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.

BRIEF IN SUPPORT OF EXCEPTIONS

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STATEMENT OF THE CASE

The Charging Party, Timothy Buban, filed unfair labor practice charges against Teamsters "General" Local Union No. 200 (hereinafter "Local 200" or "the Union"), claiming that Local 200 failed to fairly represent Buban with respect to his employment with and layoff from Bechtel Construction Corporation ("Bechtel") in 2007 and 2008. The charges stem from Buban's misperception that Local 200 "refused" to refer him back to work at Bechtel subsequent to his September 2007 layoff and his belief that this non-referral was due to his opposition, as a former officer of Local 200, to those serving as current Local 200 officers. At the time of Buban's layoff, Bechtel had laid off all Teamsters' drivers who lacked a Class A driver's license. Buban was one such driver and was therefore one of the multitude of drivers Bechtel laid off. Many of those laid off drivers asked Local 200 to refer them back to work at Bechtel if positions for which they were qualified became available; Buban did not.

Local 200 and Bechtel were and remain parties to a collective bargaining agreement that requires the Company to give Local 200 forty-eight (48) hours to refer drivers and warehouse employees to fill vacant positions with Bechtel, at the Elm Road Generating Station in Oak Creek, Wisconsin. Local 200 maintained an informal out-of-work list from which it would provide Bechtel names of people who qualified to perform certain work at Bechtel. Every person on the list had made a specific request to be placed on the list. Individual referrals were made subject to a set of criteria including numeric place on the list, layoff status, seniority, experience and work history.

After he was laid off, Buban filed a grievance seeking to be returned to his position as a bus driver at the site. During the pendency of this grievance, Buban never requested that he be placed on the referral list nor expressed interest in working at another position at the Elm Road

site; Buban apparently expected the officials at Local 200 to read his mind and know that he wanted to be returned to Bechtel in a capacity other than as a driver, despite pursuing a grievance alleging that he was entitled to work as a driver. When a referral failed to materialize and he learned that he lost his grievance, Buban finally asked that he be placed on the out-of-work list and then expected to leapfrog over every other person already on the list to be referred to the next available position.

While Buban is a former officer of Local 200, the ALJ's conclusion that Local 200 failed and refused to refer Buban for employment at the Elm Road project because he engaged in internal union activities is clearly in error. First, this conclusion requires a finding that Local 200 operated an exclusive hiring hall; it does not. Second, it requires a showing that Buban was adversely affected—that he had some entitlement to immediate referral; he did not. And, third, it requires an actual showing of animus; there is none. To the extent the ALJ reached conclusions with respect to these three points, those conclusions were additionally in error and based, in some cases, on impermissible burden shifting.

The ALJ also concluded in error that Bechtel never hired drivers or warehouse employees "off the street" because Bechtel viewed the labor agreement to require that all craft employees be hired from their respective unions. Testimony established that the referral process never changed during the course of this many years-long project; yet the judge disallowed evidence as "irrelevant" which established that 1) the procedure had not changed; and 2) the procedure prior to the time period at issue was found by Region 30 as a non-exclusive hiring hall.

Finally, the judge expanded the scope of the Complaint during and after the hearing, including new allegations in the discussion of his decision and finding new violations by Local 200. The expansion of the scope of the complaint denied Local 200 the opportunity to present

evidence in its defense with respect to the allegations that Local 200's actions affected other individuals, and therefore denied Local 200 due process.

The Board should therefore find that Local 200 did not violate the Act as charged in the Complaint. Alternatively, should the Board find that this matter must be remanded; the remand should be to a different judge.

FACTS

The facts of this case are quite complex and involve a fluid series of events and circumstances relating to the administration of Local 200, as well as the literal and practical application of a series of collective bargaining agreements with Bechtel. The primary issues, however, are the referral and requisition process utilized by Local 200 with respect to Bechtel Construction Corp. projects, and the treatment of Timothy Buban in relation to this referral process.

A. Background

Teamsters Local 200 is a general Teamsters local union headquartered in Milwaukee, Wisconsin. (Tr. 49) As with most unions, Local 200 has an elected executive board, including Local 200 President, Vice-President, and Secretary-Treasurer, and employs appointed business agents who negotiate, administer, and handle grievances arising under labor agreements, and to tend to other concerns and contract issues raised by bargaining unit members. (Tr. 49) [1] The tasks of maintaining, administering and enforcing particular bargaining agreements are divided among business agents. (Tr. 241)

[1] Elections of executive board members, every three years, in accordance with the International Brotherhood of Teamsters Constitution and its requirements. (See Respondent-15)

Officer and delegate elections within Local 200 have historically been contested. The 2003 and 2006 local union officer elections were no different. (Tr. 157) The Charging Party, Timothy Buban, was active in local union politics. In 2003, Buban was elected secretary-treasurer (the principal officer) with several other officers from the "Buban-Connell slate"[2]; in 2006, Buban's slate was opposed by the Millonzi-Bennett slate, which ultimately won the fall 2006 officer elections. (Dec. p. 13:20)[3] Buban resigned from that position in October 2006 after referring himself for employment with Bechtel at the Elm Road Power Generating Station (ERGS) for the WE Energies power plant construction project in Oak Creek, Wisconsin. (Tr. 167, 56)[4]

B. Requisitions and Referrals

Buban was able to refer himself to Bechtel for employment because Local 200 and Bechtel are parties to an area agreement with an addendum and a project labor agreement ("PLA") for the Elm Road Station. (GC-5; see R-16)[5] These agreements outline a referral process by which individuals can become employed by Bechtel as Local 200-represented warehouse employees or drivers who operate a variety of heavy equipment within the small confines of the project. (Tr. 56-57)

[2] Buban's administration included, among other elected officials, Darryl Connell, as president, and Frank Ardellini, Jim Lyons and Carol Simon as appointed business agents, (Tr. 240), and affiliated with the national "Teamsters for a Democratic Union" or "TDU" slate. (Tr. 157, 160)

[3] The Decision of ALJ Shamwell is cited herein as "Dec. _"; specific references to portions of the decision are to the page ("p") and line ("l") as "pp:ll."

[4] Buban obtained this employment within days of the TDU slate losing their re-election bid to the current Local 200 administration when the business agent assigned to the Bechtel contract at the time, Frank Ardellini, referred both himself and Buban to the project. (Tr. 189)

[5] The Respondent's exhibits are subsequently referred to as "R- ", while the General Counsel's exhibits are denoted by "GC- ".

Article 9 of the Local 200 Addendum to the Area Agreement addresses the referral of applicants for employment. Specifically, it notes the following:

> …
> 9.2 The Union administers and controls its referrals and it is agreed that these referrals will be made in a non-discriminatory manner and in full compliance with federal, state and local laws and regulations which require equal employment opportunities and non-discrimination. Referrals shall not be affected in any way by the rules, regulations, by-laws, constitutional provisions, or any other aspect or obligation of union membership, policies or requirements.
>
> 9.3 In the event the referral facilities maintained by the Local Unions do not refer the employees as requested by the Employer with in a forty-eight (48) hour period after such request is made by the Employer (Saturdays, Sundays and Holidays excluded), the Employer may employ applicants from any source.
>
> 9.4 The Employer agrees to be bound by the hiring referral rules in a local area not inconsistent with the terms of this Agreement. Notwithstanding Section 2 above, the hiring referral rules that prevail in a local area are on other than an exclusive basis, such rules shall be applicable if not in violation of either state or federal law.
>
> …

(R-7) The language in the Addendum mimics the language in Article 14, "Referral of Employees," in the Area Agreement. (GC-6) Article 2.4 of the Area Agreement states:

> Whenever the Employer needs additional employees, he shall give the Local Union an equal opportunity with all sources to provide suitable applicants, but shall not be required to hire those referred by the Union….

The Project Labor Agreement ("PLA") states at Article II, at page 6, that:

> …In the event the referral facilities maintained by the Union does not refer the employees requested by the Employer, or in the Employer's determination, the employees referred do not have the required qualifications or skills, within a forty eight (48) hour period after such requisition is made by the Employer (Saturdays, Sundays and Holidays excluded), the Employer may employ applicants from any source.

(GC-5) The unambiguous language of the PLA further provides that when there is a conflict between the PLA and a local agreement (such as Local 200's Area Agreement), the language of the PLA controls. (Id. at p. 4-5)

To fill a vacant Teamster-represented position, Bechtel is required under the CBA to *first* send a requisition form to Local 200, which then has 48 hours to refer applicants; failure to timely or otherwise refer individuals for employment with Bechtel permits Bechtel, under the PLA, to hire whomever it chooses. (Tr. 154; 262) The PLA does not require that Bechtel actually hire those referred individuals. Neither the referral process nor contract language has changed since the power plant project began in 2005. (Tr. 154)

Following the installation of Local 200's newly-elected officers in late 2006, Mike Gurich and Tom Benvenuto were hired as business agents on January 1, 2007, and were immediately assigned to administer the Bechtel contract. (Tr. 57, 326-327) The contract was later reassigned exclusively to Gurich. (Id.) Gurich immediately began receiving calls from people asking about their "place" on the Bechtel referral list. (Tr. 75) Gurich had not seen such a list, so he and Benvenuto searched for the list within the Local 200 offices, among the records, documents and computer files that the Buban-Connell administration left in the office. (Tr. 241-242, Tr. 327) While the list eventually turned up months later (Tr. 250, R-1), the initial search—which included scouring Local 200 offices and asking Bechtel employees including the foreman, general foreman, and steward (Local 200 members) and human resources personnel if they had seen a referral list—was unsuccessful. (Tr. 241-243) Gurich also consulted with Frank Ardellini, the business agent who maintained the list during Buban's administration, who denied that a list ever existed. (Tr. 242) No one admitted to having a copy of the referral list. (Id.)

In the absence of a referral list, Gurich recorded on "sticky-notes" and scrap paper the names, contact information and qualifications of individuals he spoke with (or who spoke with someone else at Local 200) who were interested in performing Teamster work at Bechtel, or who stated they were on the referral list maintained by the previous Local 200 administration. (Tr. 70, 242-243)[6] Gurich eventually transferred the information from the sticky notes directly to the pages of the notebook, chronologically, based on the date Local 200 received the request.[7] (See GC-9; Tr. 75-77) When it became apparent that there would never be enough requisition requests to place all of the individuals who asked to be referred, Gurich stopped writing the sticky note information into the notebook, but kept the sticky notes in chronological order within the notebook. (Tr. 77)

There are no requirements to be placed on the referral list except that individuals *must* ask to be placed on the list. (Tr. 84; 322-323) Logically, in establishing a list of any and all individuals who want to be referred to work at Bechtel and in the absence of a person actually asking to be on the list, Local 200 would be required to read the minds of not only its out-of-work members, but the members of other locals and the public, at large. No person has been referred to the ERGS project by Local 200 who has not asked to be referred to the site.[8] (Tr. 85-87)

[6] These prospective Bechtel employees included both members of Local 200 and the general public, at large, who provided their name to Local 200—either to Gurich or another business agent or the administrative staff either in person or by telephone. (Tr. 69, 83-84)

[7] The first person on the list was assigned number "40" based on Gurich's belief that there were already approximately 39 people working on the project. (Tr. 78)

[8] The inconsistent testimony of John Gomaz fails to contradict Gurich's testimony that every person asked to be placed on the out-of-work list for a potential referral. Local 200 referred Gomaz in response to a requisition request after he asked Gurich to be placed on the out-of-work list for referral. (Tr. 281) Gomaz's name appears on the out-of-work list as number 52. (Id.) Any assertion by the General Counsel that Gomaz never asked to be referred is without support in the record, as Gomaz actually testified that he probably asked Gurich to be placed on the list in early 2007, (Tr. 230-232) which testimony is corroborated by Gurich. (Tr. 281)

While there are no requirements a person must meet to have his or her name placed on the list, Bechtel establishes criteria with respect to qualifications of its drivers and other employees. (See GC-8(a)-(r), Tr. 148) Based on the criteria that Bechtel indicated on a majority of the requisition forms, Gurich would ask questions of those individuals he spoke to who sought to be referred to Bechtel related to their qualifications, ability to drive and operate certain machinery, and past work experience. (Tr. 72; 79; 81-84) Upon receipt of a requisition, Local 200 refers to Bechtel the names of individuals with the necessary qualifications. In accordance with the collective bargaining agreements, Local 200 has 48 hours to supply the names of individuals for referral, otherwise the Company is free to seek out its own employees. (Tr. 154)[9]

Referrals were made in the order of the out-of-work list, subject to the return of laid off employees, beginning with the very first requisitions filled in March 2007, subject to the return of laid off employees. (Tr. 110-116)[10] With respect to referring laid off employees back to Bechtel, the referral criteria included considerations as to whether a person previously worked at Bechtel, his or her seniority with Bechtel, and the individual's qualifications and work history. (Tr. 94)[11] In practice, the process operates as follows: 1) a person is laid off from Bechtel ***and*** 2)

[9] The first requisition Local 200 received from Bechtel lead to the filing of two grievances with respect to the application of the collective bargaining agreement. Local 200 believed that the Company, by writing in the names of the individuals it would like referred, failed to allow the union 48 hours to refer individuals to fill the requisition. (Tr. 95, 262, 332) The grievance was about nothing more and nothing less than Bechtel adhering to its contractual obligation to give Local 200 a full 48 hours to respond to requisition requests with the names of applicants. (Tr. 334) Had 48 hours elapsed between sending the requisition and the Company selecting who it would hire, Local 200 would have had no grievance, thus, the grievances were resolved when Bechtel agreed to abide by its obligation in the PLA to permit Local 200 a 48-hour period in which it could refer applicants for the requisitioned positions. (Tr. 262)

[10] Section 13.1(d) of the Area Agreement provides that any "rehiring" is to be in the "reverse of the layoff procedure," however the Addendum to that Agreement completely eliminates all recall rights. (See GC Exh. 5, p. 5: "Delete 13.1(d).")

[11] At times, Bechtel foremen verbally requested that Local 200 refer a particular laid off employee due to positive past experiences such as attendance, work ethic, and work history; such requests and recommendations, as well as seniority and experience, were factored into referrals. (Tr. 116-118)

asks return to Bechtel; 3) Gurich placed that person's name on a sticky note into the approximate place on the referral list at the place where the last person was referred; 4) the qualified, laid off employee was referred to Bechtel before the next qualified person on the out-of-work list in response to a requisition. (Tr. 93-94, 115)[12]

Once all laid off Bechtel employees who asked to be returned to Bechtel are returned to work at the project, requisitions are filled by the next individual named on the out-of-work list, subject only to that individual's qualifications. (Tr. 93-94) This means, for example, that a person who cannot perform all of the functions of a Class A driver, where such functions and skill are determined and evaluated by Bechtel, will not be referred in response to a driver requisition. Instead, the next qualified individual on the list will be referred. [13]

C. Buban Did Not Ask to Be Placed on the Out-of-Work List for Referral to Bechtel Until April 2008 and was Not Entitled to be Referred Back Immediately, Without Regard for the Referral Criteria.

Tim Buban, after using his Local Union position to have himself referred to Bechtel in October 2006, worked as a driver at the ERGS site, primarily driving a school bus. (Tr. 167; R-16) He was among several drivers laid off in September 2007 due to lack of qualifications for the driver position. (Tr. 264; see also R-17) Buban filed two grievances protesting his layoff and sought to be reinstated to his position as a bus driver at the ERGS site. (Tr. 274; GC-13) Buban never mentioned or suggested going back to work in any capacity other than as a driver, (Tr. 274), despite being classified by Bechtel as a "Class B" driver. All drivers classified by Bechtel

[12] If a laid off employee lacks the qualifications to fill a requisition, that individual cannot be referred out to fill that requisition. Instead, the next qualified laid off individual will be sent, or if there are no remaining laid off individuals qualified to fill that position, Gurich will sent the next qualified person from the out-of-work list.

as Class B drivers were laid off; none has returned to work except and unless they received additional training following the initial layoff or asked for referrals to warehouse work. (Tr. 264)

Local 200 processed Buban's grievances through the contractual grievance machinery which was out of the hands of the Local. (See R-5, 8, 11, 13) In April 2008, the Milwaukee Building Trades Council[14] determined that the grievances lacked sufficient merit to proceed to arbitration. (Tr. 264, 274) The Building Trades Council is *not* affiliated with Local 200 or the International Brotherhood of Teamsters, but is a trade council, established under labor agreements with employers and labor organizations engaged in a variety of trades, that hears grievances arising under those labor agreements. (See Exceptions 7, 8, 11; GC-6, 7) The MBTC subsequently notified Buban of its decision that it would not allow his grievance to advance to arbitration. (Tr. 264-265, R-11)

Buban first asked Gurich to be placed on the referral list on or around the date he learned his grievance would not proceed to arbitration, by a voicemail message which is reflected in Gurich's phone log on April 14, 2008. (Tr. 108, 172, 272, 338, GC-14) This phone call marked Buban's first request to Gurich that he be placed on the Bechtel out-of-work list. (Tr. 273-274) Region 30 similarly concluded that April 2008 was the first time Buban requested to be added to the out-of-work list, and on these grounds, dismissed those portions of the charge; the partial dismissal was subsequently affirmed by the Office of Appeals. (See R-17, R-18 p. 2-3)[15] There is

[14] The Milwaukee Building Trades Council controls which grievances arising under the PLA or supplemental area agreements thereto, will proceed to arbitration, regardless of the craft or trade agreement under which the grievance actually arises. (See Exceptions No. 7, 8, 11)

[15] As noted by the Region in its partial dismissal, there was no evidence that the Union ever placed a grievant's name on the out-of-work list while the grievance was pending, nor any evidence that Buban requested to be placed on the out-of-work list prior to April 2008, nor any evidence that any individual's name was ever placed on the list except and unless the individual so requested. (R-19, p. 2-3) The Office of the General Counsel denied the Charging Party's appeal and concluded that the Regional Director's partial refusal to issue a complaint on the aforementioned matters was upheld, and that further proceedings on such claims were unwarranted. (R-19) None of the evidecnce

no real dispute that Buban could not be referred to Bechtel as a driver since he lacked the qualifications Bechtel required for that position. There is no dispute that the time at issue with respect to Buban's complaint is subsequent to April 2008, when Buban asked to be, and was, placed on the out-of-work list, in hopes of being referred back to Bechtel, but as a warehouse employee.

D. Requisitions and Referrals in March and May, 2008.

Beginning in March 2007, and continuing through and after the time Buban requested to be placed on the out-of-work list, Gurich operated the referral list in the same manner he always had, as described above. (Tr. 65-69, 93-94; GC-8) When job requisitions were plentiful and no previously laid off Bechtel employees who requested to return to the project remained on the list, Gurich responded to requisitions by offering the next qualified individual on the list as applicants. (Tr. 93-94) By 2008, the number of layoffs had increased (Tr. 101-102) and requisitions were becoming fewer and farther in between.

In March 2008, there were a number of laid-off Bechtel employees whose names were placed on sticky notes in the out-of-work list, who had asked to be placed back on the list for referral to Bechtel. Among the laid off employees were Matt Anderson, Mike Klingbeil, John Gomaz, Arnold Cheske, Margo Bonaparte, and Scott Olson, each was previously referred to Bechtel from the out-of-work list, and each of whom, with the exception of Gomaz, was classified and laid off as a Class B driver. (Tr. 101-102, 275-277) Each had requested to be referred back to Bechtel whenever and wherever possible. (Tr. 275) Since these individuals were

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presented at the hearing suggests anything to the contrary of the original findings of the Regional Director in this matter.

laid off from the original referral list, and some were specifically requested back, Gurich tried to refer these applicants back to Bechtel when the opportunity arose. (Tr. 93, 115-117)

When Local 200 received a requisition for drivers and a warehouse worker in March 2008 (before Buban asked to be added to the out-of-work list), it referred Matt Anderson, who was laid off from a driver position earlier, to the warehouse position. (Tr. 118, 275, GC 8(i)) Anderson was the most senior person on layoff—he was *more senior than Buban*. He was not qualified as a Class A driver, therefore requested warehouse work so he could return to the project and was qualified to perform that work. (Id.) The foremen additionally told Gurich that Anderson was a good worker, and asked that he be returned when a position became available. (Tr. 117-118) Two other qualified individuals were referred in response to the requisition for Class A drivers. (GC 8(i)) No Class B driver was referred back to Bechtel as a driver. (Tr. 279) [16]

Local 200 received a requisition for three additional warehouse employees on May 16, 2008. (GC-8(n)) In response to that requisition, Gurich referred laid off former-Bechtel employees Scott Olson, Margo Bonaparte and Arnold Cheske. (Id., See also Tr. 276-278) Margo Bonaparte was originally referred from the out-of-work list. She was laid off due to lack of qualifications and asked to be returned to the warehouse. (Tr. 119, 277) Both Bonaparte and Olson had greater seniority than Buban and had warehouse experience. (Tr. 118-119, 275)

Arnold Cheske was referred to Bechtel from the out-of-work list as a driver but was moved into a warehouse position from which he was laid in August 2007. (Tr. 120) Gurich referred Cheske back to Bechtel in response to a requisition for a warehouse employee due to Cheske's previous warehouse job, his position among laid-off employees, his original place on

[16] Mike Klingbeil was laid off from a driver position due to lack of qualifications, but was referred back as a driver after obtaining additional training which qualified him to work as a driver as the Bechtel project. (Tr. 116)

the out-of-work list, and specific requests from the foremen. (Tr. 119-120, 278-279) Notably, Cheske's name is well before Buban's on the out-of-work list—Cheske was number 45 while Buban was number 113; and Cheske—who was previously referred from the list—was among those laid off who had asked and was waiting to be referred, again, to the project in accordance with Local 200's general referral procedure. (Tr. 278, 298, GC-9 p. 1, 45)[17] Despite never having been referred off of the referral list, Buban apparently expected to skip that inconvenient step and be referred immediately.

In any event, Cheske was laid off from the warehouse, again, nine weeks later, and was not returned since. (Tr. 278) Cheske's referral marks the *only* referral for which Buban, technically, had more seniority among laid off employees. Quite notably, there were other laid-off Bechtel employees on the out-of-work list with more seniority than Buban whom Local 200 has similarly been unable to refer back to Bechtel for potential employment. (Tr. 279)

E. The General Counsel's Motion to Amend the Complaint.

The sole focus of the General Counsel's lengthy investigation and the Complaint was the charging party, Timothy Buban, and allegations that Local 200 acted improperly toward Buban by failing to provide him requested information, failing to refer him to work, and improperly placing his name on the out-of-work list.

The final, amended unfair labor practice (ULP) charge upon which the complaint allegations are based, first alleges that:

> Beginning sometime in March 2008 and continuing to this date, the above-named Union, through its officers, agents, or representatives, has failed and refused to fairly represent its member, TIMOTHY BUBAN, for arbitrary, discriminatory,

[17] The placement of Buban's name at page 45 shows the *first* and *only* instance of Buban's name appearing on any Teamsters' out-of-work list for the Bechtel project. (Compare R-1, GC-9)

> invidious and/or bad faith reasons by reversing its original decision to take his grievance to arbitration and by refusing to process his grievance to arbitration.

This particular allegation was dismissed by the Region, and is not at issue in the Complaint. (See GC-1(i)) The Complaint issued on the remaining ULP allegations that:

> Beginning sometime in March 2008 and continuing to this date, the above-named Union, through its officers, agents, or representatives, has failed and refused to fairly represent its member, TIMOTHY BUBAN, for arbitrary, discriminatory, invidious and/or bad faith reasons by failing to refer him to work to the below-named employer.
>
> Since on or about August 22, 2008 and continuing to date the above-named Union, through its officers, agents, or representatives, has refused to allow its member, TIMOTHY BUBAN, to inspect the documentation of the Union's hiring hall/referral system.
>
> Beginning sometime in March 2008 and continuing to this date, the above-named Union, through its officers, agents, or representatives, discriminatorily placed and maintained the name of its member, TIMOTHY BUBAN, further down on the referral list than where it rightfully should have been, and failed to put the name of its member, TIMOTHY BUBAN, on its referral list until months after the Union knew he wished to return to work.

(See GC-1(g), GC-1(i) ¶7(b), 8, 9). It was these allegations which were investigated, which Local 200 was on notice to defend, and upon which the Complaint was issued.

The Complaint was based largely on final amended charge, but contained language that opened the door for the General Counsel to make broad, open-ended and uninvestigated allegations against Local 200. (GC-1(i)) Concerned by the breadth of these allegations, Local 200 filed a Motion for a Bill of Particulars on two grounds. First, Local 200 was concerned that it could not adequately defend itself against a Complaint that potentially expanded to unknown individuals. In addition, Local 200 raised concerns about its ability to defend against allegations which could be expanded at will by the General Counsel at trial, thereby denying Local 200 its ability to adequately prepare a defense. (See GC-1(o)) The motion was denied at trial when the

judge, based upon the General Counsel's representations, clarified the scope of the Complaint and allegations therein. (Tr. 25-28)

Despite the clarification, more than halfway through the trial, the General Counsel moved to amend the complaint to add a paragraph 9(c) to the Complaint to plead:

> In the alternative, since about March 2008, a more specific date currently unknown to General Counsel, and continuing to date, Respondent has failed to notify or inform individuals seeking referral for employment with the Employer at the Employer's facility of any objective rules, practices or criteria used in making referrals, and/or any changes to such rules, practices or criteria used in making referrals.

(Tr. 212-213) The amendment refers to Local 200's actions and duties, not only with respect to its entire membership, but also to interactions with the general public, individuals on the out-of-work list, and any other person who may have ever somehow thought, mentioned, or inquired about an out-of-work list or job opportunities available with Local 200 employers. Local 200 vehemently opposed the amendment on the grounds of lateness, lack of notice and general prejudice to the union. It also objected to the General Counsel's very selective use of excerpts of a deposition transcript which allegedly served as the basis for the Motion, on the grounds of Fed. R. Civ. P. 32(a)(6) and Rule 106, Federal Rules of Evidence.

The ALJ technically denied the General Counsel's Motion (Dec. p. 7:35-8:10; Exceptions 5), but concluded that the new allegations proposed by the General Counsel were within the scope of the original complaint. (Id.; Exceptions 5, 18, 27, 29, 33) The ALJ made findings in his decision with respect to each new allegation the General Counsel proposed in its Motion to Amend the Complaint. (Exceptions 5, 18, 40)

F. The Union's Rejected Exhibits.

During the hearing, the judge refused to allow testimony on, and rejected a union-proffered exhibit addressing, the operation of the non-exclusive hiring hall arising under the relevant CBAs in this case with respect to the time period prior to January 2007. (See Tr. 251-258) Specifically, Local 200 offered the out-of-work list maintained by the prior Local 200 (Buban) Administration (R-1) and a decision by Region 30 in Case No. 30-CB-5043 in which the Region rejected the notion that identical referral language in a bargaining agreement with the same employer, administered in precisely the same manner as at issue here, and for the same project but merely another location, was not an exclusive hiring arrangement (R-2; Tr. 251-252) The exhibits were rejected as irrelevant based upon the judge's conclusion that there was a change in procedure. (Tr. 259) There was not a change in procedure; the exhibits put forward by Local 200 specifically addressed the consistency with respect to the procedure. (Tr. 255)

SPECIFCIATION OF THE QUESTIONS INVOLVED

1) Did the ALJ improperly consider the allegations regarding the posting and dissemination of information related to the alleged hiring hall? (Exceptions No. 5, 7, 8, 18, 19, 20, 22, 23, 27, 29, 36, 40, 41)

2) Did the ALJ erroneously conclude that Local 200 operated an exclusive hiring hall?

(A) Did the ALJ erroneously shift the burden of proof of establishing that Local 200 operated an exclusive hiring hall with respect to the Bechtel project from the General Counsel, and instead place the burden of proof on Local 200 to establish that it did not, in fact, operate an exclusive hiring hall?

(B) Did the ALJ additionally commit procedural error in refusing to allow and rely on certain documentary evidence proffered by Local 200?

(Exceptions No. 2, 3, 4, 14, 15, 16, 17, 18, 33, 35, 40)

3) Did the ALJ erroneously conclude that Local 200 discriminatorily failed and refused to refer Buban for employment at the Elm Road Power Generating Station as a result of his Section 7 internal union activities? (Exceptions No. 38, 39)

4) Did the ALJ erroneously conclude that Local 200 operated the exclusive hiring hall without consistently using publicized and known objective criteria or factors in referring applicants for employment for available jobs at the warehouse facilities? (Exceptions No. 20, 21, 23, 27, 29, 36, 40, 41)

5) Did the ALJ erroneously conclude that Local 200 violated the Act when it inadvertently or negligently failed to provide a copy of the referral list to Buban? (Exceptions 22, 24, 41)

ARGUMENT

I. THE ALJ IMPROPERLY CONSIDERD THE ALLEGATIONS REGARDING THE POSTING AND DISSEMINATION OF INFORMATION RELATED TO THE ALLEGED HIRING HALL.

A. The ALJ Erroneously Increased the Scope of the Complaint when he Denied the Motion to Amend the Complaint but Incorporated New Allegations from the Proposed Amended Complaint into the Existing Complaint.

The ALJ ruled that the lateness of the General Counsel's Motion to Amend the Complaint was the most compelling basis for denying the amendment, but ultimately concluded that the General Counsel's untimely-proposed amendment "can reasonably be construed to be incorporated in the existing complaint allegations." (Exception 5, Dec. p. 7:35-8:52) The result was that, while technically denying the General Counsel's Motion, the judge expanded the scope of the complaint and incorporated those new allegations the General Counsel sought to include in its proposed amended complaint. (Id.) This expansion denied Local 200 procedural due process with respect to those allegations.

The proposed amendment cannot reasonably be construed as incorporated into the existing complaint. The denial of the motion is a denial in name only—the Complaint alleges

absolutely nothing related to the administrative requirements such as posting and disseminating information related to the out-of-work list. Thus the *de facto* incorporation of the new allegations from the Amended Complaint were improperly considered and ruled on by the judge, in violation of Local 200's right to due process with respect to such allegations.

Where an amended complaint proposes a new allegation based upon a new or different legal theory, "due process requires [the ALJ to] determine whether Respondent had clear notice that it must defend against both theories of violation, and a fair opportunity to do so. No violation may be found unless the matter has been fully and fairly litigated." Garden Ridge Mgmt., 347 NLRB 131 (2006) (citing Mine Workers District 29, 309 NLRB 1155, 1158 (1992)). "The mere presentation of evidence relevant to a possible violation does not satisfy the 'fully and fairly litigated' requirement."

"To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case and may not change theories in midstream without giving respondents reasonable notice of the change." Id. (citing Lamar Advertising of Hartford, 343 NLRB 261, 265 (2004) (citations and internal quotation marks omitted)). Amendments are permitted only if they are "just," which depends on (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated. Stagehands Referral Serv., LLC, 347 NLRB 1167 (2006) (citing Cab Associates, 340 NLRB 1391, 1397 (2003)); See also Board Rules & Regulations §102.17.

In light of the foregoing legal precedent, the ALJ erred when he denied the General Counsel's motion in name only. The expansion of the complaint denied Local 200 notice concerning the theory of the violations involved and involved new legal theories with respect to

how Local 200 may have violated the Act. (Exceptions No. 5, 7, 8, 18, 19, 20, 22, 23, 27, 29, 36, 40, 41)

1. **The Complaint Cannot Be Fairly Construed to Incorporate the Proposed Amended Allegations. The Judge Denied Local 200 Due Process and Erred in Failing to Deny the General Counsel's Motion on Such Grounds and by Expanding the Scope of the Existing Complaint to Include those Allegations.**

The complaint cannot "reasonably be construed to be incorporated in the existing complaint allegations." The Complaint, and the investigation leading up to the Complaint, was devoid of any reference to administrative error relating to the maintenance of and access to the alleged exclusive hiring hall, except as related to the specific situation involving Buban and his numeric place on the referral list. (GC-1(i)) The issue was never whether, when, and how the general public was told about the existence, maintenance and operation of an out-of-work list.

The proposed amendment is not "broadly" encompassed within the existing complaint allegations. (See Exception No. 5(a), (b); 18) Neither the Complaint nor ULP charge, initially or as amended, references allegations of administrative violations related to the posting and dissemination of information related to the out-of-work list. (GC-1(g), (i)) The administration of the out-of-work list as a whole is not and was never an issue. (See GC-1(i)) The Complaint issued on three allegations set forth in the original ULP, each of which dealt specifically with Timothy Buban, the administration of the list *only* with respect to Buban, and Buban's non-referral to Bechtel. (See GC-1(g), GC-1(i) ¶7(b), 8, 9).

Every allegation in the ULP related to Buban. (GC-1(g)) Every allegation in the Complaint focused on Buban and his non-referral to the Bechtel site or his request for information. (GC-1(i)) Yet, the General Counsel's Motion to Amend the Complaint on the last day of the hearing expanded the scope of the complaint well beyond the scope of the

investigation which was focused on how *Buban* was treated in relation to the Bechtel out-of-work list. It was these allegations which were investigated, which Local 200 was on notice to defend, and upon which the Complaint was issued. There were no allegations or insinuations that Local 200 violated a duty owed to every person on the list or every person who could potentially have an interest in ever placing their name on the list.[18] The late incorporation of these allegations prejudiced Local 200: there was no opportunity to investigate the circumstances surrounding each individual on the referral list and the procedures generally. By enlarging the scope of the violations in the Complaint, the judge denied Local 200 the opportunity to investigate the broader allegations and present evidence in its defense.

The General Counsel's mid-hearing motion fails to meet the "justness" criteria, thus is properly denied. The expansion of the scope of the Complaint by the ALJ was improper for the very same reasons the Motion should have been denied in the first place—the prejudice to Local 200 by the late amendment and lack of notice that new allegations denied Local 200 the opportunity to investigate and defend itself—therefore denied Local 200 due process.

2. Gurich's Testimony With Respect to the Existence of Rules was Entirely Consistent and Credible, thus there was No Justification in the Delay of the General Counsel's Motion.

The proposed amendment cannot be framed as "actually [] based on Gurich's testimony at the hearing." Gurich's testimony with respect to the referral rules and procedures was

[18] In Stagehands Referral Serv., LLC, 347 NLRB 1167 (2006) the General Counsel moved to amend the complaint to allege that the Union operated an unlawful hiring hall (without objective criteria and without readily ascertainable rules and procedures) at the end of the hearing, contending that the complaint, as originally pleaded, put the Union on notice that the operation of its hiring hall was at issue. The original complaint alleged discrimination in the operation of a referral system as related to a single discriminate. The Board concluded that the proposed Amendment was improper because the respondent was "certainly not given notice that the field of discriminatees might be thrown wide open and the operation of the hiring hall placed in issue," and that given the lateness of the amendment, even allowing the Respondents additional time to put on evidence, "such an opportunity does not necessarily cure the problem...: Stagehands Referral Serv., LLC, 347 NLRB 1167 (2006).

consistent. There is no basis for the General Counsel's delay in amending the Complaint. There is no basis which supports the judge's decision to enlarge the scope of the allegations of the original complaint.

The claimed inconsistencies in Gurich's testimony are the result of parsed, warped, and reconstructed testimony, read without the context of the surrounding statements in violation of the Rules of Evidence and Fed. R. Civ. P. 32(a)(6). (Compare Tr. 88-89 and GC-10, pp. 25, 29-57) A complete reading of the relevant texts shows that, while the language is imprecise, Gurich describes in nearly identical fashion the same, informal referral procedures.

Gurich was asked during Board hearing and during the deposition:

> Q Does Local 200 have any unwritten rules or policies of how it goes about referring individuals at the Elm Road project?

(Tr. 88-89; GC-10, p.25) At the trial, Gurich responded, "I would have to say yes." In his deposition, he answered, "No," but continued on to explain—at great length—the unwritten rules and policies with respect to the referral system. In response to this facial contradiction, Gurich noted that "there's no written rules, but we do operate [the out-of-work list] like I told you." (Tr. 89) In each instance, Gurich's description of the unwritten policies and specific, in-depth description as to how referrals are made and the circumstances surrounding the out-of-work list was nearly identical. (Compare Tr. 89 and GC-10, pp. 29-57, at p. 53) Gurich's testimony was entirely consistent and neither justifies the lateness of the proposed amendment nor put Local 200 on notice that it would need to defend against a broader scope of allegations.

Given the absence of notice, investigation and time to respond to the allegations, the new allegations cannot be considered to have been fully litigated.

The ALJ, by virtually permitting the General Counsel's amendment at the late stage it was offered, or alternatively incorporating the same allegations into the Complaint, prejudiced

Local 200. There was insufficient notice of this new and unlitigated allegation, no time to prepare to defend against such an allegation, and the allegation is unrelated to the charges underlying the Complaint. Permitting a conclusion that Local 200 violated the Act with respect to these violations denies Local 200 its right to due process.

B. To the Extent the Judge's Conclusions Expand the Scope of the Complaint and Legal Theories Forwarded by the General Counsel, They Violate Local 200's Due Process Rights.

In determining whether a respondent's due process rights were violated, the Board has considered the scope of the complaint, and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the judge's theory. NYP Holdings, Inc., 353 NLRB No. 30 (2008) (citing generally Sierra Bullets, LLC, 340 NLRB 242, 242-243 (2003) (violation based on broader theory improper and violates due process when General Counsel expressly litigated case on narrow theory)). Where there are representations made which indicate that the General Counsel is pursuing a particular theory or a narrow theory (under broad allegations) of unlawful behavior, "…the Respondent should not be expected to defend against other theories that are not part of the General Counsel's case." Sierra Bullets LLC, supra; see also NYP Holdings, Inc., supra, and Paul Mueller, Co., 332 NLRB 1350 (2000) (complaint allegation was broad, but where general counsel made clear he was proceeding on a narrower theory, the Board reversed the judge's findings as to the broader allegations on due process grounds),

Local 200, prior to the hearing, filed a Motion for a Bill of Particulars with respect to the complaint, on the basis that, "The Complaint fails to state a clear and concise description of the acts which are claimed to constitute an unfair labor practice." Specifically, noting that the Complaint at:

> Paragraph 9(b) refers to "other similarly situated employees" but fails to identify to whom or what class the allegation refers. Local 200 cannot adequately defend itself from such allegations if it does not know the identity of other "similarly situated employees" alleging unfair labor practices or does not have a description or basis for identifying which individuals may be "other similarly situated employees."

The motion was discussed at length in a pre-hearing telephone conference and summarized by the judge in the hearing record:

> On October 5, 2009 Respondent submitted a request for a bill of particulars in this case. Respondent asserts that the allegations contained in the complaint are so insufficiently detailed such that it cannot defend against the allegations as charged. The Respondent specifically avers that paragraph 9(b) of the complaint refers to "other" similarly situated employees, but fails to identify to whom or what class the allegation refers. Respondent also submits that paragraph 10 of the complaint fails to identify which employees were allegedly restrained and coerced in exercise of their protective rights. That's in paragraph ten.
>
> Respondent citing Rule 102.15 of the Board Rules -- it's codified at 29 CFR Section 102.15 -- contends that the complaint fails to state a clear and concise description of the acts claimed to constitute unfair labor practices in violation of Rule 102.15; and requests that I order the General Counsel to amend the complaint to bring it into compliance with the aforementioned rule. Excuse me.
>
> The General Counsel opposes the motion essentially arguing that the complaint sufficiently and adequately advises the Respondent of the nature of the unfair labor practices violations in which it is engaged -- the Respondent's engaged and so as to allow it to address the charges and prepare its defense. General Counsel, in his opposition, indicated that at this time he's without sufficient information to determine and identify any other persons who may have unlawfully denied a referral by the Respondent and that his inclusion of other similarly situated employees in the complaint is meant to preserve his rights at the hearing and perhaps at subsequent compliance proceedings to determine and establish that other employees in addition to the Charging Party, Mr. Buban, were unlawfully denied referral by the Respondent.
>
> General Counsel's opposition did not specifically treat with the 10(b) allegation failure to identify the employees restrained and coerced by the exercise of their statutory rights. However, I view this matter as to be essentially subsumed in or simply a subset of the matter involved in the other similarly situations -- other similarly situated employees issue, and does not merit a separate consideration.

> In agreeing with the General Counsel, and considering his clarification, I would finally conclude for the reasons stated and the authority cited by him that the complaint allegations are sufficiently specific to meet the requirements of Section 102.15 of the Board Rules. **I note that the complaint clearly and concisely identifies the allegedly unlawful conduct engaged in by the Respondent, that is its failure to operate its exclusive referral system in an objective and nondiscriminatory manner, and that the named Charging Party, Mr. Buban, was an employee "restrained and coerced" in exercise of his statutory rights; and suffered discrimination by did of and through the means of the Respondent's failure to operate the referral system in an objective and non-discriminatory manner**, all in violation of the pertinent and stated sections of the NLRA.
>
> So, again, in my view, the complaint in its -- on its face and with the clarification given by Counsel seems to me to satisfy the requirements of the Board Rule. So accordingly the request for a bill of particulars is denied, and is so ordered this 20th day of October 2009.

(Tr. 24-28; see Exceptions 37, 40, 41) (emphasis added). The judge, based upon the General Counsel's representations, framed the issue, then expanded the scope of the Complaint well after the record had closed, in issuing his decision and concluding that Local 200 violated the Act by "fail[ing] 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 projected, followed and maintained." (Exception 41; Conclusion of Law #9) Based upon the foregoing ruling by the judge with respect to the Motion for Bill of Particulars, Local 200 had absolutely no basis to believe that the scope of the Complaint would extend beyond matters particularly related to Buban and the alleged failure to operate an exclusive referral system in an objective and nondiscriminatory manner. The judge's expansive reading and analysis of the scope of the Complaint denied Local 200 its right to due process.

II. THE ALJ ERRONEOUSLY CONCLUDED THAT LOCAL 200 OPERATED AN EXCLUSIVE HIRING HALL AND IMPROPERLY SHIFTED THE BURDEN OF PROOF.

A. The ALJ Erroneously Shifted the Burden of Proof With Respect to Proving the Exclusive Nature of the Alleged Hiring Hall.

The judge erroneously shifted the burden of proof with respect to the exclusiveness of the hiring hall. The General Counsel bears the burden of proving by a preponderance of the evidence that a hiring hall is exclusive, not the union. See E.I. Dupont de Nemours & Co., Inc., 303 NLRB 419, 420 (1991) ("the judge appears to have misallocated the burden, properly placed on the General Counsel, of proving an exclusive hiring arrangement as an essential element of the violation alleged.") (citing Hoisting & Portable Engineers Local 4 (Carlson Corp.), 189 NLRB 366, 374-375 (1971), *enfd*. 456 F.2d 242 (1st Cir. 1972); Laborers Local 889 (Anthony Ferrante & Sons), 251 NLRB 1579, 1581 (1980)).

The General Counsel cannot meet its burden with the evidence produced in this case. The plain language of the agreement does not require that Local 200 *always* be the only source of employees for Bechtel; but only that Local 200 must be the *first* source for employees (for 48 hours), and even then, Bechtel is not required to hire the persons referred. (R-7, GC-5, 6) The Company, by its representative Gregory Glynn, acknowledged that it retains the right pursuant to the relevant agreements and language therein relating to the referral process, to hire whomsoever it chooses after 48 hours. (Tr. 153-154) In addition, the parties' settled a grievance in March 2007 which reaffirmed the meaning of the language. Finally, Local 200 and Bechtel obtained a determination by Region 30 that identical contract language in an agreement between identical parties, where the circumstances are identical except as to the location of the project covered

under that agreement, that the hiring hall or referral process created by the relevant (identical) language did not create an exclusive hiring hall. (See R-1, 30-CB-5143)

1. The Plain Language of the Agreement—and the Parties' Understandings thereof—Does Not Support the ALJ's Conclusion that Local 200 Operated an Exclusive Hiring Hall.

Local 200 does not and has never operated an exclusive hiring hall with respect to the referral of prospective employees to Bechtel at the Elm Road Generating Station under the Project Labor Agreement. Where an exclusive hiring hall is alleged, the particular language alleged to give rise to an exclusive hiring hall is critical to establishing that an actual exclusive hiring hall exists. For instance, in Development Consultants, 300 NLRB 479 (1990) an employer and a union had entered into a collective bargaining agreement providing that:

> The local union having jurisdiction shall be recognized as the principal source of laborers and shall be given the first opportunity to refer qualified applicants for employment. The Employer shall be the sole judge to whether or not the men furnished are qualified. The Employer reserves the right to transfer or rehire laborers, provided that for those laborers rehired, the Employer shall notify the Union of the rehiring within forty-eight (48) hours of the date of rehiring.

The Board held that this clause *did not establish an exclusive hiring hall* because it could be interpreted to require only that the local union be given the first opportunity to refer applicants. In so holding, the Board concluded that the provision requires only that the local union having territorial jurisdiction of the jobsite has the first opportunity to refer applicants when the contractor decides to use the hiring hall because the contractual language does not require contractors to use the hiring hall exclusively. Development Consultants, 300 NLRB at 480.

The Board has held that similar contract provisions do *not* create an exclusive hiring hall arrangement. In Kvaerner Songer, Inc. (Laborers Local 334), 343 NLRB 1343 (2004), the contract required hiring in accordance with the "hiring procedure existing in the territory" and

gave the union the opportunity to "fill the requests of the Employer for employees within a forty-eight (48) hour period after such request for employees… [following which] the Employer may employ workmen from any source…" Id. at 1345. This configuration of contractual provisions, which is strikingly similar to Sections 14.3 and 14.4 of the Area Construction Agreement, caused the Board to find that the "local hiring procedure of these parties was non-exclusive."

As was the case in Kvaerner and Development Consultants, the language of the PLA fails to establish an exclusive hiring hall arrangement with respect to filling employee vacancies by Bechtel. Gregory Glynn, HR for Bechtel, testified that the referral process utilized by the company remained consistent from the beginning of the project in 2005 through the litigation of Buban's complaint. (Tr. 146-147) Glynn additionally acknowledged that after 48 hours elapses from the time a requisition is sent, Bechtel retains the right to hire employees itself, without regard for Local 200's out of work list. (Tr. 153-154) The General Counsel sufficiently muddied the waters by asking questions whether Local 200 had "sole discretion" to send referrals—which it did, but *only* for forty-eight (48) hours. (Tr. 155) After the general counsel planted this red flag, the judge asked:

> JUDGE SHAMWELL: So am I to understand that after this grievance procedure, irrespective of the contract terms, you always work within the referral process through the union/
>
> THE WITNESS: Correct.
>
> JUDGE SHAMWELL: And walk-ons were, I guess, somewhat discouraged from -- well encouraged to go to the unions or otherwise -- because you're not going to hire them off the street.
>
> THE WITNESS: Correct.
>
> JUDGE SHAMWELL: That was your basic policy during the period that we're talking about.

(Tr. 155) These questions were imprecise with respect to time periods when the answer to the question is entirely dependent upon the time period at issue, and despite Glynn's acknowledgement that the bargaining agreements specifically limit Bechtel's obligation to use the referral process to a 48 hour period Glynn's testimony as follows:

> Q And so after a 48 hour period if the union doesn't send you somebody, you can hire whomsoever you please, correct?
>
> A Correct.
>
> Q And that's been true from the beginning of the project until today, correct?
>
> A Correct.

(Tr. 153-154)

This dialogue, especially in light of Glynn's testimony regarding Bechtel's rights under the relevant contracts, lacks the precision and proof required of the General Counsel to sufficiently meet his burden of proof and establish an exclusive hiring hall by a preponderance of the evidence. A conclusion to the contrary ignores the fact that the referral process if valid for only 48 hours; that Glynn's "basic policy" applies only to the first 48 hours after sending a requisition; and that Glynn testified moments prior to this dialogue that he and Bechtel recognize their right, *after* 48 hours, to hire whomsoever Bechtel chooses, without regard for the out-of-work list because the time during which Local 200 must resort to the referral process has lapsed. Given Local 200's timely response to requisitions, and the Company's general inclination (as demonstrated by practice and testimony throughout the hearing) to hire those referred, Bechtel notified "walk-ons" that their best chances of being referred were through the out-of-work lists.

Local 200 also proffered evidence that the Region, only months before March 2007, determined that Local 200's out-of-work list was *not* an exclusive hiring hall. (See Tr. 254; rejected Exh. 2) The judge refused to allow testimony and documents relating to the Region's

conclusions regarding the non-exclusivity of the hiring hall evidence and also refused to take judicial notice of these previous determinations.

2. The March 2007 Grievance Fails to Suggest a Departure from the Contract Language or Practice, and Fails to Prove that Local 200 Operated an Exclusive Hiring Hall.

The ALJ erroneously 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," and used this conclusion to further find that the Union operated a hiring hall. (Dec. p. 5:25-30) (emphasis added). These conclusions ignore the plain contractual language that permits the Company to hired off-the-street *after 48 hours*, (Tr. 68-69, 155) and assume facts which are not in evidence and ignores facts that are.

Bechtel is free to hire applicants of its choosing. The caveat to this right is that Bechtel may only exercise this right after it has given Local 200 48 hours to refer an applicant in response to a requisition. (Tr. 154) Once 48 hours has expired, Bechtel is no longer bound to use the referral process and may hire whomsoever it chooses. (Id.) Thus, while Local 200 has the sole discretion as to who to refer, subject, obviously, to Bechtel's qualification requirements (see Tr. 148), Bechtel has sole discretion as to whom it ultimately hires. Bechtel attempted, in March 2007, to hire the individuals it chose, without resorting to the out-of-work/referral procedure created in the project agreements. Bechtel's attempted subversion of the referral process occurred when it sent a requisition form to Local 200, naming the individuals it had decided to hire. The individuals were not referred by Local 200 and were not on any referral list, thus were hired directly by Bechtel. (Tr. 96-97) Local 200 objected to Bechtel's actions because Bechtel failed to first give Local 200 forty-eight hours to refer individuals of its choosing. It is this issue

that the grievance was about, and this issue, specifically that was resolved: If the Company wanted to choose who it would hire, it needed to wait 48 hours. Gurich summarized the parties resolution in this manner:

> Our—the intention was that he [Glynn and Bechtel] would give us [Local 200] the 48 hours to give him [Glynn and Bechtel] names but we understood that he did not have to accept them.

(Tr. 262) That the Company told some applicants to go through the union, referring to Local 200, is inapposite and does not transform the non-exclusive referral system to an exclusive one—nor did the parties' intend or expect their resolution to abide by the contract to have such an effect. Glynn testified that Bechtel understood that, if the union doesn't send Bechtel a name in response to a requisition, Bechtel is free to hire whomever it pleases. (Tr. 153-154) Bechtel resorts to the referral procedure—and is confined to that process—for only 48 hours. The parties' rights have existed in this manner since the beginning of the project in 2000. (Id.)

That the contract language and parties' practice with respect to such language does not create an exclusive hiring hall is bolstered by Region 30's decision that identical contract language on an identical project in Case No. 30-CB-5143, supports a ruling that, at all times relevant to the Complaint, Local 200 operated nothing more than an informal referral system related to Bechtel.

The parties' practice with respect to the actual application of the referral issue was addressed at another Bechtel location, but the contract language and administration of that language was identical to the language at issue here. (Tr. 255-259) The language was considered by Region 30 in Case No. 30-CB-5143, which concluded that the contract did not establish an exclusive hiring hall. Nevertheless, the ALJ refused to hear evidence with respect to the time period prior to January 2007, in which the same bargaining agreement language with the same

employer and the same project, but merely another location (Port Washington, WI), was not viewed as exclusive by the Company. (Tr. 255-259)

Despite concluding that the evidence was irrelevant, the judge made specific findings that were addressed by this evidence, violating Local 200's due process rights. For instance, at page 27, lines 39-51 (Exception 14), the judge stated that it was unclear as to how local 200 operated its out-of-work list prior to January 2007 even though Local 200 offered into evidence a requisition which showed consistency with respect to the requisition process (R-16; Exception 15, Dec. p. 28:1-2), and later concluded that the referral practice changed in March 2007 (Exception 16; Dec. p. 28:16-19).

3. The Referral Procedure has Not Changed over the Course of the Project—*before and after January 2007*—and is Based on Objective Criteria, and Out-of-Work List Remains a Non-Exclusive Referral System.

There is no language in the in the relevant labor agreements in this case that give rise to an exclusive hiring arrangement and nothing in the record suggests a *de facto* exclusive arrangement. To the extent the General Counsel argues that the parties' actions in practice give rise to an exclusive system, the argument must fail: Local 200's relationship with Bechtel was and remains non-exclusive. The Board concluded in 2006 that the referral system created by the language of this particular PLA was not an exclusive one: the hiring procedure merely gives the Union the opportunity to send qualified candidates. (R-1, R-2)[19] If the employer rejects those candidates or decides not to hire them, or if Local 200 cannot furnish sufficient employees in 48

[19] In the decision at page 27, lines 39-51, the judge complains that it is not clear how Local 200 operated its out-of-work list prior to January 2007. The complaint is no fault of the Union's. Local 200 attempted on three occasions to offer evidence into the record as to the operation of the referral services prior to January 2007 to show the prior operation of the list as well as that the operation of the list had not changed and was therefore the same as the referral process that Region 30 concluded in Case No. 30-CB-5143 was *not* an exclusive hiring hall. Ironically, the evidence was rejected by the judge as irrelevant. (Exception No. 13, 14; Tr. 257-262; R-1, 2, 16)

hours, the employer may hire whomsoever it pleases. (Tr. 154; GC-6) This understanding is perfectly consistent with the actions of the Buban administration, which gave preferential treatment to its employees and friends, and disregarded the out-of-work list to refer such individuals. (See, e.g. R-16) Those self-serving actions speak far louder than Mr. Buban's current self-serving claims.

That the referral system has remained consistent throughout the project, and that the March 2007 requisition which contained names was an anomaly, is supported by documentary evidence in the record. Respondent's Exhibit 16 shows that even before the executive board and officers of Local 200 changed in January 2006, referrals occurred in the exact same manner as they occurred after Gurich began administering to the Bechtel contract. (Tr. 289-290) Requisitions were sent to a Local 200 business agent by fax. The requisition did not list the names of any particular individuals Bechtel wished for the Union to refer (See R-16)—it was up to Local 200, at that time by Frank Ardellini, to refer the individuals Local 200 chose from the referral list Local 200 maintained at that time. Local 200 does not now, and has not ever, operated an exclusive hiring hall with respect to the referral of prospective employees to Bechtel at the Elm Road Generating Station under the Project Labor Agreement.

The grievances resolved in March 2007 did not change or alter the negotiated language in the project labor agreement: the HR director for Bechtel testified that the referral process under the PLA *has not changed* over the duration of the project—including before, during, and after the March 2007 grievances. (Tr. 154) Thus, the March 2007 referrals which requested individuals by name represent the union's attempt to restore the procedure to the negotiated one agreed upon in the collective bargaining agreements whereby the Union makes a referral from its out-of-work list. (Tr. 149-150, 262) The named-referrals matter was grieved and resolved when

Bechtel acknowledged that it would provide Local 200 the contractual 48 hours to refer to it the names of prospective employees of its choosing, rather than the Company dictating to the Union during those first 48 hours who it intended to hire. (Tr. 149-150; Tr. 262)

B. The ALJ Committed Procedural Error when He Refused as Irrelevant Evidence Proffered by Local 200 Regarding the Operation of the Out of Work List, but Subsequently Made Findings to which the Evidence was Indeed Relevant.

During the course of the two-day hearing on the Complaint, the ALJ refused to admit certain documentary evidence as irrelevant, and then subsequently made several findings in his decision on which the rejected exhibits provided significant, relevant insight. Notably, the judge refused to allow significant testimony on, and rejected a union-proffered exhibit addressing the operation of the non-exclusive hiring hall arising under the relevant CBAs in this case with respect to the time period prior to January 2007. (See Tr. 251-258) Specifically, Local 200 offered the out-of-work list maintained by the prior Local 200 (Buban) Administration and a Region 30 decision that dismissed a charge that identical referral language in a CBA with Bechtel, administered in precisely the same manner as at issue here, and for the same project, but merely another location (Port Washington, WI), was an exclusive hiring arrangement. (Tr. 251-252; R-1, 2) The judge complained that the decision, "…falls right into the realm of this other case…It's a different case, different timeframe, may have different issues, and I have present-day testimony from the man who took over the job that there was a change in procedure at the Union behest." (Tr. 259) The Union tried to explain that it was, in fact, trying to prove that there was no change in procedure but the judge nevertheless rejected the exhibit as irrelevant, and concluded that the referral process changed in March 2007. (Tr. 255)

Despite reaching this conclusion during the hearing and specifically *refusing* to hear testimony and accept as evidence certain exhibits as to the referral procedure prior to the time the

Millonzi-Bennett slate was installed as the Local Union officers, (See Tr. 251-259; R-1, 2)[20], the ALJ concludes in his decision that it is not clear how Local 200 operated its out-of-work list prior to January 2007. (Dec. p. 27:39-51)

On three occasions during the hearing Local 200 attempted to offer evidence into the record detailing the operation of the referral services described under the collective bargaining agreement prior to January 2007. Local 200 explained that the purpose of this evidence was to demonstrate the prior operation of the list and to show that the operation of the list remained the same despite the change in political administrations, and that because the operation of the out-of-work list remained the same as it was prior to January 2007, the referral system here, like the referral process Region 30 considered in Case No. 30-CB-5143, is not and was *not* an exclusive hiring hall. (Tr. 257-262; R-1, 2, 16) The evidence was either ignored or rejected by the judge during the hearing as irrelevant.

III. THE ALJ ERRONEOUSLY SHIFTED THE BURDEN WITH RESPECT TO PROVING A VIOLATION OF THE ACT RELATED TO BUBAN's NON-REFERRAL.

To bear its burden in this case with respect to claims that Local 200 acted arbitrarily, discriminatorily or in bad faith as related to Buban, the General Counsel must establish (1) that the union member engaged in protected concerted activity; (2) the union has knowledge of that activity; and (3) animus or hostility toward this activity was a motivating factor in the union's decision to take the adverse action in question against the union member. See Wright Line, 251 NLRB 1083 (1968), *enfd*. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). However,

[20] Respondent's Exhibits 1 and 2 were rejected and placed in the rejected exhibit file.

> the Wright Line test, while dealing with the burden of proof insofar as the issue of motivation, does not remove from the General Counsel the initial burden of establishing that an adverse action has in fact occurred. Accordingly, in this case the General Counsel must first show that the Union has, in fact, acted to the alleged discriminatees in terms of job referrals. As noted above, **the fact that the General Counsel establishes suspicion is not the same as meeting, her burden of proof on this issue.**

Local 137, Int'l Union of Operating Engineers, 317 N.L.R.B. 909, 923 (1995) (emphasis added). The burden of proof to explain this situation does not devolve upon the Respondent but lies with the General Counsel to establish unlawful conduct by something more substantial than suspicion. Laborers Local 423 (G.F.C.), 313 NLRB 807, 812 (1994).

The *Wright Line* test applies only once an adverse action is proven by the General Counsel, animus demonstrated against individuals based on their protected conduct, plus evidence of out-of-order referrals, is sufficient to establish a prima facie case that a motivating factor in such out-of-order referrals was such protected conduct, thereby shifting the burden to the Union to show that it would have taken the same action for non-discriminatory reasons. Operating Engineers (Local 137), supra at 924. The ALJ erroneously shifted this burden of proof by applying the *Wright Line* analysis prior to the General Counsel meeting his burden and proving an adverse action occurred and without making a prima facie showing of discrimination. (Exception 32, Dec. p 33:4-6; Exception 34, Dec. p. 33:25-27)

A. There is No Proof Buban was Subjected to Adverse Treatment; the General Counsel Failed to Show that Buban was Entitled to be Referred to a Position at Bechtel Ahead of Any Other Person.

Nothing in the record suggests that Buban was entitled to be referred to Bechtel in the place of Arnold Cheske, or any other person. (Exception 25, Dec. p. 31:10-15) With the exception of Cheske being referred ahead of Buban because Cheske was requested by name, Buban has no grounds to claim he should have been referred. Buban was ahead of none of those

employees referred out on the out-of-work list and was not laid off after having been referred from the out-of-work list. Anderson**,** Cheske, Bonaparte and Olson were referred to Bechtel from the out-of-work list, then laid off from their employment. As laid off employees who requested that they be referred back to Bechtel, they were placed on the back side of the list in the approximate location where the next referral would come from, after all qualified, laid off employees were returned to Bechtel. (Tr. 111, 114-115; 299-301) This placement was consistent with Gurich's regular practice.

Buban was never on any referral list, at least not until April 2008. Yet Buban apparently expected to be referred to Bechtel ahead of those individuals who promptly requested that their names be placed on the out-of-work list. Even in the absence of the requirement that Buban first be referred off of the out-of-work list, there were only a couple of requisitions for warehouse workers after Buban's name was added to the list. The referrals in response to these requisitions were made through Gurich's consideration of all of the usual factors. Ultimately, those laid off individuals with the most seniority on the project were referred to Bechtel.

Nothing in the record suggests it was possible for Buban to be referred for warehouse work at any time subsequent to September 12, 2008 (and really, before May 12, 2008). After requesting to be placed on the list, Local 200 received a single requisition for one warehouse worker—the only position for which Buban was qualified. Buban, however, had never specified an interest in working in the warehouse; he made very clear to Gurich that he wanted to return to a driver position and that he believed (as evidenced by the grievance procedures) that he was entitled to return to a driver position. (Tr. 274, See GC-13) Gurich ultimately filled the requisition by referring a well-liked and previously laid-off *warehouse* employee, Arnold Cheske, who was informally requested by name. (Tr. 276-277) There were no subsequent

warehouse employee requisitions. No other Class B drivers were referred back to Bechtel in any capacity, except and unless they received additional training or told Gurich that they had an interest in returning to Bechtel in the warehouse, rather than as a driver. (Tr. 279)

B. The ALJ Erred in Finding a Prima Facie Case of Animus.

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. (Exception 31, Dec. p 32:26-30) While Gurich admitted that he personally believed Buban acted improperly when he referred himself to Bechtel outside the parameters of the out-of-work list, nothing suggests that Gurich resented Buban or treated him any differently. (Tr. 103-104) Gurich testified that he did not oppose the manner by which Buban's administration ran Local 200 and answered negatively when asked if he disliked Buban personally or politically. (Tr. 104-105)

There no actual evidence that Gurich was politically resentful of Buban. Gurich never politically opposed Buban and was appointed by a slate that ousted Buban from office. Gurich lost nothing due to Buban's political activity. Gurich and Buban were not direct political opponents. The ALJ concluded in error and without an evidentiary basis that the Teamsters 4 Teamsters slate was headed by Gurich. (Exception 6, Dec. p. 13:8-9) The only document in evidence which casts Gurich in a remotely political light is a single flyer which merely contains Gurich's picture—a far cry from evidence proclaiming Gurich the "head" of a particular group. As noted by the judge in footnote 22, this inference is the result of campaign materials picturing Gurich *among others.* (Dec. fn. 22)

There is additionally no evidence of animus between Buban and Gurich (or Local 200) related to the processing of Buban's grievance. (Exception 33, Dec. p. 33:15-27) What is obvious

is that Local 200 was carefully and cautiously pursuing the grievance in light of the likelihood that Buban (who potentially resented having lost his officer position) would claim that Local 200 did something wrong if the Building Trades Council denied Buban's grievance.

Notably, the ALJ erred to the extent that he suggests, based on Buban's testimony, that Gurich and/or Local 200 was entirely responsible for handling and controlling grievances arising at the Elm Road Project. (Exception 7, Dec. p.13:39-40; Exception 8, Dec. p. 14:11-14; Exception 11, Dec. p. 19:9)[21] The grievance procedure was beyond Gurich's and Local 200's control. It was the Building Trades Council, not Local 200 or the International, which ultimately determined that Buban's grievance would not proceed to arbitration. (Tr. 265-272; R-6-12) The Building Trades Council is not affiliated with either Local 200 or the International Brotherhood of Teamsters, but is a construct that arises from the collective bargaining agreements, and is composed of members of the various trades involved in the Bechtel construction project, including Teamsters, which hears grievances arising under PLAs to which the employer and each trade is a party. (GC- 6, 7)

The Board noted in Operating Engineers (Local 137), supra, that "if a pattern of unexplained out-of-order referrals appeared,... it would be reasonable to infer that the disfavored individuals were the victims of adverse treatment." Id. at 910. In this case, however, there is no pattern of out-of-order referrals, nor is there anything else that suggests that Buban was treated unfairly. What is really at issue is a single referral.

[21] To the extent the ALJ suggests that the "International," apparently referring to the International Brotherhood of Teamsters, dropped Buban's grievance. The grievance was processed through the normal grievance machinery by the Milwaukee Building Trades Council, in accordance with the relevant provisions set forth in the Project Labor Agreement and Area Agreement. (GC-5)

Gurich testified nothing more and nothing less than that he believed that Buban was not entitled to have been referred or to have referred himself to Bechtel having never been on the referral list, and leapfrogging over those individuals who requested that Local 200 refer them to Bechtel. (Tr. 105-106; See Exception 30, Dec. 32:16-19) Local 200 could not refer Buban to the Bechtel project in response to any requisition until his name was on the out-of-work list. Local 200 never referred an applicant to Bechtel without that applicant's name appearing first on the out-of-work list.[22] Buban made his request on April 14th or 15th 2008 and was immediately placed on the referral list. These April 2008 dates mark the first time Buban became a potential referral for Bechtel. Because Buban was not on the list in March 2008, when Local 200 received a requisition (GC-8(i)) for warehouse employees, Buban was not referred for that work. There is nothing arbitrary about *not* referring an individual whose name is *not* on the referral list. With respect to the May 2008 referrals, (GC-8(n)), Gurich applied the exact same criteria he had always applied with respect to every other referral—laid off status, qualifications, seniority, and work history, and if a laid off person did not meet those criteria, numeric order.

Nothing in evidence suggests that Gurich was politically resentful of Buban on any basis. The General Counsel failed to sufficiently meet its burden with respect to animus, and therefore did not shift the burdens given the absence of any action taken against Buban. At the most, the

[22] 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." (Exception 14, Dec. p. 21:10-12) First, Gomaz's testimony was anything but clear—he 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) These factors, combined with the witness statement Gomaz provided 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)

General Counsel raised *suspicions*, and "the fact that the General Counsel establishes suspicion is not the same as meeting, her burden of proof on this issue." Operating Engineers, 317 NLRB at 923.

C. Buban Would Not Have Been Referred to Bechtel Even in the Absence of Protected Activity.

Finally, the general counsel erred in concluding 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. (Exception 34, Dec. p. 33:25-27) The evidence establishes very conclusively that Cheske went to the warehouse following Gurich's application and consideration of the relevant and regular referral criteria—including seniority and management's opinions. (Tr. 117-119) While the referral process may not be an "exact science," the same criteria were consistently applied to Buban, to Cheske, to Olson, Bonaparte, Anderson, and every other laid off employee referred back to Bechtel.

Local 200's referral system—whether informal or formal—was reasonable and fair. To the extent Gurich exercised discretion referring employees back to Bechtel on the basis of their layoff status and seniority with Bechtel, while factoring in foremen's requests for particular employees, such discretion was utilized reasonably and fairly. Buban had been on the list for only three weeks. Apparently, he expected to leapfrog every other person ahead of him on the list and in seniority and layoff status, to be immediately referred to Bechtel, despite the fact that those two criteria were only part of an overall formula.

Even if Local 200 operated an exclusive hiring hall, Local 200 never refused to refer Buban to the Bechtel project. Upon receiving his message asking to be placed on the out-of-work referral list, added Buban's name in its rightful place. Buban was placed on the out-of-work list *immediately upon requesting* that he be placed on that list. For the entire time Gurich

administered the out-of-work list, no individual was placed on the list until he or she asked to be placed on the list. Buban apparently complains that he received only the same treatment every other laid off and prospective Bechtel employee received from Local 200, rather than the special treatment that he received two years earlier. Local 200 did not depart from its informal referral procedure when it referred four applicants to Bechtel in response to warehouse requisitions in March through May 2008. Local 200 had good reason to refer these applicants ahead of Buban: they were originally ahead of Buban on the out-of-work list; they were previously laid off from Bechtel and referred back based on seniority, lay off status, and in response to their specific requests to work in the warehouse. (Tr.116-117) Cheske, specifically, was referred back to the same position from which he had been laid off.

An absence of special treatment is not the same thing as arbitrary or discriminatory treatment. In fact, special treatment likely would have violated the duty owed to others on the referral list. The duty of fair representation generally requires the union to serve the interests of all bargaining unit employees without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1988) (quoting Vaca v. Sipes, 386 U.S. 171, 177 (1976)).

Given the General Counsel's failure to meet his burden of proof with respect to animus, the fact that Buban was not immediately referred out fails to breach any duty owed to Buban. Even if, due to an error or when weighting the relevant factors, Buban's seniority should have trumped management's request for Cheske, "one act of simple negligence does not come close to violating the 'heightened duty' standard." Jacoby v. NLRB, 325 F.3d 301, 309 (D.C. Cir. 2003). A union is *not* strictly liable for inadvertent mistakes made in operating a hiring hall. Id.; see also

Int'l Union of Operating Eng'rs, Local 150, 352 NLRB 360 (2008) (isolated referral errors in the operation of union hiring halls resulting from "mere negligence" are not unlawful.) There is no evidence that Gurich acted with hostility or discriminatory intent in failing to refer Buban. Buban's name was written into the out-of-work list, but there were sticky notes with the names of laid off employees that Gurich intended to refer back to Bechtel before resorting to the list. To the extent a mistake was made and Buban should have been referred to Bechtel, such a mistake—in the absence of actual evidence of hostility or discriminatory motive—fails to breach any duty.

To the extent Gurich did not refer Buban ahead of others that Buban would have liked to bump in front of (notably, again) to return to Bechtel, does not show that Buban's non-referral during that time period was arbitrary, discriminatory or in bad faith. Instead, such treatment shows that Buban was subject to the same referral procedures as every other prospective Bechtel employee.

IV. LOCAL 200 DID NOT OPERATE AN EXCLUSIVE HIRING HALL WITHOUT CONSISTENTLY USING PUBLICIZED AND KNOWN OBJECTIVE CRITERIA OR FACTORS IN REFERRING APPLICANTS FOR EMPLOYMENT.

A. Assuming, *Arguendo*, the Allegations are Within the Scope of the Complaint, the ALJ Erred to the Extent he Concluded the Referral Criteria were Secret.

Gurich created the out-of-work list from scraps of paper and ensured that individuals seeking to be on the list met certain qualifications, set by the employer Bechtel, in order to be referred to available positions at Bechtel. These referral criteria were never a secret and were known by individuals on the referral list. (Exceptions 19, 20, 22, 23, 27, 29, 40) It therefore

cannot be fairly concluded that "no one on or off the referral list that [Gurich] alone created knew of his referral criteria." (Exception 19, Dec. p. 29:17-20)[23]

Rationally, a person looking for any job knows that they need to actually seek out and apply for a position for which they meet the qualifications sought. With very few exceptions, none pertaining to this matter, job offers do not magically materialize for random individuals on the street. Thus there is a rational baseline from which job search criteria begins: a person must reach out to an employer or union. People on the out-of-work list knew they had to actually seek out employment. With respect to Bechtel, individuals seeking employment learned that a list existed. The first requirement to referral is, thus, getting on the referral list. Arnold Cheske testified to the logical nature of this criteria, noting that a person had to request to be placed on the out-of-work list to work at Bechtel. (Tr. 322-323)

Individuals on the referral list were apprised of specific referral criteria when they asked to be placed on the out of work list. People who called or stopped by the Local 200 office to get on the referral list were asked questions about work experience and qualifications. Gurich also informed people that they may not be referred out if they fail to meet the qualifications for a driver or warehouse position. (Tr. 72; 79; 81-84) Inquiries about qualifications included questions as to whether "they were able to do chaining and strapping and heavy." (Tr. 79:9-10) Finally, those calling the hall logically had to know that they would not be referred out for a job for which they were not qualified and that the system therefore could not be purely numeric.

In addition to the erroneous conclusion that individuals did not know the referral criteria, there is no factual basis for the ALJ's conclusion that Gurich "elected to keep his Bechtel referral

[23] Gurich testified that he often received messages from other business agents or the Local 200 administrative staff about individuals looking to be placed on the list. Those pieces of paper also contained notations as to qualifications. It therefore seems that other people did, in fact, have insight with respect to the referral criteria.

rules, procedures, criteria, and evidently the referral list close to his vest." (Exception 23, Dec. p. 30:32-35) There was no testimony elicited as to whether other Local 200 business agents were familiar with the operation of the referral list, nor is there evidence that it was Gurich, specifically, who was responsible for the decision to not post a referral list. The record only establishes that Gurich created, maintained and administered the out-of-work list. Nothing suggests it was a decision or affirmative action by Gurich.

B. Local 200 Consistently Used Known, Objective Criteria in Referring Applicants to the Elm Road Project.

The judge erroneously concluded that Local 200 operated an exclusive hiring hall without consistently using publicized and known objective criteria or factors in referring applicants to the Elm Road project. Local 200 emphatically believes that it the out-of-work list with respect to the Bechtel project is not exclusive. Without regard for this belief, though, Local 200 operates its non-exclusive out-of-work list consistently, reasonably, and fairly via the application of objective criteria to a requisition. Thus, 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. (Exception 18; Dec. p. 29:43-45 to 30:1-3)

Specifically, the decision is riddled with inconsistencies with respect to the ALJ's conclusion as to the nature of the criteria employed by Local 200: the judge intermittently concludes that Gurich acted objectively, entirely subjectively, and also—ominously—for his own reasons. (See Dec. p. 29:43, 31:17, 31:42, and 29:30-33)

At all times, Gurich acted objectively and consistently. During the hearing, Gurich repeatedly and consistently explained how he made referrals. He testified that seniority, qualifications, experience, and work history at Bechtel, including layoff status and foremen's appraisals of performance, are the criteria used to make referrals once an individual has already been laid off from Bechtel. (Tr. 87-89, 93-94; 117-119, 275-277, 295, 298) He further explained that once all laid off employees are returned to work at Bechtel, the referrals are made in numeric order of the list, subject to individuals' qualifications. (Id.) The judge's concern for subjectivity, then, apparently is the result of the lack of a precise formula or weight assigned to each of the foregoing.

The evidence is utterly lacking that Gurich acted inconsistently and "for his own reasons" with respect to referring applicants based on their numerical standing on the list. (Exception 17, p. 29:30-33) Gurich acted consistently, explaining on multiple occasions that the referral process first took into consideration whether any laid off Bechtel employee previously referred to Bechtel from Local 200's out-of-work list was interested in returning to work at Bechtel (and qualified). (See e.g. note on GC-8(m) p. 2, noting seniority and numeric position on list) Laid off individuals had to ask to be to returned to Bechtel (Tr. 72), but were not returned to a numbered portion of the list, but were placed on the list to be returned to Bechtel if the opportunity arose, and based on seniority, qualifications, and in some instances, requests from Bechtel foremen. (Tr. 111-118) If there were no laid off employees, Gurich resorted to the list, taking into account qualifications, depending on the position available. (Tr. 116-118) There is absolutely no evidence that Gurich acted either subjectively or "for his own reasons." To the extent there are claims of animus or hostility toward Buban, that burden of persuasion rests on the General

Counsel, not the union, and evidence as to animus is tenuous, at best—thus failing to meet the *Wright Line* burden.

C. The ALJ Erred in Concluding that Local 200 Violated the Act when it Failed to Post or Disseminate Criteria Related to the Out-of-Work List.

Generally, a union's inadvertent mistake in operating a hiring hall arising from mere negligence also does not violate Section 8(b)(1)(A) and (2), independent of the duty of fair representation. Steamfitters Local Union No. 342, 336 NLRB 549, 553 (2001). Therefore, assuming *arguendo* that the out-of-work list is, in fact, an exclusive hiring hall, the Board should find that the inadvertence of the failure to post the list due to Local 200's well-founded belief that it was operating a non-exclusive referral system in light of the Board's dismissal of Case No. 30-CB-5143, did not violate the Act.

Gurich testified that, based upon Region 30's decision just one month before he began his position as a business agent, Local 200 firmly believed that it was operating a non-exclusive out-of-work referral system. Local 200 offered Region 30's dismissal (R-1) as evidence that the referral system had not changed and remained non-exclusive. The Local's belief was in good faith and to the extent it erred in administering or operating the hiring hall, such error was negligence and devoid of any bad faith which would rise to the level of a violation of the Act.

V. LOCAL 200 DID NOT VIOLATE THE ACT WHEN IT INADVERTENTLY FAILED TO PROVIDE A COPY OF THE REFERRAL LIST TO BUBAN.

Local 200 did not violate the Act when it inadvertently failed to provide Buban the referral list. The out-of-work list constitutes a non-exclusive referral system, thus the only duty Local 200 owes with respect to such system is to act free from arbitrary and invidious considerations.

Due to some unknown set of circumstances, Gurich never received Buban's request for the list. The failure to provide the list was inadvertent and was due, in no part, to any arbitrary or invidious consideration. Local 200 provided the list to at least two of Buban's close political allies, Carol Simon and Frank Ardellini, immediately upon their request. (Tr. 280) There is total absence of any discriminatory motive—Buban asked Monroe, who recorded the request on a slip of paper which never made it to Gurich, the business agent responsible for fulfilling the request. (Tr. 174-178) Gurich was genuinely surprised to discover that Buban had actually requested the list. (Tr. 280)

The Board generally recognizes that inadvertent mistakes arising from mere negligence related to a union's obligations under the Act do not ordinarily rise to violations of the Act, absent arbitrary or invidious conduct. There is nothing arbitrary or invidious, nor anything that would suggest that Local 200 violated the Act with respect to its inadvertent failure to provide Buban the out-of-work list.

CONCLUSION

For the foregoing reasons, the ALJ erred with respect to its decision in the above-captioned matter.

Dated this19th day of July, 2010.

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