

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 34

UNITED BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA, LOCAL 43 AND  
NEW ENGLAND REGIONAL COUNCIL OF  
CARPENTERS  
(McDowell Building & Foundation, Inc.)

and

KEVIN LEOVITZ, An Individual

Case No. 34-CB-3047

COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO THE BOARD

Respectfully submitted,

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Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the General Counsel files the following Brief in Response to the Exceptions and Brief in support thereof filed by Respondent.

**I. STATEMENT OF THE CASE**

On July 7, 2009, Administrative Law Judge Wallace H. Nations issued his Decision in the instant case, finding that United Brotherhood of Carpenters, Local 43 (herein called Local 43) and New England Regional Council of Carpenters (herein called "the Council")(herein collectively called Respondent) committed various violations of Section 8(b)(1)(A) and (2) of the Act. (See ALJD 17-18).<sup>1</sup> On August 13, 2009, Respondent filed exceptions and a supporting brief.

**II. SUMMARY OF THE CASE**

Kevin Lebovitz is a journeyman carpenter and 10-year member of the United Brotherhood of Carpenters, Local 24. Local 24 and its sister locals in the State of Connecticut, Locals 210 and 43, are signatory to a master labor agreement containing a non-exclusive hiring hall. However, the agreement requires signatory employers to give equal opportunities for employment to local union members on projects within that local's geographical jurisdiction. The agreement also contains a "mobility" clause that permits a signatory employer to employ any carpenter who is a "member in good standing" of another Carpenters local so long as that member has worked a minimum of

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<sup>1</sup> References to Judge Nations' decision are cited as "ALJD - \_\_," followed by the page and line number, where appropriate. References to Respondent's brief in support of its Exceptions are designated "R. Br. to Board at \_\_," followed by the appropriate page number. References to the exhibits of the General Counsel and Respondent are cited herein as "GCX- \_\_" and "RX- \_\_," respectively, followed by the appropriate exhibit number or numbers. References to the official transcript of the hearing are cited as "Tr. \_\_", followed by the appropriate page number.

three weeks for the employer in the previous five months. The lawfulness of the “mobility clause” is at the heart of this case.

In December 2007, Lebovitz was hired directly by a concrete contractor called McDowell to work on a project in Rocky Hill, Connecticut, which is within Local 43’s geographical jurisdiction. It is undisputed that Lebovitz did not satisfy the requirements of the mobility clause because he had not worked a minimum of three weeks for McDowell in the previous five months. Local 43’s agents asked McDowell’s representatives to terminate Lebovitz because he did not satisfy the mobility clause, but McDowell refused. Local 43’s agents also approached Lebovitz, informed him that he did not satisfy the mobility clause, and told him that he would have to leave the worksite. On December 24, 2007, Lebovitz complied with that demand and ceased working for McDowell.

In his decision, the judge properly found that Local 43 violated the Act by demanding Lebovitz’ discharge and forcing him to quit based upon the mobility clause, which is facially unlawful as an encouragement of local union membership. (ALJD 13-15). Moreover, the record fully supports the judge’s finding that Local 43 was motivated to enforce the clause against Lebovitz because of his previous concerted activities at another Local 43 jobsite. (ALJD 16-17). For the reasons set forth below, Counsel for the General Counsel respectfully urges the Board to uphold Judge Nations’ findings that Local 43 violated Section 8(b)(1)(A) by maintaining a facially unlawful mobility clause; that it violated Section 8(b)(2) by attempting to cause McDowell to terminate Lebovitz based upon the facially unlawful mobility clause; that it violated Section 8(b)(1)(A) because Local 43’s actions resulted in Lebovitz’ loss of employment with McDowell at

the Rocky Hill jobsite; that Local 43 was motivated by Lebovitz' previous concerted and charge filing activities when it enforced the mobility clause against Lebovitz; and that the union security clause contained within the collective bargaining agreement unlawfully encourages union membership in violation of Section 8(b)(1)(A).<sup>2</sup>

### **III. THE ISSUES**

- (1) Is the mobility clause facially unlawful in violation of Section 8(b)(1)(A)?
- (2) Did Local 43's attempt to cause Lebovitz' termination based upon the mobility clause violate Section 8(b)(2)?
- (3) Did Local 43 violate Section 8(b)(1)(A) because its actions resulted in Lebovitz' loss of employment with McDowell at the Rocky Hill jobsite, even though he voluntarily quit his job?
- (4) Even if the mobility clause is facially lawful, was Local 43 motivated by Lebovitz' previous concerted and charge filing activities when it requested his discharge, in violation of Section 8(b)(1)(A) and (2)?

### **IV. THE FACTS**

#### **A. Background**

##### **1. Contract Provisions and Hiring Hall Operations**

Local 43 and Local 24 are parties to the collective bargaining agreement between the Connecticut Construction Industries Association and the United Brotherhood of Carpenters and Joiners of America, New England Regional Council of Carpenters, Locals 24, 43, 210 and 1121 (collectively referred to in the contract as "the Union"). Article 1 recognizes "the Union" for all "Carpenter employees of such members who are employed by the Employer at all of its establishments or sites of work within the Scope and Territorial Application of this Agreement." (GCX-3). Article IV defines the

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<sup>2</sup> Respondent did not except to the judge's findings and conclusions regarding the union security clause. See R. Brief to Board at 31-32.

“territorial applicaion” as carpentry work “performed by the Employer within the state of Connecticut”. Article V, Section 1 (GCX-3, page 16), contains the following union security clause:

The Employer agrees that all employees covered by this agreement shall, as a condition of employment, become and remain members of the Union in good standing. No worker shall be refused admittance and the right to maintain membership in the Union provided he/she qualifies and complies with the Constitution and Bylaws of the Union.

Article V further details membership/dues obligations effective after seven (7) days of employment, and provides for maintenance of membership.

The contract does not provide for an exclusive hiring hall, although it contains provisions concerning Union referrals. With respect to referrals, Article VI, Section I (GCX-3, page 17) states, inter alia, that:

When the Employer needs additional or new employees, he/she shall give the Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Union except for the obligations in Article X, Section 5b.<sup>3</sup>

Reinforcing the non-exclusive nature of the hiring hall is Article VII, Section 3, which provides, inter alia, that “[a]ll Employers are at liberty to employ and discharge whomsoever they may choose and all carpenters are at liberty to work for whomsoever they choose.”

Article VI, Section 3 (GCX-3, page 17) sets forth the disputed “mobility” clause, which states as follows:

Notwithstanding any language to the contrary in any area collective bargaining agreement for work in Connecticut, Massachusetts and Rhode Island and for work in Maine, New Hampshire and Vermont, the Employer

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<sup>3</sup> Article X, Section 5(b) involves “show up time” pay requirements for workers who are referred by the Union at the employer’s request, report for work, but are not put to work.

shall have the right to employ any carpenter who is a member in good standing of any local affiliate of the New England Regional Council of Carpenters pursuant to the following conditions:

- a. The carpenter employee has worked a minimum of three (3) weeks for the Employer in the previous five (5) months.
- b. If the Employer fails to notify a local union prior to commencing work on a project in that local's geographical jurisdiction, the Employer shall lose the mobility of manpower privileges for that project, and the Employer shall be restricted in its employment of carpenters to those carpenters who normally work in the geographical area of the local union where the project is located.

Regarding the collective bargaining history that led to the mobility clause, Respondent offered testimony revealing that until 1999 it had its own contract with the employer association that required preference in hiring and employment based on workers' geographic residence.<sup>4</sup> In 1999, as a result of "New England-wide" contract undertakings, the current Section 3 provisions first appeared. According to Glenn Marshall, Local 210's President and Business Manager as well as a District Manager for Respondent Council, Section 3 was included as a concession for the union contractors within the jurisdiction of Respondent Council, in exchange for which such contractors agreed to be bound by other New England local contracts when they work outside their normal geographic jurisdiction. (Tr. 102-103). Thus, each local contract contains "me-too" provisions binding union contractors to local contracts throughout New England.<sup>5</sup>

Respondent contends that the mobility clause was designed merely to be an exception to the old local geographic hiring requirement, i.e., to permit an employer who

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<sup>4</sup> That contract specified that "preference in hiring and employment shall be given to persons who have been permanent residents within the territory covered by this Agreement for at least one (1) year prior to the date of the hiring for the job involved." (See RX-2, page 13).

<sup>5</sup> The "me-too" provisions in the Connecticut contract are located in Article IV, Section 1.

previously had to hire solely from the geographic area to now bring in employees of its own crew from outside the geographic area, so long as the carpenter had worked three weeks in the past five months for that employer.

Local 43's chief representative, President and Business Manager George Meadows, admitted that its hiring hall is non-exclusive. (Tr. 140). Local 43 members are free to solicit their own jobs, and contractors are free to call former employees, either directly or through the hall. The only restrictions on hiring appear to be those set forth above, i.e., Local 43 must be given an opportunity to refer employees to a new job or opening, and the employer must satisfy the mobility clause.

## **2. Lebovitz' work history and protected activities**

Lebovitz, who lives in Mystic, Connecticut, is a 10-year member of Local 24. (Tr. 52). Since about 2000, Lebovitz generally has secured his own work rather than through any form of union referral. (Tr. 55, 67-68). Lebovitz testified that since 2000, he has spent six or seven years of that time period working on jobs that fell within Local 43's jurisdiction. (Tr. 53).

For much of the period from 2000 through 2007, Lebovitz managed to secure regular work with Manafort Brothers, a signatory employer in Connecticut. In about June 2002, Manafort transferred Lebovitz from a job in East Hartford to a large construction project located in downtown Hartford called Adriaen's Landing. (Tr. 56-57). Part of the project involved the construction of the Connecticut Convention Center.

As found by the judge, Lebovitz prompted a dispute with Local 43 in 2002 when a few months after transferring to the Adriaen's Landing site he attempted to revoke a previous authorization form he had signed regarding Respondent's PAC fund. (ALJD 9).

Essentially, Lebovitz wanted to opt out of a voluntary 5 cents per hour contribution to the PAC fund, so that instead he could receive the 5 cents per hour as “vacation” pay. (ALJD 9; Tr. 79-82). Lebovitz testified that on October 24, 2002, Local 43 steward John Haggerty approached him to try to get him to sign the card, and that he told Haggerty that he would not sign the PAC fund authorization. Lebovitz testified that Haggerty responded by calling him a “troublemaker” and threatened to “get rid” of him. (Tr. 60, 82-84). Lebovitz testified that Haggerty also threatened that Lebovitz would be the first to go on a layoff. (Tr. 60).

Steward Haggerty reported to Local 43 that Lebovitz had a problem with the form and was “following him around” while Haggerty was trying to conduct his steward’s duties. Lebovitz denied harassing Haggerty or following him around. (Tr. 84-85). According to Lebovitz, he was merely trying to inform several coworkers on the Adriaen’s Landing jobsite about how to opt out of the 5 cents per hour payment to the PAC fund (Tr. 84-85) and was thus engaged in protected concerted activity.

The next day, Friday, October 25, 2002, two of Local 43 top representatives, Business Agent Martin Alvarenga and President and Business Manager George Meadows, visited the job site to speak to Lebovitz. (Tr. 61). According to Lebovitz, Alvarenga told him that he was being brought up on internal union charges “over the green card.” (Tr. 61-62)<sup>6</sup>. The conversation turned heated. (Tr. 62). Lebovitz testified that Alvarenga told him that “you’ll never ever work again. We’re throwing you out of the Union and you’re through, you’re finished...We’re bringing you up on three charges where you’ll be thrown out of the Union and fined.” (Tr. 62). Lebovitz responded that he would bring them up on charges, too. (Tr. 62).

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<sup>6</sup> Apparently the PAC form is printed on green-colored paper.

In judging credibility of the witnesses, Judge Nations specifically noted that: "To the extent there is a credibility issue raised by this conversation, I credit the testimony of Lebovitz over the two Union officials. Lebovitz had a clear and fairly detailed memory of the event whereas the versions given by the officials are contradictory of one another." (ALJD 10, lines 11-13).

Meadows brought internal union charges against Lebovitz that same day. (GCX-11; Tr. 116). Lebovitz was notified of these charges by letter dated October 28, 2002. (GCX-5; Tr. 62). Lebovitz filed counter-charges against Haggerty, Alvarenga, and Meadows, but his charges were summarily dismissed by the Union in mid-January 2003, which prompted Lebovitz to file the charge in Case No. 34-CB-2627 against Local 43 on February 6, 2003. (ALJD 10; GCX-7; Tr. 62-64). Lebovitz ultimately withdrew his ULP charge in May 2003 as a result of a non-Board settlement pursuant to which Local 43 dropped the internal charges and ceased the PAC deductions from his pay. (See GCX-8, 9, 10; Tr. 65-66; ALJD 10, lines 22-28).

**B. Local 43 Enforces the Mobility Clause and Lebovitz Ceases Working for McDowell**

**1. Lebovitz' testimony**

Lebovitz continued working, mostly for Manafort, from 2003 through much of 2007. (Tr. 67). After being laid off by Manafort in November 2007, Lebovitz contacted McDowell seeking work. (Tr. 68-69). On Monday, December 10, 2007,<sup>7</sup> Lebovitz began work for McDowell at a job site located in Rocky Hill, Connecticut, another job within Local 43's jurisdiction. There was no job steward assigned when Lebovitz began work

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<sup>7</sup> All dates in this section are in 2007 unless noted otherwise.

at the Rocky Hill jobsite, which involved construction for a refrigerator plant. (Tr. 21-22, 27, 42, 69, 168).

Lebovitz worked at the Rocky Hill site for 10 days without incident until Thursday, December 20, when Local 43 steward John Haggerty (who had been transferred by McDowell to the Rocky Hill jobsite two days earlier, on Tuesday, December 18), approached Lebovitz at their morning coffee break. Haggerty asked Lebovitz what he was doing there. (Tr. 70). Lebovitz told him, "I'm working." (Tr. 70). According to Lebovitz, Haggerty told him "this isn't your jurisdiction -- you don't belong here." (Tr. 70-71). Haggerty then asked Lebovitz how long he had been with McDowell. When Lebovitz told him that it had been a week and four days, Haggerty announced, "Well, Friday will be your last, because....you don't belong here, this isn't your jurisdiction." (Tr. 71). Haggerty added that Lebovitz knew the "right to mobility" and that this was not personal, but was the Union rule. (Tr. 71, 88). Haggerty was the steward involved in Lebovitz's 2002-2003 dispute with Local 43 at Adriaen's Landing, which was the subject of Lebovitz's previous NLRB charge.

On Friday morning, December 21, after coffee break, Employer Vice President and part-owner Dan Carvalho (who had hired Lebovitz personally) approached Lebovitz at the jobsite and told him that Martin Alvarenga had just called him and demanded that Carvalho fire, remove or "get rid of" Lebovitz from the job. (Tr. 72). Carvalho assured Lebovitz that he would not do so. (Tr. 72).

Later that afternoon, at quitting time, Carvalho told Lebovitz that Alvarenga had called again to find out "whether he (Carvalho) had gotten rid of me or not." (Tr. 72). Carvalho told Lebovitz that he had told Alvarenga "no." (Tr. 73).

Lebovitz reported to the Rocky Hill job site on Monday, December 24. At some point between 10:00 and 10:30 a.m., Alvarenga visited the site and asked to speak to Lebovitz. (Tr. 73). Lebovitz testified that Alvarenga approached him at the site and told him that he "knew the right to mobility." (Tr. 73). Lebovitz admitted that he did. Alvarenga explained to Lebovitz that he knew he was a good worker, they had nothing against him and it wasn't personal, but it was the union rule. (Tr. 73, 91-92). Alvarenga then stated that Lebovitz had to leave the job. (Tr. 73).

When Lebovitz offered to leave immediately, Alvarenga said that Lebovitz could finish out the day, because Alverenga "didn't want to hurt (his) livelihood." (Tr. 73). Alvarenga added that if he let Lebovitz get away with it, he'd have to let others get away with it. (Tr. 73, 92). The conversation ended with Alvarenga repeating that Lebovitz had to get off the job and stay off the job, and telling him "don't come back." (Tr. 73, 92-93). Lebovitz replied "okay." (Tr. 74).

Lebovitz testified that Alvarenga then walked over to speak briefly with Foreman Sal Morello, and that as he was leaving he told Lebovitz that he would inform Morello that Lebovitz could not come back to the job. (Tr. 74, 93, 98). At the end of his shift, Lebovitz informed Morello that he (Lebovitz) would not be coming back to the job site because Alvarenga had told him to get off the job. (Tr. 75). Morello replied that he had already been told. (Tr. 75). Lebovitz did not report for work to the Rocky Hill jobsite on December 26 or on any day thereafter. (Tr. 75; see also GCX-4(c)).

Lebovitz testified that he chose not to report to the Rocky Hill site, despite admittedly having never been fired or laid off by McDowell, because he feared that Local 43 would bring him up on charges again. (Tr. 75, 93, 95). Lebovitz testified that

he was aware of two other cases in which a Local 43 member worked in Local 24's jurisdiction without satisfying the mobility provision and the rule was not enforced against either employee. (Tr. 76-77).

## **2. The Employer's testimony**

Employer representatives Vice President Dan Carvalho and Foreman Sal Morello testified on behalf of Counsel for the General Counsel. Carvalho testified that Haggerty did not start work at the Rocky Hill job until Tuesday, December 18. (Tr. 27; see also GCX-4(b)-5)). Carvalho testified that two days later, on Thursday, December 20, Haggerty interrupted him as he was handing out paychecks to tell him that Lebovitz "was not allowed on the job....due to something about a mobility rule." (Tr. 28). Carvalho testified that until that moment he had never heard of a "mobility rule." (Tr. 29). The brief exchange ended with Carvalho telling Haggerty that "that's union stuff", and he continued passing out paychecks. (Tr. 28-29).

Carvalho testified that the next morning, Friday, December 21, he received a call on his cell phone from Alvarenga, who called to discuss Lebovitz and the mobility clause. (Tr. 29-30). According to Carvalho, Alvarenga began the conversation by telling Carvalho that he had to remove Lebovitz from the job. (Tr. 30). When Carvalho protested that Lebovitz was "one of (his) best guys," Alvarenga mentioned the mobility rule. (Tr. 30). Carvalho told Alvarenga that he was not going to ask Lebovitz to leave the job. At that, Alvarenga told Carvalho that he could be brought up on "charges", but did not elaborate. (Tr. 30, 38).<sup>8</sup> Curious at this point about why Alvarenga was so insistent that he remove Lebovitz from the job, Carvalho asked Alvarenga, "Why are we

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<sup>8</sup> Carvalho is a member of the Masons and Allied Craftsmen Union, Local One, but is not a member of the Carpenters Union. (Tr. 18-19, 30).

going through all this?" (Tr. 31). *Alvarenga answered by specifically mentioning "something about the Connecticut Convention Center."* (Tr. 31)(emphasis added).<sup>9</sup>

Carvalho reiterated that he was not about to ask Lebovitz to leave. After the two "exchanged words," Alvarenga suggested that Carvalho assign Lebovitz to another job. (Tr. 31). Carvalho explained the only other job he had was in Danbury, which is in Local 210's jurisdiction. (Tr. 31, 36). Carvalho testified that moving Lebovitz to Danbury would not have helped with the mobility clause because Lebovitz would not have satisfied mobility in Local 210's territory either, and in any event, he needed Lebovitz on the Rocky Hill job site. (Tr. 32). The phone conversation ended with Carvalho telling Alvarenga that if he wanted Lebovitz off the job, "You have to tell him to leave, but I'm not telling him to leave. He's staying here." (Tr. 32).

Carvalho testified without contradiction that up until that point, in his seven years with the Employer, he had never heard of an instance where any Carpenters local had demanded the removal of a worker from a job based on the mobility clause. (Tr. 35).

Carvalho testified that later that afternoon he approached Lebovitz and asked him what all the "fuss" was about. (Tr. 32). Carvalho could not recall exactly what Lebovitz said, but testified that he "mentioned some of the same things with mobility rules and they had issues from the past." (Tr. 33). Carvalho assured Lebovitz that he wasn't getting rid of him, and that he did not want Lebovitz to leave. (Tr. 34). The following week, Carvalho learned that Lebovitz had left the job after Alvarenga had "asked him to leave." (Tr. 34).

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<sup>9</sup> Carvalho explained that the Convention Center/Adriean's Landing "was all one big project." (Tr. 32).

On cross examination, Carvalho admitted that, having now read the mobility rule, he understood that Lebovitz would not have satisfied its restriction, as Lebovitz had not worked for his company for three weeks in the previous five months. (Tr. 39).

Sal Morello, a 31-year member of Local 24, testified that on either Thursday or Friday of the week before Christmas 2007, Haggerty approached him and asked him how long Lebovitz had worked for the Employer in the past. (Tr. 42-43). Haggerty then told him that Lebovitz couldn't be on the job because of the mobility clause. (Tr. 42-43). Morello testified that in this initial conversation about Lebovitz and the mobility rule, Haggerty specifically "mentioned something about that they had other allegations before that job, in the past." (Tr. 43). Morello admitted that Haggerty did not specify the nature of the past "problem." (Tr. 43).

Morello testified that because he had never heard of a mobility clause, he called a business agent from Local 24 to find out if it existed. (Tr. 44). He testified that the Local 24 agent confirmed that the clause exists, "but not all the locals enforce it." (Tr. 44). Morello testified that on the following Monday (December 24), Alvarenga visited the Rocky Hill jobsite and asked him if Lebovitz had worked for McDowell before. Morello told him no. (Tr. 44). Morello testified that Alvarenga asked if he had any other job out of Local 43's jurisdictions where the Employer could place Lebovitz for three weeks, and then bring Lebovitz back to Rocky Hill. (Tr. 44, 50-51). Morello explained to him that the only other job was in Danbury.<sup>10</sup> Morello testified that in all his years of experience he could not recall ever hearing of a situation in which an employee had left a job pursuant to the mobility clause. (Tr. 45).

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<sup>10</sup> That job, roughly two hours distant from Lebovitz's home, would have been outside Local 24's jurisdiction, but within Local 210's jurisdiction, not Local 43's.

### 3. Respondent's Defense

Respondent argues that it simply enforced a contract provision that lawfully promotes a geographical hiring preference, that it routinely enforces the provision, that it was not motivated by any unlawful animus against Lebovitz, and that Lebovitz was not terminated but rather quit voluntarily in response to the noncoercive and nonthreatening communications from Local 43 regarding his admitted failure to satisfy the mobility clause. The judge properly rejected all of these defenses.

#### a. History of the clause and its enforcement

Respondent presented testimony, through Marshall, concerning the evolution of the mobility clause and the historic application of the mobility clause. Meadows, Alvarenga, and Haggerty each testified that Local 43 stewards routinely check into whether workers on the job satisfy the mobility clause. (See Tr. 118-120, 145, 162-163). However, the record also revealed that, despite having been in existence for eight (8) years by that point in time, the first evidence of any written training materials concerning the mobility clause that were provided to stewards by Local 43 occurred at a membership meeting held *on Thursday, December 20, 2007*. (See RX-4; Tr. 121-123, 151-152). This date happened to coincide with the exact same date Haggerty confronted both Carvalho and Leboviz about mobility. In its brief to the Board (at p. 6), Respondent disingenuously claims that this "syllabus" was prepared "prior to the events late in the month involving Mr. Lebovitz." It was not; the syllabus first surfaced at the afternoon membership meeting held on December 20, 2007, the exact same date that Haggerty had first confronted Lebovitz at the job site.

Moreover, Meadows, Respondent's chief representative at the hearing, was forced to admit that the *only* pre-December 2007 case for which Respondent could produce records concerned the case at hand. (See Tr. 136-137). Respondent could not point to a single other pre-Lebovitz case in which it had documentary evidence of having enforced the mobility clause -- which had been in the master labor agreement since 1999.

The judge found it curious that in March 2008, just several months *after* the enforcement against Lebovitz, Local 43 stewards filed separate internal union charges against four non-Local 43 members working on other job sites, ostensibly for non-compliance with the mobility rule. (ALJD 17, lines 8-11; GCX-12(a)(b)(c)(d); Tr. 128-131, 213). While Respondent in its brief to the Board dismisses this concern (R. Brief to Board, at 28-29), it remains "curious" that the *only* other documentation of any mobility rule dispute in nearly 10 years occurred just a few months after the instant ULP charge was filed. In any event, Local 43 steward Haggerty revealed the true purpose behind the mobility clause: "Our guys are going to work if there's work." (Tr. 161).

Meadows admitted on direct examination that Local 43 uses its discretion in enforcing the clause: "There are circumstances when mobility is waived." (Tr. 123). Meadows explained that one exception would be if a contractor required a certain job skill that none of the Local 43 members possessed. (Tr. 123-124). Meadows also testified that another such situation occurred in the Summer of 2007 at the Cigna project, when the "cupboard" (employees on the out of work list) was bare, and a Local 108 member was permitted to remain on the job despite not meeting the mobility rule.

(Tr. 126).<sup>11</sup> Glenn Marshall, Local 210's President, testified that Local 210 has had difficulty in manning jobs in the past and that his local was the "most lenient" in enforcing the mobility clause. (Tr. 108). Marshall essentially admitted that Local 210 has not strictly enforced the mobility clause.

Other than Haggerty, whose only example of enforcing the mobility clause involved the instant dispute, despite his having checked mobility "probably a thousand times" (Tr. 163), Respondent did not present a single Local 43 steward. Instead, it offered the brief testimony of two management representatives of companies not involved in this case, John Kendzierski and Robert Fitch.

Kendzierski, the President and owner of Professional Drywall Construction, a signatory employer for over 10 years, testified that Local 43 has a reputation for enforcing "all of their rules pretty stringently," including the mobility rule. (Tr. 188-189). Kendzierski testified to two situations he was aware of in which Local 43 enforced the mobility clause, but offered no dates or names of the employees involved. (Tr. 190). On cross examination, he recalled that one of the incidents occurred in 2005 or 2006, with a Local 108 member. Kendzierski could not remember if the employee was returned to the job site after meeting mobility, or any other details. (Tr. 193). Kendzierski admitted that despite being a signatory employer for 10 years, he only learned of the existence of the mobility clause in about 2004, when he began performing more work in Local 43's territory. (Tr. 197).

Robert Fitch, President of New Haven Partitions, another signatory employer, testified that he laid off an unknown number of Local 24 members and replaced them

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<sup>11</sup> Regarding any supposed need to enforce the mobility clause at the time of Lebovitz' employment by McDowell, the record revealed that after full employment in the summer of 2007 only approximately 70 members (out of 800) were on Local 43's out-of-work list in December 2007. (See Tr. 135, 210).

with Local 43 members on three different occasions since 2005 or 2006 because of the mobility rule. (Tr. 200-206). He could not name the individual employees involved, or provide exact dates of these incidents. Thus, while the two contractors offered testimony that Local 43 had caused the removal of some unspecified number of Local 24 and Local 108 carpenters on a few occasions in the past four or five years, the judge apparently considered such evidence to be of limited value.

In its latest brief and in its exceptions, Respondent faults the judge for not providing a detailed analysis of the contractors' testimony in his *Wright Line* analysis. (See R. Brief to Board at 25-26). However, the judge noted their testimony in his recitation of the facts. Implicit in his failure to refer to that testimony later in his decision is an indication that he evidently found it of little value. As Counsel for the General Counsel pointed out to the judge in his initial brief, Respondent's witnesses offered only extremely limited and non-specific examples of actual enforcement of the mobility clause in a manner similar to Lebovitz, lacking in exact dates or even the names of the employees allegedly affected.

In this regard, despite Respondent's exhaustive analysis of the testimony in its latest brief, the fact remains that Local 43's top officials did not present evidence of a single example comparable to Lebovitz, i.e. showing that when a member of another local who did not satisfy the mobility clause tried to work on a job within Local 43's jurisdiction, Local 43 secured his removal from that job and the employee did not return to the job site. Judge Nations correctly noted that: "Though Meadows testified that a number of workers have been removed from jobsites in Local 43's jurisdiction over the years, he could not name a particular person *other than Lebovitz* who had been

removed from a job for lack of mobility. There is no written documentation of a worker being removed from a jobsite for lack of mobility before the Lebovitz incident in December 2007.” (ALJD 6, lines 25-29)(emphasis added).

b. Respondent’s other defenses regarding Lebovitz

With respect to the 2002 incident with Lebovitz at the convention center job site, neither Meadows nor Alvarenga specifically disputed Lebovitz’ detailed testimony. Meadows specifically did not deny the damaging statements that Lebovitz attributed to their meeting on October 25, 2002, claiming instead that Alvarenga did not even speak. (Tr. 114-115). Alvarenga echoed this testimony. (Tr. 143-144). Alvarenga admitted that the conversation was heated, and that he could not recall everything that was said. (Tr. 156-157). Alvarenga specifically failed to deny the damaging statements attributed to him by Lebovitz (“you’ll never ever work again...We’re throwing you out of the Union and you’re through”), claiming simply that he did not speak. (Tr. 143). Haggerty similarly failed to deny Lebovitz’ testimony that on October 24, 2002, Haggerty had called him a “troublemaker” and threatened to remove him from the job.

Regarding the December 2007 incident that prompted the instant litigation, Alvarenga did not deny seeking to enforce the mobility rule against Lebovitz. (See Tr. 146-149). Alvarenga did not deny the comments attributed to him by Carvalho (the threat to bring him up on charges) and admitted visiting the Rocky Hill job site on December 24, 2007 to speak to Lebovitz and Morello. (Tr. 149-150, 153-155). In any event, Judge Nations credited Lebovitz. (See ALJD 10, lines 11-13).

## V. ARGUMENT

It is undisputed that Respondent Local 43 sought to have the Employer remove Lebovitz from the job, and justified its request by the further undisputed fact that he did not meet the requirements of the mobility clause, i.e., he had not worked for McDowell at least three weeks in the previous five months. It is also undisputed that Local 43's enforcement of the mobility clause resulted in Lebovitz's loss of employment. The existence and maintenance of the union security clause in the collective bargaining agreement is similarly undisputed. Judge Nations correctly found that Respondent violated the Act as alleged in the Complaint.

### A. Applicable Law

Inasmuch as Local 43's enforcement of the mobility clause clearly resulted in Lebovitz's loss of employment, its conduct raises a presumption that it is unlawful, unless the union can show that it was "necessary to the effective performance of its function of representing its constituency." *Acklin Stamping Co.*, 351 NLRB 1263 (2007); *Operating Engineers Local 18 (Ohio Contractors Ass'n)*, 204 NLRB 681 (1973). In this regard, a union may lawfully request the termination of an employee if it is done to ensure that lawful contractual provisions are not being violated, or that the rules of a legitimate hiring hall are not being circumvented. See *Operating Engineers Local 181 (Raymond Construction)*, 269 NLRB 611, 627 (1984); *Boilermakers Local 40*, 266 NLRB 432 (1983). Moreover, Section 8(f) makes it lawful for employers and unions in the construction industry to enter into agreements that require notice to unions and provide the unions the opportunity to refer employees, and to give "a priority in opportunities for employment based upon . . . length of service in the particular geographical area." See

*Bricklayers, Masons and Plasterers Union No. 28 (Plaza Builders, Inc.)*, 134 NLRB 751 (1961). It is also lawful to frame the rights of travelers to work in a particular jurisdiction based on their service in another geographical area covered by other collective bargaining agreements, as long as it is not based upon union membership. See *Bechtel Power Corporation*, 229 NLRB 613 (1977); *Plumbers Local Union 469 (Mackey Plumbing Co.)*, 228 NLRB 298 (1977); *Construction, Building Materials & Miscellaneous Drivers, Local 83 (Various Employers in the Construction Industry)*, 243 NLRB 328, 328-331 (1979).

It is also well established that in the absence of an exclusive hiring hall, unions cannot seek the termination of employees who were not referred by the union. *Kvaerner Songer, Inc.*, 343 NLRB 1343, 1346 (2004); *Sheet Metal Workers Local 16 (Parker Sheet Metal)*, 275 NLRB 867 (1985); *Operating Engineers Local 17 (Combustion Engineering)*, 231 NLRB 1287, 1289 (1977).

**B. The judge correctly found that the Mobility Clause is facially unlawful in violation of Section 8(b)(1)(A)**

As noted above, geographical hiring preferences are lawful so long as they are not based upon union membership. However, the mobility clause in this case clearly requires that in order for an employer to employ a carpenter from outside a local's geographical jurisdiction, the carpenter must be a "member in good standing" of another Carpenter's local in New England. Thus, on its face, the mobility clause requires union membership in order for a carpenter to work in Local 43's geographic jurisdiction, which violates Section 8(b)(1)(A) of the Act. *Bricklayers Local 1 (Denton's Tuckpointing, Inc.)*, 308 NLRB 350, 351 (1992) (finding that union violated Section 8(b)(1)(A) "simply by maintaining an agreement" which contained a provision granting unlawful preference in

employment to union members). Even absent specific examples of discrimination, the Board will find unlawful a contractual clause that on its face discriminates based on union membership or conditions employment on union membership. See, e.g., *Ann Arbor Fire Protection, Inc.*, 312 NLRB 758, 758 (1993) (finding that union, by maintaining a facially unlawful contractual provision giving preference in layoffs to union members, violated Section 8(b)(1)(A)).

Respondent argues that “members in good standing” should not be read literally, but should be interpreted in light of the statute, i.e., financial core membership. Such an interpretation, even if correct, fails to legitimize the clause because a union cannot cause discrimination against employees based on their union security delinquencies *outside* the bargaining unit. See *Iron Workers Local 433*, 272 NLRB 530 (1984), enforced, 767 F.2d 1438 (9th Cir.1985); *Carpenters Local 740 (Tallman Constructors)*, 238 NLRB 159 (1978). The mobility clause clearly permits Respondent Local 43 to restrict employers from bringing in employees who have worked at least three weeks in the past five months based on the employees’ failure to be current in dues obligations *in another bargaining unit*. A union cannot, as a condition of employment, enforce dues obligations incurred outside the bargaining unit. See *Iron Workers, Local 433*, supra; *Iron Workers, Local 433*, 266 NLRB 154, 157 (1983), enforced mem., 730 F.2d 768 (9th Cir. 1984); *Tallman Constructors*, supra, 238 NLRB at 160-161. Moreover, an employee’s contractual obligation to pay dues under a valid union security clause cannot be imposed until the contractual grace period has expired. *Id.* at 161.

Here, the mobility clause forbids employers from hiring workers who are not members in good standing of their home locals. Respondent argues that this language

is "superfluous" and does no more than to state "the obvious, and does not make the clause any more unlawful than the clause would be without the reference to 'members.'" (R. Brief to Board, at 13). The flaw in this reasoning, however, lies in the fact that it is not hard to conceive of the situation in which a union member could easily be in trouble with his home local for any manner of reasons, and thus be found to be lacking in "good standing." The mobility clause, as written, requires good member status. While Respondent has crafted an outwardly appealing argument for its being "superfluous," upon closer inspection the clause is anything but.

Moreover, Lebovitz credibly testified that when working in Local 43's jurisdiction he continues to pay regular monthly dues to his home local: Local 24. (Tr. 54). Given these facts, the mobility clause would require Local 43 to ascertain whether those dues are in fact paid, and whether the traveler is a member in good standing of his home local. Thus, the clause makes dues payment -- for dues incurred outside the bargaining unit -- a condition of employment, in violation of Section 8(b)(1)(A). The mobility clause is invalid for these two reasons alone.

The judge's finding that the mobility clause is an unlawful restriction on travelers is not unreasonable. Respondent claims that, rather than restricting the rights of travelers, the mobility clause merely promotes a lawful geographical hiring preference. This argument was properly rejected by the judge. As noted by Judge Nations, it is not unlawful to base a referral preference on the objective criterion of area residence. (ALJD 13). In *J. Willis & Son Masonry*, 191 NLRB 872, 874 & note 6 (1971), the Board found lawful contractual language that could be construed to give preference to area residents. In *Metropolitan District Council*, 194 NLRB 159 (1971) (*MDC*), the Board

found no violation where a Carpenters local caused the discharge of three carpenters who had been hired by the employer from another geographic area. However, *MDC* is distinguishable because there was no contractual provision relied upon by the local union in that case, nor was there any type of hiring hall. The Board found no violation because there was insufficient evidence to establish that the local union caused the discharge of the three carpenters because they were not members of the local union. Put another way, the Board found the local geographic preference lawful because there was no evidence that the union's objective was to gain preferred treatment for members of one union over another, as is the case here. Moreover, as discussed herein, it is well settled that unions cannot discriminate in referrals or employment on the basis of membership or nonmembership in the union. *Sachs Electric Co.*, 248 NLRB 669, 670 (1980), enforced sub nom. *NLRB v. Elec. Workers IBEW Local 453*, 668 F.2d 991 (8th Cir. 1982) (*Sachs Electric*); *Carpenters Local 2396 (Tri-State Ohbayashi)*, 287 NLRB 760, 763 (1987), enfd., 878 F.2d 1439 (9<sup>th</sup> Cir. 1989).

Read literally, the mobility clause prohibits an employer from hiring union member employees unless they have worked three weeks in the previous five months for that employer before they were hired. The clause thus makes a distinction, with respect to eligibility for employment, between members of Respondent Council and all other applicants. More significantly, in practice, the parties use the clause to distinguish, with respect to employment eligibility, between members of the local in whose jurisdiction the work is performed and members of other locals (so-called "travelers"). Thus, although the mobility clause literally applies to all members of the

New England Regional Council, the parties have largely interpreted the clause in practice as a restriction only on travelers, that is, members of other Carpenters' locals.

Respondent's claim that the mobility clause is simply a permissible local hiring preference is not without some surface appeal. As Respondent Council's District Manager Marshall explained, the pre-1999 master contract included standard local hiring preferences, but in a concession to the Association for agreeing to be bound by local contracts throughout New England, Respondent agreed to substitute the mobility clause. The clause, by Respondent's account, allows an employer to bring in his own crew, provided that the crew satisfies the requirements of the mobility clause.

The judge was correct, however, that a close reading of the clause does not legitimize Respondent's claim. (ALJD 13, lines 44-45). The collective-bargaining agreement provides for a non-exclusive hiring hall and explicitly allows employers to hire any applicant. The only restrictions on hiring are that the Union must be given an equal opportunity to refer workers for a position and the mobility clause must be satisfied. The mobility clause, on its face, restricts only hiring of members of the New England Regional Council.

Furthermore, the only reference to a local hiring preference in the agreement is Section 3(b) of the Agreement *which takes effect only if an employer fails to notify the local union of a new project in that local's geographical jurisdiction.*<sup>12</sup> Thus the mobility clause clearly gives preference to members of the local in whose jurisdiction the work will be performed over travelers. Indeed, non-union members also receive a preference over travelers because employers can hire any worker without restriction, unless that

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<sup>12</sup> The parties stipulated at hearing that this is not a "notice" case. (Tr. 209).

worker is a union member. The clause therefore violates Section 8(b)(1)(A) as it discriminates against travelers.

Therefore, the mobility clause is fundamentally flawed. On its face, it discriminates based on union membership, it unlawfully requires a local union, prior to enforcing it, to seek the employee's "good member" status in a bargaining unit outside the local area (as for example, a carpenter from a Vermont local), and it impermissibly discriminates against travelers, such as Lebovitz. The judge properly reached these conclusions.

**C. Judge Nations correctly found that Local 43's attempt to cause Lebovitz's termination based upon the mobility clause violated Section 8(b)(2) of the Act**

Inasmuch as Local 43 relied upon a facially unlawful rule in admittedly seeking Lebovitz' discharge from the Rocky Hill jobsite, such conduct clearly violated Section 8(b)(2) of the Act. See *IATSE (Hughes-Avicom International)*, 322 NLRB 1064 (enforcement of a contractual provision limiting welfare and pension benefits to union members violates Section 8(b)(2)).

It is also well established that a union violates Section 8(b)(2) when it attempts to cause an employer to fire or lay off employees for reasons other than their failure to pay dues and fees under a valid union-security clause, including attempts to have employers fire travelers for no other reason than their status as travelers. *Pipefitters Local Union No. 392 (The Oberle-Jordre Co.)*, 273 NLRB 786, 793 (1984) (finding that a "bare request" that an employer discriminate against a traveler, even when that request is unaccompanied by threats and ultimately ignored by the employer, violates Section 8(b)(2)). Asking an employer to comply, even when that employer refuses, violates the

Act where there is "no legitimate basis for the request, which was premised solely on the Union's desire to employ its local members at the expense of the travelers." *Id.* See also *Glaziers Local 513 (National Glass)*, 299 NLRB 35, 43-44 (1990)(*National Glass*). Here, it is undisputed that Alvarenga demanded that Carvalho fire Lebovitz because he did not satisfy the mobility clause and threatened to bring Carvalho "up on charges" if he refused. Although Carvalho refused to fire Lebovitz, Alvarenga's demand that he enforce an unlawful contract provision violated Section 8(b)(2). See, e.g., *Carpenters Local 2396, supra*, 287 NLRB at 762-763.

In its brief to the Board and its exceptions, Respondent claims that even if the mobility clause is found to violate Section 8(b)(1)(A) as facially invalid, "the only remedy available for Mr. Lebovitz is a remedy for a violation of Section 8(b)(2) and that occurs only where the enforcement of the clause is discriminatory." (R. Brief to Board at 18-19). Respondent then crafts an argument that parses out the "membership" provision of the mobility clause, arguing that Respondent's officials did not enforce that part of the clause, but instead enforced only the "three weeks of employment provision for out-of-area carpenters. The 'membership' provision is entirely irrelevant, and the Local did not 'rely' on *that provision* of the clause in applying it to Mr. Lebovitz' employment." (*Id.* at 19; emphasis original).

Respondent cites no relevant Board law for this rather novel proposition that implies that employees on a construction site are equipped (as Respondent's counsel clearly is) to artfully parse such fine legal distinctions. If the clause offends the Act, it cannot legally be relied upon for enforcement, all the more so if such enforcement is shown, as here, to be discriminatory. As noted above, it is well settled that enforcement

of an invalid union rule violates Section 8(b)(2) of the Act. *IATSE (Hughes-Avicom International)*, supra. See also *IBEW, Local Union No. 3 (White Plains)*, 331 NLRB 1498 (2000).

Respondent also faults the judge and Counsel for the General Counsel for “completely misapprehending the clause.” (R. Brief to Board at 12). The short answer to this is that not even the Employer in this case knew of the clause’s existence, much less the intricacies of the clause carefully parsed out by Respondent in its latest brief. Carvalho had never heard of it, and Morello, a 31-year member of Local 24, was so unfamiliar with the rule that he had to call his home local to see if it even existed. (See Tr. 29, 44). Based upon the credited evidence, the record fully supports the judge’s finding (ALJD 14) in this case. See *Oberle-Jordre*, supra, 273 NLRB at 793; *National Glass*, supra, 299 NLRB at 43-44.

**D. Local 43 violated Section 8(b) (1) (A) by relying on the unlawful mobility clause to coerce Lebovitz and induce him to quit his job**

Although the Employer did not discharge Lebovitz pursuant to Local 43’s request, Lebovitz clearly left the job because of pressure from Local 43. The judge properly concluded as much. As discussed above, maintaining an unlawful contract provision, such as the mobility clause in this case, restrains and coerces employees in the exercise of their Section 7 rights and violates Section 8(b)(1)(A). *Enforcing* that clause further violates Section 8(b)(1)(A). See, e.g., *Denton’s Tuckpointing*, supra, 308 NLRB at 351-352 (union violated Section 8(b)(1)(A) and (2) by maintaining and enforcing a contract provision giving unlawful preference in employment to union members). See also *Kvaerner Songer, Inc.*, 343 NLRB 1843, 1843 (2004) (finding that union violated Section 8(b)(1)(A) and (2) by telling employer it could not hire employees who had not

been referred by the union where there was no exclusive hiring hall arrangement); *National Glass*, supra, 299 NLRB at 44 (finding same violation where union with non-exclusive hiring hall attempted to have employer fire a worker who had not been referred by the union).

In addition, it is well established that a union violates Section 8(b)(1)(A) through "threats and coercion designed to force travelers into quitting their jobs so that the jobs can be filled by local union members." *National Glass*, supra, 299 NLRB at 43. See also *Oberle-Jordre*, supra, 273 NLRB at 786 (union violated Section 8(b)(1)(A) when its steward asked travelers to quit, threatened them with sanctions, and told travelers he "would not want to be a traveler and still be on the job on Monday.")

In this regard, the Board has previously concluded that similar "requests" that travelers quit their jobs are coercive, reasoning that travelers are "undoubtedly" aware that the requests come from union officials who "control, and will continue to control, the travelers' livelihoods." *Oberle-Jordre*, supra, 273 NLRB at 793 (quoting *Sachs Electric*, supra). The Board has long held that union requests to travelers that they quit, even in the absence of direct threats, can violate the Act. In *Sachs Electric*, supra, the union operated an exclusive hiring hall. The "requests" included local union agents' statements that a number of the respondent local's members were out of work, and that he was looking for volunteers to relinquish their jobs to them; that local members were "on the bench", and that the local wanted travelers to quit; and that if he was in someone else's jurisdiction and was asked to leave, he would certainly do so. In explaining why the conduct was coercive, the Board cited its finding in a prior case that IBEW commonly requests that travelers quit for such reasons, and that these

occasionally have been enforced by violence and threats of violence. The Board stated that:

Additionally, travelers asked to quit under circumstances such as those present in the instant case undoubtedly are aware that the requests come from union officials who, by virtue of their responsibilities in administering the hiring hall, control, and will continue to control the travelers' livelihoods within the hiring hall's jurisdiction. Thus, it should not come as a surprise if these "requests" are construed by traveler employees as more than mere solicitations for "volunteers."

The Board, overruling the ALJ, found that, under the circumstances, the local union's requests that certain "travelers" from other locals quit their jobs in favor of unemployed members of the respondent local were coercive, violated Section 8(b)(1)(A) and warranted a make whole remedy.<sup>13</sup>

Although there is no exclusive hiring hall in the instant case, as there was in *Sachs Electric*, the *Sachs* rationale is equally applicable here. Local 43's efforts to have the Employer discharge Lebovitz made it obvious that it might try to exercise control over his employment at future jobsites, even though McDowell in this case refused to accede to Local 43's demands.

Moreover, Local 43's "requests" to Lebovitz to leave the Rocky Hill job site clearly were coercive. Its steward Haggerty told Lebovitz that they he did not belong there and had to leave by Friday (although Lebovitz made it to the following Monday). Alvarenga visited the job site personally to inform Lebovitz that although he could finish the day Monday, he should not come back. Moreover, in 2002, Haggerty and Alvarenga each had threatened Lebovitz that he would never work in Local 43's jurisdiction again, and Local 43's top official had filed internal union charges against him. In light of this

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<sup>13</sup> See also *Oberle-Jordre*, supra, where the Board found that a union violated Section 8(b)(1)(A) by its efforts to cause six travelers to quit their jobs in order to provide employment for local union members, and ordered the union to make whole the employees who quit upon the union's request.

conduct, it was entirely reasonable for Lebovitz to conclude that he had no choice about remaining with McDowell at the Rocky Hill jobsite. In addition, it was entirely reasonable for Lebovitz to interpret these statements as meaning that he would be subject to internal union charges if he continued working for McDowell at the Rocky Hill jobsite, especially given the fact that Local 43 had filed internal charges against Lebovitz in the past.

Local 43 in its brief to the Board continues to argue that Local 43 was not attempting to cause the Employer to terminate Lebovitz and that he “quit on his own accord.” This claim was correctly rejected by Judge Nations, as it simply flies in the face of the reality of the relationship between a union member in the construction industry and his union. See also, *Carpenters Local 2396*, supra (Board upheld judge’s finding that respondent union violated Section 8(b)(1)(A) and (2) by prevailing on company officials not to hire individual who was a member of a different Carpenters local, under a “direct interference” theory). Finally, Local 43’s “post-Lebovitz” internal union charges filed against employees related to the mobility clause in 2008 demonstrate that Lebovitz’ concerns about internal union charges if he remained working for McDowell at the Rocky Hill jobsite were not unreasonable. Based upon all of these considerations, the record evidence strongly supports the judge’s finding that Local 43 violated Section 8(b)(1)(A) by unlawfully coercing Lebovitz to quit his job at McDowell.

**E. Judge Nations correctly found that Local 43 was motivated by Lebovitz’ prior concerted and charge filing activities**

Regardless of the validity of the mobility clause, there is abundant evidence to support the judge’s finding that Local 43 enforced the mobility clause against Lebovitz

due to his previous concerted and charge filing activities. The strongest evidence of unlawful motive lies in the fact that, according to McDowell's representatives, Local 43's representatives mentioned Lebovitz' past conflicts with Local 43 during the conversations where they sought Lebovitz' removal from the job because he did not satisfy the mobility clause. In its brief to the Board, Respondent carefully avoids any mention of these facts.

Noteworthy is the fact that Morello testified that after Haggerty cited the mobility clause, *Haggerty referred to a past problem with Lebovitz*. Carvalho stated that when Alvarenga pressed him to remove Lebovitz from the job based on the mobility clause, and Carvalho resisted, Alvarenga mentioned something about Lebovitz at the Connecticut Convention Center (Adriaen's Landing). Respondent's key witnesses, Haggerty and Alvaranga, failed to rebut this damaging testimony. On all such critical matters, the judge apparently credited Lebovitz over Haggerty and Alvaranga by noting that the damaging testimony from the Employer witnesses "was neither rebutted nor contradicted." (See ALJD 16, line 13).

Respondent also revealed animus towards Lebovitz' protected activities in October 2002 when Local 43's President wasted no time in filing internal union charges against him, and its agents threatened that they were going to throw him out of the Union and warned that he'd never work again. Again, this damaging testimony was unrebutted. As observed by the judge, Haggerty failed to deny calling Lebovitz a "troublemaker" in 2002, a term the Board has long recognized in the labor context reveals animus against protected activities. See *New Haven Register*, 346 NLRB 1131, 1145 (2006) (ALJD 16, lines 15-21).

Respondent argues in its brief to the Board that Local 43 is more insistent in enforcing its rules than the two other locals in Connecticut. (See R. Brief to Board, at 30). Respondent claims that Local 43's strict enforcement negates any finding of animus, and ridicules the judge's finding in this regard as "bizarre." However, the discretion apparently accorded to each local union in enforcing the mobility clause is merely a factor to be considered in assessing the merits of Respondent's defense. Moreover, none of Respondent's stewards could recall a single specific incident similar to the case at hand. Coincidence? Respondent simply cannot evade the fact that both Haggerty and Alvarenga mentioned Lebovitz' previous "problems" with Local 43 in their dealings with Carvalho and Morello. Thus, based upon the totality of the credited evidence, the record supports the judge's finding that Local 43 enforced the clause against Lebovitz in retaliation for his previous concerted and charge-filing activities. As the judge noted, "Meadows confirmed that no other carpenter has ever filed internal union charges against him." (ALJD 16, lines 32-33; Tr. 140).

Finally, as noted by the judge, Local 43 provided no documentation regarding its general testimony that prior to the December 2007 incident involving Lebovitz, its stewards routinely inquired into the mobility data of employees on the job. In its brief to the Board, Respondent downplays the significance of this lack of documentation. (See R. Brief to Board, at 27-28). More specifically, Respondent argues that: "Contract enforcement, whether on the shop floor or on a construction site, involves a multitude of informal adjustments that are never reduced to writing...there is no rational basis for drawing any negative inference from the lack of documentation of Local 43's contract enforcement when there never was any occasion to document it."

Despite Respondent's protestations, the lack of documentation of others to whom the mobility rule had been enforced is merely an additional factor weighing against Respondent in assessing its *Wright Line* defense. It was hardly the sole reason for discrediting Respondent's defense, but it was surely a factor -- much as it is in any garden variety Section 8(a)(3) case in which the employer has no documentation to support its claims of consistent treatment. Probably of much greater significance was the fact that the judge credited the Employer's testimony that the Local 43 representatives mentioned Lebovitz' past "problems" with Local 43 in the same breath that Local 43 sought Lebovitz' removal from the job because he did not meet the mobility clause.

Based upon all of the above considerations, ample record evidence supports the judge's findings that, *based upon the credible evidence*, Local 43 "was unlawfully motivated in enforcing the mobility clause against Lebovitz based upon its animus and against his prior protected activities" (ALJD 16, lines 33-35) and that Local 43 "unlawfully discriminated against Lebovitz by enforcing the mobility clause and causing him to leave his job." (ALJD 17, lines 24-25).

**F. The collective-bargaining agreement's union security clause is facially unlawful in violation of Section 8 (b) (1) (A)**

Finally, the judge correctly found that the union-security clause in Article V is facially unlawful. (ALJD 17). The union-security clause explicitly requires compliance with the Union's constitution and bylaws, a requirement that violates Section 8(b)(1)(A). See *Stackhouse Oldsmobile, Inc. v. NLRB*, 330 F.2d 559, 560 (6th Cir. 1964) (finding that employer did not violate the Act by refusing to sign a collective-bargaining

agreement in which the union-security clause unlawfully required compliance with the union's constitution and bylaws); *IBEW, Local Union No. 3 (White Plains)*, 331 NLRB 1498, 1500 (2000) (finding facially unlawful a union rule requiring hiring hall users to comply with internal rules to maintain their position on the referral list). The rule here requires employees to comply with the Union's constitution and by-laws as a condition of employment. Such a requirement clearly violates the Act. Respondent in its brief to the Board acknowledges as much.

## **VI. CONCLUSION**

Based upon all of the above, Counsel for the General Counsel respectfully urges the Board to uphold Judge Nations' findings and conclusions that:

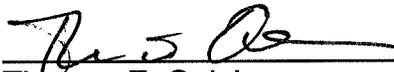
- (1) The mobility clause unlawfully restricts employment based upon union membership and thus facially violates Section 8(b)(1)(A);
- (2) Local 43's attempt to cause Lebovitz' termination based upon the mobility clause violated Section 8(b)(2);
- (3) Local 43 violated Section 8(b)(1)(A) because it coerced Lebovitz to leave his job with McDowell at the Rocky Hill jobsite;
- (4) Local 43 violated Section 8(b)(1)(A) and (2) by discriminatorily enforcing the mobility clause against Lebovitz in retaliation for his previous concerted and charge filing activities; and
- (5) The Union security clause is facially unlawful in violation of Section 8(b)(1)(A) because it requires compliance with the Respondent's constitution and by-laws.

For all of the above reasons, and based upon the evidence contained in the record, Counsel for the General Counsel respectfully urges the Board to uphold Judge Nations' Decision and to find and conclude that Respondent has violated the Act as

found by the judge, and to recommend the remedy prescribed in his Decision.

Dated at Hartford, Connecticut, this 21st day of August, 2009.

Respectfully submitted,



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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 34

UNITED BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA, LOCAL 43 AND  
NEW ENGLAND REGIONAL COUNCIL OF  
CARPENTERS  
(McDowell Building & Foundation, Inc.)

and

KEVIN LEOVITZ, An Individual

Case No. 34-CB-3047

DATE OF MAILING August 21, 2009

**AFFIDAVIT OF SERVICE OF copies of COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO THE BOARD**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by Federal Express and regular mail upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 21<sup>st</sup> day |

DESIGNATED AGENT Loida Caro

of August, 2009

  
NATIONAL LABOR RELATIONS BOARD