

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 509 (TOUCHSTONE
TELEVISION PRODUCTIONS, LLC
D/B/A ABC STUDIOS),**

Case No. 11-CB-4020

and

THOMAS TROY COGHILL, An Individual

**RESPONDENT'S REPLY BRIEF
IN SUPPORT OF EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

Jonathan G. Axelrod
Justin P. Keating
BEINS, AXELROD, P.C.
1625 Massachusetts Ave., NW
Washington DC 20036
telephone: 202-328-7222
telecopier: 202-328-7030
jkeating@beinsaxelrod.com
jaxelrod@beinsaxelrod.com

Counsel for Respondent Teamsters Local 509

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STATUTES

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent Teamsters Local 509 files this Reply Brief to the Answering Briefs submitted by counsel for the General Counsel and by counsel for the Charging Party. However, counsel for the Charging Party's Answering Brief does not address the Union's Exceptions based on the closing of its Referral List.

In its Exceptions, Local 509 does not challenge the ALJ's credibility resolutions and does not challenge his finding that the Union operated an exclusive referral hall.

A. Closing the Referral List Was Lawful

Counsel for the General Counsel's brief is based on the misconception that the Union's closing of the Referral List in June 2008 was not lawful. To the contrary, the ALJ was quite explicit:

In sum, I conclude in agreement with General Counsel and the Charging Party that the Respondent's movie referral list constituted an exclusive hiring hall arrangement. However, I do not find that the Respondent's arbitrary closing of the list in June 2008 violated the Act because counsel for the General Counsel's motion to amend the complaint to allege such a violation was untimely. Although General Counsel was aware during the investigation that the list had been 20 "closed", no allegation was included in the initial complaint or any subsequent amendments. Even when the issue came up in testimony at the hearing, counsel failed to advise the Respondent that its actions in June 2008 were being challenged as unlawful. Had the Respondent been so notified, it might have called additional witnesses or presented other evidence to justify the decision to close the list. In addition, the Respondent would presumably have addressed the issue in its brief had it known of the amendment. Only after the hearing was closed and briefs were filed did the Respondent get notice of this potential additional violation. Under these circumstances, I find that the issue was not "fully and fairly litigated" and that Respondent was denied due process by the post-hearing attempt to amend the complaint.

[ALJD 9 (emphasis supplied)]. Counsel for the General Counsel filed no exception to this Decision. Therefore, the Union's closing of its Referral List did not violate the Act. Oddly, counsel for the General Counsel objects to the Union's assertion that it is "undisputed" that the Union's decision to close its Referral List was "lawful" by noting her untimely challenge to its legality. [GC Brief at

15, n. 7]. At all material times, the legality of the Union's decision to close the List was unchallenged. The ALJ agreed, finding the Union's action did not violate the Act.

Counsel for the General Counsel's entire brief is a study in excusing her error or arguing for its irrelevance.

Nor did Counsel for the General Counsel file an Exception to the ALJ's finding that

It is undisputed that the Respondent, through Fletcher and Caldwell, told Coghill that his name could not be placed on the list. These statements to Coghill were based on action that had been taken by the Respondent's Executive Board on June 14, 2008, while production on season two was in progress.

[ALJD 6 (emphasis supplied)]. Thus, Coghill was not placed on the Referral List because the Union had closed the List to all applicants.¹

Counsel for the General Counsel's brief instead argues that because her error caused the ALJ to conclude that the Union did not violate the Act by closing the List, the Union's action was still not "lawful." She asks the Board not only to excuse her error but to use her error as the rationale for negating the ALJ's finding that closing the List did not violate the Act. She seems to find a distinction between conduct found "not unlawful" and conduct found "lawful." [GC Brief at 4-5]. But there is no such distinction, at least in this case.

Simply stated, any conduct which is found not to violate the Act must be deemed lawful within the meaning of *Machinists Lodge 1424 v. NLRB*, 362 U.S. 411, 429 (1960), where the Court stated that "Congress, in the judgment that a six-month limitations period did 'not seem unreasonable,' ... barred the Board from dealing with past conduct after that period had run, even at

¹The General Counsel does not allege that the Union's refusal to accept Coghill's request to transfer his membership to Local 509 transfer was unlawful. [Tr. 27]. In fact, as the ALJ found, the Union denied the transfer request because the Referral List was closed. [ALJD 5].

the expense of the vindication of statutory rights.” The same principle must apply where, as here, counsel for the General Counsel failed to timely allege that the closing of the Referral List was unlawful and the ALJ expressly found that the closing of the Referral List did not violate the Act..

Counsel for the General Counsel compounds this error by asserting that the Union’s reliance upon the closing of the list, which an ALJ found was the basis for failing to refer Troy Coghill [ALJD 6], was a “continuing violation.” [GC Brief at 8]. Her reliance upon *Electrical Workers Local 6*, 318 NLRB 109, 126 (1995), is misplaced. There, the ALJ stated as follows:

The General Counsel concedes that the promulgation and maintenance of such rules beyond the statutory 10(b) period may not be attacked but that “the maintenance of an unlawful rule is a continuing violation. See *Teamsters Local 174 (Totem Beverages, Inc.)*, 226 NLRB 690, 701 (1976),” ... The cited case supports the proposition advanced.

(emphasis supplied). Here, because the ALJ expressly concluded that the closing of the Referral List was not unlawful, there was no “unlawful rule” to continue.

Furthermore, the Board has recognized the fundamental conflict between the continuing violation theory and the policies underling Section 10(b) as set forth in *Machinists Lodge 1424*. The Board has explained that the continuing violation theory conflicts with the goal of stable relationships. The Board has also explained that

the continuing violation theory impairs the adjudication process because it permits litigation of distant events. ... a respondent’s ability to prepare a defense is increasingly prejudiced as those circumstances become more distant in time and pertinent evidence grows increasingly stale.

A & L Underground, 302 NLRB 467, 468-469 (1991).² Nor has the decision to close the Referral List been challenged as “facially invalid.” *Operating Engineers (Tribune Properties, Inc.)*, 304

²This problem was particularly evident in the testimony of Local 509’s witnesses concerning the formation and maintenance of the “B List” or “Wait List,” discussed more fully below.

NLRB 439, 442 (1991). But a belated claim that the Union's decision was "facially invalid" conflicts with the ALJ's finding that there was no violation, a finding to which Counsel for the General Counsel did not file an Exception.

Counsel for the General Counsel further argues that the Union's failure to publicize its closing of the Referral List makes it unlawful [GC Brief at 8]. But the ALJ found that Union President L.D. Fletcher personally informed Coghill of the closing in a telephone conversation that was arguably within the Section 10(b) period.³ Thus, the person most concerned had actual notice, but failed to file a timely charge. Perhaps more importantly, counsel for the General Counsel's notice argument is an obvious attempt to evade the ALJ's refusal to allow an amended complaint challenging the closing of the Referral List and his conclusion that the Executive Board decision was not unlawful.

Counsel for the General Counsel correctly, but irrelevantly, asserts that a union operating an exclusive referral hall cannot refuse to refer persons simply because they are not union members. We have conceded that Local 509 operated an exclusive referral service. But the ALJ found that Local 509 refused to add Coghill to its List because it had lawfully closed the List to all applicants, members or non-members. Nothing counsel for the General Counsel says, or could say, undermines that finding.

³The Union never raised Section 10(b) as an affirmative defense because it never had notice that its June 2008 action was allegedly unlawful. Nor did the Union have any reason to question Coghill or Fletcher concerning the precise date of the conversation. We do believe, however, that the conversation between Fletcher and Coghill was within six months of the Executive Board decision and that Coghill did not file a timely charge concerning that Executive Board action.

B. Local 509 Created a “Wait List” or a “B List”

It is undisputed that after closing its Referral List in June 2008 Local 509 created a list of people who asked to be placed on the List. [UE 1]. It is true, as counsel for the General Counsel states [GC Brief at 13], that the Union’s witnesses were unclear about the formation and mechanics of the Wait List. Their lack of clarity may have been caused by the delay between June 2008 and the trial. But the Union did keep such a list.

More importantly, even if the Union had not maintained such a wait list, there is no evidence that anyone was added to the Referral List after the Local 509 Executive Board’s decision to close the Referral List. To the contrary, the record demonstrates that the Union complied with its Executive Board decision.

Moreover, Counsel for the General Counsel misconstrues [GC Brief at 14] the letter from Local 509 Secretary-Treasurer Caldwell to Coghill. Caldwell wrote:

Teamsters Local 509 is in receipt of your request to be placed on the Movie Referral List. At this time, no additional names are being added to the list. Therefore, we are unable to transfer your membership to Local 509. I am returning all of your paperwork and the check you sent.

[ALJD 6; GCE 10]. This letter expressly states that the Referral List had been closed to all applicants. Consistent with Fletcher’s understanding that members of other Local Unions could not transfer into Local 509 unless they were already employed in Local 509’s jurisdiction, Caldwell refused to accept Coghill’s tender of dues. Caldwell explained that placement on the List had to come before Union membership, not that placement was conditioned on membership.

CONCLUSION

For the reasons stated herein and in our Brief in Support of Exceptions, the ALJ's conclusion that Local 509 violated the Act by failing to refer Troy Coghill to *Army Wives* Season Three should be reversed and the Complaint should be dismissed.

Respectfully submitted,



Jonathan G. Axelrod

Justin P. Keating

BEINS, AXELROD, P.C.

1625 Massachusetts Ave., NW

Washington DC 20036

telephone: 202-328-7222

telecopier: 202-328-7030

jkeating@beinsaxelrod.com

jaxelrod@beinsaxelrod.com

Counsel for Respondent Teamsters Local 509

April 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April 2011, I served the enclosed Respondent's Reply Brief on the following persons by UPS Overnight at the address listed below:

W. James Young, Esq.
National Right to Work Legal Defense Fund
8001 Braddock Rd. Suite 600
Springfield, VA 22160

Rosetta B. Lane, Esq.
National Labor Relations Board Region 11
Republic Square
4035 University Parkway Suite 200
Winston-Salem, NC 27106-3325


Jonathan G. Axelrod

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