

**IN THE MATTER BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

Teamsters General Local Union No. 200,
Respondent,

-and-

Case No. 30-CB-5303

Timothy Buban, an individual,
Charging Party.

EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent, Teamsters “General” Local Union No. 200, by its attorneys, excepts to the following portions of the decision of Administrative Law Judge Earl Shamwell:

1. Page 3, line 18. The ALJ erred when he found as an undisputed fact that Local 200 employed two general foremen at the Elm Road Project. Local 200 does not employ any person on the Bechtel site; the foreman and general foreman referred to were employed by Bechtel. (Tr. 58)

2. Page 5, paragraph 4 (lines 25-30). The ALJ erred when he concluded that Bechtel officials never hired any drivers or warehouse employees off the street, because they viewed the labor agreement...to require that all craft workers be hired through the appropriate union hiring hall.” Bechtel’s Human Resources manager Greg Glynn testified that after a 48 hour period, Bechtel can hire whomever it chooses and that that Bechtel has had this right since project began. (Tr. 154)

3. Page 5, line 25-26. The ALJ erroneously finds as an undisputed fact that “...from at least March 2007 to the present, Bechtel obtained either drivers or warehouse employees from

no source other than Local 200,” and that this action is “[p]ursuant to the agreement.” The plain contractual language that permits the Company to hire off-the-street after 48 hours, (GC-6; Tr. 68-69, 155) Bechtel recognizes that it has had and retains this right. (Tr. 154)

4. Page 5, last paragraph (lines 33-37). The ALJ erroneously concluded that “this procedure,” [referring to a procedure by which Bechtel obtained its drivers *pursuant to the agreement*, from no source other than Local 200, and that it never hired drivers off the street] began in 2000 and was applied to all crafts, and in place at all times material to the present matter. During the hearing, the ALJ concluded that the process changed when Gurich took over, (Tr. 255); refused to allow evidence that showed the process was unchanged from the beginning of the project (Tr. 251-259; R-1, 2)

5. Page 7, lines 35 through 52 and continuing on Page 8, through line 10. The ALJ erroneously concluded that the lateness of the General Counsel’s Motion to Amend the Complaint was the most compelling basis for denying the amendment, and furthermore erred in concluding that the General Counsel’s untimely-proposed amendment “can reasonably be construed to be incorporated in the existing complaint allegations.” Local 200 excepts to this conclusion on the grounds that the allegations put forward in the General Counsel’s Motion to Amend the Complaint are new allegations, thus not within the scope of the existing complaint allegations. (Tr. 214-218) Consideration of such allegations prejudiced Local 200 by denying it the opportunity to investigate and defend against the new charges. (Id.)

a) The ALJ erred in concluding that the General Counsel’s untimely-proposed amendment “can reasonably be construed to be incorporated in the existing complaint allegations,” and further concludes that the proposed amendment “actually is based on Gurich’s testimony at the hearing.” Gurich’s testimony at the hearing and during his

deposition in February 2009 was consistent and does not support the amendment and/or new allegations. (Compare Tr. 88-89 and GC-10, pp. 25, 29-57)

b) The ALJ erroneously concludes that “the proposed amendment is broadly encompassed within the existing complaint allegations.” The Complaint contains allegations which focus specifically on Timothy Buban and the operation of the hiring hall specifically related to Buban. To the extent the allegations reference other individuals, Local 200 specifically filed a Motion for a Bill of Particulars to seek clarification as to whom the allegation referred in order to present a defense and preserve its due process rights. (Tr. 26-27)

6. Page 13, lines 8-9; fn. 22. The ALJ erroneously concluded that the Teamsters 4 Teamsters slate was headed by Michael Gurich. This conclusion was based on a flyer which contained a picture of Gurich in a group of individuals. Gurich was one person on a slate of candidates seeking to be a convention delegate; he was not the head of the group. (Tr. 127-128)

7. Page 13, lines 39-40. The ALJ erred to the extent that he suggests, based on Buban’s testimony, that Gurich was entirely responsible for handling and controlling grievances arising at the Elm Road Project. The grievance procedure was beyond Gurich’s and Local 200’s control. It was the Building Trades Council, an independent organization existing pursuant to the PLA, that ultimately determined that Buban’s grievance would not proceed to arbitration. (Tr. 265-272; R-6-12; GC-5)

8. Page 14, line 11-14. The ALJ erred in crediting any statement that suggests the “International,” apparently referring to the International Brotherhood of Teamsters, dropped Buban’s grievance. It was the Milwaukee Building Trades Council, an organization independent

of Local 200 and the “International,” which ultimately determined that Buban’s grievance would not proceed to arbitration. (Tr. 265-272; GC-5; R-6-12)

9. Page 15, Line 17. The ALJ erroneously summarizes Gurich’s testimony and length of time Gurich served in his position as business agent. Gurich assumed his position as business agent in January 2007. (Tr. 57, 326-327)

10. Page 15, line 20-21. The ALJ erred in concluding that Gurich served as a steward for Local 200. Gurich did not serve as a steward for Local 200, but as a steward for the bargaining unit at Redi-Mix, which was represented by Local 200. (Tr. 49)

11. Page 19, line 9. The ALJ erred to the extent he finds that the Building Trades Council is affiliated with the “International.” The Building Trades Council is an independent entity, not affiliated with either Local 200 or the International Brotherhood of Teamsters. It is a Council composed of representatives from labor organizations, pursuant to the WE Energies Project Labor Agreement, and has ultimate discretion as to which grievances will progress through the grievance machinery. (GC-5)

12. Page 20, footnote 43. The ALJ’s conclusions with respect to Buban’s request to see the referral list and Gurich’s credibility are erroneous. Although the Complaint alleged a failure to provide the out-of-work list to Buban, Gurich did not know that Buban had actually made a request to Local 200 to see the out-of-work list until the hearing. (Tr. 280)

13. Page 21, lines 10-12. The ALJ erroneously credits the testimony of John Gomaz to the extent he concludes that “Gomaz specifically and insistently recalled not asking Gurich to be placed on the Bechtel out-of-work list in either 2007 or 2008, and never asked to be referred out.” Gomaz’s memory was neither specific nor insistent with regard to this point. Gomaz’s testimony was imprecise with respect to dates, indicated that he may have spoken with Gurich,

noted that he went to the union hall on several occasions, and said he “didn’t think so,” on examination as to whether he asked Gurich to be referred out. (Tr. 225-228) Gomaz also provided a witness statement to General Counsel much closer in time to the period being investigated in which he noted in which he acknowledged that he may have spoken to Gurich about getting on the referral list, and again noted that he didn’t recall a variety of circumstances related to his referral to Bechtel. (Tr. 229-230)

14. Page 27, lines 39-51. The judge erred in concluding that the record is unclear with respect to how Local 200 operated its out-of-work list prior to January 2007. Local 200 offered into evidence the relevant contract language, the out-of-work list from the Buban administration and decision of Region 30 relating to the non-exclusivity of an out-of-work referral list administered under identical contractual language between Bechtel and Local 200 (R-1, 2) which were rejected as irrelevant by the ALJ (Tr. 259-262) and put into evidence a requisition from the Buban administration, (R-16).

15. Page 28, line 1-2. The ALJ erroneously noted that “no requisitions from Bechtel covering the period prior to January 1, 2007, were adduced at the hearing.” Local 200, in fact, offered such a requisition into evidence. (See R-16)

16. Page 28, lines 16-19. The ALJ erred in concluding that Gurich (and Local 200) established a formal referral system for the Bechtel project in March 2007. Local 200 offered into evidence the relevant contract language, the out-of-work list from the Buban administration and decision of Region 30 relating to the non-exclusivity of an out-of-work referral list administered under identical contractual language between Bechtel and Local 200 (R-1, 2) which were rejected as irrelevant by the ALJ (Tr. 259-262) and put into evidence a requisition from the Buban administration, (R-16).

17. Page 28, lines 30-32. The ALJ erred to the extent that he concluded the only limit to exclusivity was and is the requirement that the right to refer applicants be exercised within 48 hours. The contract language does not require Bechtel to hire any particular referred individual; Bechtel additionally sets the qualifications referred individuals must possess. (GC-6, 7, 8; Tr. 148)

18. Page 29, lines 1-3. The ALJ erred when he concluded that Local 200 operated an exclusive hiring hall, and further erred when he exceeded the parameters of the complaint to consider the requirements for lawful operation of a hiring hall, at least to the extent those requirements arose under the General Counsel's tardy, mid-hearing amendment of the complaint. Local 200 objects to this finding on the grounds that the scope of the complaint was narrowed during the discussion regarding its Motion for a Bill of Particulars, and that to the extent the new allegations were not encompassed during that discussion, their introduction at such a late time, and the inclusion within the ALJ's decision denied Local 200 the right to present a defense as to these allegations, was made without appropriate notice and violates Board Rule 102.17. (Tr. 24-28)

19. Page 29, lines 17-20. The ALJ erred in concluding that "no one on or off the referral list that [Gurich] alone created knew of his referral criteria." Gurich informed individuals as to the referral criteria, including qualifications, during conversations with individuals seeking to be placed on the out-of-work list. (Tr. 70-72)

20. Page 29, lines 22-24. The ALJ erred in concluding that it "seems that anyone who knew of the list had no way of knowing what to expect from Gurich as to where they stood on the list, and when and upon what terms a person could be referred out to Bechtel." Individuals

were aware of the fact that they were placed on a list for referral and that they had to have certain qualifications. (Tr. 70-72)

21. Page 29, lines 30-33. The ALJ erred when he concluded that Gurich acted inconsistently and “for his own reasons” with respect to referring applicants based on their numerical standing on the list. Gurich consistently testified that he used the same criteria with respect to referrals, (Tr.93-94; 115-118), and there is no evidence that Gurich acted for his own reasons.

22. Page 29, lines 43-45 through page 30, lines 1-3. The ALJ erred when he concluded, “that Local 200, through Gurich, breached its duty of fair representation in the operation of its exclusive employee referral system by an inconsistent application of arguably objective as well as clearly subjective criteria or facts or without informing or notifying its membership or other applicants for employment at the Elm Road Bechtel Project in any way of these factors or criteria.” Gurich informed individuals as to the qualification and other referral requirements during phone and in-person conversations and when individuals requested to be placed on the out-of-work list for referral. (Tr. 70-72) Criteria were also set by Bechtel when it made requisitions. (Tr. 148; GC-8)

23. Page 30, lines 32-35. The ALJ erred when he concluded without a factual basis that Gurich “elected to keep his Bechtel referral rules, procedures, criteria, and evidently the referral list close to his vest.” Applicants were informed that they must meet certain qualifications to be referred to Bechtel as drivers, were asked about their particular qualifications, and Bechtel management was aware that seniority and work history played a factor in referrals. (Tr. 70-72; 320, 322-323; GC-8(n))

24. Page 30, lines 40-42. The ALJ erred when he found, “that Local 200 violated Section 8(b)(1)(A) by not providing Buban the requested documentation about the employee referral system for the Elm Road project.” Local 200’s failure to fulfill the request was inadvertent, it was not due to any invidious or arbitrary motivation, as Gurich—the individual at Local 200 who would ordinarily fulfill the request—never actually received the request. (Tr. 280) This failure was not motivated by animus; the list was ordinarily provided to any person who asked, including Buban’s political allies, Carol Simon and Frank Ardellini. (Tr. 280-281)

25. Page 31, lines 10-15. The ALJ erred to the extent he suggests that it was possible to refer Buban for warehouse work at any time subsequent to September 12, 2008. No requisitions were produced at the hearing to support this finding.

26. Page 31, lines 16-19. The ALJ erroneously concluded that Gurich made referrals employing criteria that arguably could be considered objective at least as to Cheske. Cheske was referred to Bechtel based upon the same criteria employed in referring every other applicant from the out-of-work list. (Tr. 93-94; 115-118)

27. Page 31, lines 29-31. The ALJ’s conclusion that no members could reasonably know what criteria Gurich would use to refer employees was erroneous. Applicants were informed that they must meet certain qualifications to be referred to Bechtel as drivers, were asked about their particular qualifications, and Bechtel management was aware that seniority and work history played a factor in referrals. (Tr. 70-72; 320, 322-323)

28. Page 31, lines 37-40. The ALJ erroneously concludes that Gurich was not credible with respect to his testimony regarding Buban’s qualifications simply because Gurich knew that Buban did not have a Class A driver’s license. Buban was laid off with other drivers who lacked a Class A license because he also lacked the Class A license; Gurich therefore knew the

qualifications Buban *lacked* with respect to driving. There is nothing in the record to suggest that Gurich knew what other qualifications, if any, Buban had for the *warehouse*, nor evidence that suggests Buban specifically told Gurich of his qualifications. (Compare Dec. fn. 39; see also Tr. 180)

29. Page 31, lines 45-48. The ALJ erred when he concluded that, “with respect to employee referrals to the Elm Road Project’s warehouse facilities in March and April 2008, Gurich operated the Local’s exclusive referral system without consistently employing known and published objective criteria in violation of Section 8(b)(1)(A). Local 200 consistently referred individuals using reasonable and known criteria, including qualifications, seniority and work history. (Tr. 92-93, 115-118, 295)

30. Page 32, lines 16-19. The ALJ erred in concluding that Gurich harbored some resentment of Buban, and further erred to the extent he concluded that this resentment was acknowledged via Gurich’s own admission. Gurich never admitted a dislike for Buban, and testified without animus, that he did not believe Buban used the referral system fairly in referring himself to Bechtel while still serving as Local 200’s secretary-treasurer. (Tr. 103-104)

31. Page 32, lines 26-30. The ALJ erred when he concluded that Gurich harbored animus against Buban on at least three grounds: politically, related to Buban’s self-referral to Bechtel, and because Buban charged Gurich and Local 200 with a conflict of interest in processing Buban’s grievance. Gurich never admitted a dislike for Buban, and testified without animus, that he did not believe Buban used the referral system fairly in referring himself to Bechtel while still serving as Local 200’s secretary-treasurer. (Tr. 103-104) Gurich’s involvement in the 2006 elections was minimal. (Tr. 52) Additionally, Local 200 carefully processed Buban’s grievance using the contractual grievance machinery. (Tr. 106-108; R-6-13)

32. Page 33, lines 4-6. The ALJ erroneously applied the *Wright Line* test prior to the General Counsel meeting his burden with respect to proving an adverse action occurred and making a prima facie showing of discrimination by Gurich and Local 200 against Buban. The burden was shifted before the General Counsel made a sufficient showing.

33. Page 33, lines 15-27. The ALJ erroneously concluded that Local 200 operated an exclusive referral system; that the referral system operated by Local 200 was required to operate with certain formalities which were not followed in the case of Buban; that Buban was out of favor with Gurich and Local 200 leadership; and that because the referral system operated unlawfully, it affected other unnamed persons who were similarly situated and may have been discriminated against. With respect to this finding, Local 200 was denied due process when it was denied the opportunity (and notice) to investigate the allegations and provide evidence with respect thereto. (Tr. 24-28)

34. Page 33, lines 25-27. The ALJ also concluded in error that Local 200 failed to meet its burden and show that, irrespective of Buban's protected activities, he would not have been referred to a warehouse job. Local 200 carefully employed a variety of factors with respect to referrals. There is no evidence Buban was not referred because of his Section 7 activities, but that Cheske's laid off status and work experience, combined with the Bechtel foremen's request for Cheske, and Buban's place on the referral list, were the deciding factors in referring Cheske. (Tr. 278, 298)

35. Page 33, Conclusion of Law 3. The ALJ erred in concluding that the Respondent operated an exclusive hiring hall or referral system in which it referred applicants for employment with Bechtel Construction Company, specifically its Elm Road Power Generating

Station Project at Oak Creek, Wisconsin, beginning around January 1, 2007, and continuing to present. Local 200 did not operate an exclusive hiring hall. (See GC-5, 6, 7; R-2)

36. Page 33, Conclusion of Law 4. The ALJ erred as a matter of fact and law in concluding that the Respondent operated the exclusive hiring hall without consistently using publicized and known objective criteria or factors in referring applicants for employment in violation of Section 8(b)(1)(A) of the Act. This finding is made despite evidence in the record that Local 200 consistently used criteria known to applicants and publicized by Gurich to such applicants when they requested that they be placed on the referral list. (Tr. 70-72) Gurich consistently utilized these same criteria. (Tr. 295)

37. Page 33, Conclusion of Law 5. The ALJ erred in concluding that from about April 14-15, 2008, and continuing to the present, the Respondent failed and refused to refer for employment at the Employer's Elm Road Power Generating Station Project, specifically for available jobs at the warehouse facilities, employee and member in good standing, Timothy Buban, and other employees similarly situated, causing Bechtel Construction Company to discriminate against him and them in violation of the Act. There was no "refusal" to refer Buban; based upon a consideration of the complete set of criteria normally and reasonably employed by Gurich in making referrals, Cheske was referred to Bechtel in response to a requisition in May 2008 for a warehouse employee. (Tr. 295, 299-301)

38. Page 34, Conclusion of Law 6. The ALJ erred in concluding that from about April 14-15, 2008, and continuing to the present, the Respondent failed and refused to refer for employment at the Elm Road Power Generating Station, specifically the warehouse facilities for reasons other than failure of Buban to tender period dues and initiation fees uniformly required for membership in the Respondent, in violation of the Act. There was no refusal to refer Buban;

based upon a consideration of the complete set of criteria normally and reasonably employed by Gurich, another employee was referred to Bechtel in response to a requisition in May 2008 for a warehouse employee. (Tr. 295)

39. Page 34, Conclusion of Law 7. The ALJ erred in concluding that from about April 14-15, 2008, and continuing to the present, the Respondent failed and refused to refer for employment an employee and member in good standing with the Respondent, Buban, because he engaged in internal union activities, including serving in the elected office of secretary-treasurer, in violation of the Act. There is no evidence that Gurich failed or refused to refer Buban, that Buban was entitled to be referred, and/or that the non-referral was motivated by political animus, as set forth above.

40. Page 34, Conclusion of Law 8. The ALJ erred in concluding that from about March 11, 2008, the Respondent operated the exclusive hiring hall without consistently using publicized and known criteria or factors in referring applicants for employment to the Elm Road Power Generating Station Project, specifically for available jobs at the warehouse facilities, in violation of Section 8(b)(1)(A). This conclusion was made in violation of Local 200's right to due process, and without allowing Local 200 to look into and present evidence in its defense of a proposed mid-hearing amendment to the Complaint. The amendment was denied by the ALJ but still incorporated into the Complaint in the judge's decision. (Tr. 24-28; Dec. p. Page 7:35-52 through p. 8:1-10)

41. Page 34, Conclusion of Law 9. The ALJ erred in concluding that the Respondent from about August 23, 2008, to the present, the Respondent failed to provide members and applicants for employment pertinent information (including job referral lists, rules, policies and procedure notices) that would allow them to determine if their Section 7 rights are being

protected, followed and maintained. Local 200 did not operating an exclusive referral system, thus had no duty to provide such information; additionally the failure to provide the documents to Buban was inadvertent and without invidious or arbitrary motivation. (Tr. 280)

42. Page 34-35, "The Remedy." The ALJ erred in ordering any remedy with respect to Buban or any other person. Local 200 did not discriminate against Buban. Additionally, to the extent the remedy extends to other individuals, Local 200 was denied the opportunity to investigate and/or present a defense with respect to such individuals and still does not know to whom this portion of the Complaint and/or decision refers. (Tr. 24-28)

Dated this 19th day of July, 2010.

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