

IN THE MATTER BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

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In the Matter of:

Teamsters General Local Union No. 200,  
Respondent,

-and-

Case No. 30-CB-5303

Timothy Buban, an individual,  
Charging Party.

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**REPLY BRIEF OF RESPONDENT, TEAMSTERS LOCAL 200, IN SUPPORT OF  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**TABLE OF CONTENTS**

I. LOCAL 200 DOES NOT OPERATE AN EXCLUSIVE HIRING HALL..... 1

II. EVEN IF THE BECHTEL REFERRAL LIST IS AN EXCLUSIVE HIRING HALL,  
LOCAL 200 CONSISTENTLY UTILIZED OBJECTIVE CRITERIA IN MAKING  
REFERRALS. ....3

    A. The Referral Criteria were Objective, Clear and Consistently Applied.....3

    B. To the extent any person was not referred to Bechtel, the non-referral was the  
    result, at worst, of mere negligence, thus Did Not Violate a Duty or the Act.....4

    C. Buban Was Not Denied a Referral; To the Extent Buban Claims Entitlement  
    to a Particular Referral, there is No Proof he was Denied a Referral for an  
    Intentional, Malicious, or Arbitrary Reason.....5

III. LOCAL 200 WAS DENIED DUE PROCESS AS TO THE ALJ's FINDINGS  
REGARDING UNNAMED "SIMILARLY SITUATED APPLICANTS," AND BY THE  
MID-HEARING EXPANSION OF THE SCOPE OF THE COMPLAINT.....7

    A. Local 200 was Denied the Opportunity to Defend Itself to the Extent the  
    ALJ Found any Violations Against Any Person Other than Buban.....8

    B. The ALJ Improperly Permitted the ALJ to Expand the Scope of the Complaint  
    to Include Administrative Duties Related to the Administration of a Hiring Hall  
    .....9

IV. CONCLUSION.....9

## TABLE OF AUTHORITIES

<u>Boilermakers Local 587 (Stone &amp; Webster)</u> , 223 NLRB 612 (1977).....	1
<u>Carpenters Local 78 (Murray Walter)</u> , 223 NLRB 733, 734 (1976) .....	1
<u>Development Consultants</u> , 300 NLRB 479 (1990) .....	1-2
<u>Int'l Ass'n of Ironworkers Local 10 (Guy F. Atkinson Co.)</u> , 196 NLRB 712, 713 (1972) .....	2
<u>Jacoby v. NLRB</u> , 325 F.3d 301, 309 (D.C. Cir. 2003).....	4, 8
<u>Kvaerner Songer, Inc. (Laborers Local 334)</u> , 343 NLRB 1343 (2004) .....	2
<u>Manno Electric</u> , 321 NLRB 278, 280 n. 12 (1996).....	6
<u>Mountain Pacific Chapter AGC</u> , 119 NLRB 883, 894 (1958) .....	1
<u>NLRB v. AFSCME Local 1640</u> , 325 F.3. 301 (6 <sup>th</sup> Cir. 2006).....	4
<u>Paul Mueller, Co.</u> , 332 NLRB 1350 (2000).....	8-9
<u>Plumbers and Steamfitters Local 91 (Brock &amp; Blevins)</u> , 336 NLRB 541 (2001).....	8
<u>Plumbers Local 342 (Contra Costa Electric)</u> , 329 NLRB 688 (1999) ( <u>Contra Costa I</u> ) .....	4, 8
<u>Teamsters Local Union No. 174 (Totem Beverages)</u> , 226 NLRB 690, 691 (1976).....	2

The evidence in this case does not establish that Local 200 operates an exclusive hiring hall. However, to the extent the evidence suggests an exclusive referral process, the General Counsel failed to meet its burden and prove that Timothy Buban was entitled to any referral, or alternatively, that if he was entitled to a referral, the non-referral was due to something more than negligence or inadvertence. Local 200 routinely utilized consistent and clear criteria in managing the referral list; there was no violation of any duty owed to Buban or any other person on the referral list. Local 200 did not violate the Act.

I. LOCAL 200 DOES NOT OPERATE AN EXCLUSIVE HIRING HALL.

The cases cited by the General Counsel fail to stand for any broad and sweeping proposition that one particular fact determines the existence of an exclusive hiring hall. Rather, the cited cases, taken together, stand for the notion that each case is to be decided based upon its own circumstances.

The mere existence of a time period in a bargaining agreement relating to a referral procedure does not mandate finding an exclusive hiring hall. See Mountain Pacific Chapter AGC, 119 NLRB 883, 894 (1958) (CBA places the burden of recruiting employees on the union; obligates the employer to call upon the union to obtain employees; and *only* permits the employer an alternative mechanism when the Union *cannot* refer workers within 48 hours) (emphasis added); see also Carpenters Local 78 (Murray Walter), 223 NLRB 733, 734 (1976) (Employer agrees to employ those furnished by the Union within 48 hours and requires “any new men employed on the job *shall* come from the area local.”) (emphasis added); Boilermakers Local 587 (Stone & Webster), 223 NLRB 612 (1977) (Employer can hire *if*, within 48 hours, union is *unable* to fill the request) (emphasis added). Similarly, contract language is not determinative; it must be read with an eye towards the parties’ intentions. For instance, in

Development Consultants the contract language made clear that the union was the first and principal source of employees, but the Board found that such language does not necessarily establish an exclusive hiring hall. 300 NLRB 479 (1990). Instead, it was noted that CBA language is subject to interpretation. Id. Similarly, in Kvaerner Songer, Inc. (Laborers Local 334), 343 NLRB 1343 (2004), a CBA with language specifying a time period in which the union could refer applicants did not result in a conclusion that the referral process was exclusive.<sup>1</sup>

The independent existence of a time period, certain words, or any other circumstances is not determinative. When all circumstances are considered, it is clear that the ALJ erred in concluding Local 200 operated an exclusive hiring hall. The literal language of the Local 200-Bechtel Agreements does not preclude the Company from hiring individuals of its own choosing; this much was acknowledged by both Bechtel and Local 200. (Tr. 68-69,153-154) The language in the Bechtel CBAs merely requires that Local 200 have an opportunity to refer individuals for consideration. That opportunity expires 48 hours after receipt of the requisition.<sup>2</sup> The March 2007 grievances did not change the parties' understanding of the language.<sup>3</sup> (Tr. 95, 262) The grievance was resolved when the Company agreed to abide by the bargaining agreement—i.e.

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<sup>1</sup> See Teamsters Local Union No. 174 (Totem Beverages), 226 NLRB 690, 691 (1976) (union and employer mutually regarded hiring hall as exclusive, this was a critical fact to the Board's finding of an exclusive hiring hall); Int'l Ass'n of Ironworkers Local 10 (Guy F. Atkinson Co.), 196 NLRB 712, 713 (1972) (an employer's practice to hire only those who were cleared or referred by the union, without more, merely shows a unilateral practice on the employer's part so to act and does not show the union's participation therein; no exclusive arrangement has been demonstrated). Glynn testified that the Company can hire whomever it chooses (Tr. 153-155) and there is no evidence that Local 200 believed the Company understood the hiring hall to be exclusive (See Tr. 254; rejected exhibit R-1, R-2 Case No. 30-CB-5143)

<sup>2</sup> The General Counsel repeatedly notes that Bechtel obtains its drivers from Local 200 and has since the start of the Elm Road project, but despite this repetition, objected to Local 200's attempt to introduce evidence that Region 30 determined in late 2007 that this very same hiring hall—the same one the GC repeatedly states hires all of its drivers and warehouse personnel from Local 200—was non-exclusive. (Tr. 251-258; See R-1, R-2)

<sup>3</sup> The ALJ and GC incorrectly frame the issues underlying the March '07 grievance as seeking "to influence the referral process by requesting individuals by name;" the requisition marked the Company's independent action, completely ignoring the referral provisions, to indicate that it would hire who it chose. (Tr. 262)

provide Local 200 a 48-hour period in which it could refer applicants in response to a Bechtel requisition. Bechtel retains the right to hire off the street if it so chooses. (Tr. 153-154)

Because the Bechtel referral list is not an exclusive hiring hall, the duty of fair representation does not attach to the administration of that list and there is no violation of the Act with respect to the administration of the out-of-work list or the referrals and administrative procedures related thereto.

II. EVEN IF THE BECHTEL REFERRAL LIST IS AN EXCLUSIVE HIRING HALL, LOCAL 200 CONSISTENTLY UTILIZED OBJECTIVE CRITERIA IN MAKING REFERRALS.

Federal labor policy merely requires that referrals be made based upon consistently applied, objective standards. Gurich consistently used the same set of factors in making referrals. The fact that some criteria did not apply every person on the referral list does not militate a finding that the criteria were subjective.<sup>4</sup> Each criterion was among the set of factors evaluated every time in making the referrals.

A. The Referral Criteria were Objective, Clear and Consistently Applied.

In responding to Bechtel requisitions, referrals were made based upon an individual's position on the list, layoff status, seniority, experience and qualifications, and foremen's requests. (Tr. 93-94; 110-116) These criteria guided every referral and were applied to every requisition request. Specifically, referrals occurred as follows:

- 1) Referrals were made from the list in numeric order (subject to qualifications), *unless* there were laid off employees on post-it notes by virtue of their request to be referred back to Bechtel subsequent to their layoff

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<sup>4</sup> For example, whether the foremen requested someone is as objective as whether a particular person has the required experience—it's either yes or no.

- 2) Laid off employees (whose names are memorialized in post-it notes on the back side of the referral list) are referred back based upon the time of their layoff, their seniority, experience, qualifications for the position, and supervisory request.

The procedure is clear. The criteria are legitimate and objective and were consistently applied. That some employees were not requested by foremen, not qualified for a particular position, or not previously laid off after being referred from the list does not make the criteria subjective.

B. To the extent any person was not referred to Bechtel, the non-referral was the result, at worst, of mere negligence, thus Did Not Violate a Duty or the Act.

The heightened duty of fair dealing requires a union to operate a hiring hall using “objective criteria” and “consistent standards.” It does not, however, hold a union strictly liable for inadvertent mistakes when it is otherwise operating its hiring hall pursuant to the prescribed criteria and standards.

Jacoby v. NLRB, 325 F.3d 301, 309 (D.C. Cir. 2003); Plumbers Local 342 (Contra Costa Electric), 329 NLRB 688 (1999) (Contra Costa I)(mere negligence in the operation of an exclusive hiring hall does not breach a union's duty of fair representation). “[A] union commits an unfair labor practice if it administers the exclusive hall arbitrarily or without reference to objective criteria and thereby affects the employment status of those it is expected to represent.” Jacoby, supra, at 308. In Jacoby, the Court considered what the standard is for determining whether an out-of-order referral is a violation of any duty. Specifically, the Court considered whether the decision was “‘so far outside a wide range of reasonableness’ as to be irrational.” In another case, the reviewing Court noted that, ‘...an unwise or even an unconsidered decision’ by a union is not necessarily an irrational decision.” NLRB v. AFSCME Local 1640, 325 F3. 301 (6<sup>th</sup> Cir. 2006); see also Jacoby, supra, (a union might violate the DFR in instances of gross negligence or where its hiring hall business practices are so reckless as to cause foreseeable adverse effects on employment).

Gurich, in administering the referral list, consistently utilized objective criteria in making referrals.<sup>5</sup> He did not act arbitrarily. To the extent Gurich (allegedly) deviated from those criteria at any point in time with respect to Buban or any other person, such deviation cannot be framed as a violation of any duty absent proof that the deviation was intentional, malicious or arbitrary, and due to more than inadvertence or mere negligence. There is no such evidence in this case.

C. Buban Was Not Denied a Referral; To the Extent Buban Claims Entitlement to a Particular Referral, there is No Proof he was Denied a Referral for an Intentional, Malicious, or Arbitrary Reason.

With respect to the allegations specifically involving Timothy Buban, this case does not require an evaluation as to whether one particular person was referred to Bechtel “over” Buban. Although Cheske was referred to Bechtel in March 2008 and Buban was not, the issue is the placement of Buban’s name on the referral list<sup>6</sup> (he was placed at the end of the list on the date he requested to be placed on the list) and Local 200’s motivation for that placement since an inadvertent error, or one due to negligence, is insufficient to establish a violation of any duty.

Local 200 acted appropriately in referring Cheske to Bechtel in March 2008—Cheske was available, qualified, laid-off, previously referred from the list, on a post-it note to be referred

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<sup>5</sup> The criteria were not secret. Individuals seeking placement on the referral list knew that there was certain criteria: they had to get on the list; were asked questions about work experience and qualifications and informed 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; 322-323)

<sup>6</sup> Despite the General Counsel’s reference to Buban making more than one request to be placed on the list, Region 30 dismissed any claims by Buban that he had requested to be placed on the list earlier. In its partial dismissal, the Region found no evidence that the Union ever placed a grievant’s name on the out-of-work list while the grievance was pending; that Buban requested to be placed on the out-of-work list prior to April 2008, or that any person was ever placed on the list except and unless he or she 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 evidence presented at the hearing suggests anything to the contrary of the original findings of the Regional Director in this matter.

ahead of those named only in the list and requested by management.<sup>7</sup> The referral conformed with Local 200's regular practice. Buban's name was on the list, not on a post-it note as a laid off employee. (Tr. 120-121, 305) Gurich testified repeatedly that individuals on post it notes were referred back to Bechtel, when possible, before going line-by-line down the referral list. Thus it would have marked a departure from the hiring hall procedures to ignore the names on the post-it notes. After Cheske's referral, Bechtel did not send another requisition for a warehouse employee for four months. At that time, having run through the post-it notes, Gurich referred the next person in line on the out-of-work list, Craig Pini. Buban's name remained on the list, below Pini. (Tr. 305) These two referrals were consistent with the manner in which the out-of-work list was previously operated.

Even if Buban's name had been on a post-it note, he was not entitled to referral ahead of Cheske. The objective criteria that Gurich consistently employed did not necessarily warrant the referral of Buban over Cheske. Cheske had extensive warehouse experience *at the Bechtel facilities*; was laid off for longer; and was requested by management. Furthermore, to the extent the General Counsel insinuates that Gurich referred Cheske because he felt that Cheske had not had a fair shake at Bechtel, a referral on that basis fails to establish animus—it fails to establish anything more than a lapse in judgment related to the referral and it certainly does not prove that Buban's union activity was a substantial and motivating factor in the non-referral.<sup>8</sup> (See Manno

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<sup>7</sup> The General Counsel suggests that, on one occasion, Gurich utilized the criteria as to whether he believed the Company acted fairly when it laid Arnold Cheske off, initially. There is no evidence that this belief actually factored into the referral decision, or that this belief ultimately led to the referral. Cheske had been a warehouse employee, had seniority and experience *in the warehouse*, and management requested that he be returned to the warehouse when a position became available. To the extent the GC proved that this belief was a factor and deviation, it shows that animus toward Buban *did not* drive the referral decision.

<sup>8</sup> Gurich testified that Cheske was the least seniority person among those laid off Bechtel employees listed on "post-it" notes on the reverse side of the referral list. Despite Gurich's feeling that Cheske should never have been laid off, Gurich did not refer Cheske ahead of any of the other post-it note individuals with more experience or more seniority. This subjective standard did not impact Cheske's referral. (Tr. 120-121)

Electric, 321 NLRB 278, 280 n. 12 (1996) (General Counsel must prove that animus was a substantial and motivating factor in Respondent's decision to take adverse action.)) When Local 200 received the next requisition for a warehouse employee, Craig Pini was referred in order *from the lists*. Buban's name was not on a post-it note, it was on the out-of-work list, in the proper position as of the date of his request to be added to the list and after Pini's name: Buban was not yet up for referral.

Local 200 did nothing wrong in referring Cheske and/or Pini. Buban's placement on the list corresponds with the date and time he called and asked to be placed on the list for referral. Local 200's motivation in referring Cheske and Pini in response to the two requisitions for warehouse employees that subsequently occurred was not malicious, but was consistent with the manner in which Gurich ordinarily referred individuals. Furthermore, and to the extent Local 200's referral system can be considered an exclusive hiring hall, the placement of Buban on the referral list, as opposed to on a post-it note, was not a violation of the Act. To the extent Buban claims, and proves, his name should have been elsewhere on the list, any mis-placement was negligent at most, and without a malicious or improper motive.

### III. LOCAL 200 WAS DENIED DUE PROCESS AS TO THE ALJ's FINDINGS REGARDING UNNAMED "SIMILARLY SITUATED APPLICANTS," AND BY THE MID-HEARING EXPANSION OF THE SCOPE OF THE COMPLAINT.

Local 200 filed a Motion before the hearing seeking a more definite statement of the allegations in the Complaint on the grounds that it was unable to adequately defend itself given the potential for an expanded scope of the Complaint. Additionally, when the General Counsel sought to expand the scope of the Complaint via a proposed amendment, Local 200 again vigorously objected on the grounds that it was unable to adequately defend itself. Nevertheless,

the ALJ made conclusions that were class-based and theoretical; Local 200 was denied a real opportunity to defend itself against these alleged “violations.”

A. Local 200 was Denied the Opportunity to Defend Itself to the Extent the ALJ Found any Violations Against Any Person Other than Buban.

As noted above, a union is not strictly liable for inadvertent mistakes or mere negligence in the operation of a hiring hall. See Jacoby, supra, and Contra Costa I, supra. In addition, and to the extent the General Counsel met its burden of proof with respect to proving the existence of an exclusive hiring hall, Local 200 is entitled to present a defense where and when it deviated from the hiring hall procedures, if it in fact deviated from such procedures. As such, the ALJ’s sweeping conclusion that Local 200 failed to refer other, unidentified individuals similarly situated to Buban denies Local 200 the opportunity to 1) defend itself with respect to whether or not any departures (to the extent they occurred) were necessary to the administration of the bargaining unit, see Plumbers and Steamfitters Local 91 (Brock & Blevins), 336 NLRB 541, 543-544 (2001) (Union should be able to show whether a departure from the hiring hall rules was “necessary to the effective performance of [the Respondent’s] function of representing its constituency” in efficiently operating the hiring hall.) or 2) that the error was either inadvertent or the result of mere negligence Plumbers and Steamfitters Local 91 (Brock & Blevins), supra at 543 (a departure that is not motivated by discrimination or animus suggests that the business agent was merely negligent in failing to follow the prescribed procedures, or at worst made a good-faith error in judgment, and did not breach the Respondent’s duty of fair representation or violate the Act) because Local 200 has no idea to whom the ALJ’s conclusion refers. Local 200 took specific steps to narrow the scope of the Complaint both before and during the hearing and was assured that the only allegations against it were those specified in the Complaint. Thus, to the extent the ALJ’s conclusion extended beyond the findings with respect to Buban, Local 200

was denied the opportunity to present defenses with respect to these unnamed individuals and unspecified (alleged) out-of-order referrals, if any, and therefore denied due process. See 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).

B. The ALJ Improperly Permitted the ALJ to Expand the Scope of the Complaint to Include Administrative Duties Related to the Administration of a Hiring Hall.

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 Complaint issued on three allegations set forth in the original ULP, each of which dealt specifically with Buban, the administration of the list *only* with respect to Buban, and Buban's non-referral to Bechtel. (See GC-1(g), (i) ¶7(b), 8, 9). The administration of the out-of-work list as a whole is not and was never an issue. (See GC-1(i)) Gurich's testimony did not open the door to the expansion of the Complaint. His testimony was very specific and, in both instances, specified the exact same procedures used in making referrals.

The mid-hearing expansion of the scope of the Complaint was in error.

### **CONCLUSION**

It is the General Counsel who must prove that the hiring hall is exclusive and the General Counsel who bears the burden of proving that the Union acted improperly *and that* those improper actions were arbitrary, capricious or otherwise invidiously motivated. In the absence of proof that the improper actions were more than mere negligence or inadvertence, the General Counsel fails to meet his burden. The General Counsel failed to meet these burdens. To the extent the ALJ found otherwise, the decision was in error.

For the foregoing reasons, in addition to those stated in Respondent's initial Brief in Support of Exceptions, the ALJ erred with respect to the decision in the above-captioned matter.

Dated this 17<sup>th</sup> day of August, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in this matter has been filed electronically at [www.nlr.gov](http://www.nlr.gov) in accordance with the Board's Rules and Regulations and has been served this date on:

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A courtesy copy has been sent to the charging party:

Timothy Buban, Charging Party  
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by UPS Overnight Delivery.

Dated: August 17, 2010.

/s/ Sara J. Geenen  
Sara J. Geenen