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Teamsters “General” Local Union No. 200, an affiliate of the International Brotherhood of Teamsters and Timothy Buban. Case 30–CB–5303

December 29, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On April 21, 2010, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

¹ The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In his discussion of Respondent Business Agent Michael Gurich’s testimony, the judge found that Gurich testified to an “incident of a problematic nature regarding the Bechtel contract that occurred on or about June 26 and 27, 2007.” We note, however, that Gurich did not testify to an incident that occurred on either June 26 or 27. Rather, he testified that those were the dates when the Respondent settled certain grievances concerning Bechtel Construction Company’s referral request of certain named individuals. This clarification does not affect our ultimate findings of violations.

The judge also found that Gurich was the head of the “Teamsters 4 Teamsters” slate that lost a 2006 election to select delegates for an international Teamsters convention to a slate headed by Timothy Buban. We clarify that the record shows only that Gurich was a member of the slate.

² We shall amend the judge’s conclusions of law and remedy, and shall modify his recommended Order, to reflect the violations found and to conform to the Board’s standard remedial language. We shall also substitute a new notice that reflects those changes.

We shall additionally modify the judge’s recommended Order to delete the reference to other members of the Respondent who may be similarly situated to discriminatee Buban. Such a requirement would shift “to the compliance stage determinations which are to be made in unfair labor practice proceedings.” See *Laborers Local 158 (Contractors of Pennsylvania)*, 280 NLRB 1100, 1101 (1986), enfd. mem. 865 F.2d 251 (3d Cir. 1988).

We shall further amend the judge’s recommended remedy in accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enfd. denied on other grounds 647 F.3d 1137 (D.C. Cir.

The judge found that the Respondent: (a) violated Section 8(b)(2) of the Act by discriminatorily failing and refusing to refer Timothy Buban for employment at Bechtel Construction Company’s Elm Road Power Generating Station Project, and (b) violated Section 8(b)(1)(A) of the Act by operating an exclusive hiring hall without consistently using objective criteria or factors in referring applicants for employment and by failing and refusing to provide Buban with pertinent information that would allow him to protect his referral rights. We adopt these findings for the reasons set forth in the judge’s decision.³

The judge further found that the Respondent violated Section 8(b)(1)(A) by failing to publicize and make known its criteria for hiring hall referral. The Respondent excepts to this finding on due process grounds. As explained below, we find merit in this exception.

The complaint did not allege a failure-to-notify violation. On the first day of the hearing, however, the Respondent’s business agent, Michael Gurich, testified that the Respondent had failed to inform individuals of its requirements for referral. At the beginning of the second day of the hearing, the General Counsel, citing Gurich’s testimony, moved to amend the complaint to allege that the Respondent unlawfully “failed to notify or inform individuals . . . of any objective rules, practices or criteria used in making referrals.”

Although the judge advised the parties that he would defer ruling on the motion until they had an opportunity to submit briefs, he nonetheless expressed concerns about the lateness of the motion. He added that he was disinclined to grant the motion, but that if he did, he would probably have to convene a supplemental hearing to reopen the record. The judge further stated that the cited testimony “may be more supportive of the charges that we have in place now as opposed to making it the subject of a new charge.”

2011), by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

Finally, we shall modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

³ In adopting the judge’s finding that the Respondent harbored animus against Buban for his protected activity, we do not rely, as the judge did, on the evidence of Respondent Business Agent Gurich’s displeasure with Buban’s referral of himself to work at Bechtel upon leaving his union secretary-treasurer position.

We adopt the judge’s finding that the Respondent’s hiring hall is exclusive. We thus find it unnecessary to pass on the judge’s statement that a union operating a hiring hall owes referral applicants a duty of fair representation regardless of whether the hiring hall is exclusive or nonexclusive.

In his decision, the judge denied the General Counsel's motion to amend because it was untimely. He found, however, that one of the complaint's existing allegations—the allegation that the Respondent unlawfully operated an exclusive hiring hall—was broad enough to encompass the failure-to-notify allegation. The judge then found, consistent with the allegation that the General Counsel sought to add, that the Respondent violated the Act by failing to publicize its criteria for referral.

We agree with the Respondent that the judge's finding in this regard violated the Respondent's due process rights. The judge's statements at the hearing reasonably suggested an inclination not to consider the allegation on the merits. As noted above, the judge expressed concerns about the lateness of the motion and added that the cited testimony "may be more supportive of the [allegations] in place" rather than the new allegation. Significantly, he suggested that the Respondent would not have to litigate the General Counsel's proposed amendment absent explicit notice and reopening of the record. In these circumstances, the Respondent could reasonably believe that it did not have to present evidence in defense of such an allegation, at least not on the second day of the two-day hearing. And, in fact, the Respondent did not present any such evidence.

Moreover, a finding of a separate violation runs contrary to the judge's denial of the motion to amend the complaint to add this allegation. Significantly, there are no exceptions to that ruling.

Accordingly, it is clear that the judge's actions led the Respondent to reasonably believe that it would not have to defend against a failure-to-notify allegation. In these circumstances, the judge erred in finding a violation in the absence of a complaint allegation, and we reverse this finding. See *Coppinger Machinery Service*, 279 NLRB 609, 609–610 (1986).

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 4.

"4. The Respondent operated an exclusive hiring hall without consistently using objective criteria or factors in referring applicants for employment in violation of Section 8(b)(1)(A) of the Act."

2. Substitute the following for the judge's Conclusion of Law 5.

"5. The Respondent discriminatorily failed and refused to refer Timothy Buban for employment at Bechtel Construction Company's Elm Road Power Generating Station Project, specifically for available jobs at the warehouse facilities, in violation of Section 8(b)(1)(A) of the Act."

3. Substitute the following for the judge's Conclusion of Law 6.

"6. The Respondent violated Section 8(b)(2) of the Act by causing or attempting to cause Bechtel Construction Company to discriminate against Buban in violation of Section 8(a)(3)."

4. Delete the judge's Conclusion of Law 8 and renumber the subsequent paragraphs accordingly.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(b)(1)(A) and (2) by refusing to refer Timothy Buban to Bechtel Construction Company, we shall order that the Respondent make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him by paying him backpay equal to the amount of earnings and other benefits that he would have earned had he not been unlawfully denied referral to Bechtel Construction Company since about April 14–15, 2008, less net interim earnings. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, supra.⁴

Having found that the Respondent violated Section 8(b)(1)(A) by failing to respond to Buban's request for information including its job referral lists, rules, policies, and procedure notices, we shall order the Respondent to provide Buban with the requested information.

ORDER

The National Labor Relations Board orders that the Respondent, Teamsters "General" Local Union No. 200, an affiliate of the International Brotherhood of Teamsters, Milwaukee, Wisconsin, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Operating an exclusive hiring hall without consistently using objective criteria in referring applicants for employment.

(b) Failing and refusing to refer employees for employment because they engaged in activities and exercised rights guaranteed them by Section 7 of the Act.

⁴ We leave to compliance the determination of the nature and extent of Buban's employment opportunities at Bechtel Construction Company after April 14–15, 2008, the date that the Respondent first failed to refer him for employment.

(c) Failing and refusing to provide applicants for employment with pertinent requested information (such as job referral lists, rules, policies, and procedure notices) that would allow them to determine that their referral rights are being maintained and followed.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Operate its exclusive hiring hall by using objective criteria when making referrals.

(b) Refer Timothy Buban to Bechtel Construction Company in accordance with the applicable hiring hall rules.

(c) Make Timothy Buban whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Provide Timothy Buban with pertinent information (including job referral lists, rules, policies, and procedure notices) that he requested around August 23, 2008.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Milwaukee, Wisconsin facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to

ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 14 days after service by the Region, deliver to the Regional Director for Region 30 signed copies of the notice in sufficient number for posting by Bechtel Construction Company at its Oak Creek, Wisconsin facility, if it wishes, in all places where notices to employees are customarily posted.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 29, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT operate our exclusive hiring hall without consistently using objective criteria in referring applicants for employment.

WE WILL NOT fail and refuse to refer you for employment because you engage in activities and exercise rights guaranteed you by Section 7 of the Act.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail and refuse to provide you with pertinent requested information (such as job referral lists, rules, policies, and procedure notices) that would allow you to determine that your referral rights are being maintained and followed.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL operate our exclusive hiring hall by using objective criteria when making referrals.

WE WILL refer Timothy Buban to Bechtel Construction Company in accordance with our applicable hiring hall rules.

WE WILL make Timothy Buban whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL provide Timothy Buban with pertinent information (including job referral lists, rules, policies, and procedure notices) that he requested around August 23, 2008.

TEAMSTERS "GENERAL" LOCAL UNION NO. 200, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Andrew S. Gollin, Esq., for the General Counsel.
Scott D. Soldon, Esq. and Sara J. Geenen, Esq. (Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman S.C.), of Milwaukee, Wisconsin, for the Respondent.
Timothy Buban, pro se, of Milwaukee, Wisconsin.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard by me in Milwaukee, Wisconsin, on October 20 and 21, 2009, pursuant to an original charge filed by Timothy Buban (the Charging Party) on June 13, 2008, against Teamsters "General" Local Union 200, an affiliate of the International Brotherhood of Teamsters (the Respondent, Local 200, or Union). Buban filed amended charges against the Respondent on September 17 and December 10, 2008, and April 29, 2009.

On May 15, 2009, the Regional Director for Region 30 of the National Labor Relations Board (the Board) issued a complaint against the Respondent alleging that it violated Sections 8(b)(1)(A), 8(a)(3), and 8(b)(2) of the National Labor Relations Act (the Act). The Respondent filed its original answer to the complaint on May 29, 2009, and an amended answer on October 5, 2009, in both essentially denying the commission of any unfair labor practices and asserting in both answers certain affirmative defenses. The Respondent also filed its second amended answer and affirmative defenses on October 19, 2009.

At the hearing, the parties were represented by counsel except Buban who appeared pro se, but all were afforded full opportunity to be heard, examine, and cross-examine witnesses and introduce evidence. On the entire record, including my

observation of the demeanor of the witnesses, and after considering the briefs¹ filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

A. The Employer

At all times material, Bechtel Construction Company, a corporation with an office and place of business in Oak Creek, Wisconsin, known as the Elm Road Power Generating Station (Elm Road Project), has been engaged in the construction industry. During the past calendar year in conducting its business operations at the Elm Road Project, the Employer purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Wisconsin. The Respondent admits, and I would find and conclude, that Bechtel Construction Company (Bechtel or the Employer) has been an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

B. The Labor Organization

The Respondent, Local 200, admits, and I would find and conclude, that it is a labor organization within the meaning of Section 2(5) of the Act.

II. PRELIMINARY ADMISSIONS OF THE RESPONDENT

A. The Respondent admits, and I would find and conclude, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All drivers and warehouse employees employed by the Employer at the Elm Road Generating Station Project.

The Respondent admits that since about January 2006, and at all material times, it has been the designated exclusive collective-bargaining representative of the unit and since then, it has been recognized as the representative of the unit by the Employer. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from June 1, 2008, through May 31, 2011. The Respondent admits, and I would find and conclude, that at all material times since 2006, based on Section 9(a) of the Act, the Respondent has been the exclusive collective-bargaining representative of the unit as described above in this section.

B. The Respondent admits that it entered into a collective-bargaining agreement with Bechtel on or about January 16, 2006, and that since that date the agreement was and continues to be in force and effect at all material times.

III. UNDISPUTED FACTS²

A. The Elm Road Power Generating Station Project at Oak

¹ Charging Party Buban did not file a brief.

² In this section, I have determined that certain matters are established fact either because they are not controverted by the parties or I have credited certain evidence documentary or testimonial, again that was not disputed or seriously so by the parties.

Creek, Wisconsin; the Referral System in Operation

The Employer in this matter is Bechtel Construction Company (Bechtel).³ Bechtel is the general contractor for the construction of two coal fired power plants on the shore of Lake Michigan that includes a coal handling facility and tunnel that extends to the lake to bring in cooling water. The project began in about June 2005 and is scheduled for completion in August 2010. There are about 2100 persons employed on this project represented by around 15–16 labor organizations, including Local 200 which represents the drivers and warehousemen. The drivers pick up and deliver building materials and throughout the day drive the shuttle buses from the employee parking lot to the various onsite work areas. Warehouse workers handle the construction material received at the site and stored in the onsite warehouse facilities, and distribute same as needed; warehouse employees operate forklifts to place and retrieve material when needed.

Bechtel employed two general foremen, one for the drivers and another for the warehousemen at the Elm Road Project. The drivers' general foreman supervised two and sometimes three foremen to whom the project drivers reported; these lesser foremen reported to the drivers' general foreman. The warehouse general foreman did not supervise any other foremen, but only the four to six warehousemen handling material.

Bechtel and Local 200 are signatories to certain agreements which outline their respective rights and responsibilities at the Elm Road site. First, there was the project labor agreement (PLA) executed by Bechtel and Local 200, the general purpose of which was to promote efficient construction at the Elm Road site and provide for peaceful settlement of labor disputes.⁴ Second, there was an area construction agreement between Local 200 and Bechtel dated January 16, 2006.⁵ The third agreement was the parties' addendum agreement executed on July 28 and August 1, 2008, by Bechtel and Local 200, respectively, covering the period June 1, 2008, through May 31, 2011; this agreement essentially covered and replicated the terms of the area construction agreement.⁶

The labor agreements most pertinent in this case are the area agreement and the addendum. These agreements contain the following language regarding referral of Local 200 members to the Elm Road Project in articles 14 and 9, respectively.

³ Bechtel is not directly implicated in the unfair labor practice charge except by dint of the alleged conduct of the Respondent which caused and attempted to cause the Company to discriminate against Buban, in violation of Sec. 8(a)(3) of the Act.

⁴ See GC Exh. 5, a copy of the agreement. This agreement stemmed from an earlier agreement between Wisconsin Energy Corporation (the primary employer for Elm Road) and the Milwaukee Building and Construction Trades Council, acting as agent and representative of its member unions (to include Local 200).

⁵ See GC Exh. 6, a copy of the agreement. This agreement specifically established a definite labor management contract covering wages, hours, conditions of work, and terms of employment in the relationship between Local 200 and Bechtel, and included recognition by Bechtel of Local 200 as the sole and exclusive bargaining agent with respect to rates of pay, hours of work, and all other conditions of employment for all employees covered by the agreement.

⁶ The addendum agreement is contained in GC Exh. 7.

ARTICLE 14 [The Area Agreement]
Referral of Employees

14.1 The Employer shall have the right to select and hire directly all supervisors it considers necessary and desirable. The Employer shall have the right to determine the competency of all employees, the right to determine the number of employees required.

14.2 *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.* [Emphasis added.] 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.

14.3 *In the event the referral facilities maintained by the Local Unions do not refer the employees as requested by the Employer within 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.* [Emphasis supplied.]

14.4 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.

14.5 The Union will exert its utmost efforts to recruit sufficient number of skilled and certified craftsmen to fulfill the manpower requirements of the Employer.

Where governmental agencies impose equal employment obligations on the Employer's project, referral procedures shall be subordinate to such obligations. [GC Exh. 6, p.16.]

ARTICLE 9 [The Addendum]
Referral of Employees

9.1 The Employer shall have the right to select and hire directly all supervisors it considers necessary and desirable. The Employer shall have the right to determine the competency of all employees, the right to determine the number of employees required.

9.2 *The Union administers and controls its referrals* [emphasis added] 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 within 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.* [Emphasis added.]

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.

9.5 Where governmental agencies impose equal employment obligations on the Employer's project, referral procedures shall be subordinate to such obligations. [GC Exh. 7, p. 3.]

For purposes of and in compliance with these contract requirements, Bechtel obtained Local 200 drivers and warehouse employees during the relevant and material times pertinent to the issues presented in this matter using the following process and procedures.⁷

First, the project superintendent filled out a craft requisition form⁸ that included the date(s) for which employees were needed, the classification of the needed employee, e.g., driver or warehouseman. The requisition request then was approved by and through a company approval process and once approved, the company labor relations manager (Glynn) forwarded the requisition request to the Local 200 business representative. From January 1, 2007, to the present, Gregory Glynn handled the requisitions for Bechtel and Local 200 Business Agent Michael Gurich handled them for Local 200.

Pursuant to the agreement, from at least March 2007 to the present, Bechtel obtained either drivers or warehouse employees from no source other than Local 200. Moreover, Bechtel officials never hired any drivers or warehouse employees "off the street," because they viewed the labor agreement, in particular the overarching project labor agreement, to require that all craft workers be hired through the appropriate union hiring hall. Any persons who sought employment off the street were given a list of all signatory unions working at the Elm Road site and instructed to have their names placed on the pertinent union's out-of-work list.

This procedure, which began in 2000, was applied to all crafts working at Elm Road, including Local 200, and was in place at all material times associated with this litigation. Notably, Bechtel, employing these procedures during the times material to this litigation, never rejected any employees referred to it by the Local; and Local 200 never failed to refer someone within 48 hours of the requisition request, at least as of March 2007.

⁷ In this regard, I have credited the testimony of Gregory Glynn, a 33-year employee and the labor relations manager for Bechtel at the Elm Road Project for the past 4 years. Glynn's responsibilities included administering the pertinent labor agreements for Bechtel, particularly the referral provisions and process, as well as handling grievances filed by Local 200. Notably, Glynn's testimony is not disputed in any material way by the parties.

⁸ See GC Exh. 8(a) through (r), copies of various craft requisition forms and the Local 200 referrals to the Elm Road Project covering various dates beginning March 27, 2007, and ending September 12, 2008.

IV. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. The Complaint Allegations

The complaint alleges essentially that since January 1, 2007, the Respondent (Local 200) through one of its business agents—Michael Gurich—began keeping a list of individuals seeking employment at Bechtel's Elm Road Project; that since about August 22, 2008, Gurich failed and refused to honor Buban's request to review this list, known as an out-of-work referral list, as well as all documentation pertaining to the operation of the Respondent's alleged exclusive referral system.

The complaint further essentially alleges that since April 2008, when Buban asked to be and was placed on the referral list, Local 200 (through Gurich) failed and refused to refer Buban for employment at Bechtel's Elm Road Project because of Buban's having engaged in internal union activities and his having served as secretary-treasurer of Local 200.

Moreover, it is alleged that since March 2008, Gurich failed and refused to refer Buban and other similarly situated employees for employment at Bechtel's Elm Road warehouse facility because of the Respondent's failure to use objective criteria when selecting individual persons for referral for warehouse jobs.

The complaint states that by these acts and conduct the Respondent has restrained and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act and Section 8(b)(2) by causing Bechtel to discriminate against Buban and others similarly situated with respect to employment in Bechtel's warehouse at Elm Road.

However, at the hearing, the General Counsel, by oral motion, proposed the following amendment to paragraph 9 of the complaint denominated 9(c), and incorporated this new allegation in paragraph 10:

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 General Counsel submitted that the proposed amendment was based on new and contradictory evidence adduced through the testimony of Gurich at the hearing. The General Counsel stated (Tr. 213–214):

Your Honor, I move to amend the Complaint to include this allegation based upon the testimony offered yesterday by Mr. Gurich, and which deviated from prior testimony he gave to the Board during the investigation and which is contained in his statement under oath, in which he had previously indicated that there were no written rules, no unwritten rules, and no established practice regarding the making of referrals. He began to deviate in his answers regarding whether or not such unwritten rules or established practices exist.

This was the first that we received notice of that, which is why this is the first time that we've had an opportunity to make an amendment to the complaint to include this alternative allegation; therefore, we do not believe that it's a due process situation. It's the first notice that we have, and we provided the notice, upon receiving the notice, to the Respondent.

The reason for the allegation is although we believe that the evidence will establish that Respondent did not have objective criteria, rules, or practices in making referrals, the fact of the matter is, is that based upon what appears to be a change in testimony from Mr. Gurich, in the event such objective unwritten rules or practice exist, they have not—"they" being Respondent—have not notified any of the individuals seeking employment.

And the Board has held situations in which if the event in a Respondent is found to have objective criteria, it is a separate violation, although potentially encompassed in an overarching allegations, that the failure to inform individuals of the objective criteria, practices, or rules is a violation of 8(b)(1)(A) of the Act.

Based upon those points, we believe that the motion to amend the Complaint to include this alternative allegation be allowed.

The Respondent opposed the proposed amendment at the hearing and on brief (Tr. 215–218 and R. Br., pp. 16–26).

At the hearing, I took the matter under advisement, but indicated that I was disinclined to grant the amendment mainly because of its lateness, a possible denial of due process, and the unnecessary time and expense associated with granting the amendment.

I have considered the motion anew and reviewed carefully the Respondent's points and authorities submitted in its brief. In agreement with the Respondent, I would deny the amendment, but not for all of the points advanced by the Respondent.

The Respondent on brief principally argues that the amendment should be denied because the amendment proposes a new allegation factually unrelated to the allegations in the third amended charge; the issues raised by the new allegation were not fully and fairly litigated; the lack of a factual basis for the amendment and no justifiable excuse for the General Counsel's delayed motion.

In my view, it is the lateness of the motion that is most compelling. Also, the proposed amendment, it seems to me, is or can reasonably be construed to be incorporated in the existing complaint allegations. I note that this case, according to the allegations and the General Counsel's theory of his case, essentially is about the Respondent's unlawful operation of an exclusive referral system, that is, its failure to utilize objective criteria, to include rules and procedures for referrals, not providing requested pertinent documentation by at least one member, Buban for the warehouse job, and discriminating against Buban for purposes of referral because of his protected activities.

The proposed amendment, which actually is based on Gurich's testimony at the hearing, essentially goes to another feature of the alleged unlawful operation and in my mind, if so determined by me, could be remedied through the customary

cease-and-desist mechanism of my recommended Order. In that sense, no formal amendment is necessary.

The Respondent's main defense is that Local 200 did not operate as an exclusive referral system and, if so determined, as the Board case law indicates, the Respondent would not necessarily be obligated to notify individuals requesting referrals of any objective rules, practices, and changes thereto, etc. it used in making referrals. Based on this defense, if successful, the Respondent would escape liability to Buban as well as any putative other employees similarly situated.

So, on balance, in the exercise of my discretion, I would find and conclude that the proposed amendment is broadly encompassed within the existing complaint allegations, and if a violation is found and the evidence supports a finding consistent with the amendment, then I will fashion an appropriate recommended remedy. The motion for the proposed amendment is denied.

B. Basic Issues Presented

Did the Union operate an exclusive hiring hall for the drivers and warehouse employees without utilizing or not consistently utilizing objective criteria in referring applicants for employment at the Elm Road Project, in violation of Section 8(b)(1)(A) of the Act?

Did the Union refuse to refer Buban (and other similarly situated employees) for employment at the Elm Road Project, more particularly the warehouse, for reasons other than his failure to pay applicable dues and fees, and thereby causing Bechtel to discriminate against him in violation of Section 8(b)(2) and 8(a)(3) of the Act?

Did the Union operate a nonexclusive hiring hall and fail and refuse to refer Buban for employment the Elm Road Project because he engaged in protected activities to include engaging in internal union matters, including running for and holding union office?

V. THE LAW AND LEGAL PRINCIPLES APPLICABLE TO THE UNFAIR LABOR PRACTICE ALLEGATION

Section 8(b) of the Act⁹ provides in (pertinent part):

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection a(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender periodic dues and

⁹ 29 U.S.C. §158(b).

the initiation fees uniformly required as a condition of acquiring or retaining membership.

The Supreme Court in *Vaca v. Sipes*,¹⁰ a 1967 case, held that a union has a statutory duty of fair representation to serve the interests of all of its members for whom it acts as their exclusive representative in any given bargaining unit.

Therefore, it is well established that a union that operates an exclusive hiring hall job referral system or arrangement may not discriminate against and among employees in the way it refers employees for employment. *Laborers Local 334 (Kvaerner Songer)*, 335 NLRB 597 (2001).

Under an exclusive hiring hall, basically the employer and the Union will be the sole source of referral of applicants for employment with the employer. The employer thus gives up its right to hire from any other source.¹¹

The Board has long recognized that an exclusive hiring hall can lawfully be based on not only a written agreement between an employer and a labor organization¹² but also through oral understandings or course of conduct or practice between the parties.¹³ In the case of a course of conduct or practice situation, the Board refers to these as a “defacto” exclusive hiring hall.

The party asserting the existence of an exclusive hiring hall arrangement bears the burden of establishing this fact. *Carpenters Local 537 (E. I. DuPont)*, 303 NLRB 419, 429 (1991).

A union that operates a nonexclusive hiring hall is not obliged to follow a nondiscriminatory referral system (*Teamsters Local 460 (Superior Asphalt)*), 300 NLRB 441 (1990), because in such a case, the union lacks the power to put jobs out of reach of the workers. *Carpenters Local 537*, supra, 303 NLRB 419; *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174 (2000).

Generally, defacto exclusive hiring halls may be determined where there is an implicit understanding between the employer and the union that an exclusive referral practice would be continued. *Electrical Workers Local 2115 (National Electrical Contractors Assn.)*, 136 NLRB 1618, 1619 (1962), enf. 322 F.2d 1022 (2d Cir. 1963).

A union operating a hiring hall—irrespective of whether it is exclusive or nonexclusive—owes referral applicants a duty of fair representation and is obligated to operate the hiring hall in a manner free from any arbitrary or invidious considerations. *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898 (1985). A union’s refusal to assist a member in obtaining jobs may violate Section 8(b)(1)(A) when the referral is in retaliation for the member’s having engaged in protected activity. *Plasterers Local 121*, 264 NLRB 192 (1982).

¹⁰ 386 U.S. 171 (1967).

¹¹ *Ironworkers Local 46*, 320 NLRB 982 (1996), enf. denied 149 F.3d 93 (2d Cir. 1998).

¹² *Longshoremen ILWU Local 19 (Albin Stevedore Co.)*, 144 NLRB 1443 (1963).

¹³ *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB 777 (1984), enf. mem. 782 F.2d 1030 (3d Cir. 1986); *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690 (1976); *Teamsters Local 293 (Beverage Distributors)*, 302 NLRB 403 (1991); and *Morrison-Knudsen Co.*, 291 NLRB 250 (1988).

Furthermore, the Board in *Boilermakers Local 374 (Construction Engineering)*, 284 NLRB 1382, 1383 (1987), enf. 852 F.2d 1353 (D.C. Cir. 1988), noted:

This code of acceptable conduct necessary extends to the institution of any referral rules which the union adopts in accord with contractual provisions. In other words, the referral rules themselves, including any referral grievance mechanism, cannot be discriminatory or arbitrary. *Laborers Local 304 (AGC of California)*, 265 NLRB 602 (1982).

A union must make good-faith effort to give notice of rule changes governing operation of an exclusive hiring hall, and in a manner calculated to reach all employees who use the exclusive hiring hall; but standards must be objective to be valid. *Teamsters Local 657 (Texia Productions)*, 342 NLRB 637 (2004).

In *Sheet Metal Workers Local 19*, 321 NLRB 1147 (1996), the Board held that under an exclusive hiring hall system, if there is a change of rules governing the system, the union must make a good-faith effort to give timely notice of the changes in a manner reasonably calculated to reach all those using the hiring hall.¹⁴

A union may violate Section 8(b)(1)(A) when it denies arbitrarily a charging party’s request for job referral information when the request is reasonably directed toward ascertaining whether the member has been fairly treated with respect to being referred to jobs. *Operating Engineers Local 3 (Kiewi Pacific Co.)*, 324 NLRB 14 (1997).

It should be noted that a union’s mistakes or mere negligence in the operation of an exclusive hiring hall may not violate the union’s duty of fair representation. For example, the Board held in *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999), a union’s negligent failure to refer a charging party to a job in proper order from its exclusive hiring hall was not unlawful because the conduct was not arbitrary or discriminatory, or in bad faith.

The Board has held that certain types of information can be disclosed by the exclusive union hall pursuant to the duty of fair representation to verify the accuracy of hall data and ensure that the hall’s hiring operations are not conducted in a discriminatory way basically to ensure that the Union is dealing fairly with the requests of employees. In that regard, the names, addresses, and telephone numbers of list registrants, dispatch records, dates of referral, and out-of-work lists are producible, and a union’s refusal to supply members of this type of information may pose a violation of Section 8(b)(1)(A).¹⁵ *Iron Workers Local 27 (Morrison-Knudsen)*, 313 NLRB 215 (1993). In fact, the Board has further held that it is a per se violation

¹⁴ See, also, *Electrical Workers IBEW Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995), noting that a union may change its rules and procedures, but notice must be made to all hiring hall users and the union is obligated to supply information about hall procedures, and the individual’s particular place in the register if requested.

¹⁵ Social Security numbers of registrants may not be disclosed. *Carpenters Local 102 (Millwright Employees Assn.)*, 317 NLRB 1099 (1995).

for a union not to let members view an out-of-work list. *Laborers Local 423 (G.F.C)*, 313 NLRB 807 (1991).

Notably, a union's duty of fair representation in the operation of a referral system—exclusive—is obligatory and must be free from arbitrary or invidious considerations, but the Board does not necessarily require that the hall rules and procedures be either written or posted. *Longshoremen ILA, Local 20 (Ryan-Walsh Stevedoring Co.)*, 323 NLRB 1115 (1977).

As noted, Section 8(b) states that a labor organization may not lawfully cause or attempt to cause an employer to discriminate against an employee. The Board has held that causing or attempting to cause discrimination need not exclusively take the form of an overt demand by the union or the employer. Rather, the discrimination may be made out (under the circumstances) by the mere failure by the union to refer an employee for work without directing the employer not to hire him.

In fact, in *Electrical Workers Local 675 (S & M Electric Co.)*, 223 NLRB 1499 (1976), enfd. mem. 556 F.2d 574 (4th Cir. 1977), the Board noted:

The Board has consistently found a violation of Section 8(b)(1)(A) and (2) of the Act where a union has discriminatorily refused to refer an employee for employment pursuant to the terms of an exclusive referral system in effect between the union and the employer. Such union conduct, by its very nature indirectly induces the employer to refuse employment to that employee in violation of Section 8(a)(3). [Id. at 1499. (Footnotes omitted).]¹⁶

Where an alleged violation turns on motive, as in the instant case, the Board requires that the charge be analyzed under the framework set out in *Wright Line*, 251 NLRB 1083 (1968), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* analysis is applicable to alleged violations of Section 8(a)(3) and (b)(1)(A).¹⁷

Under *Wright Line*, the General Counsel must establish (1) that the employee/union member engaged in protected concerted activity; (2) the employer/union has knowledge of that activity; and (3) animus or hostility toward this activity was a motivating factor in the employer/union's decision to take the adverse action in question against the employee/union member.

Once the General Counsel establishes initially that the employee/union member's protected activity was a motivating factor in the decision, the burden of persuasion shifts to the employer/union to show that it would have taken the same action even in the absence of the protected activity. *Transportation Management Corp.*, 462 U.S. 393 (1983).

It is also well settled, however, that when an employer/union's stated motives for the actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer/union desires to conceal. The motive may be inferred from the total circumstances provided. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

¹⁶ See, also, *Plumbers Local 420 (Carrier Corp.)*, 347 NLRB 563 (2006).

¹⁷ See *Plasterers Local 21*, 264 NLRB at 192.

Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, as noted, even without direct evidence. Evidence of suspicious timing (*Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993)) and false reasons given in defense (*Electronic Data Systems Corp.*, 305 NLRB 219 (1991)) may support an inference of animus and discriminatory motivation.

The employer/union's burden under *Wright Line* requires it "to establish its *Wright Line* defense only by a preponderance of evidence." The respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

To establish an affirmative defense, "[a]n employer [union] cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996).¹⁸

Notably, the test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). The Board has held that, "[A] finding of pretext necessarily means that the reasons advanced by the employer [union] either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). In short, a finding of pretext defeats any attempt by the [union] to show that it would have not referred the discriminatee absent his protected activities. *Golden State Foods Corp.*, 340 NLRB 382 (2003).

It should be noted that irrespective of the exclusive or non-exclusive nature of the hiring hall, a union may violate Section 8(b)(2) if it causes an employer to discriminate against an employee(s) because they have opposed a union business agent during a (recent) election. *Local 626 (Strawbridge & Clothiers)*, 310 NLRB 500 (1993). In short, a union may not retaliate against employees for engaging in protected activity. *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174 (2000).¹⁹

VI. THE GENERAL COUNSEL'S WITNESS

Timothy Buban

Buban testified that he has been a member of the Union since 1984 and has held a number of official positions with Local 200, including recording secretary (1995–2000); and secretary-treasurer (2004–2006).²⁰ According to Buban, the secretary-treasurer, the top executive within the Local's hierarchy is re-

¹⁸ With some license, I have bracketed the legal rubric here to make it conform to a discriminatory nonreferral case.

¹⁹ See *Newspaper & Mail Deliverers (City & Suburban Delivery)*, 332 NLRB 870 (2000), in context of nonexclusive referral, a member crossed a picket line during an earlier strike/lockout and the union refused to recommend members for certain positions at employer's facilities.

²⁰ There is no dispute as to Buban's good standing as a dues-paying member of Local 200.

sponsible for the hiring of union personnel, administering finances, assigning staff, and generally represents the Local in terms of dealing with the membership and other constituent groups, including various employers.

Buban also testified that since about 1990 or 1991, he has been involved with and actually joined a group of Teamsters dedicated to reform of the Teamster International called Teamsters for a Democratic Union (TDU). Buban volunteered that TDU has had a contentious relationship with the current Teamsters International leadership under James Hoffa and, as such, his group had operated as a political rival to the current leadership.

Buban stated that every 5 years the International puts on a major convention. Buban said that over the years he has served as a Local 200 convention delegate, but specifically in 1999, 2001, 2002,²¹ and in 2006.

According to Buban, at the major convention, the elected delegates participate in discussions for changes in the union constitution, nominate members for election to International offices, devise a slate of nominees, and speak to these issues on the convention floor.

Buban said that in February 2006, Local 200 conducted an election to select delegates for the 2006 convention and he was on a slate of candidates designated the Buban-Connell slate. Buban said that his slate was opposed by a rival group of Local 200 members who called themselves Teamsters 4 Teamsters, headed by Michael Gurich, and generally known as the Gurich slate.²² Buban said that his slate won this delegates' race and he and his group attended the 2006 International convention.

Buban testified further that at the 2006 convention, he stood as a candidate for International vice president while supporting the candidacy of Tom Leedham against Hoffa. Buban related that he was unsuccessful in his own bid for the vice presidency and Hoffa's slate ultimately won.

Buban stated that having served his 3-year term as secretary-treasurer from 2004–2006, he ran for reelection with a slate principally composed of himself, Darryl Connell, and Carol Simon. Buban said he was opposed by a rival group consisting of Tom Millonzi, Tom Bennett, Jeff Flayter, and Tim Pinter, collectively known as the Millonzi-Bennett slate. According to Buban, the campaign was vigorously pursued by all parties and highly contentious and even involved International officials. Buban testified that Michael Gurich was an active campaigner for the Millonzi-Bennett slate and engaged in leafleting for that slate.

Buban said that the Local 200 election took place in October 2006, and the Teamsters 4 Teamsters (Millonzi-Bennett) slate won. Buban said that while his term officially would end at the end of December 2006, he resigned his position in October 2006, and went to work for Bechtel at the Elm Road power plant site that month. Buban said that he resigned because he needed a job and wanted to get on the seniority list before the

²¹ Buban stated that the Teamsters sometimes convene special conventions, and did so in 2002 as he recalled.

²² See GC Exh. 15, a copy of Teamsters 4 Teamsters campaign material listing members of the slate which includes a picture of Gurich and others on his slate.

new Local 200 administration took office.

Buban stated (in effect) that he put himself to work at the Elm Road site on October 7, 2006, driving a bus which shuttled employees about the worksite. Buban also noted that other members of his slate—Frank Ardellini, Jim Lyons, and Carol Simon—also went to work at Elm Road. Buban said that he worked at the Bechtel project for about 11 months but was laid off around September 14, 2007. However, he believed that his layoff was improper, contrary to the existing project labor agreement, and he filed a grievance. Buban volunteered that Gurich, as of January 1, 2007, was employed as Local 200's business agent and was responsible for handling all Elm Road Project grievances, including his.²³

Buban said that over the telephone and in person he frequently spoke with Gurich about this grievance and his desire to return to working at Bechtel, either as a bus driver, a 5-ton truckdriver, or even working in the warehouse, that any of these positions would be suitable. Buban noted that Gurich seemed initially under the impression that he only wanted to return to driving the bus, but he corrected him and advised him that he would gladly work in other jobs.

Buban recalled a conversation with Gurich around January 2008, just prior to a regular general Local 200 membership meeting. According to Buban, Gurich approached him and informed him that later that month there was to be a grievance meeting with Bechtel and that his (Buban's) driver qualifications would probably be challenged. Buban said that he responded, acknowledging that this might be true, but queried Gurich about a warehouse job, and told him that he was willing to work there. According to Buban, Gurich said that he did not think there were openings then available in the warehouse and the conversation basically ended on this note.

Buban said that the grievance meeting did take place about a couple of weeks after this conversation, but he was ultimately not successful—the grievance was dropped. Buban stated that he found out about the International's dropping of his grievance sometime in April 2008.

Buban went on to say that because his grievance was lost, he asked Gurich to put him on Local 200's job referral list, he believed, in April 2008. Buban explained how this happened.

First, Buban noted that while he held office he did not know whether Local 200 maintained a referral list for the Elm Road Project and, in any case, these referrals were not his responsibility as secretary-treasurer. However, around April 2008, he received a call from one of his former slate members, Carol Simon, telling him that Gurich had mentioned to her that he (Buban) evidently was not interested in going back to work at Bechtel because he had not signed up for the out-of-work list. Buban said that this prompted him to call Gurich (the same day) and discuss the matter.

According to Buban, when he reached Gurich, Gurich admitted that he had spoken to Simon and made the comments about his not having signed up on the referral list. Buban stated that to avoid all confusion, he told Gurich to put him on the list for

²³ See GC Exh. 13. Buban identified this document as a copy of the grievance he filed; this document appears to have been received by Local 200 on September 20, 2007.

Bechtel and that he would take any job at the Elm Road site.

Buban was shown a copy of a document purporting to be the Elm Road referral list²⁴ and testified that he had never before seen (or been informed about) any written policies or rules regarding the list or the operation of the referral process. However, Buban noted that he had requested a copy of the referral list as part of a general request for referral information around August 23, 2008, in person at the union hall from another Local 200 business agent, Randy Monroe,²⁵ because Gurich was not there; nor were any of the other officers, namely, Millonzi and Bennett.

Buban said that he asked Monroe for a copy of the referral list, any written rules, any notices posted at the hall, and basically any documentation regarding the referral process. According to Buban, Monroe did not provide any such information but did jot down his requests and agreed to put the note on Tom Benvenuto's desk.²⁶ Buban testified that the conversation with Monroe concluded with this but he never received his requested information, including the referral list and, furthermore, he was never contacted by anyone from the Local regarding his request.²⁷

Buban stated that since his September 2007 layoff from Elm Road, he has never been referred to the Elm Road site for any jobs, either driving or warehouse. Regarding the warehouse position, Buban related that he had worked in warehouse jobs; for instance, at Consolidated Freightways for about 23 years as a loading dock forklift operator, a skill he retains to the present. Buban opined that Gurich knew of his prior warehouse experience because this information was contained in Buban's campaign literature, just as he knew that Gurich's experience lay in driving redi-mix concrete trucks. Buban noted that Gurich at no time suggested to him that he should obtain additional driving experience to overcome any objections to his driver qualifications by any employer, let alone Bechtel.

²⁴ At this point in his examination on direct by the General Counsel, Buban was shown a copy of GC Exh. 9, already in evidence. This exhibit was admitted through Michael Gurich testifying as an adverse witness called by the General Counsel. Gurich testified, as noted, that this was the Elm Road referral list he created in January 2007 upon assuming the business agent position with Local 200.

²⁵ At the hearing, the Respondent's counsel stipulated and agreed that Monroe was then employed as a business agent for Local 200 and was a statutory agent.

²⁶ Benvenuto testified at the hearing and stated that he is a member of Local 200 and since January 2007, he has been employed by Local 200 as a business representative and for about 3 months, one of his assignments was the Bechtel Elm Road Project. Other aspects of his testimony will be discussed later herein.

²⁷ Buban testified that he secretly recorded his conversation with Monroe and produced a copy of the recording disc at the hearing. The disc is contained in GC Exh. 22; Buban also produced a copy of a transcript he prepared (several weeks before the hearing) of the recording. Buban also explained how he and an associate played the tape and sentence by sentence prepared a transcript in longhand (copies of which were discarded) and then typed up the final product. The transcript is contained in GC Exh. 23.

Michael Gurich²⁸

Gurich stated that at the time of the hearing, he had been employed by Local 200 as a business representative or agent for about 2 years and 9 months; he has been a member of Local 200 for about 25 years and worked in the construction industry primarily driving a ready redi-mix concrete truck. Gurich also noted that during his career he has served as a steward for the Local.

Gurich outlined his duties and responsibilities as Local 200's business representative which included handling grievances, negotiating labor agreements, dealing with the members and employer representatives, and handling equal employment and Board charges.

Gurich stated that Local 200's current leadership included Tom Millonzi, secretary-treasurer;²⁹ Tom Bennett, president; Tim Pinter, vice president; and Jeff Flayter, recording secretary. The Local's executive board is composed of these persons and two others, Jim Hilgenberg and Keith Ellenbecher. Gurich noted that this leadership group was part of a slate of candidates elected by the membership in October 2006; this slate, the Millonzi-Bennett slate, defeated a rival slate composed of Buban, Darryl Cornell, and Carol Simon, and some others. Gurich admitted that he campaigned for Millonzi-Bennett, mainly by distributing campaign materials. Gurich noted that he and the other current business representatives were hired by the Millonzi executive board.³⁰

Directing himself to the Elm Road Project, Gurich noted that this was a power plant construction project for which Bechtel served as the general contractor, which commenced in 2005 and was scheduled for completion sometime in 2010.

Gurich testified that he was aware of and familiar with the project labor agreement, the area agreement, and the addendum agreement which governed the referral of Local 200 employees to the Elm Road Project and that upon his assumption of the business representative position in January 2007, he was the union official responsible for making the referrals that came by way of Bechtel's requisition requests.³¹ Gurich explained how he made referrals to the Elm Road Project.

According to Gurich, when he assumed the business representative position in January 2007, he started receiving telephone calls from members asking where they stood on Local 200's referral or out-of-work list. Gurich said that he told them that he did not know of any such list, and that there was none such in the file. Gurich said that he thereupon investigated the matter, contacting former Buban administration officials and Bechtel's project manager, Greg Glynn, all of whom said they

²⁸ Gurich was called by both the General Counsel and the Respondent. As a witness for the General Counsel, Gurich, on motion, was declared "adverse" by me pursuant to Rule 611(c) of the Federal Rules. Gurich is an admitted agent under the Act.

²⁹ Gurich confirmed that secretary-treasurer is the highest executive position in Local 200.

³⁰ Gurich identified the other business representatives currently employed by Local 200, namely, Jeff Bandur, Steve Nelson, Jim Seelow, Darrick Jordan, Randy Monroe, Tom Benvenuto, and Bob Prinz.

³¹ Gurich identified GC Exh. 8(a) through (r), the Bechtel requisition forms for March 21, 2007, through September 12, 2008, and the employee referrals he sent in response.

were unaware of any referral list. Gurich said that he then decided to create a referral list³² and informed Bechtel that he had done so and was ready to send employees to Elm Road upon request. In March 2007, Gurich stated that Bechtel sent the first requisition for employees.

Gurich noted that the referral process did not commence without a hitch. According to Gurich, some of the early Bechtel requisition forms contained the names of persons to be hired at the site, and this prompted him to inquire of a contact Bechtel employee, Sharon Tooze, why this was so. Gurich stated that Tooze told him that she had been given the names as out-of-work members.³³ Gurich said that he informed Tooze that these individuals were not on his list. According to Gurich, Tooze responded and told him to send whomever he wanted. On March 22, 2007, he sent a fax to Bechtel (Glynn) with the names of three drivers (from his referral list) who were to report at the site on March 27, 2007.

Gurich stated that on March 27, he, Tom Benvenuto, a fellow business representative, along with three designated referral list members, Christine Ballewski, Brian Topczewski, and Roland O'Hearn, went to Elm Road to place these employees. However, Bechtel told him that Ballewski and Topczewski were hired, but O'Hearn was not. Gurich said that Bechtel informed him that the three-employee requisition had been filled and instructed him and O'Hearn to leave the site.

Gurich testified that later that day the matter was resolved and, shortly thereafter, members Carol Simon, Gary Karnes, Ballewski, and O'Hearn ultimately went to work at the site.³⁴

Gurich also related another incident of a problematic nature regarding the Bechtel contract that occurred on or about June 26 and 27, 2007. Gurich stated that Local 200 filed grievances 8864 and 8865 regarding referrals to the Elm Road site. However, this, too, was settled by him and Glynn with no involvement of the Teamsters International, basically by their mutual agreement to follow the dictates of the project labor agreement and Glynn's agreement to give the Union up to 48 hours to send employees. Gurich, however, testified that he understood that irrespective of their agreement, Bechtel did not have to accept persons he sent in response to the requisition requests. According to Gurich, from that time (March 27–June 26, 2007) to the present, Bechtel hired Local 200 members under this understanding; that is, Bechtel would send requisitions and Local 200 would fill the requisition requests with members he referred within 48 hours.

Gurich testified that these problems aside, nonetheless, he did not believe that Local 200 operated an exclusive referral system for the Bechtel contract. However, Gurich further testified that as he made the referral decisions, he believed that he

was consistent in the way he put people to work, using what he described as his informal work list; however, Gurich conceded that his referral system was not an "exact science." (Tr. 295.)

Gurich stated that in making referrals, he may have looked at the qualifications (driver or warehouse) of the person he was considering; whether they had worked at the Bechtel project previously; whether the general foreman at the site thought the person had done a good job; whether the person had good attendance at the site; the person's willingness (based on the foreman's opinion) to work overtime; and whether the person had received what he described as a "fair deal" working at Bechtel. Gurich admitted that he has never informed anyone (the membership) of the factors he employed in making referrals to Elm Road.³⁵ On balance, Gurich stated that generally he preferred to send members who had previously worked at Elm Road, but had been laid off, back to the Elm Road site (Tr. 304); Gurich stated, however, he did not do this in all cases. (Tr. 305.)

Gurich stated that for prospective Elm Road employees during 2007–2008, he employed no set rules to put members on the referral list. According to Gurich, members would just come to the hall or knew someone such as a business agent at the hall, or telephoned asking to be placed on the informal out-of-work list. Gurich also admitted that there were no formal instructions for those who wanted to be placed on the list.

At the hearing, Gurich stated that "We simply ask that prospective employees leave their names, telephone numbers and qualifications at the hall." Gurich stated that even this information/instruction since March 2007 was not posted at the hall, and that the Union in fact did nothing to inform the prospective employees about the procedures to get on the list for employment at Elm Road (Tr. 71), such as notifying the members in writing that it maintains a referral list for Elm Road, posting such a notice at the hall (Tr. 73), or periodically informing those on the list when they could be referred out (Tr. 85). Gurich volunteered that the referral list is "public," but the Union has not taken steps to notify people on the list that it was public, which, he explained, meant that anyone who requested to see the list could see it. Gurich further noted that he put no one on the referral list without his asking to be placed on it.

While admitting that Local 200 did not have written rules or policies governing referrals to Elm Road, Gurich, nonetheless, insisted there were the unwritten ones as he had explained, and that basically he viewed his system as an informal referral system that relied in part on his discretion in making referrals.

³² Gurich identified GC Exh. 9 as the referral list he created.

³³ Gurich identified GC Exh. 8(a), which listed Mike Dercola, Gary Karnes, and Carol Simon as the persons submitted by Bechtel on the requisition. As noted, Simon was a member of the Buban administration.

³⁴ Simon, Karnes, and another member, Dercola, were on the original requisition. According to Gurich, Dercola chose not to go to work at Bechtel, basically because he was then engaged in negotiating a contract with another employer and Gurich needed him there. Gurich emphasized that this was his decision and not Bechtel's. (Tr. 249.)

³⁵ It goes without saying that Gurich's factors were never written and published (posted) in any meaningful way during the times material herein and beyond. I note that on direct examination by the Respondent's counsel, Gurich was queried about several referrals he made to Bechtel—I will not go through each in detail—but in discussing them Gurich stated that these aforementioned factors in some respects (and not consistently so) were employed by him in making the referrals. My examination of Gurich's out-of-work list in conjunction with his testimony leads me to conclude that the persons he referred were not selected in the numerical order in which they appear on the list. Also, it seems clear that Gurich utilized his referral criteria rather subjectively. See Gurich's testimony—Tr. 292–303—on cross-examination by the General Counsel.

Gurich also volunteered that as he administered the referral system, there were no requirements for getting on the list. (Tr. 84). He also noted that while the persons on his list were listed in numerical order, he did not always refer them in that order; he mainly looked at their qualifications and layoff status.

Turning to Buban, Gurich acknowledged that he knew him as the former secretary-treasurer of Local 200 and that Buban had lost his reelection bid in 2006. Gurich also acknowledged that he knew that Buban (and some members of his administration) had gone to work for Bechtel after his election loss. Gurich readily admitted that he believed that Buban and his former administration members had manipulated the referral process to get their jobs at Bechtel, basically by putting their names ahead of others awaiting a referral to Bechtel. Gurich believed that this was not right or proper and candidly stated that Buban should not have secured his job at Elm Road that way.

Asked about his views on Buban's administration and the way he ran the Local during his tenure, Gurich stated he was not opposed to Buban on these grounds and actually was not really familiar with his running of the Local; for instance, in terms of how he handled union finances or bargaining or administered the contracts. Gurich denied not liking Buban personally or even politically.

Gurich stated that he was aware that Buban, along with about 10 or more other members, was laid off by Bechtel in the fall of 2007³⁶ and that Buban filed grievances regarding that layoff and Gurich processed them.³⁷

Gurich further recalled that Buban persistently contacted the Local many times regarding his grievance, and he spoke with him many times. Gurich also noted that he wrote to Buban on October 23, 2007, about his grievances and also on November 27, 2007,³⁸ and otherwise monitored the status of his grievances with the Milwaukee Building and Construction Trades Council. Gurich acknowledged that he knew that Buban wanted to return to Bechtel, but Buban only specifically told him of his desire once in April 2008. According to Gurich, a significant barrier to Buban's returning to work at Elm Road was his lack of

qualification as a class A driver and that Buban never informed him that he was willing to work in a nondriver (warehouse) position.

Based on his telephone log, Gurich recalled putting Buban on the referral list around April 15, 2008.³⁹ He stated that at the time, the Union assumed that the Building Trades Council (of the International) would arbitrate Buban's layoff grievance, that he would prevail and then be returned to his former job driving the bus. However, Building Trades did not move Buban's case to arbitration.⁴⁰ According to Gurich, he believed that this was the first time Buban had requested to be put on the out-of-work list since he was laid off in September 2007, and noted that Buban's request came about 4 days before the Building Trades Council denied Buban's request for arbitration which, if he had prevailed, may have returned him to his former position at the site.

Gurich stated that to him it was always Buban's single desire to go back to his bus driving job at Elm Road and prior to requesting to be put on the out-of-work list in April 2008, Buban had never requested to work in the warehouse and that is why his name appears on page 17 of the out-of-work list at number 113.⁴¹

Gurich noted that Buban never filed any grievances over any members' being sent to the warehouse out of order nor did he file any internal charges against the Union. Gurich further noted that Bechtel has not called for any class B drivers (like Buban) since his layoff in September 2007, and that even members with more seniority than Buban have not been returned to work there.

Regarding the tape-recorded conversation between Buban and Monroe, Gurich stated that he was unaware before the hearing that the two had conversed about Buban's obtaining a

³⁶ See GC Exh. 12, a copy of a document entitled "seniority list," which Gurich identified as having been produced by Local 200 pursuant to the Board investigation. The list contains the names of Buban and 10 other employees he said were laid off at the time by Bechtel. According to Gurich, Bechtel ultimately laid off all class B drivers, which was Buban's classification.

³⁷ See GC Exh. 13, copies of two grievances filed by Buban on about September 20, 2007, one for alleging a subcontracting violation of the contract and the other alleging his improper layoff on September 14, 2007.

³⁸ See R. Exh. 5, a copy of Gurich's letter to Buban advising him of the status of his grievances among other matters pertinent thereto, including advancing the matter to step 3 of the grievance process. See also R. Exh. 6, Gurich's November 27, 2007 letter to Buban also referring to Buban's grievances and related matters. Notably, on January 3, 2008, Gurich advised Bechtel by letter of the Union's intention to advance Buban's grievances to step 3. (R. Exh. 7.) It should be noted that these two letters to Buban indicate that Buban's grievances were becoming somewhat controversial and suggestive of the early stages of a less than friendly relationship between the Union (Gurich) and Buban. This will be discussed later herein.

³⁹ According to Gurich's referral list, Buban occupies the numerical slot #113 with a question mark (?) by his name and telephone number; no date is included. Many of the other Local 200 members on the list have designations such as "qualified," warehouse, "ASE certified," "class B only," and "ex power plant." Gurich noted that "qualified" meant that the person was able to drive or operate the types of vehicles being used on the Elm Road Project. According to Gurich, he did not actually know Buban's qualifications for purposes of employment eligibility at Elm Road, except his not having class A driver competency.

⁴⁰ See R. Exh. 12, a letter from Lyle Balistreri of the Milwaukee Building and Trades Council to Gurich dated April 18, 2008, informing him that Buban's grievance would not be taken to arbitration. Also, see R. Exh. 13, a copy of a letter from the Milwaukee Building and Trades Council dated April 18, 2008, in reference to Buban's subcontracting and layoff grievances, informing Greg Glynn, labor relations manager for Bechtel, that the Council had decided not to process further either grievance (that is, proceeding to step 4 arbitration under the contract), with copies sent to Buban and Gurich.

It should be noted that by letter dated January 28, 2008, Gurich wrote to Glynn of Bechtel informing him that the Union was going to move Buban's grievances to arbitration (see R. Exh. 8), but clearly there was a later reversal on the decision, based on the letters referred to above.

⁴¹ It should be noted that Gurich testified that his list began at number 40 in January 2007 when he devised the list because he believed there were about that many Local 200 members then working at Elm Road.

copy of the out-of-work list and other referral documentation. Gurich insisted that he has given copies of the list to anyone who asked, including former members of Buban's administration, namely, Carol Simon and Frank Ardellini, and that he would never have denied Buban a copy if he had asked him.

Gurich conceded that Buban was more senior than some of the persons he referred to Bechtel; for example, Arnold Cheske had been initially hired by Bechtel on April 24, 2007, and laid off with Buban in the fall of 2007. However, Gurich stated that while seniority is a fair way of making referrals, it is only a part of his system. According to Gurich, Cheske was sent back to Bechtel because he (Gurich) did not think Cheske got a "fair shake" when he was initially laid off, so when Bechtel requested four class A drivers on May 16, 2008, he sent Cheske back to the site.⁴²

Gurich testified that Buban has never asked to see the referral list for Elm Road, and he could not recall if Buban ever asked for the rules, policies, and procedures for the Local 200 referrals; and to his knowledge, Buban has never asked anyone in the Union for documentation relating to the referral of workers to Elm Road.⁴³

Gurich stated that Buban dealt with another former business agent of the Union regarding Buban's grievances, and Gurich gave that agent a copy of his referral list. Accordingly, Gurich believed that Buban was given a copy of the referral list by that agent. Gurich insisted that Buban never asked him for the referral list.

John Gomaz

Gomaz testified that he was a Local 200 member and had been so affiliated off and on for about 40 years, but has never held union office. Gomaz stated that he was currently employed at the Elm Road Project as a driver⁴⁴ and has been so employed since about March 2008. Gomaz stated that he

⁴² See GC Exh. 8(b), p. 3, Gurich's response to Bechtel's requisition of April 16, 2007. Notably, Buban's seniority date was October 17, 2006, according to GC Exh. 12. At the time of their respective layoffs in 2007, Buban drove a bus and Cheske a 5-ton truck. However, Gurich testified that at the time of his initial layoff, Cheske was working in the warehouse although he regarded him as a skilled driver who was not given a "fair chance" to drive at Bechtel. When called by the Respondent, Gurich said that Cheske should not have been laid off because Bechtel was then laying off drivers and Cheske was a warehouse worker. Gurich said that he believed Cheske had not filed a complaint (as had Buban), had done a good job while at the warehouse in 2007, and had been requested by the general foreman. So, on May 16, 2008, he sent Cheske back to the warehouse (GC Exh. 8(n)) per Bechtel's request for warehouse workers. I should note that Gurich's handling of Cheske clearly indicates his subjective application of the criteria he employed in making referrals to Elm Road.

⁴³ Gurich testified that he was not aware of Buban's charge that since August 22, 2008, the Union had failed and refused to provide information relating to his question of the referral system; he never received a copy of the charge. However, Gurich admitted that he did receive a copy of the complaint but turned everything over to the Union's attorney. Gurich was clearly not aware of the recorded conversation between Buban and Business Agent Monroe on August 23, 2008. I should note that I did not find Gurich's testimony along these lines to be very convincing and, in fact, was not credible.

⁴⁴ Gomaz was a class A driver who could operate heavy equipment.

started working at the project in February 2006, but not continuously; Gomaz volunteered that he was involved in an on-the-job altercation at the site and was suspended around November 2006 for misconduct and took up working for a local trucking company for the next 6 months.

Gomaz testified that he eventually went back to the project at Elm Road. Gomaz recalled that he received an unsolicited call from Gurich offering him a driver position at Elm Road; 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.

According to Gomaz, Gurich never mentioned to him a referral list or any such rules explaining how Local 200 refers workers to Bechtel.⁴⁵

Gomaz volunteered that he honestly believed that he did not have the option of going back to Bechtel (because of his misconduct) and recalled when out of work, going to the hall to get a withdrawal card (to avoid being assessed dues), but not ever speaking with Gurich about returning to Bechtel during any time prior to calendar 2007.

Gomaz believed he was referred to a local trucking company by someone other than Gurich prior to being sent back to Bechtel; he stated that he did not even know who Gurich was prior to being called by him in July 2007.

James Lyons

Lyons testified that he was a member of Local 200 and has been affiliated with the Union for about 6 years. Lyons stated that he is currently employed at the Elm Road Project and works in one of the two warehouses located at the site; he has worked there for about 3 years.

Lyons described his job as essentially operating the forklifts used to load and unload the trucks; he performs this function 7–8 hours per day and this is a critical skill for a warehouse job at Elm Road.

Lyons testified that he knew several Local 200 members employed at one time or the other in the warehouse at Elm Road. Directing himself to the spring of 2008, he knew that Margo Bonaparte, Matt Anderson, and Scott Olson had not worked for Bechtel at the warehouse in the past; however, Cheske had prior warehouse experience. Lyons recalled that at the time, all were referred to warehouse #2 at some point, with a total of three members working any one time.⁴⁶

Lyons recalled being required to train both Anderson and Bonaparte in the operation of the forklift and familiarize them

⁴⁵ Gomaz believed that any communication with Gurich was by telephone, and he could not recall his calling Gurich about returning to Bechtel. I note that Gomaz had some trouble with dates, but to me he appeared sincere in his attempts to put accurate dates on the matters about which he testified. For instance, he initially testified that he went back to the Elm Road Project in March 2008, then later (Tr. 231) said he returned to Bechtel in July 2007. This corresponds with Gomaz' testimony that he worked for a trucking company for about 6 months after being suspended in November 2006. I note that Gurich, responding to a Bechtel requisition request, referred Gomaz to the site on July 17, 2007, as a driver. (See GC Exh. 8(i)).

⁴⁶ Lyons said that at the time of the hearing there currently were two warehouses in operation at Elm Road, but that at one time there were about five warehouses; four were offsite; one was onsite.

with the warehouse and its operations. He noted that neither Anderson nor Bonaparte, prior to his training them, knew how to operate a forklift and that when they were referred, it was the first time he had been required to train any referrals.⁴⁷ Regarding Cheske, Lyons said that he worked with him in warehouse #2 for several months prior to the spring and summer of 2008, perhaps in 2007; he believed that Cheske was laid off ultimately and currently is not working in warehouse #2.

VII. THE RESPONDENT'S WITNESSES

Tom Benvenuto

Benvenuto testified that he has been employed by Local 200 as a business representative since January 2007;⁴⁸ his duties and responsibilities including administering the Local's contracts with signatory employers, handling grievances, and generally dealing with issues involving the membership. Benvenuto stated that most of the contracts he is responsible for are in the construction industry; the Bechtel agreement was one such, but he was only involved with Bechtel for about 3 months.

Benvenuto testified that when he assumed his duties in early 2007, he was greeted by calls from various Local 200 members asking for their respective places on the out-of-work list for the Elm Road Project, along with even non-Local 200 persons desiring to be put on the list.

Benvenuto stated that he, however, could not find such a list even after an exhaustive search of the Local's files. According to Benvenuto, he queried the former Buban administration business representatives, specifically Frank Ardellini—the last Buban-hired representative he knew to have handled the Bechtel contract—and was told that no referral list existed.⁴⁹ According to Benvenuto, Gurich also undertook a studious search for the out-of-work list, but could not find one.

Benvenuto stated that, nonetheless, when the members started calling in, he recorded their calls on yellow sticky (post-it) notes and placed them on Gurich's desk. Benvenuto noted that for his part at the time, he had a very busy workload and was merely taking the referral calls and passing the information on to Gurich.

Benvenuto stated that in the end, both he and Gurich were never able to find a referral list either at the hall, or at the work-site. Benvenuto said that he undertook no responsibility or part in putting the names on the list, or referring anyone off of it to Elm Road.⁵⁰

⁴⁷ Anderson was referred by Gurich to the Bechtel site on March 7, 2008, for the warehouse (GC Exh. 8(i)); Olson, Bonaparte, and Cheske were referred to the warehouse on May 16, 2008 (GC Exh. 8(n)), by Gurich. The requisitions stipulated that the persons referred needed to be qualified on forklift.

⁴⁸ Benvenuto, an admitted agent of Local 200, was on the Millonzi-Bennett ticket that ousted the Buban administration.

⁴⁹ Benvenuto stated that he also queried Vincent Klingbeil, the general foreman at Bechtel during Buban's last term in office, and Kevin Tatroe, the water truckdriver at Bechtel; both men told him that no such list existed. Ardellini did not testify at the hearing. No other Buban administration officials or agents testified at the hearing.

⁵⁰ Benvenuto noted that he merely gave Gurich the "tags" (the post-it notes) but never saw what he did with them and never saw a physical referral list, but he believed that one was being created (by Gurich) at

Benvenuto, however, recalled that in March 2007, Bechtel sent in two requisition forms; one had no names on it and the other had three names listed.⁵¹ However, according to Benvenuto, this requisition presented an issue of concern to the Local. Benvenuto stated that first, according to the project labor agreement, Local 200 had the right to fill a requisition request within 48 hours of the request. Second, one of the persons on the list, Mike Dercola, a bargaining committee member, was then involved in contract negotiations with another company and was needed there. Benvenuto said that he and Gurich immediately contacted Greg Glynn and Sharon Tooze at Bechtel (and complained) about the matter; in the end, according to Benvenuto, Tooze said that we (Local 200) were to send four people, the ones who are next (on the Local 200 list?). Benvenuto stated that on March 11, 2007, Gurich then referred three persons, Christina Ballewski, Brian Topczewski, and Richard O'Hearn, and forwarded their names to Bechtel.

Benvenuto said that both he and Gurich accompanied the three to the Bechtel site on their scheduled show-up date. However, when the employees arrived at the site orientation/receiving trailer, only Christine Ballewski was accepted; the other two were turned away because the positions had been, according to the Bechtel representatives, already filled.

According to Benvenuto, both he and Gurich immediately went to the trailer to meet with Glynn, the Bechtel labor relations manager, to arrange a meeting about the matter. The meeting took place with Local 200 general foreman, Klingbeil and steward Tatroe also attending, and with Glynn and another Bechtel representative, Larry Brown. Benvenuto stated that Gurich and he had a grievance prepared, basically grieving over "not allowing us to refer people to the project" (Tr. 334) and asked Tatroe to sign it; Tatroe refused to sign it. Benvenuto stated that Gurich and Glynn "had words," and Gurich left the meeting. Benvenuto said that he remained and discussed with Glynn the labor agreement that permitted Local 200 to send referrals within the 48-hour period and the Local's intention to file a grievance over the matter. Benvenuto stated that after this encounter, he had no involvement with any requisitions and referrals to the Elm Road Project.

Turning to Buban, Benvenuto recalled communicating with him both by telephone and in person in his capacity as a local business representative; Benvenuto believed his first contact with him occurred some time in March 2008 when Buban dropped off his grievance at the union hall.⁵² At the time, Benvenuto recalled receiving the grievances and making copies and time-stamping them for Buban, and inquiring of him whether he wanted to speak to Gurich. According to Benvenuto, Buban declined his invitation, and this was the only time he ever spoke with him in person as a union official about Bechtel. However,

the time. (Tr. 339.) I note that GC Exh. 8(b) indicates that Benvenuto referred Terry Floss to Bechtel for a driver's job on July 24, 2008.

⁵¹ Benvenuto identified the Bechtel requisition form dated March 21, 2007 (GC Exh. 8(a)) that listed Mike Dercola, Gary Karnes, and Carol Simon. The requisition stated that two class B drivers and one class A driver were needed by March 27, 2007. Frank Ardellini of the Buban administration is listed as the union contact person on the form.

⁵² Benvenuto identified copies of Buban's grievance contained in GC Exh. 13.

since he answered Gurich's telephone at the hall on occasion, he recalled speaking to Buban off and on but, as he did with all of Gurich's calls, he merely noted the call, the time of the call, and any message included, and included these on a call log.

Benvenuto identified a union call log (GC Exh. 16) and noted an entry dated April 14 ("4-14") in his handwriting reflecting Buban's having called that day. Benvenuto stated that his recollection was that Buban called that day to ask to be put on the Bechtel referral list. According to Benvenuto, this was the first time Buban had so requested, but that Buban had never requested (of him) to see a copy of the referral list for the Bechtel project, and in fact no other members had asked for a copy.

Arnold K. Cheske

Cheske testified that he was not currently employed and not currently affiliated with Local 200,⁵³ but when he was a member, he was referred to the Bechtel project by Gurich who told him about a referral list and asked whether he (Cheske) wanted his name placed on it. Cheske said that he did and was eventually referred to Elm Road.

Cheske recalled asking Gurich if there was any work, and he knew from his experience with other companies that unions maintained a list for out-of-work members; and that the union would place a member's name on the list. According to Cheske, Gurich responded that he was working out some details with Bechtel and when work was available, he (Cheske) would be called. Cheske recalled that Gurich was the only Local 200 representative he ever spoke with about Bechtel and never spoke with anyone from Bechtel regarding a job.

According to Cheske, he found out about the referral list in January 2007 and believed that his first referral as a driver was April 23, 2007; he drove the (shuttle) bus onsite; Cheske said he held this position for about 2-1/2 months. Cheske said that he also worked at the site warehouse; that Vince (Klingbeil), whom he described as the site supervisor, asked him if he would like to work in the Bechtel warehouse. Cheske stated that he worked at the warehouse up to August 3, 2007, when he was laid off.⁵⁴

Cheske stated that after his layoff in August 2007, he called the hall and asked Gurich to be put back on the list for a future opening. Cheske said he was not called back until May 20, 2008, by Gurich.

Cheske recalled that prior to his August 2007 layoff, Jeff (last name unknown), a warehouse supervisor, and Klingbeil told him that he was doing an outstanding job in the warehouse.

Be that as it may, Cheske said that he reported to Bechtel on May 20, 2008, for orientation, and Klingbeil explained to him in his office the requirements of the job and also informed him that he was in a better position in the warehouse, and that Klingbeil was happy to have sent him back. Cheske said that he worked in the warehouse from May 20 through July 25, 2008.

⁵³ Cheske testified that he has never been an officer or steward in the Buban administration; he had no official role in Local 200 during the Buban tenure.

⁵⁴ Cheske recalled that a member named Don worked with him; but he could not remember anyone named Jim Lyons working with him at that time.

Cheske noted that in 2008, he had been laid off from a driver position. Therefore, he believed that he should have been rehired as a class A driver, but was sent to the warehouse, so then he was called back to the warehouse.⁵⁵

Cheske noted that he always let Gurich know when he was out of work and asked to be put back on the referral list for future openings. Cheske stated that it was his understanding that this was a requirement, that if he did not call Local 200, he would not be called back to Bechtel. Cheske said that he understood that not calling the Local would be interpreted to mean he was not interested in getting another job. In fact, according to Cheske, Gurich specifically told him that he had to contact Local 200 to ask to be put back on the referral list in order to be referred out. However, Cheske noted that Gurich did not provide any other rules or procedures he needed to follow regarding referrals to Bechtel.

VIII. THE PARTIES' POSITIONS

The General Counsel contends essentially that Local 200 operated an exclusive job referral service for the Elm Road/Bechtel project; however, it operated this exclusive referral services arbitrarily and made referrals to the project work-site, more particularly the warehouse, without a consistent application of objective criteria, the effect of which was to deny Buban (and other similarly situated employees) a fair opportunity to be employed at the Elm Road Project, and more particularly the warehouse. The General Counsel further contends that Local 200 failed to notify persons seeking referral to Elm Road of any objective rules, practices, or criteria it used in actually making referrals or even the existence of any such objective rules, procedures, practices, or other criteria.

The General Counsel further submits that Local 200 operated an exclusive referral service for the Elm Road Project discriminatorily from April 2008 to the present by denying Buban employment opportunities at the Elm Road warehouse facility because of his having engaged in internal union activities, including serving as secretary-treasurer. Lastly, the General Counsel submits that Local 200 breached its statutory duties by failing to provide Buban within the pertinent information he sought regarding the Local's referral service for the Elm Road Project. The General Counsel asserts that based on the foregoing, Local 200 violated Section 8(b)(1)(A) and (b)(2) of the Act.

The Respondent first asserts that Local 200 utilized an informal referral process that was consistently and orderly applied based on an out-of-work list of prospective employees who were referred, taking into account the next name on the list, the qualification of the person, and his/her seniority and layoff status. The Respondent further maintains that its out-of-work referral system, as governed by the specific contractual language giving rise to referrals to Elm Road, does not establish an exclusive hiring hall. On the strength of these contentions, essentially that there was no exclusive hiring hall arrangement

⁵⁵ Cheske's testimony here is not altogether clear. I interpret him to mean that he had been sent to the warehouse earlier when he should have gone back as a driver. However, having been sent to the warehouse, he was then returned to the warehouse by Gurich when a warehouse spot was available.

in place at Local 200 for purposes of referring individuals to the Elm Road Project, Local 200 did not owe a duty of fair representation to any person related to the list, and no duty to provide information about referrals or the procedures attendant to referrals as well. The Respondent asserts that no unfair arbitrary or discriminatory action was ever taken against or with respect to Buban that was related to the out-of-work list.

The Respondent has also asserted certain defenses both in the several answers to the complaint and on brief.⁵⁶ I will treat only with the affirmative defenses that the Respondent has asserted and maintained in its brief, and will consider the other affirmative defenses to the extent they do not overlap with those asserted in the Respondent's brief as having been abandoned.

The Respondent in part IV of its brief generally asserts that the Board is estopped from finding in favor of Buban by dint of (a) his having waived his right to pursue his claims (against Local 200) because he never filed a grievance over the failure to refer him back to Bechtel, or even expressed his desire to the Local to go back to Bechtel via the referral process; (b) his failure to exhaust and abide by internal union remedies as set out and mandated by the Union's constitution and bylaws and that Buban as a high-level office and long-time member knew of the requirement; and (c) his claims being barred by Section 10(b) (29 U.S.C. §160(b)) of the Act because Buban pursued no internal remedies, and there was no tolling of the limitations period.

The Respondent specifically contends that to a certainty Buban knew that he had not been previously placed on the referral list in April 2008. However, he did not file a charge specific to the failure to put his name on the referral list until December 10, 2008, more than the 6 months permitted under the 6-month limitation of Section 10(b). The Respondent further asserts that any alleged violations cannot be considered continuing in nature because there have been no requisitions from Bechtel for employees to fill jobs for which Buban was qualified since that date.

The General Counsel in response contends that an employee who claims that he is denied employment through his union hiring hall is not required to exhaust internal union rules and procedures, because there is an overriding public interest in allowing the employee unimpeded access to the Board, and that only in the case of plainly internal affairs should that access be denied.

As pointed out by the General Counsel, I note that Gurich could not explain the internal complaint or grievance process that Buban could or should have followed or pursued, and more to the point Buban's complaint about his treatment by Gurich in the referral process would have to go through the very administration with which he was at political odds and whose conduct produced his claim of discrimination and unfair treatment. In my view, this was not a matter clearly or plainly internal.

⁵⁶ In its initial answer, the Respondent asserted in six enumerated paragraphs affirmative defenses. In its amended answer, the Respondent asserted in eight enumerated paragraphs its affirmative defenses. In its second amended answer, the Respondent in 10 enumerated paragraphs asserted its affirmative defenses.

Moreover, in my view, under the circumstances any complaint Buban might have filed against his perceived perpetrator would have been an exercise in futility. Be that as it may, on the authority of *NLRB v. Marine & Shipbuilding Workers (United States Lines Co.)*⁵⁷ Buban was under no obligation to pursue and follow any pertinent internal rules and procedures of Local 200 in order to vindicate his claim that he was denied fair representation in its operation of the referral system associated with the Bechtel contract. I would reject this defense for these reasons.

The General Counsel also contends that Buban's claims are not time barred under the Act. He notes that under Board law the 10(b) period begins to run only after the aggrieved party receives actual or constructive notice of the conduct constituting the alleged unfair labor practice, and in such cases has customarily 6 months to file a charge. However, he correctly notes that the 10(b) period can be tolled if the violations at issue are or can be considered continuing or ongoing in nature.

It is important to note that the gravamen of Buban's claims against Local 200 from his first filing to the last filed lay in his assertion that Local 200 breached its duty of fair representation to him.

Buban filed his first charge on June 13, 2008, and alleged Local's failure to process a grievance relating to his September 2007 layoff. Buban's second charge was filed on September 17, 2008, and renewed his claim regarding the Local's handling of his grievance *and* added a charge of breach of duty by failing to refer him for work at Bechtel. So, accepting as fact that Buban knew or should have known of a possible violation by Local 200 regarding its handling and operation of the referral system with respect to him, by April 14, 2008, it is clear that he timely filed his referral system charges within a 5-month period. Buban, of course, later filed a second amended charge on December 10, 2008, which again included the former arbitration grievance and discriminatory failure to refer him to Bechtel, but also a new charge alleging Local 200's failure to allow him to inspect referral system documents. It should be noted that in the December charges Buban stated that Local 200, from at least beginning March 2008 *and continuing* to date, engaged in discriminatory conduct against him, *inter alia*, by failing to put his name on the referral list, knowing that he wished to return to work at Bechtel. Buban's third amended charge filed on April 29, 2009, essentially incorporated the aforementioned charges, and stated the continuing nature of Local 200's unlawful treatment of him in connection with the operation of the referral system.

Thus, on this record of the pleadings, it can hardly be gainsaid that Buban's charges as contained in the complaint are time barred. Even if, *arguendo*, some of Buban's charges were filed without the 6-month period, in agreement with the General Counsel, I would find and conclude that all are certainly closely related to one and the other in terms of Local 200's alleged unlawful treatment of Buban over a period of time, and in my view are of a continuing and ongoing nature.

I would find and conclude that Buban's charges and the complaint allegations related thereto are not time barred by

⁵⁷ 391 U.S. 418 (1968).

Section 10(b) of the Act.

Discussion and Conclusions

It is not altogether clear on this record exactly how Local 200 operated its referral service before Gurich was hired as the business agent for the Elm Road Project by the Millonzi administration which assumed leadership after the defeat of the Buban administration in the fall of 2006. However, it is undisputed that the labor agreements with Bechtel were in force and effect prior to Gurich and that the Local did have members working at the site prior to January 1, 2007. Commonsense dictates a finding that these employees certainly had to be referred in some fashion.

Gurich credibly testified that at the time he undertook responsibility for the Bechtel contract, he believed that Local 200 had about 40 employees onsite and consequently started his referral list at 41. Then there is Buban who seemingly referred himself to the site in October 2006 when he resigned the secretary-treasurer position and drove a bus from that point until September 2007, when he was laid off.

Also, I note that no requisitions from Bechtel covering the period prior to January 1, 2007, were adduced at the hearing. However, the credited testimony of Bechtel's Glynn indicates that there was a referral system in place with Local 200 from the inception of the Elm Road Project and that the terms of the pertinent labor agreements governed the process.

In any case, Gurich credibly testified that when he assumed responsibility for the Bechtel contract in January 2007, he could find no documentation for a referral list that the inquiring members asked about. Gurich then launched a search of the Local's files and queried former Buban administration officials about the list and finding none, ultimately created his own referral list. Gurich evidently either did not search for any Bechtel requisition forms covering the period before he assumed his responsibilities for the Bechtel contract, or could not find any; none were produced at the hearing.

In March 2007, Gurich received the first of the Bechtel requisition forms for which he was responsible, but the forms already contained the names of persons whom he had not selected and, in the case of one employee, did not even know. As I view the matter, it was at this point in operation of the Local 200 referral system that a change from whatever prior practice had existed took place, that Gurich (and Local 200) established (to his credit) or perhaps reestablished a formal—not informal—referral system for the Bechtel project. It is clear from the testimony of Gurich and Benvenuto that Local 200 believed that Local 200 was solely entitled to make the referrals of Local 200 employees to the Elm Road Project and made an issue of the matter first with Tooze, then at the jobsite when two of his referrals were not hired, and then later filing formal grievances over the matter. In the end, Local 200 and Bechtel agreed that all referrals to Elm Road would be governed by the pertinent provisions of the labor agreement in effect at the time.

It is undisputed that the contract provisions previously set out in this decision govern the matter of employee referrals to Elm Road. In summary, these provisions provide that Local 200 administered and controlled its referrals and only in the event that it did not make a referral within 48 hours after Bech-

tel made a request for employees, Bechtel was free to employ applicants for employment from any source. In my view, the terms of the contracts clearly and reasonably create an exclusive referral system. The only limit to exclusivity was and is the requirement that the right be exercised within 48 hours. The time limitation in my view is in no way in derogation of the exclusive nature of the Local's entitlement to provide employment at Elm Road exclusively; it merely requires the Local to exercise its right within a given time frame so that Bechtel can assure itself that its project will be manned in a timely fashion.

The next question is how did the parties actually conduct themselves in and under the referral system. It is clear that after their agreement, both Gurich and Bechtel (Glynn) operated precisely along the lines and dictates of the labor contracts, that is, Bechtel submitted employee requisition forms; and Gurich submitted names of qualified employees he believed met the qualifications listed on the requisitions; Bechtel in practice, without exception, accepted Gurich's submissions and employed his referrals. Moreover, according to Glynn, Bechtel not only never hired any applicants for Teamster jobs off the street, but additionally directed all such applicants where appropriate to Local 200 to sign up on the out-of-work list. So consistent with the main tangents considered by the Board to determine referral system exclusivity—the contract terms and the conduct of the parties operating within the referral system—Local 200 clearly at least from January 1, 2007, when Gurich took over, to the present operated and continues to operate as an exclusive hiring hall regarding the Elm Road Project.⁵⁸

Accordingly, having determined that from at least January 1, 2007, to the present, Local 200 has operated as an exclusive hiring hall for the Bechtel Elm Road Project, we turn to what was and is required for its lawful operation.

Consistent with the authorities previously cited, Local 200 was and is required to operate its exclusive hiring hall by and through objective rules and procedures, consistently applied to all Elm Road Project applicants because it was the sole source of employment there, at least for a 48-hour period after the submission of an employee requisition by Bechtel.

Based on Gurich's testimony, it seems that he did have and employed arguably objective criteria in making referrals to Bechtel. For instance, Gurich stated that he used seniority, or prior experience at the project; favorable recommendations from the general foreman; good conduct; applicant qualifications (class A or B driving status); and willingness to do overtime as factors governing his referrals. However, it is clear from his testimony that he did not consistently apply these factors (such as with Cheske, and Lyons, or Gomaz) to all applicants on the list. However, the most serious deficiency in Gurich's administration of

⁵⁸ It should be noted that in my view, at the time he was assigned the Elm Road Bechtel contract, Gurich evidently was faced with a somewhat chaotic situation and, to his credit, tried to bring some order and system to the Local's referral process. Based on his testimony at the hearing, however, it seems he was mistaken in his understanding of what constituted an exclusive as opposed to a nonexclusive hiring hall. He admitted on the witness stand that essentially the instant matter (from investigation to trial) provided him with additional education about his statutory duties.

the referral hall was that, as I heard the evidence, no one on or off the referral list that he alone created knew of his referral criteria. So even if one were to view his factors as objective, they were neither known by word of mouth nor published in any fashion so that applicants could determine if they were eligible for employment at Elm Road. It seems that anyone who knew of the list had no way of knowing what to expect from Gurich as to where they stood on the list, and when and upon what terms one could be referred out to Bechtel.

Another deficiency in Gurich's administration of the exclusive hiring hall was his resort to purely subjective criteria to include deciding whether an employee was given a "fair shake" while employed at Bechtel (Cheske) or deserved to be returned to the site irrespective of misconduct at the site (Gomaz). Applicants for employment at Bechtel, especially persons with some "history" like Buban, could not have known of this consideration and therefore could be disadvantaged in the application process. Also, Gurich, for his own reasons, did not consistently, if at all, refer applicants based on their numerical standing on his list. So if an applicant were to request his numerical standing on the list, in point of fact, this did not under Gurich's system mean that he would be next referred out if qualified based on his number. This again inures to the detriment of applicants who normally would believe that they would be referred out to appropriate jobs based on their place on the list, absent other contrary rules and procedures understood and communicated to them by the Local.

So while Gurich may be said to have employed arguably some objective criteria in referring employees to Elm Road, he did not in my view make his criteria known to the applicants in any meaningful way; he applied his criteria inconsistently; and he supplemented these criteria with subjective notions and other considerations he deemed applicable.

Thus, on bottom, I would find and conclude 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 meaningful way of these factors or criteria.

Turning to complaint allegations involving Buban (and other employees similarly situated), the Local is charged first with not honoring his request of August 22–23, 2008, to review the referral list and all other documentation pertaining to the exclusive referral system operated by it. Local 200 is also charged with failing and refusing to refer Buban for employment at the warehouse at Elm Road since April 2008, because he engaged in internal union activities, to include specifically previously holding the office of Local 200 secretary-treasurer.

The Local is further charged with failing and refusing to refer since March 2008, Buban and other employees to the Elm Road Project warehouse without using objective criteria when selecting persons for referral there. The Local's conduct in these particulars as charged constitute violations of Section 8(b)(1)(A), restraint and coercion of the employees' exercise of their Section 7 rights, and Section 8(b)(2), causing Bechtel to discriminate against Buban (and other employees) in violation

of Section 8(a)(3) of the Act.

As to Buban's August 2008 information request, Gurich insisted that Buban did not ask him personally for any referral system documentation, particularly the referral list, and he did not know whether such a request had been made by Buban to another Local agent, and if he had known of Buban's request, he would have complied with it. However, in point of fact, Buban made the referral information request of Monroe and to date that request has not been honored. I find it immaterial that Gurich may not have been directly requested to provide the referral system documentation.

In my view, Gurich, as the union official or employee charged with the operation of an exclusive hiring hall, cannot avoid his statutory duty by hiding behind another agent. Of course, if the Local 200 hiring hall rules and procedures, including the referral list, were generally known or posted and published, then this type of problem would not present itself. That point aside, Gurich evidently elected to keep his Bechtel referral rules, procedures, criteria, and evidently the referral list close to his vest and in that way Buban's request went unanswered.

Accordingly, no one in the Local could honor a simple request by a referral list applicant concerned about not being referred to Bechtel because Gurich did not see it necessary to make the rules and the list available. I note in passing that in all likelihood there was also no documentation other than the referral list that could have been provided to Buban at the time, since Gurich's criteria or referral factors were known solely to him and were never committed to written form. However, I would find and conclude, nonetheless, that Local 200 violated Section 8(b)(1)(A) by not providing to Buban the requested documentation about the employee referral system for the Elm Road Project and that the violation is ongoing and continuing.

Turning to the remaining charges, which are somewhat similar and to an extent overlapping in that Buban essentially was allegedly denied in April 2008 a warehouse referral because of his having engaged in internal union activities and holding union office, and because Gurich did not employ objective criteria or factors in making referrals for employment at Bechtel's warehouse to the detriment of Buban and other employees who were similarly situated to him as early as March 2008. As I read the charges, the gravamen of the Local's unlawful conduct toward Buban reposes in possible retaliation and hostility because he engaged in internal dissident activities and the way he ran the Local while secretary-treasurer, a possible violation of Section 8(b)(2) and (a)(3). The General Counsel's evidence and theory of liability seems to point in that direction. By not employing objective criteria in making referrals to Bechtel for warehouse positions even before Buban requested that his name be placed on the out-of-work list—March 2008—Local 200 allegedly violated Section 8(b)(1)(A) with respect to not only Buban but other employees similarly situated to him.

First, based on the requisition forms, Bechtel requested warehouse workers on the following dates and Gurich responded with the name of a selected employee:

March 11, 2008, one employee

May 12, 2008, three employees⁵⁹
 September 12, 2008, one employee

Therefore, there were warehouse jobs available to Buban after April 14–15, 2008, when he asked to have his name placed on the out-of-work list—as he said, for any job available at Elm Road. Of course, he was not referred then or at any time subsequent. On the issue of whether Gurich made referrals to the Bechtel warehouse facilities using an objective criteria, based on his testimony it seems that he did indeed employ a criteria that arguably could be considered objective at least as to Cheske, a former warehouse employee, but who had less seniority than Buban.

However, as I have previously determined any criteria or factors (objective or subjective) that Gurich may have employed to make referrals to Bechtel for any available jobs were known only to himself; that is, they were never published or posted at the hall or, as far as the record discloses, revealed to any other Local 200 officials. In my view, any criteria objective or otherwise for referral that is basically secret, or at the least not published or otherwise made available to and known by the job-seeking membership, is tantamount to not having one. Among the persons who were sent to the warehouse, both Buban and Cheske had Bechtel Elm Road experience, but Cheske had less seniority than Buban but also had prior warehouse experience, which Buban did not. Neither Buban nor any other members could reasonably know what criteria Gurich would use and did use to refer Cheske out under such circumstances. Margo Bonaparte and Scott Olson were sent out to the warehouse in spite of having no prior warehouse experience—contrary to the requisition's requirements—and according to the credible testimony of Lyons, he had to train a man named Anderson referred in March 2008, as well as Bonaparte in forklift operation. Buban credibly testified that he had ample warehouse type experience, especially operating forklifts, and that Gurich should have known this. But for whatever reason, Gurich sent totally inexperienced workers to the warehouse instead of Buban. I might add that Gurich was not credible to the extent he testified that he did not know Buban's qualifications. Gurich clearly knew Buban's class B driver qualifications, so his placing a question mark on his referral list regarding Buban's qualifications seems disingenuous.

So it seems clear that while Gurich may have employed some arguably objective criteria in making the warehouse referrals, he kept that criteria to himself and applied the criteria secretly and applied it in any way he alone deemed fit. In the context of the operation of an exclusive hiring hall, this approach is not permissible. I would find and conclude that with respect to employee referrals to the Elm Road Project's warehouse facilities in March and April 2008, Gurich operated the Local's exclusive referral system without consistently employing known and published objective criteria in violation of Section 8(b)(1)(A).

Last we turn to the Local's claimed discrimination or the causing thereof against Buban for his internal union activity and holding of union office.

⁵⁹ Gurich sent Scott Olson, Margo Bonaparte, and Arnold Cheske to the warehouse per this requisition.

As previously noted, in determining unlawful discrimination occurring in the context of union referral situations, the *Wright Line* analysis is required.

First, it is to a certainty well established that Buban engaged in internal activities as a member of Local 200, and ultimately rose to the highest office, secretary-treasurer. It is also beyond dispute that Gurich supported the current leadership of Local 200 which defeated Buban's administration in a hotly contentious election held in 2006, embers of which seemingly did not die until sometime in 2007.⁶⁰ Gurich was later hired as business agent by the current leadership and was assigned the Bechtel Elm Road Project contract and charged with handling not only the referral process but also any grievances that may be filed on behalf of the Local.

By his own admission, Gurich harbored some resentment of Buban from the beginning of his tenure, believing as he stated on the record—that Buban wrongly placed himself ahead of other members on the referral list and in that way secured the bus driver job at Bechtel in October 2006. When Buban was laid off in September 2007 by Bechtel, and filed a grievance, Gurich handled that matter. Notably even in this effort, Gurich and Buban seemed to be at odds, given the tenor and tone of Gurich's letters to Buban in October and November 2007.

Notably, Gurich, in his November 27, 2007 letter to Buban, complained about Buban's charge of a conflict of interest on Gurich's part and former secretary-treasurer's having accused Local 200 of wrongdoing; and that Buban was not the ordinary grievant and his grievances were not the ordinary grievances.⁶¹ It is clear to me that Gurich harbored animus against Buban on at least three grounds: Buban's political opposition to the Millonzi-Bennett administration that Gurich supported; Buban's placing himself ahead of other members for a Bechtel job when leaving office; and Buban's charges against Gurich and the Local for alleged conflict of interest and wrongdoing in the context of the Local's handling of Buban's grievances.

As to warehouse positions at Bechtel, Buban stated that he was qualified to perform the available jobs there; that he had substantial experience operating forklifts which, based on the credible evidence, was a critical part of the job and required by Bechtel in the requisitions. Buban's qualifications in this regard in my view are undisputed.⁶² The record reflects that after Buban was placed on the referral list, Gurich referred other Local 200 members on the referral list for warehouse positions

⁶⁰ See GC Exhs. 15–19, and 21. These documents are various campaign materials and newsletters that were circulated and distributed during the Local 200 election campaign and afterwards. Buban (and his administration) figures prominently in these materials and often is the subject of substantial negative criticisms by the Millonzi-Bennett team.

⁶¹ This letter from Gurich was in response to a draft letter Buban delivered to the Local around October 23, 2007, which Gurich said contained somewhat hysterical allegations that Local 200 was in some way responsible for Buban's layoff from the Bechtel project. The November 27 letter is contained in R. Exh. 6; the October 23 letter is contained in R. Exh. 5.

⁶² Buban testified that Gurich knew or should have known of his prior experience in warehouse/loading dock work, both of which require forklift operation. Gurich did not deny this, saying only that Buban's driver's qualifications (for class A) were insufficient.

who were not as qualified as Buban, especially in terms of a forklift operation. Of course, as I have found, Gurich did not consistently apply his proffered criteria for referrals, so this result probably was unavoidable but, nonetheless, was discriminatory in effect, especially to Buban and others like him.

So, on balance, I would find and conclude that the General Counsel fully met his *Wright Line* obligation, prima facie, to show that Buban was unlawfully discriminated against by Gurich (and Local 200) by denying him a referral to the Bechtel warehouse at Elm Road.

As to the Respondent's defense, there seems to be little meaningful proffered, except that Local 200 fairly operated a nonexclusive employee referral system and, accordingly, owed Buban no duty to refer him when he was not on the referral list, and he had expressed no interest in going to the warehouse. Moreover, the Respondent asserts that the persons who were sent to the warehouse after Buban's name was placed on the list were ahead of him and, therefore, were rightfully sent out by Gurich who did not harbor any animus against Buban.

I have set out at length that Local 200, through Gurich, operated an exclusive referral system which by law is required to operate with certain formalities in order to vindicate a union's duty of fair representation to the membership. This was not done in this case and Buban, who clearly was out of favor with Gurich, if not the current Local 200 leadership, was in my mind discriminated against by him especially with respect to referring him to a warehouse opening. Moreover, because Gurich operated the referral system unlawfully, other employees similarly situated to Buban regarding warehouse openings at Bechtel may have also been discriminated against. I will recommend an appropriate remedy to cover such individuals.

Based on the foregoing, I would find and conclude that the Respondent, Local 200, has not met its burden to show that irrespective of Buban's protected activities, it would have taken the action complained of against him, that is, not refer him to a warehouse job after his name was placed on the referral list in April 2008.

CONCLUSIONS OF LAW

1. Bechtel Construction Company is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, Teamsters "General" Local Union No. 200, an affiliate of the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent operated an exclusive hiring hall or referral system in which it referred applicants for employment with Bechtel Construction Company, specifically its Elm Road Power Generating Station Project at Oak Creek, Wisconsin, beginning around January 1, 2007, and continuing to the present.

4. The Respondent operated the exclusive hiring hall without consistently using publicized and known objective criteria or factors in referring applicants for employment in violation of Section 8(b)(1)(A) of the Act.

5. From about April 14–15, 2008, and continuing to the present, the Respondent failed and refused to refer for employment

at the Employer's aforementioned Elm Road Power Generating Station Project, specifically for available jobs at the warehouse facilities, employee and member in good standing, Timothy Buban (and other employees similarly situated), causing Bechtel Construction Company to discriminate against him (and them) in violation of Section 8(a)(3) and (b)(2) of the Act.⁶³

6. From about April 14–15, 2008, until the present, the Respondent failed and refused to refer Buban for employment at the Elm Road Power Generating Station, specifically the warehouse facilities for reasons other than the failure of Buban to tender period dues and initiation fees uniformly required for membership in the Respondent, in violation of Section 8(a)(3) and (b) of the Act.

7. From about April 14–15, 2008, until the present, the Respondent failed and refused to refer for employment an employee and member in good standing with the Respondent, Buban, because he engaged in internal union activities, including serving in the elected office of secretary-treasurer, in violation of Section 8(b)(1)(A) of the Act.

8. From about March 11, 2008, the Respondent operated the exclusive hiring hall without consistently using publicized and known objective criteria or factors in referring applicants for employment to the Elm Road Power Generating Station Project, specifically for available jobs at the warehouse facilities, in violation of Section 8(b)(1)(A).

9. From about August 23, 2008, to the present, the Respondent failed to provide members and applicants for employment pertinent information (including job referral lists, rules, policies, and procedure notices) that would allow them to determine if their Section 7 rights are being protected, followed, and maintained.

10. The unfair labor practices of the Respondent as set out above affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. The Respondent has not violated the Act in any other manner.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily denied Timothy Buban referral for employment, I shall recommend that it be ordered to make him whole for any loss of earnings or benefits he may have suffered from about April 14–15, 2008, through the date of this Order or the termination of the Elm Road Project's hiring activities for Local 200 referrals, which-

⁶³ No other such employees were identified at the hearing. I have included this category of employees on the strength of their inclusion in the complaint and relevant Board authorities, namely *Teamsters Local 328 (Blount Bros.)*, 274 NLRB 1053, 1060 (1985). However, it would be my recommendation that any such persons identified at the compliance stage of the proceedings at the least must have been treated with animus by Local 200 because of some activity connected to their exercise of Sec. 7 rights, as was Buban, to be in a meaningful way similarly situated to him as alleged in the complaint. I leave to the compliance process the determination of such persons, if any.

ever event is later in time,⁶⁴ because of such discrimination, less any net interim earnings, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I further recommend that the Respondent be ordered to notify Buban in writing that use of the Respondent's referral system will be available to him on an equal and nondiscriminatory basis with other employees and applicants, and to so refer him; and to take remedial action in accordance with the standards set forth in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Ferguson Electric Co.*, 335 NLRB 142 (2001). I shall also recommend that the Respondent be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶⁵

ORDER

The Respondent, Teamsters "General" Local Union No. 200, an affiliate of the International Brotherhood of Teamsters, Milwaukee, Wisconsin, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Operating an exclusive hiring hall without consistently utilizing publicized and known objective criteria in referring applicants for employment.

(b) Failing and refusing to provide applicants seeking employment at the Elm Road Project with information such as referral lists, rules, policies, procedures notices, and other documentation that will allow them to determine if their Section 7 rights are being protected, maintained, and followed.

(c) Failing and refusing to refer for employment employees for reasons other than the failure of the employees to tender the periodic dues and the initiation fees uniformly required for membership in the Respondent.

(d) Failing and refusing to refer employees for employment because they engaged in activities and exercised rights guaranteed them in Section 7 of the Act.

(e) Causing and attempting to cause employers to discriminate against its employees.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Timothy Buban (and other employees similarly situated) whole with interest for any loss of pay and benefits he (they) may have suffered as a result of the Respondent's unlawful action as required by *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

(b) Create in writing, notify, and publish or otherwise make

known at the hiring hall objective criteria or factors in making referral decisions, and consistently apply the objective criteria or factors to be used in all referral decisions regarding the Elm Road Project.

(c) Notify all applicants for employment that the established criteria, factors, rules, procedures, and other pertinent information are available to them on request, verbally or in writing, for referrals to the Elm Road Project.

(d) Within 14 days after service by the Region, post at its union office in Milwaukee, Wisconsin, copies of the attached notice marked "Appendix."⁶⁶ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 21, 2010

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT operate an exclusive hiring hall without consistently utilizing known and publicized objective criteria or factors in referring applicants for employment.

WE WILL NOT fail and refuse to refer for employment any employees for reasons other than the failure to tender the periodic dues and the initiation fees uniformly required for membership in Local 200.

WE WILL NOT fail and refuse to refer employees for employment because of their having engaged in protected activities and exercised rights guaranteed them under the Act.

WE WILL NOT cause or attempt to cause employers to discriminate against employees seeking referrals for employment.

WE WILL NOT fail or refuse to provide applicants for employment their requests for all pertinent information, including re-

⁶⁴ I leave to the compliance stage of the proceedings the determination of the period of the discrimination.

⁶⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ferral lists, rules, procedures, factors, or criteria for referral, regarding the operation of our exclusive hiring hall, especially with regard to available positions at the Bechtel Elm Road Project.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Timothy Buban (and other employees similarly situated) whole, with interest, for any loss of pay and benefits suffered by him (them) as a result of our unlawful conduct.

WE WILL create and notify the applicants, and make available on written or verbal requests by applicants all pertinent information, including referral lists, rules, procedures, factors, or criteria for referral, regarding the operation of our exclusive referral system, especially with reference to available warehouse positions at the Bechtel Elm Road Project.

TEAMSTERS "GENERAL" LOCAL UNION No. 200, AN AFFILIATE
OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS
(BECHTEL CONSTRUCTION Co.)