwise unlawful. The judge found the violation because the employers' highly valued contractual right to bypass the out-of-work list hinged on their hiring union *members* and thus impermissibly encouraged union membership.

Neither the Respondent nor the NYC Council excepts to the judge's finding that the full-mobility hiring provisions contravene the National Labor Relations Act. They ask us, however, not to invalidate the provisions—even though they undisputedly violate the Act—because doing so, they claim, would be "in direct conflict and inconsistent with the objective and terms of the Consent Decree and related orders." The consent decree to which they refer, approved on March 4, 1994, settled a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO) brought by the U.S. Department of Justice against the NYC Council and some of its officers. As for the "related orders," the Respondent and the NYC Council particularly point to *United States v. District Council of New York City & Vicinity of Carpenters*, 90 Civ. 5722 (RMB) (S.D.N.Y. Oct. 23, 2013), in which the district court "approved" the 2011–2015 collective-bargaining agreement.

The NYC Council has been monitored by the United States District Court for the Southern District of New York (the district court) ever since it entered into the 1994 consent decree. Pursuant to the decree, the NYC Council applied to the district court for approval of the 2011–2015 agreement. In its October 23, 2013 Order, the district court granted approval, relying on its earlier approval of an essentially identical collective-bargaining agreement between the NYC Council and another employer association, the Association of Wall-Ceiling & Carpentry Industries of New York ("the WCC"). In its May 8, 2013 Decision and Order approving the WCC agreement, the court stated:

> Integral to the CBA is full mobility and a computerized compliance program designed to protect against abuse and corruption in the workplace. As to full mobility, the ability of the contractors to select the carpenters they employ appears to have been freely bargained for with the Union, resulting in, among other things, a higher wage component. As to the anti corruption [sic]

[1] The NYC Council and the Respondent have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] Glen G. McGorty, the court-appointed independent monitor under the RICO consent decree (described below), filed an amicus brief, and the General Counsel filed a response.

[3] The General Counsel cross-excepts to the judge's inadvertent omission of a "Conclusions of Law" section from his decision. We grant the unopposed exception and provide the section below. We shall modify the judge's recommended Order to conform to the violation found and the Board's standard remedial language, and in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

[4] The full text of the provisions is set forth in the judge's decision.

[5] The sole exception to this arrangement was that even if the hires were NYC Council members, the shop steward had to be hired from the out-of-work list.

> compliance provisions, these seem genuinely calculated to prevent fraud and abuse in the workplace. . . . [These include] (1) Shop Stewards electronically reporting personnel and hours, (2)carpenters [sic] being able to check through the electronic reporting system any and all jobs on which they were employed to insure the accuracy of the number of reported carpenters and hours, (3) the hiring of additional on-site inspectors employed by the Inspector General of the District Council for visiting job sites on a 24 hours a day and 7 days per week basis and concentrating on one and two-person jobs where the CBA will not require a Shop Steward, and (4) CBA sanction and arbitration provisions by which contractors found to have willfully and with bad intent violated staffing, wage, and benefit requirements would be subject to loss of the right to full mobility and instead would be required to use the [out-of-work list] for at least fifty percent (50%) of their staffing requirements while otherwise being bound by all of the other provisions of the CBA. . . . Most importantly, the CBA is a bargained over agreement and was approved by the Executive Committee of the District Council and by the Delegate Body of the District Council, lawfully designated representatives with the authority to approve collective bargaining agreements.

United States v. District Council of New York City & Vicinity of Carpenters, 90 Civ. 5722 (RMB) (S.D.N.Y. May 8, 2013) (citations omitted).

Having reviewed the district court's October 23, 2013 Order and its May 8, 2013 Decision and Order, we conclude that finding and remedying the unfair labor practice at issue here does not undermine the court's important anticorruption objectives or its orders in support of those objectives.

Initially, we emphasize the limited nature of our finding. The hiring provisions at issue violate the Act because they condition "full mobility"—that is, the right of Cement League employers to hire without reference to the out-of-work list—on hiring NYC Council *members*. We order only that the Respondent cease maintaining and giving effect to those provisions and notify employees and employers in the association that those provisions are invalid. Our Order does not invalidate any other part of the 2011–2015 agreement.

Our finding does not countermand the district court's orders. In approving the 2011–2015 agreement and its full-mobility hiring provisions, the district court assessed whether the agreement was consistent with the 1994 consent decree. The district court particularly emphasized that the agreement was freely bargained for and democratically approved within the NYC Council. The district court did not cite any provision of the NLRA or analyze the agreement's full-mobility provisions under the NLRA. Because it was not relevant to its analysis, the district court did not discuss the significance, under the Act, of the provisions conditioning the employers' full-mobility rights on their hiring of union members—the critical fact in an NLRA analysis.

We also find no indication in the district court's orders that the full-mobility hiring provisions had an anticorruption purpose. The district court did not mention anticorruption together with full mobility except when noting that employers "found to have willfully and with bad intent violated staffing, wage, and benefit requirements would be subject to loss of the right to full mobility and instead would be required to use the [out-of-work list] for at least fifty percent (50%) of their staffing requirements." In other words, full mobility is a privilege that could be taken away as a sanction—a benefit to persuade compliance and not itself an anticorruption mechanism.[6] We therefore reject the arguments of the Respondent, the NYC Council, and the independent monitor that the full-mobility hiring provisions serve the court's anticorruption goals. But even assuming that the provisions at issue may serve those goals to some extent, the district court decided only to *permit* the provisions in the agreement put before it; other hiring provisions have been approved by the district court in the past and surely could be again.[7]

In sum, there is no dispute that the 2011–2015 collective-bargaining agreement's full-mobility hiring provi-

[6] In support of their argument that the hiring provisions were important for the district court's anticorruption objectives, the Respondent and the NYC Council cite a decision that issued after the hearing in this case, involving the WCC and its identical agreement: *New York City & Vicinity District Council of Carpenters v. Assn. of Wall-Ceiling & Carpentry Industries of New York, Inc.*, 14 Civ. 6091 (S.D.N.Y. April 27, 2015). In that decision, the court vacated an arbitrator's award that departed from the hiring provisions in the agreement because the award was contrary to the agreement's unambiguous language, which the arbitrator was bound to follow. The court did not cite anticorruption objectives when it vacated the award.

[7] When the NYC Council entered the consent decree, its collective-bargaining agreements provided for a 50-50 hiring ratio. That is, employers could choose 50 percent of their employees from any source, and they had to hire the other 50 percent from the NYC Council's out-of-work list. The consent decree required that referrals from the out-of-work list comply with the principle of first-listed, first-referred, with the exception that an employer could take an employee out of order if the employer had employed him or her in the previous 6 months. Subsequent collective-bargaining agreements ran afoul of the consent decree's first-listed, first-referred rule, and the district court modified the hiring provisions to remedy the breach by imposing a 67-33 hiring ratio under which, without exception, 33 percent of hires had to be referred from the out-of-work list *in order*. See *United States v. District Council of New York City & Vicinity of Carpenters*, 592 F. Supp. 2d 708, 722 (S.D.N.Y. 2009).

sions violate the Act. As explained, setting aside those provisions does not conflict with the district court's important anticorruption objectives under the consent decree and RICO. We accordingly proceed to remedy the undisputed violation consistent with our standard practice.[8]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Northeast Regional Council of Carpenters is a labor organization within the meaning of Section 2(5) of the Act.

3. The New York City and Vicinity District Council of Carpenters is a labor organization within the meaning of Section 2(5) of the Act.

4. By maintaining and/or otherwise giving effect, since about November 6, 2013, to article VI, section 2, article VII, section 2, article VII, section 5, article VII, section 5(b), and article XIX, section 35 of its collective-bargaining agreement with the New York City and Vicinity District Council of Carpenters, to the extent that those provisions give preference in hiring based on membership in that labor organization, the Respondent has violated and is violating Section 8(a)(1) of the Act.

5. The Respondent's unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that Respondent The Cement League, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or otherwise giving effect to provisions in its collective-bargaining agreement with the New York City and Vicinity District Council of Carpenters that give preference in hiring based on membership in that labor organization.

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

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

(a) Notify all employers in the Respondent association that, to the extent that article VI, section 2, article VII, section 2, article VII, section 5, article VII, section 5(b), and article XIX, section 35 of the collective-bargaining agreement with the New York City and Vicinity District Council of Carpenters give preference in hiring based on membership in that labor organization, those provisions violate the Act and can no longer be maintained or given any force or effect.

(b) Within 14 days after service by the Region, post at its offices in New York, New York, and any other geographic area covered by its collective-bargaining agreement with the New York City and Vicinity District Council of Carpenters, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent since November 6, 2013.

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

Dated, Washington, D.C., February 12, 2016

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Mark Gaston Pearce, Chairman

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[8] The Respondent and the NYC Council, both parties to the 2011–2015 agreement, interpret the agreement to provide that if the Board invalidates the full-mobility hiring provisions, the entire agreement is null and void, and the terms of the 2006–2011 collective-bargaining agreement (as modified by the district court to impose the 67–33 hiring ratio) would come back into effect. To be clear, we do not order that outcome, and nothing in our Decision and Order precludes the parties from bargaining further and reaching a new agreement.

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

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or otherwise give effect to provisions in our collective-bargaining agreement with the New York City and Vicinity District Council of Carpenters that give preference in hiring based on membership in that labor organization.

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

WE WILL notify all employers that are members of our association that the full-mobility hiring provisions in our 2011–2015 collective-bargaining agreement with the New York City and Vicinity District Council of Carpenters are unlawful under Federal labor law and can no longer be maintained or given any force or effect.

THE CEMENT LEAGUE

The Board's decision can be found at http://www.nlrb.gov/case/03-CA-126938 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

John Grunert Esq. and *Charles Guzak Esq.,* for the General Counsel.
Michael Salgo Esq., for The Cement League.
Raymond G. Heineman Esq., for the Charging Party.
James M. Murphy Esq., for the Party in Interest.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on March 25, 2015, in New York City. The charge in this proceeding was filed on April 21, 2014, and the complaint was issued on December 31, 2014. It essentially alleges that a collective-bargaining agreement between The Cement League, an employer association, and the New York City and Vicinity District Council of Carpenters contained provisions granting preference in hiring based on union membership.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Cement League is an employer association that bargains on behalf of its employer members with various labor organizations including the New York City and Vicinity District Council of Carpenters (the NYC Council). It is conceded that members of The Cement League, who are engaged in the construction industry, collectively purchase and receive goods on an annual basis, valued in excess of $50,000 directly from points outside the State of New York. I therefore conclude that The Cement League is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the two Carpenter District Councils are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Although the Respondent in this case is nominally The Cement League, the actual dispute is between two of the Regional Council's of the Carpenters International Union. That dispute relates to under what conditions or limitations, an employer member of The Cement League (or a signatory to The Cement League collective-bargaining agreement), that is doing work in New York City, may hire individuals who are not members of local unions that are not part of the NYC Council. And notwithstanding that this dispute is essentially between two labor

[1] The Respondent did not file a brief.

organizations, with the employers in the middle, these unions have been unable to resolve this issue internally or with the assistance of their International Union.

The Cement League and the NYC Council have executed a series of successive collective-bargaining agreements for many years. The NYC Council, as a Regional Council, is made up of a group of local carpenter unions. The most recent contract runs from July 1, 2011, to June 30, 2015. Basically, this contract covers work done in the New York Metropolitan area.

The Charging Party is the Northeast Regional Council of Carpenters (the Northeast Council). This Council is made up of various local carpenter unions and its geographic jurisdiction covers northern New Jersey, upstate New York and Long Island.

Historically, members of the unions affiliated with the NYC Council and the Northeast Council have, from time to time, gotten jobs in the respective jurisdictions of each Council. When obtaining such jobs, they would be covered by the applicable collective-bargaining agreement for wages and benefits, but would not be required to change their union membership.[2] For some time, there was a trend of people going from New York City to New Jersey, Long Island and upstate New York. But in more recent years, the flow has been in the opposite direction with suburban carpenters going to New York City and transferring their membership to locals of the NYC Council. And although in the past, a carpenter member of the Northeast Council who decided to obtain employment in New York City might have simply obtained employment there from an employer-member of The Cement League and worked under the NYC Council contract, that has changed. For the past several years, those upstate or suburban carpenters have been transferring their local union membership from locals affiliated with the Northeast Council to locals affiliated with the New York City Council. More about this later.

Many of the employers who are members of The Cement League are large contractors performing construction work on office buildings and residential apartment buildings and who maintain more or less stable work forces that move from job to job. In the past, the contract between the NYC Council and The Cement League has permitted employers to select up to one half of their work force for any given project, but required them, after the hiring of a foreman and a shop steward, to obtain the other half from the NYC Council out-of-work list; this being a nonexclusive referral system which was not limited to members of the affiliated local unions of the NYC Council. This was memorialized at article VI of the contract covering the period from July 1, 2006, to June 30, 2011.

In September 1990, the United States Attorney filed a civil RICO action against the NYC Council and some of its officers. (*United States of America v. District Council of New York City and Vicinity Carpenters, et al*., 90 Civ. 5722). The thrust of this action was the Government's allegations that this labor organization had been engaged in graft and corruption and that it had connections to organized crime. Among the allegations were the assertions that the NYC Council had, through the provisions of its contract and hiring hall, abused the hiring hall system by rewarding associates and punishing dissident union members. It was alleged that the Union and local shop stewards had conspired with employers and had been paid off to allow employers to hire employees "off the books." If proven this would mean that there were instances where employers, with the approval of corrupt union officials and agents, hired employees who were not paid the wages required by the collective-bargaining agreement. It also would mean that those employers would not have made the contractually required payments to various pension and other benefit funds that were established for the benefit of bargaining unit employees.

After a trial commenced in September 1993, the NYC Council offered to settle that case and a consent decree was entered on March, 4, 1994. In part, the settlement provided for the selection of a court appointed monitor, who at the present time is Glen G. McGorty. It also required that the Court approve any new collective-bargaining agreements made by the NYC Council or its affiliated unions.

In 2007, as a result of a contempt proceeding, the Court, in 2009 ordered that the 50:50 hiring ratio be modified so that the employers could now hire 67 percent of their work force from any source whereas 33 percent would be referred by the Union from the out-of-work list. *U.S. District Council of NYC & Vicinity of Carpenters*, 592 F.Supp. 2d 708 (2009).

In April 2010, the District Court, based on a stipulation, entered an Order regarding the appointment of a review officer. This person pursuant to the Order would have the access to all union and union benefit fund records, and would have the powers, inter alia, to conduct investigations, to initiate lawsuits against union officers, agents and employees, to oversee union elections, to discipline union officers, agents and employees, and to supervise job referral rules and procedures.

In May 2013, The Cement League and the NYC Council negotiated modifications to their existing contract and this was ratified on October 9, 2013. Among the issues agreed to was that the employers could, with the limitations described below, man any particular project with employees of their own choosing, without being required to utilize the Union's out-of-work or referral list. The limitation was that in order to do so, *the employer's chosen work force would have to consist of members of the NYC Council*.

On October 23, 2013, United States District Judge Richard M. Berman, after being asked to review a proposed contract, issued an Order which stated; "the Court herby grants the District Council's application and approves the CBA between the District Council and The Cement League, including its provisions regarding full mobility and anti-corruption technology mechanism." [3] The NLRB was not a party to this lawsuit and

[2] It is my understanding that for example when an employee from the Northeast Council got a job in New York City, he would be paid the New York contract rate but the pension and welfare contributions would be transferred to the funds operated by affiliates of the Northeast Council.

[3] The Court noted that the parties to the agreement were to establish an electronic jobs reporting system. Although this is not described in any detail, I would assume that this mechanism was to enable the monitor to determine the names, job classifications, rates of pay, and hours of work for those persons employed by the members of the NYC Coun-

as far as I can determine there was no consideration by any of the parties or the judge as to whether any of the contract's provisions might have been in conflict with the mandates of the National Labor Relations Act.

The contract that was approved by the Court contained the following provisions that the General Counsel claims to discriminate against nonmembers of the affiliated locals of the NYC District Council.

> Article VI, Section 2:
> Any employees not members of the District Council shall be matched 1:1 from the District Council Job Referral List. The Union will cooperate, in order to meet all legal requirements, and furnish qualified carpenters.
>
> Article VII, Section 2:
> For jobs only requiring one (1) or two (2) employees, the Employer will be permitted to work without a certified shop steward without a time limitation. Any employee who is not a member of the District Council will be matched 1:1 from the District Council's Job Referral List.
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> Article VII, Section 5:
> Notwithstanding any other provisions of this Agreement, the Employer shall be permitted to hire any and all Carpenters, except for the Shop Steward and except as otherwise provided in Article VII, Section 2, without reference to hiring ratios (i.e., the Employer will be able to hire Carpenters, except as specifically limited, under so-called full mobility).
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> Article VII, Section 5(b):
> The arbitrator shall be empowered as a remedy to reinstate the 50:50 hiring ratio provisions for the duration of this Agreement for any Employer found to have acted willfully and with the bad intent to violate the staffing and payrolling requirements of this Agreement. Such a remedy would mean that the individual Employer would be required to hire at least fifty percent (50%) of Carpenters from the District Council's Job Referral List (called an Out of Work List or OWL) without the ability to make requests.
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> Article XIX, Section 35:
> . . . if at any time during the term of this Agreement the United States District Court for the Southern District of New York or any other court of competent jurisdiction voids the provisions of Article VII, Section 2 and Article VII, Section 5 (i.e., the so-called full mobility hiring provisions), this Agreement shall become a nullity and the Parties shall return to the terms and conditions under their collective bargaining agreement that expired on its terms on June 30, 2011.

III. ANALYSIS

Among other things, Section 7 of the Act gives employees the right to join a labor organization and the right to refrain from doing so. Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Similarly, Section 8(b)(1)(A) of the Act prohibits a union from restraining or coercing employees in the exercise of the rights guaranteed in Section 7.

Section 8(a)(3) prohibits, inter alia, discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization. However, it does permit an employer from making an agreement with a lawfully recognized union that would require membership on or after the 30th day following the beginning of employment or the effective date of the agreement whichever is the later.

In the construction industry, Section 8(f) of the Act permits an employer and union to enter into a prehire collective-bargaining agreement and to contract for a union security clause of 7 days.

But under either Section 8(a)(3) or Section 8(f), the statute prohibits an employer to condition the hiring of any employee on whether he or she is a member of a union or is not a member of a union.

If the provisions of the contract between The Cement League and employers performing services in New York City, explicitly required the employers to hire or give preference in hiring for all or a portion of their work force to members of the NYC Council, it would follow that such provisions would be unlawful on their face.

In that circumstance, cases cited by the General Counsel and the Charging Party would be dispositive. In *Bricklayers Local 1 (Denton's Tuckpointing),* 308 NLRB 350, 351 (1992), the Board invalidated a contract provision that stated that "when members of Bricklayers Local Union No. 1 . . . are available they shall constitute at least 80% of the bricklaying force of the Employers at all times." In *Plasterers' Local 32*, 223 NLRB 486, 490 (1976), the following language in a contract was held to violate Section 8(b)(1)(A) and 8(b)(2); "it is agreed that at all times during the progress of any and all jobs, fifty percent (50%) of all plasterers employed by the contractors, plus the odd man, if any, shall have been dues paying members of the local in whose jurisdiction the work is being done, for the six (6) months preceding employment. The remaining fifty percent (50%) of the work force may be residents of the area or nonresidents at the discretion of the contractor." In *Carpenters Local 43 (McDowell Building & Foundation*), 354 NLRB 1013, 1017 (2009), the Board concluded that there was a violation where the Union enforced a "mobility" clause against any individual who was not a member of Local 43.

In *Newspaper & Mail Deliverers Union (New York Post),* 361 NLRB No. 26 (2014), the Board held that the Union violated the Act when its contracts with certain employers gave hiring preference to persons who had industry wide seniority with employers having contracts with the Union, irrespective of the fact that seniority included employment outside of the relevant collective- bargaining unit.

The point is that these cases all involved situations where there were contractual provisions that clearly and unambiguously required signatory employers to hire, for all or part of their work force, persons who were members of a particular union or whose seniority was based on nonunit length of service with employers having contracts with a particular union.

Strictly speaking, the contract provisions in the present case do not require any employer to hire all or a part of its work

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cil and to enable the monitor to ascertain whether individuals hired to perform work as carpenters were being covered by the terms of the collective-bargaining agreement.

force for any project in New York City because such individuals are already members of the NYC Council. What they do require is that *if* an employer chooses to hire persons who are nonmembers, then the employer would be required to hire 50 percent of its work force from the NYC Council's job referral list that is also called, "the out of work list." And although it may be fairly assumed that there is strong probability that the people on that list would be members of the NYC Council, there is no showing that the Union prevents or precludes nonmembers from registering for the list. (The record doesn't disclose the mechanics of how the list is created, maintained or utilized.) In this sense, the use by a union of a job referral list is the equivalent of a hiring hall, whether exclusive or nonexclusive. And since the Board has, with some restrictions, sanctioned the utilization of both exclusive and nonexclusive hiring halls, I think that it would be fair to say that the Charging Party is not seeking, in the context of this case, for the Board to find that a collective-bargaining agreement that either requires or allows the use of a union hiring hall would be unlawful simply because that would tend to encourage membership in a union that was a party to such a contract.

The General Counsel and the Charging Party argue that articles VI and VII encourage employees to become members of the NYC Council and to drop their membership in the Northeast Council because those provisions state that when an employer wants to hire employees of its own choosing, the employees that it hires for a New York City project, who are not members of the District Council, must be matched, essentially on a 50–50 basis, from the NYC Council's job referral list.

It is my understanding that there are employer members of The Cement League who perform work within New York City but who also work on projects in New Jersey, Long Island, and upstate New York. And when they work in those locations, outside the City, they operate under the contract with the Northeast Council. Similarly, it is my understanding that there are employers having a contract with the Northeast Council, who will obtain jobs within New York City and will operate as signatories under the auspices of The Cement League's Carpenters contract. So for example, in situations where an employer, such as Rogers & Sons Concrete Inc., which ordinarily has performed work outside of the five boroughs and typically has employed a steady crew of Northeast Council members, obtains a job in New York City, it operates under The Cement League contract.[4] And if that employer wants to bring its own work force to the City, the employees that comprise its steady crew would be strongly incentivized to transfer their union membership from Northeast Council locals to the NYC Council. This would be because that crew normally would consist of employees who ordinarily would not be members of the NYC Council and as such, only half of them would be eligible for employment on a NYC project; with the other half being required to come from the NYC Council's job referral list.

The Cement League which is the nominal Respondent did not file a Brief and from statements made at the hearing, it appears to me that it is pretty much agnostic about the outcome of this case.

The NYC Council, as the Party in Interest, did file a Brief. But its arguments did not question the illegality of the contract provisions as such. Rather, its defense is that the contract was approved by United States District Court Judge Richard M. Berman in the context of a settlement of a civil RICO. (As noted above, that case involved serious allegations of corruption by union officers including some shop stewards.)

In asserting that the Board should defer to the District Court's approval of the collective-bargaining agreement and the provisions in issue here, the NYC Council asserts:

> The anticorruption benefit of this provision is obvious. The District Council and the government benefit from having local New York City District Council members present on any job. If there is any misreporting, underreporting, "working off the books," or any other corruption whatsoever on the job, it is believed that District Council members would have a sound interest in policing those matters and reporting them. Without a District Council presence beyond a Shop Steward among any given signatory employer's workforce, the corruption that has plagued the District Council (e.g., "working off the books," accompanying payoff schemes, etc.) could be accomplished by using strangers drawn from a different labor pool. In other words, contractors bound by District Council agreements could simply move to a neighboring locale (e.g. upstate New York, northern New Jersey, etc.) obtain their workforces from a Carpenters union affiliate in any of those places and bring them to New York City, all the while perpetuating the same fraud and corruption of years past. There would be no District Council carpenters tied to the Consent Decree to police against those corrupt practices.

The Charging Party's response is:

> The Cement League and the NYC District council argue that the purpose of the new language of Article VI, Section 2 and Article VII, Section 2 is to mandate that in addition to the Shop Steward, there are carpenters on the job who have a stake in ensuring that the contractual wages and benefits are paid on all hours worked. The merits of the argument, depend on acceptance of the dubious assumption that NYC District Council members are less corruptible than other carpenters, an assumption which seems to be more dubious in light of the history of corruption which resulted in the District Court's intervention over the administration of the NYC District Council's collective bargaining agreements. . . .

Whether having NYC Council members, as opposed to members of other Carpenter locals, on New York jobs would or would not be advantageous in fighting corruption, this is not an issue that can or should be decided by me. The fact is that the NLRB was not a party to the RICO action brought against the NYC Council and was not asked for and did not give any opinion as to whether the hiring provisions proposed for approval,

[4] The record shows that Rogers & Sons Concrete Inc. is a construction industry contractor based in LaGrangeville, New York. It is a signatory to the contract between the Northeast Council and the Construction Industry Council of Westchester for work done in Hudson Valley. It is also a signatory to the Cement League collective-bargaining agreement with the NYC Counsel and therefore it operates under this latter contract when it utilizes carpenters for projects in New York City.

would violate the National Labor Relations Act. Moreover, there is no indication that the provisions were evaluated in light of the NLRA. As such the Court's approval of the contract is simply not binding on the Board, irrespective of the asserted public policy considerations. Accordingly, if the contract provisions violate the Act, they need to be remedied. Thus, in *Field Bridge Associates*, 306 NLRB 322, (1992), the Board stated:

> The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully. *Allbritton Communications*, 271 NLRB 201, 202 fn. 4. . . . Underlying this rule is the long-recognized principle that "Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940). See also *National Licorice Co., v. NLRB*, 309 U.S. 362–364 (1940). . . . Thus the Board, as a public agency asserting public rights should not be collaterally estopped by the resolution of private claims asserted by private parties…. In this case, the Board was not a party to the New York State Court proceedings. Accordingly, we decline to give them a preclusive effect.

In light of the above, I am inclined to agree with the theory proposed by the General Counsel and the Charging Party and to conclude that the provisions of The Cement League's collective-bargaining agreement unduly encourage membership in local unions affiliated with the NYC Council and tend to unduly discourage membership in the locals affiliated with the Northeast Council.

I am also going to reject the defense that the Board should defer to the fact that a contract, in the context of the RICO settlement, was approved by Judge Berman. I am doing so despite the fact that that lawsuit was not between private parties and involved a branch of the government other than the NLRB. As noted above, there is no indication that these particular provisions of the collective-bargaining agreement that was submitted for review and approval were considered in light of the statutory obligations set forth in the National Labor Relations Act.

Therefore, I conclude that the Respondent, The Cement League has violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

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

ORDER

The Respondent, The Cement League, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and/or otherwise giving effect to article VI, section 2, article VII, section 2, article VII, section 5, article VII, section 5(b), and article XIX, section 35 of its collective-bargaining agreement with the New York City and Vicinity District Council of Carpenters, that requires the giving of preference in the hiring or retention of employment to employees based upon membership or nonmembership in any labor organization except to the extent permitted by Section 8(a)(3) of the Act.

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

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

(a) Notify all employer-members of Respondent, bound by a collective-bargaining agreement with Respondent, that article VI, section 2, article VII, section 2, article VII, section 5, article VII, section 5(b), and article XIX, section 35 of the collective-bargaining agreement between Respondent and the New York City District Council of Carpenters, effective for the period July 1, 2011 through June 30, 2015, or any amendments thereto or successors thereof containing such provisions, are unlawful.

(b) Within 14 days after service by the Region, post at its office(s) in New York, New York, and any other geographic area covered by its collective-bargaining agreement with the New York City and Vicinity District Council of Carpenters, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent since April 21, 2014.

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

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

Dated, Washington, D.C. May 21, 2015

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or otherwise give effect to any agreement with the New York City and Vicinity District Council of Carpenters requiring any employer bound by the collective-bargaining agreement to give preference in hiring or retention of employment to employees based on membership or nonmembership in any labor organization, except to the extent permitted by Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify all employers bound by our collective-bargaining agreement that any and all contract provisions or portions of contract provisions giving unlawful hiring preference based upon considerations of union membership, including article VI, section 2, article VII, section 2, article VII, section 5, article VII, section 5(b), and article XIX, section 35 will be given no further force or effect.

THE CEMENT LEAGUE