

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 25

and

DENISE AVALLON, An Individual

and

PARTIES TO THE CONTRACT
(See Attachment A)

CASE 1-CB-10882
JD-35-10

**COUNSELS' FOR THE ACTING GENERAL COUNSEL
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted by:

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I. Counsels' for the Acting General Counsel Answer to Respondent's Specific Exceptions

Pursuant to Section 102.46(d) (2) of the Board's Rules and Regulations, Counsels for the Acting General Counsel file the following Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision.

Respondent's repeated assertions in its Exceptions and Brief that the Administrative Law Judge failed to consider certain facts in his findings and conclusions or misunderstood the facts as presented are simply not supported by the Decision or by the overall record. Thus, to the extent Respondent's factual characterizations in its Brief are inconsistent with the factual findings in the Administrative Law Judge's Decision, they should be disregarded as unreliable representations.

Respondent excepts, in part, to the Administrative Law Judge's findings of fact and his conclusions based on those findings. As set forth below, the Judge fully considered all the facts in a reasoned and impartial manner and made appropriate conclusions based on his factual findings.

As the Acting General Counsel believes necessary, Respondent's stated exceptions are addressed specifically below. Many of Respondent's arguments have already been addressed in the previously filed Counsels' for the Acting General Counsel Brief in Support of the Judge's Decision.¹

¹ In this brief, "GC" is used to designate Counsels' for the Acting General Counsel exhibits; "R" is used to designate Respondent's exhibits; "T" is used to designate pages of the official transcript; and "ALJD" or Judge's Decision is used to designate the Administrative Law Judge's Decision, and pages therein.

Counsels for the Acting General Counsel rely on the findings of fact, legal analysis and conclusions in the Judge's Decision² and, therefore, the facts of the case will not be restated herein, except when necessary to address Respondent's specific Exceptions.

A. Respondent's Exceptions to certain Factual Findings in the Administrative Law Judge's Decision lack merit, and should be rejected: Exceptions 1, 2, 3, and 4.

Regarding Exception 1, the record is replete with examples of Transportation Coordinators (TC") who did not consider casual list drivers that had not previously worked with. James Donahue testified that, while TC for the movie "*This Side of the Truth*," which was filmed between March 24 and May 14, 2008, he called the Union Hall to get names of qualified drivers for this project upon the advice of O'Brien Sr. (T. 326.) He did not use the casual list then in effect to find drivers for this movie. (T. 327). Donahue also testified that his general practice when calling drivers from the causal list was to look first for familiar names who had either worked for him or with him in the past and then to choose those drivers who he deemed dependable, courteous and a good past performer. (T. 369) O'Brien Sr., when he was the TC for "*Ghosts of Girlfriends Past*," during the January to May 2008 time frame, hired drivers McGuire, Anderson, Coyman, and Leahy because he knew them from earlier productions. (T. 502-511). O'Brien Sr. then hired Leahy, Indelicato, Cronk, and Moran for the project "*Knowing*" immediately thereafter, based on his prior experience working with all of them. (T. 525-

² In their previously filed One Exception to the Decision of the Administrative Law Judge, Counsels for the Acting General Counsel respectfully excepted to one narrow issue, the Administrative Law Judge's failure to recommend, in the Remedy Section, that the Board order backpay be calculated using a compound interest formula, as set forth in the Counsels' for the Acting General Counsel Brief in Support of their Exception.

529). Again, as TC for the "*Lakehouse/GrownUps*" movie, for which he employed a total of 91 drivers during the March-December 2009 timeframe, he called the drivers he had worked with before on prior productions and/or whom other TC's recommended to him from working with them. (T. 543) The five causal drives who he hired for "*The Social Network*" TV pilot to work on October 9, 2009 were selected because they had worked for him on the "*Lakehouse*." (T. 547) The 35 drivers who were later hired to work on October 19, 2009 for "*The Social Network*" had all been laid off from "*Lakehouse*," and this was the basis upon which O'Brien Sr. selected them for the "*Social Network*." (T. 548) O'Brien III, acting as the TC for "*Edge of Darkness*" in July 2008, testified that he hired C & D licensed drivers Coleman, McGonigle, Redmond, and Johnson from the casual list because he knew them from working with them before. (T. 416, 418, 420) Robert Carnes acted as TC for several projects in 2008 and 2009. Robert Carnes testified that he generally prefers to call drivers who he has worked with on other films. (T. 650) As TC for "*The Proposal*" in February 2008, Carnes testified that he hired drivers based on their ability and prior work performance and that he did not exhaust the February 1, 2008 casual list when hiring drivers, instead just calling the drivers that he knew. (T. 588) In July 2008, on "*Four Single Fathers*," Carnes called and ultimately hired John Fiddler (whose name appeared on the casual list) because he thought Fiddler was a friend of his brother's. (T. 594-595) In August 2008, Carnes hired Dan Redmond and Jeffrey Vance to work on the movie "*Donnie McKay*" from the casual list because they had worked for him previously. (T. 599, 604) For the "*Edge of Darkness*" Unit II, Carnes hired drivers Dana Price and Brian Hatch because he had worked with them on "*The Proposal*" and driver Joe Fournier because he had worked

with him on "*Best Friend's Girl*." (T. 610, 618) From June 2009 to November 2009, Carnes acted as the TC for "*The Zookeeper*." Carnes testified that he hired drivers whose names appeared on the Call Sheet because he had worked with them in the past or because they had just completed another project and had been referred to him by another TC. (T. 627) For the movie "*Hotel Hatteras*," in November/December 2009, Carnes hired Price, Joseph Travers, and Jacob Hackett because they had worked with him on previous films and he liked their work. (T. 622, 623, 624) He also called Ed King (who refused the job) to work on that project because King had worked for him before. (T. 625) Robert Wright, who acted as a TC on various projects throughout 2008-2009, testified that he selected drivers with Class D licenses based on their past "work ethic," meaning he had worked with them in the past and was comfortable with them. (T. 686, 691) If he didn't personally know a driver by name, he would call other TC's for a recommendation and hire a driver when he received a good one. (T. 686-687)

Regarding Exception 2, the record is also replete with examples of transportation coordinators referring drivers whose names were not on the movie casual list when there remained qualified drivers on the current casual list. O'Brien Sr., while TC for "*The Surrogates*," from May to September 2008, hired an unnamed group of drivers who had recently been laid off by a trucking company without regard to the then current casual list. (T. 523) For "*Ghosts of Girlfriends Past*," from January to May 2008, O'Brien Sr. hired Mario Sanchez, whose name did not appear on either the then current seniority or casual list, from the Union Hall. (T. 504) O'Brien III, while acting as the TC for "*Mall Cop*," during the time frame mid-February to end of May 2008, hired John Reardon (Local 82 member) along with 3 retired members of Local 25, J. Chambers, R. Riccardi,

and J. Crehan, without regard to then current casual list. (T. 399-400)³ He failed to keep a copy of the casual list he used to hire from, although he claims to have called all drivers who were listed on it. (T. 404) In "*Edge of Darkness*," O'Brien III testified that he exhausted the July 29, 2008 casual list for A & B drivers before he called the Union Hall for more names, but not for non-CDL (C & D) drivers. (T. 461-462) O'Brien III further testified that his method of hiring from the casual list was to first look at what license qualification the drivers held, and then to look for ones whom he had worked with in the past who had done what he felt was a good job, i.e., "drove without accidents, reported on time and had a good work ethic." (T. 462) For example, Carnes hired and referred drivers from Local 251 in Providence whose names he got from the Union Hall for jobs on the movie "*The Proposal*." (T. 583).

Regarding Exception 3, that Kelleher referred/hired players Bill Owerka, Jim Black, Chad White, Pat Friel, and Mark Cavanaugh for the "*Bride Wars*" production, none of whom are contained on the casual list. Respondent has misconstrued the facts as they pertain to this point. Kevin Kelleher clearly testified that, while acting as the Transportation Coordinator for the movie "*Bride Wars*" during the time period of late February to mid May 2008, he utilized the Casual List dated March 7, 2008 to call drivers for that project. (GC. 51, GC. 15; T. 260, 264) "*Bride Wars*" was in preproduction in February but was scheduled to begin actually filming on April 7, 2008. (GC. 50; T. 260)

The actual copy of the March 7, 2008 List which Kelleher used at the time to hire the majority of the drivers for this project, with his personal handwriting on it, was

³ O'Brien III was unsure which of the five different February (1, 11, 19, 21, and 26) 2008 Casual Lists he used to hire for this project. Of the four hires by O'Brien III, only Chambers appears on the Feb. 1st list. (T. 394)

identified by Kelleher and introduced into evidence. (GC. 51)⁴ Neither Bill Owerka, Jim Bilack, Mark Cavanaugh nor Chad White (who were hired as drivers by Kelleher (GC. 52 & 53) appear anywhere on the March 7, 2008 Casual List. (GC. 15 & 51) Nevertheless, the Administrative Law Judge was correct in finding that several of the drivers who Kelleher referred to work on that movie were not on the March 7, 2008 Causal List that he was using at the time. The fact that later there were other updated Casual Lists produced by Respondent in March of 2008, doesn't change the fact that Kelleher, as he admittedly testified, was not using any of those, including the one dated March 21, which Respondent's Counsel refers to in her brief in support of this Exception. (GC. 18) The fact that some of these names may have appeared on a subsequent casual list, *after* they had actually been called to work on the production, does not change the fact that they were not on the actual casual list being utilized at the time they had been called for a referral by Kelleher.

Regarding Exception 4, that Wright called Mark Harrington for the names of out-of-work "oilmen," it appears that the Administrative Law Judge may have inadvertently used the name of Robert Wright in place of that of Kevin Kelleher who testified that he called Harrington for names of fuel drivers [out-of-work oil men] who were going to be laid off and that Harrington provided him with these names. (T. 278, 284)

⁴ While the Administrative Law Judge correctly observed that the name Pat Friel does not appear on this Casual List either, the name "Padhriac Friel" does appear at #105, which Respondent's Counsel represents to be one and the same.

B. Respondent's Exceptions to Certain Factual Conclusions made by the Administrative Law Judge, lack merit, and should be rejected: Exceptions 7, 8, and 11.

In Exception 7, Respondent excepts to the Administrative Law Judge's finding that no employer ever requested that Avallon be removed from a production, dismissed from a job, or complained about her work performance to Respondent. Respondent's Counsel has failed to cite any transcript reference to any testimony by the various transportation coordinators admitting that Avallon was ever removed from a production or dismissed from her job on any production on the basis of any complaints by an Employer.⁵ Indeed, because she was not.

Nor was there any documentary evidence introduced by Respondent to establish that any such complaint was ever filed or received by the Respondent against Avallon. In fact, Mark Harrington testified that there were no specific records of any complaints against Avallon and no written complaints were made against her by any transportation coordinator. (T. 61) Robert Wright testified that, in making his referrals, he would take into consideration prior problems a driver had experienced in deciding whether to select the driver for referral but *only when the problems were documented*. (T. 671) (emphasis added)

Regarding any complaints by any employer about Avallon's work performance, there is limited testimony by O'Brien Sr. that Wardrobe Director Kurtland wanted Wright

⁵ This Exception should be partially disregarded because it does not meet the Board's minimum standards of Sec. 102.46(b)(1)(iii) of the Board's Rules and Regulations, in that Respondent failed to reference specific support in the record for this part of this exception in either its Exceptions or its Brief in Support of Exceptions. *BCE Construction Inc.*, 350 NLRB 1047, 1047-1048 (2007); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, fn.1 (2005), enfd. 456 F.3d 265 (1st Cir.2006). The substantive lack of merit of the remainder of this Exception is addressed in this Answering Brief.

to be his driver in place of Avallon due to an alleged incident of ducking while going through a tunnel on Storrow Drive in Boston and testimony by Wright that Kurtland had complained to the producers of *"The Worst that Can Happen"* about Avallon's lack of knowledge of driving directions in downtown Boston. (T. 550, 668) However, Avallon was merely switched with Wright and continued to drive a 12 passenger van for the remainder of that movie project. (T. 690). Compare this to the following testimony of TC Kevin Kelleher that: he had multiple drivers on the *"Bride Wars"* film in 2008 who "didn't know how to get from Point A to Point B," and that he had to constantly give them directions to where they were going; a lot of the drivers "hadn't seen the inside of Boston and the streets before," and he had to tell people "to follow the leader to get people to where they had to go;" "directions was (sic) always a problem;" and he "had to say that a lot of people had trouble with directions." (T. 304, 305, 309, 310) Moreover, he did not recall removing any driver from a project because the driver didn't know or couldn't follow driving directions and he was sure he never removed any driver for disciplinary reasons. (T. 310) Thus, it is clearly not the practice of Respondent to disqualify drivers who are unfamiliar with local driving directions.

Similarly, the only first hand testimony of any alleged misconduct by Avallon on *"Message In a Bottle"* was provided by O'Brien, Sr. He testified that some unnamed individual, who he claimed to be a producer from the production company, complained to him about Avallon "stalking" Kevin Costner on that set, that Avalon denied it, and that he merely warned her to be careful and watch herself. (T. 553) He received no other complaints from anyone concerning this allegation after that. (T. 555) Neither that allegation nor any of the other less inflammatory ones (that she had bumped into a pole

while parking her van in a parking lot damaging a headlight, drove too slowly on one occasion late at night, and hung “hippy beads” in her van) resulted in any removal or discipline of Avallon from this project, for which O’Brien Sr. served as the TC. (T. 559)

In Exception 8, Respondent excepts to the Administrative Law Judge’s finding that Respondent has not successfully demonstrated that referring Avallon would have jeopardized its relationships with contracting employers. The Administrative Law Judge’s finding is sound. There is no record evidence of any employer complaint to Respondent that it would refuse any referrals of Avallon in the future, that she be removed from a production, or that it would refuse to do business with Respondent if it continued to refer Avallon for work. This is the standard that must be met for the Respondent to overcome the presumption that when a union interferes with an employee’s employment status for reasons other than the failure to pay dues, initiation fees, or other fees uniformly required, that interference is intended to encourage union membership. *Local 18, Operating Engineers*, 204 NLRB 681 (1973). The Board, in *Stage Employees IATSE Local 150 (Mann Theatres)*, 268 NLRB 1292 (1984), concluded that actions taken by a union to protect its representational status may overcome this presumption by showing that it refused to refer an applicant based on a history of misconduct which would jeopardize its position as the exclusive representative. However, in *Mann*, the Board relied on the fact that employers, who were parties to the hiring hall agreement, explicitly informed the union that they did not want the employee referred to work for them for performance reasons. See also, *Stagehands Referral Service LLC*, 347 NLRB 1167, 1171 (2006) and *Plasterers Local 299 (Wyoming Contractors Association)*, 257 NLRB 1386 (1981) (the “union’s [legitimate] decisions

not to refer were objectively based on employer complaints.”) There is no record of any employer written, or other formal, complaints about Avallon. There is no evidence that any employer requested that Avallon not be referred to, or removed from, a production. Moreover, no one from the Respondent ever notified Avallon that there was a problem with her work or that she was not being referred for that reason. See *Stage Employees IATSE Local 412 (Asolo Center)*, 308 NLRB 1084, 1088 (1992), “If the Union had legitimate problems with...past conduct on the job....it had available to it, its own internal procedures for bringing charges... However it did not do so, but rather treated him as having been charged and found guilty by imposing economic sanctions by refusing to refer him for employment.”

In Exception 11, Respondent excepts to the Administrative Law Judge’s conclusion that Respondent deprived Avallon of income and benefits she would have earned but for the Respondent’s transgressions. This conclusion appropriately flows from the Judge’s finding that Respondent has unlawfully failed and refused to refer Avallon for driving jobs from its exclusive hiring hall and it is the logical outcome that she would have lost earnings as a result. The basis for such is addressed in the Judge’s ordered Remedy. As the Board has held, “[A]lmost without exception, the remedy ordered by the Board for unlawful refusals to refer employees from exclusive hiring halls has been, and is, that “the union shall make [the employee] whole for any loss of earnings and benefits sustained by him as a result of the union’s failure and refusal to refer him for employment.” *IATSE (AVW Audio Visual, Inc.)*, 352 NLRB 29, 32 (2008). (ALJD 25, 35)

C. Respondent's Exceptions to the Legal Analysis, Conclusions and Recommendations in the Administrative Law Judge's Decision lack merit, and should be rejected: Exceptions 5, 6, 9, 10.

As set forth more fully in the Counsels' for the Acting General Counsel Brief previously filed in Support of the Administrative Law Judge's Decision, the Administrative Law Judge applied the appropriate legal standards, fully considered all the facts, and presented well-reasoned analyses that result in conclusions the Board should adopt.

Exception 5 addresses Respondent's criticism of the Judge's conclusion that the Respondent violated Section 8(b)(1)(A) in the operation of its exclusive hiring hall.

As discussed previously, the Administrative Law Judge's reasoning and conclusions, based primarily on his application of *Local 394, Laborers' International Union of North America, AFL-CIO (Building Contractors Association of New Jersey)*, 247 NLRB 97, fn. 2 (1980); *Plumbers Local 619 (Bechtel Corp.)*, 268 NLRB 766 (1984); and *Denver Theatrical Stage Employees' Union Local 7 (Carole A. Miron)*, 339 NLRB 214, (2003), are correct, and the Counsels for the Acting General Counsel urge the Board to adopt the Judge's Decision in this regard.

Exception 6 addresses Respondent's criticism of the Administrative Law Judge's conclusion that Respondent violated Sections 8(b)(1)(A) and 8(b)(2) by its failure and refusal to refer Avallon. As already discussed in the Brief in Support, long-established Board law supports the Judge's conclusion that Respondent's failure to refer Avallon for jobs in the motion picture and television industry was unlawful under the circumstances of this case.

Exception 9 addresses Respondent's criticism of the Administrative Law Judge's conclusion that Respondent violated Section 8(b)(1)(A) and 8(b)(2) by failing to refer individuals from the casual list who were unknown to the Transportation Coordinators. The evidence discussed above demonstrates that the transportation coordinators relied upon their own personal experience in previously working with a driver or sometimes anecdotal evidence from other TC's. If a casual list applicant had not previously worked with a particular TC, he/she wasn't likely to be considered. See *Denver Theatrical State Employees Union No. 7*, supra at 219, where the Board found a union agent to have exercised unfettered discretion, in violation of the Act, where he made subjective determinations as to experience, skills, and ability, based on "observation or word of mouth from others." (ALJD 19, 30-33). The same conclusion was properly made by the Administrative Law Judge in the instant case.

Exception 10 summarily addresses Respondent's disagreement with all the Judge's conclusions of law listed in paragraph 3 of page 24 of the Administrative Law Judge's Decision, some of which Respondent has duplicated in its Exceptions 5, 6, and 9 above. For the reasons discussed in the Counsels' for the Acting General Counsel Brief in Support of the Administrative Law Judge's Decision, these exceptions lack merit. Counsels for the Acting General Counsel urge the Board to adopt the Administrative Law Judge's Decision in its entirety.⁶

II. Conclusion and Remedy

For the reasons discussed above, it is submitted that Counsels for the Acting General Counsel have established, by a preponderance of the evidence, that Respondent

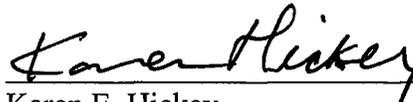
⁶ With the one Exception to the recommended Remedy that the back pay be calculated using a compound interest formula.

violated the Act as alleged in the Complaint and that the Administrative Law Judge's Order and Remedy should be adopted.

Respectfully submitted,



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Dated at Boston, Massachusetts, this 22nd day of September, 2010.

ATTACHMENT A

PARTIES TO CONTRACT

NEW LINE PRODCUTIONS/AVERY PIX, INC., Party to Contract

and

COLUMBIA TRISTAR-SONY., Party to Contract

and

SURROGATES PRODUCTIONS, INC. (DISNEY), Party to Contract

and

PROPOSAL PRODUCTIONS, INC. (DISNEY), Party to Contract

and

UTOPIA PLANITIA PRODUCTIONS, Party to Contract

and

FOX 2000/FOX ENTERTAINMENT GROUP, Party to Contract

and

EDGE OF DARKNESS, LLC, Party to Contract

and

DONNY MCKAY, LLC, Party to Contract

and

MFX USA, LLC, Party to Contract

and

ATLANTIC FILM PRODUCTION, Party to Contract

and

SUMMIT ENTERTAINMENT, Party to Contract

CERTIFICATE OF SERVICE

I hereby certify that I served the attached Counsels' for the Acting General Counsel Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge on the parties listed below, by electronic, overnight and/or regular mail, on this date.

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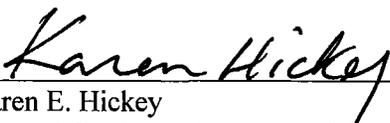
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