

**Nos. 12-1002 & 12-1103**

---

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**TEAMSTERS LOCAL UNION NO. 509**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**THOMAS TROY COGHILL**

**Intervenor**

---

**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**ROBERT J. ENGLEHART**  
*Supervisory Attorney*

**TYLER JAMES WIESE**  
*Attorney*  
*National Labor Relations Board*  
**1099 14th Street, N.W.**  
**Washington, DC 20570**  
**(202) 273-2978**  
**(202) 273-3847**

**LAFE E. SOLOMON**  
*Acting General Counsel*

**CELESTE J. MATTINA**  
*Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*  
*National Labor Relations Board*

---

**CERTIFICATE AS TO PARTIES,  
RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1) of the rules of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties and Amici**

1. Teamsters Local Union No. 509 was the respondent before the Board and is the Petitioner/Cross-Respondent before the Court.
2. The Board is the Respondent/Cross-Petitioner.
3. Thomas Troy Coghill was the charging party before the Board and is the Intervenor before the Court.
4. The Board’s General Counsel was a party before the Board.
5. There are no amici in the case.

**B. Ruling Under Review:** The ruling under review is a Board Decision and Order issued on December 13, 2011, and reported at 357 NLRB No. 138.

**C. Related Cases:** The Board is not aware of any potentially related cases in this Court or any other court.

Respectfully submitted,

/s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570

Dated at Washington, DC this 11th day of May, 2012

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of jurisdiction .....	1
Statement of the issue presented .....	2
Relevant statutory provisions.....	3
Statement of the case.....	3
Statement of the facts .....	4
The Board’s findings of fact .....	4
A. Local 509’s movie referral service .....	4
B. The Employer uses Local 509’s referral service for its <i>Army Wives</i> production.....	6
C. Coghill’s employment in Local 509’s jurisdiction.....	7
D. Local 509’s response to the Employer’s decision to allow Coghill to continue working on <i>Army Wives</i> Season Two while Local 509 members were out of work.....	8
E. Coghill seeks work on Season Three and is denied.....	10
The Board’s conclusion and order .....	13
Summary of argument.....	14
Standard of review .....	17
Argument.....	18

Substantial evidence supports the Board’s finding that Local 509 violated Section 8(b)(1)(A) and (2) of the Act by favoring Local 509 members in the operation of its exclusive hiring hall, thereby discriminating against Coghill.....	18
A. The distinction between exclusive and non-exclusive hiring halls.....	18
B. General principles governing union conduct in exclusive hiring halls.....	20
C. Local 509 operated a hiring hall that discriminated against applicants on the basis of union status.....	23
D. Local 509’s discriminatory policies unlawfully prevented Coghill’s placement on the referral list and precluded him from receiving employment.....	31
E. Local 509’s defenses are meritless.....	33
1. Local 509’s decision to close the hiring hall does not rebut the presumption of unlawfulness, as the closing would not have affected Coghill had the list been operated lawfully.....	33
2. Local 509’s due process arguments rest on the erroneous assumption that the Board found the decision to close the referral list was unlawful.....	36
3. Section 10(b) does not bar the Board’s finding because the initial unfair labor practice charge was filed within six months of Local 509’s failure to place Coghill on the referral list.....	39
Conclusion.....	42

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>*Boilermakers Local 374 v. NLRB</i> , 852 F.2d 1353 (D.C. Cir. 1988) .....	18,19,20,21,22,32
<i>Breining v. Sheet Metal Workers Int’l Ass’n Local Union No. 6</i> , 493 U.S. 67 (1989) .....	18
<i>Brenner v. United Bhd. of Carpenters, Local 514</i> , 927 F.2d 1283 (3d Cir. 1991) .....	19
<i>Carpenters Local 537 (E.I. DuPont de Nemours &amp; Co.)</i> , 303 NLRB 419 (1991).....	19
<i>Castleman &amp; Bates</i> , 200 NLRB 477 (1972).....	33
<i>Detroit Mailers Union No. 40 (Detroit Newspaper Publishers Ass’n)</i> , 192 NLRB 951 (1971).....	28
<i>Fall River Dyeing &amp; Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987) .....	17
<i>Highway &amp; Local Motor Freight Emps., Local Union No. 667 (Spector Freight)</i> , 248 NLRB 260 (1980).....	28
<i>*IBEW, Local 581</i> , 287 NLRB 940 (1987), <i>enforced mem.</i> , 862 F.2d 309 (3d Cir. 1988).....	35
<i>Int’l Ass’n of Bridge, Structural &amp; Ornamental Iron Workers, Local No. 111 v. NLRB</i> , 792 F.2d 241 (D.C. Cir. 1986) .....	22
<i>*Int’l Union of Elevator Constructors Local Union No. 8 v. NLRB</i> , 665 F.2d 376 (D.C. Cir. 1981) .....	27,29

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Local 367, IBEW,</i> 230 NLRB 86 (1977), <i>enforced mem.</i> , 578 F.2d 1375 (3d Cir. 1978).....	22
<i>Local No. 948, IBEW v. NLRB,</i> 697 F.2d 113 (6th Cir. 1982).....	22
<i>Lummus Co. v. NLRB,</i> 339 F.2d 728 (D.C. Cir. 1964) .....	21
<i>Machinists Lodge 1424 v. NLRB (Bryan Manufacturing),</i> 362 U.S. 411 (1960) .....	40
<i>Monmouth Care Ctr. v. NLRB,</i> 672 F.3d 1085 (D.C. Cir. 2012) .....	20
<i>NLRB v. IBEW Local 322,</i> 597 F.2d 1326 (10th Cir. 1979).....	34,35
<i>NLRB v. Int’l Ass’n of Bridge, Structural &amp; Ornamental Iron Workers,</i> <i>Local 433,</i> 600 F.2d 770 (9th Cir. 1979) .....	22
<i>NLRB v. Local 334, Laborers International Union of N. America,</i> 481 F.3d 875 (6th Cir. 2007).....	18
<i>NLRB v. Local Union 633, Plumbers &amp; Pipefitters,</i> 668 F.2d 921 (6th Cir. 1982).....	22
<i>Permanente Steamship Corp.,</i> 107 NLRB 1111 (1954).....	35
<i>Plumbers Local 198 v. NLRB,</i> 747 F.2d 326 (5th Cir. 1982).....	22

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>*Plumbers &amp; Pipe Fitters Local Union No. 32 v. NLRB</i> , 50 F.3d 29 (D.C. Cir. 1995).....	21,22,33
<i>Radio Officers' Union v. NLRB</i> , 347 U.S. 17 (1954) .....	21
<i>*Road Sprinkler Fitters Local Union No. 669 v. NLRB</i> , 778 F.2d 8 (D.C. Cir. 1985) .....	22,23,32,38
<i>Ross Stores v. NLRB</i> , 235 F.3d 669 (D.C. Cir. 2001) .....	40
<i>Southwire Co. v. NLRB</i> , 820 F.2d 453 (D.C. Cir. 1987) .....	17
<i>Stagehands Referral Service, LLC</i> , 347 NLRB 1167 (2006), <i>enforced</i> , 315 Fed. App'x 318 (2d Cir. 2009).....	23
<i>Teamsters Local 357 v. NLRB</i> , 365 U.S. 667 (1961) .....	21
<i>Tualatin Elec., Inc. v. NLRB</i> , 253 F.3d 714 (D.C. Cir 2001) .....	17
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951) .....	17
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967) .....	21
<i>Woelke &amp; Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982) .....	20

---

\* Authorities upon which we chiefly rely are marked with asterisks

## TABLE OF AUTHORITIES

<b>Statutes</b>	<b>Page(s)</b>
 <b>National Labor Relations Act, as amended</b> <b>(29 U.S.C. § 151 et seq.)</b>	
Section 7 (29 U.S.C. § 157).....	20
Section 8(a)(3) (29 U.S.C. § 158(a)(3)) .....	3,20
Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)).....	2,3,13,18,20,31,32
Section 8(b)(2) (29 U.S.C. § 158(b)(2)).....	2,3,13,18,20,31,32
Section 10(a) (29 U.S.C. § 160(a)).....	2
Section 10(b) (29 U.S.C. § 160(b)).....	16,39,40
Section 10(e) (29 U.S.C. § 160(e)).....	2,17,20
Section 10(f) (29 U.S.C. § 160(f)).....	2,17

## **GLOSSARY**

Act	National Labor Relations Act
Board	National Labor Relations Board
Local 509	Petitioner/Cross-Respondent, Teamsters Local Union No. 509
Employer	Touchstone Television Productions, LLC, d/b/a ABC Studios

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Nos. 12-1002 & 12-1103

---

TEAMSTERS LOCAL UNION NO. 509

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

THOMAS TROY COGHILL

Intervenor

---

ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

---

BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

---

**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Teamsters Local Union No. 509 (“Local 509”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Decision and Order of the

Board that issued on December 13, 2011, and is reported at 357 NLRB No. 138.<sup>1</sup> (A. 821–29.) The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board found that Local 509 violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)). The Board’s Order is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act. Local 509 filed its petition for review on January 3, 2012. (A. 830.) The Board filed its cross-application for enforcement on February 17, 2012. (A. 831.) All filings were timely; the Act imposes no time limit on such filings.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board’s finding that Local 509 violated Section 8(b)(1)(A) and (2) of the Act by refusing to place Thomas Troy Coghill on its movie referral list for discriminatory, arbitrary, and invidious reasons, and thereby preventing Touchstone Television

---

<sup>1</sup> “A.” references are to the two-volume Joint Appendix. Where applicable, references preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Productions, LLC, d/b/a ABC Studios (“the Employer”) from hiring Coghill for Season Three of *Army Wives*.

### **RELEVANT STATUTORY PROVISIONS**

The relevant statutory provisions are contained in the addendum to this brief.

### **STATEMENT OF THE CASE**

Acting on unfair labor practice charges filed by Coghill, the Board’s General Counsel issued a complaint alleging that Local 509 violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by failing to place Coghill on its referral list, and violated Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)) by attempting to cause or causing the Employer to violate Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)). (A. 561–76.) A hearing was held before an administrative law judge, and on March 9, 2011, the judge issued a decision finding that Local 509 violated the Act as alleged. (A. 821–29.) Local 509 filed exceptions, and on December 13, 2011, the Board issued its decision affirming the administrative law judge. (A. 821.)

## STATEMENT OF THE FACTS

### THE BOARD'S FINDINGS OF FACT

#### A. Local 509's Movie Referral Service

Local 509 operates a referral service for individuals seeking employment as drivers in the television and movie industry throughout its jurisdiction in South Carolina. (A. 822; 187–89.) Local 509's referral service compiles a list of individuals seeking employment in the area and provides this list to participating employers who sign collective-bargaining agreements with Local 509. (A. 822; 188, 193, 249.) L.D. Fletcher, Local 509's President and Business Agent, was responsible for operating the movie referral service. (A. 822, 824; 185–87, 201, 203–04, 252–53.)

Although employers retained discretion to select specific employees from the referral list (referred to by the parties as a “producers choice” system), it is undisputed that the referral service operated as an exclusive hiring hall—that is, employers were required to hire off the referral list before looking to outside sources for employees. (A. 821 n.1; 44, 56, 191–92, 196, 204–05, 296, 300, 506, 514, 518, 528.) It is also undisputed that Local 509's exclusive referral list consisted only of Local 509 members until after complaint issued in this case. (A. 821–22; 94, 187, 201, 214, 227, 387.) Although Local 509 intended the movie referral list to operate as the

exclusive source of employees for signatory employers, the list was often exhausted. (A. 822–23; 60–61, 194.) This situation forced employers, like the Employer, to hire from outside the movie referral list. (A. 823; 60–61, 194.)

Local 509, as part of the operation of its hiring hall, sent two forms to the Employer to distribute to drivers when they began working on *Army Wives*, a television production being filmed in Charleston, South Carolina, within Local 509’s jurisdiction. (A. 45–48.) One form, addressed to travelers<sup>2</sup> but apparently distributed to all drivers, established that travelers would receive employment only after the movie referral list was exhausted, pay two percent of their gross wages as a “service fee” to Local 509, and would not transfer to Local 509’s referral list. (A. 823 & n.2; 47–49, 590, Add. 1.)<sup>3</sup> Along with this form, Local 509 also sent membership applications and dues-checkoff forms for the drivers to fill out so that Local 509 dues and service fees could be deducted from the driver’s paychecks. (A. 823; 45–46, 591, Add. 2.)

---

<sup>2</sup> “Travelers” are union members from other locals who work in Local 509’s jurisdiction.

<sup>3</sup> For the Court’s convenience, copies of the Local 509 traveler referral policy and membership application are provided in the attached addendum (Add.) at pages 1–2.

**B. The Employer Uses Local 509's Referral Service for Its *Army Wives* Production**

The Employer utilized Local 509's referral service to obtain drivers for its show *Army Wives*. (A. 822; 39–40, 191.) When filming began for the pilot episode in August, 2006, the Employer's Transportation Coordinator, Lee Siler, contacted Local 509 for a list of qualified drivers. (A. 822; 37–38, 42.) Siler was able to fully staff the pilot episode using Local 509's referral list. (A. 823; 42.) After filming the pilot episode, the Employer and Local 509 reached a collective-bargaining agreement for Season One of the show, which included language requiring the Employer to utilize the referral list going forward. (A. 823; 58, 191–92, 211–12, 514.)

At the onset of production for Season One in January, 2007, Siler attempted to rely on Local 509's referral list to find qualified drivers. (A. 823; 58–59.) Due to the high volume of other productions occurring in the area, the referral list did not contain enough Local 509 drivers to satisfy the show's staffing requirements. (A. 823; 58–61.) Siler subsequently hired drivers from other Teamsters Locals who were not on Local 509's referral list. (A. 823; 60–61.) One of these drivers was Thomas Coghill, a member of Teamsters Local 391 in Willmington, North Carolina, with over 9 years experience as a driver in the movie and television industry. (A. 823; 60–61, 143–45, 149, 613.)

### C. Coghill's Employment in Local 509's Jurisdiction

At the time Coghill began working on *Army Wives* Season One, he was required to sign the traveler's movie referral form and membership application provided by Local 509 and distributed by the Employer, discussed *supra* p. 5.<sup>4</sup> (A. 823 & n.2; 45, 148–49, 590–91, 741, Add. 1–2.) Before beginning employment in Local 509's jurisdiction, and for every show that he worked in the jurisdiction thereafter, Coghill signed both forms. (A. 823; 45–46, 148–49.) Coghill subsequently worked on Season One and Two of *Army Wives* and paid the required two-percent service fee for the "privilege of working within the jurisdiction of [Local 509]." (A. 823; 147–49, 225, 590, Add. 1.)

When production began for Season Two of *Army Wives* in March, 2008,<sup>5</sup> many of the Local 509 drivers on the referral list were again engaged in other productions, including drivers who had worked on Season One of *Army Wives*. (A. 823; 65–66.) Although the Season Two contract, like the

---

<sup>4</sup> At the time Siler sought Coghill to work on *Army Wives*, Coghill was already in South Carolina working on a production called *Nailed* with a different employer, Smiley Face Productions. The drivers for this production were also supplied by Local 509, although Coghill was not on the Local 509's referral list. Prior to working on *Nailed*, Coghill signed the dues authorization form and application for membership; it is unclear whether he also signed the traveler's movie referral policy. (A. 147–49, 741.)

<sup>5</sup> All dates hereinafter are in 2008, unless otherwise noted.

Season One contract, required the Employer to hire exclusively from the movie referral list, the list again had an insufficient number of qualified drivers when production started. (A. 823; 65–66, 506, 514, 518.) Siler was forced to go outside the referral list, and he again hired Coghill. (A. 823; 66–67.) Mid-season, when the other productions concluded, the referral list drivers who worked on those productions but who also had worked on Season One of *Army Wives*—all of whom were members of Local 509—replaced the non-referral list drivers, with the exception of Coghill. (A. 823; 67.) Coghill was the only non-Local 509 driver, other than the transportation captain and two specialty equipment drivers,<sup>6</sup> who worked the entirety of Season Two. (A. 823; 67, 75, 224–25.)

**D. Local 509’s Response to the Employer’s Decision To Allow Coghill To Continue Working on *Army Wives* Season Two While Local 509 Members Were Out of Work**

The Employer’s decision to allow Coghill to continue working on Season Two left two Local 509 drivers from Season One with only part-time, “day player” work. (A. 823; 68–70, 212–13.) This arrangement upset Local 509 President Fletcher, who called Siler to complain that non-Local 509 drivers, like Coghill, were working full-time while his members were

---

<sup>6</sup> Local 509 and the Employer agreed that these positions did not need to be staffed through the exclusive hiring hall, as Local 509 did not have qualified drivers to fill these positions. (A. 823; 50–51.)

only working part-time. (A. 823; 71, 115, 214.) After Siler refused to remove Coghill, Fletcher talked with Laura Legge, the Employer's labor attorney in Los Angeles, and made the same complaint. (A. 823; 214–15.)

These complaints led to an in-person meeting between the parties on May 13 at the Employer's production office. (A. 823; 74–75, 216–17.) The Employer representatives at the meeting were Siler and Barbara D'Alessandro, the Employer's Production Manager; Fletcher and Business Agent James Todd represented Local 509. (A. 823; 74, 216–17, 648.) At this meeting, Fletcher repeatedly demanded that the Employer release any drivers not on the referral list and replace them with Local 509 members. (A. 823; 75, 217, 650–56.) Fletcher backed up these demands by threatening to shut down the entire *Army Wives* production. (A. 823; 229, 303, 652.) Fletcher did not shut down production, however, and Coghill continued to work on *Army Wives* for the remainder of Season Two. (A. 823; 153–54, 224.)

On June 14, Local 509's Executive Board met and discussed the movie referral list. (A. 824; 219, 365–66, 662.) Fletcher, a member of the Executive Board, made a motion at the meeting to close the referral list, in order to preserve work for the people—all of whom were Local 509 members—currently on the list. (A. 821, 824; 219, 227, 365–66, 400–01,

662.) Todd, another trustee, amended the motion to allow individuals who were formerly on this list the option to rejoin the list if they became current in dues and fees. (A. 824; 367, 662.) The Executive Board passed the motion, as amended by Todd. (A. 824; 368, 662.)

**E. Coghill Seeks Work on Season Three and Is Denied**

As Season Two neared completion in September, Siler told Coghill that if he wanted to work on Season Three, he should attempt to transfer his membership to Local 509 because Local 509 was continually pressuring him to hire exclusively from the referral list. (A. 823; 77, 154.) Despite this pressure from Local 509, D’Alessandro and Siler planned to hire Coghill for Season Three because he was a “great, obviously very good employee.” (A. 324, 690.) As late as September 25, Coghill was on the Employer’s planned hiring list for Season Three. (A. 690.) On October 1, however, D’Alessandro wrote an email to her supervisors that Coghill would not be hired for Season Three. (A. 684.) This abrupt change in position, according to D’Alessandro, was due to continuing pressure from Fletcher not to hire Coghill. (A. 322, 341–42.)

Starting in November, Coghill began calling Local 509 to find out what he needed to do to transfer his membership from Local 391 to Local 509, so that he could join the movie referral list and work on the upcoming

season. (A. 823–24; 155–56, 159–60, 254–55, 627–30.) He also sent a letter to both his home Local and Local 509 inquiring how he could transfer his membership. (A. 823–24; 161–62, 614–15.) Despite these letters and phone calls, Coghill was only able to reach a Local 509 officer, namely Fletcher, once. (A. 824; 163–64, 225.) During this conversation, Coghill asked Fletcher about transferring his membership so that he could continue to work for the Employer. (A. 824; 163, 225.) Fletcher replied that the list was closed. (A. 824; 163, 225, 398.) Coghill asked why he could not transfer membership to Local 509, as he was a member in good standing of Local 391 and had paid the requisite service fees to Local 509 while working. (A. 824; 163–64.) Fletcher responded by saying that he would send Coghill an application and place him on the “B” list. (A. 824; 164, 398.) Fletcher also told Coghill that the Teamster’s constitution would not allow him to transfer membership to Local 509 without first having a job in Local 509’s jurisdiction. (A. 824; 360–61, 396–98, 543–44.) In January, 2009, Local 509 sent Coghill an application for membership and a movie referral request form; he filled out both documents and sent them to Local 509, along with the required fees. (A. 824; 166–68, 618–21.)

While Coghill was attempting to join Local 509, the Employer and Local 509 were engaged in negotiations over the Season Three contract. (A.

824–25; 92, 336–37, 432–33, 451, 674–75.) The parties agreed during negotiations in December to continue applying the Season Two contract until a Season Three contract could be reached. (A. 824; 233, 460–61, 674–75.) During a December 2008 meeting, Local 509 specifically informed the Employer that Coghill would not be on the referral list. (A. 824; 682.) On January 21, 2009, the parties engaged in their only face-to-face negotiation meeting for the Season Three contract. (A. 825; 93–94, 451–52, 664–69, 677–81.) At this meeting, Fletcher reiterated to the Employer’s representatives—including Siler—that they could only hire drivers on the referral list. (A. 825; 94, 664.) Several months later, when the parties reached a collective-bargaining agreement for Season Three, the contract required the Employer to hire its movie drivers from the list. (A. 825; 528, 785.) Because Coghill’s name was not placed on the referral list either before or after the parties signed the Season Three contract, Siler did not hire him for Season Three. (A. 824–25; 95, 173, 327, 331, 592, 611–12, 645–47, 671–73.)

After Coghill filed an unfair labor practice charge and after the Board’s Regional Director issued the instant complaint, Local 509 placed Coghill on the referral list. The Employer subsequently hired him to work on *Army Wives* Season Four. (A. 825; 101, 144, 172–73, 224, 346.)

## **THE BOARD'S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Pearce and Members Becker and Hayes) found that Local 509 violated Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) of the Act by refusing to place Coghill on its referral list because he was not a member of Local 509, and violated Section 8(b)(2) (29 U.S.C. § 158(b)(2)) of the Act by preventing the Employer from hiring Coghill for Season Three because he was not on Local 509's referral list. (A. 821.) In making these findings, the Board adopted the administrative law judge's conclusion that Local 509 operated an exclusive hiring hall that excluded applicants, specifically Coghill, on the basis of their non-membership in Local 509. (A. 821.)

The Board considered and rejected Local 509's defense that Coghill was not referred because Local 509 had closed the referral list to new applicants. According to the Board, closing the list "merely perpetuated the unlawful effect of its prior maintenance of a members-only, exclusive hiring hall." (A. 821.) The Board reasoned that "regardless of whether the list was open or closed, [Local 509] would not have placed Coghill, a non-member, on the list or referred him for employment." (A. 821.)

The Board's Order requires Local 509 to cease and desist from "[f]ailing and refusing to place Coghill, or any other individual seeking

employment in the movie industry, on its movie referral list for arbitrary, discriminatory, or invidious reasons”; from “causing or attempting to cause [the Employer], or any other employer signatory to its ‘Movie Agreement,’ to refuse to hire Coghill or any other applicant because they are not a member of [Local 509]”; and “[i]n any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.” Affirmatively, the Board’s Order requires Local 509 to make Coghill whole for any loss of wages and benefits by paying to him \$55,467.62 with interest; to post remedial notices at its office and electronically, if Local 509 customarily communicates with employees and members by such means;<sup>7</sup> and, if the Employer does not object, the Employer’s offices in Charleston, South Carolina. (A. 828–29.)

### **SUMMARY OF ARGUMENT**

Local 509 operated an illegal exclusive hiring hall that discriminated against travelers, like Coghill, on the basis of their not being members of Local 509. Local 509’s written hiring hall policies established that travelers could not be placed on the hiring hall list so long as they retained membership in their home local union. Fletcher, the Local 509 official

---

<sup>7</sup> Member Hayes did not adopt the portion of the Order requiring Local 509 to electronically distribute the remedial notice. (A. 821 n.2.)

responsible for the operation of the hiring hall, consistently told the Employer that it had to hire members of Local 509 before hiring travelers from other unions. And Fletcher's actions were effective, as Siler and Coghill both understood after several years of working in Local 509's jurisdiction that an employee had to be a Local 509 member to get placed on the hiring hall list.

Local 509's actions unlawfully denied Coghill access to the exclusive hiring hall, and prevented his placement on the referral list. Local 509's unlawful refusal to place Coghill on the movie referral list prevented the Employer from hiring Coghill for Season Three of *Army Wives*. This raises a presumption that Local 509 violated the Act, a presumption that Local 509 was unable to rebut in this case.

In attempting to defend its actions, Local 509 relies primarily on its Executive Board's decision to close the hiring hall to new applicants in June 2008. As the Board notes, however, this closing "merely perpetuated" the prior unlawfulness of Local 509's practices. Prior to the closing of the list, Local 509 structured its policies and conduct in an unlawful manner that denied Coghill the opportunity to be placed on the list because he was not a member of Local 509. If these policies were not in existence, then Coghill would have been unaffected by the list closure. He did everything that he

was lawfully required to do to be placed on the referral list, and yet Local 509 unlawfully denied him the opportunity to be placed on the referral list because he was not a member of Local 509. Therefore, the closure of the list does not serve as a defense to Local 509's conduct.

Local 509's procedural defenses also can be dismissed. Contrary to Local 509's argument, the Board's decision does not rest on a finding that the closing of the list itself was unlawful. The Board found that the failure to refer Coghill in November 2008 was unlawful, and that the closing of the referral list did not serve as a defense to this conduct. Nowhere in its decision does the Board conclude that the list closing was unlawful. Local 509's attempt to characterize this case as a denial of "due process," based on its assumption that the Board passed on the lawfulness of the closing, simply has no basis in the Board's decision. The Section 10(b) (29 U.S.C. § 160(b)) defense raised by Local 509 is similarly off the mark. The violation that was found stems from Local 509's failure to place Coghill on the referral list in November, 2008; the charge was filed in February, 2009, well within the six-month limitation period. Therefore, Local 509's procedural arguments have no merit, and the Board's Order should be enforced.

## STANDARD OF REVIEW

The Board's findings of fact are "conclusive" when supported by substantial evidence on the record considered as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488–91 (1951). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Id.* at 488; *see also Southwire Co. v. NLRB*, 820 F.2d 453, 459 (D.C. Cir. 1987). The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them "so long as they are neither arbitrary nor inconsistent with established law." *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts.") (citation omitted).

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT LOCAL 509 VIOLATED SECTION 8(b)(1)(A) AND (2) OF THE ACT BY FAVORING LOCAL 509 MEMBERS IN THE OPERATION OF ITS EXCLUSIVE HIRING HALL, THEREBY DISCRIMINATING AGAINST COGHILL**

#### **A. The Distinction Between Exclusive and Non-Exclusive Hiring Halls**

The extent to which the Act proscribes union conduct with regards to hiring halls turns largely on whether a hiring hall is found to be “exclusive” or “non-exclusive.” An “exclusive” hiring hall is defined as an arrangement between a union and an employer “under which workers can obtain jobs only through union referrals.” *Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988). A “non-exclusive” hiring hall serves as a source of potential employees, but an employer remains free to hire employees from other sources as well. *See Breininger v. Sheet Metal Workers Int’l Ass’n Local Union No. 6*, 493 U.S. 67, 71 (1989); *NLRB v. Local 334, Laborers Int’l Union of N. America*, 481 F.3d 875, 880 (6th Cir. 2007).

Although both arrangements share the name “hiring hall,” the rights and obligations of a union under the two arrangements are almost diametrically opposed. In a “non-exclusive” hiring hall, a union retains the right to condition access to the hall on union membership but does not

possess the power to require an employer to utilize the hall or to terminate those employees who the employer has hired outside the hiring hall. *See Brenner v. United Bhd. of Carpenters, Local 514*, 927 F.2d 1283, 1286 n.2 (3d Cir. 1991) (internal citations omitted); *Carpenters Local 537 (E.I. DuPont de Nemours & Co.)*, 303 NLRB 419, 419–20 (1991) (union that operates nonexclusive hiring hall may legitimately refuse to aid nonmembers). An “exclusive” hiring hall grants the union the power to require the employer to utilize the hiring hall for its employees and to require the employer terminate employees who do not utilize the hiring hall; in return for this power over employment opportunities, the union is obligated to provide equal access to the hiring hall to all qualified applicants, without regard to union membership or other invidious or arbitrary considerations. *See, e.g., Boilermakers Local 374*, 852 F.2d at 1358 (quoting *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985)).

Here, it is undisputed that Local 509’s movie referral list operates as an exclusive hiring hall.<sup>8</sup> (A. 821 n.1; 44, 56, 191–92, 196, 204–05, 296,

---

<sup>8</sup> Under the terms of the collective-bargaining agreements between Local 509 and the Employer, Local 509’s referral service served as the exclusive source of movie drivers for *Army Wives*. (A. 514, 528.) Before the Board, Local 509 did not challenge the administrative law judge’s finding that the referral list operated as an exclusive hiring hall (A. 821 n.1), and thus any

300, 506, 514, 518, 528.) This fact defines Local 509's obligations to Coghill, as discussed below.

**B. General Principles Governing Union Conduct in Exclusive Hiring Halls**

Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) makes it an unfair labor practice to “restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7 of the Act.” Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)) makes it unlawful for a union to “cause or attempt to cause an employer to discriminate against an employee in violation of” Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)).<sup>9</sup> “These general principles apply fully to exclusive hiring hall arrangements, under which workers can obtain jobs only through union referrals.” *Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988).

---

argument to the contrary is precluded by Section 10(e) of the Act. 29 U.S.C. § 160(e); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that court of appeals lacked jurisdiction to consider an issue not raised by either party before the Board); *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1088 (D.C. Cir. 2012).

<sup>9</sup> Section 8(a)(3) provides in relevant part: “It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment to discourage or encourage membership in any labor organization . . . .” Section 7 of the Act (29 U.S.C. § 157) grants employees the right “to form, join, or assist labor organizations, . . . and also . . . to refrain from any or all such activities . . . .”

The fundamental policy driving these statutory provisions is the separation of employees' organizational rights from their employment opportunities. Employees should be "allow[ed] . . . to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954). This Court has characterized the Act as erecting a "wall . . . between organizational rights and job opportunities." *Lummus Co. v. NLRB*, 339 F.2d 728, 734 (D.C. Cir. 1964).

A union that operates an exclusive hiring hall necessarily brushes up against this wall, as it "assume[s] the role of employer, as well as representative." *Plumbers & Pipe Fitters Local Union No. 32 v. NLRB*, 50 F.3d 29, 33 (D.C. Cir. 1995). Although an exclusive hiring hall is not inherently unlawful, the union is held to a "high standard of fair dealing." *Boilermakers Local 374*, 852 F.2d at 1358; see *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 673–74 (1961). "The union's tremendous authority and the works' utter dependence create 'a fiduciary duty on the part of the union not to conduct itself in an arbitrary, invidious, or discriminatory manner when representing those who seek to be referred out for employment . . . ." *Boilermakers Local 374*, 852 F.2d at 1358 (citation omitted); see *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). These fiduciary duties extend "to

all users of the hiring hall, not simply to its members or those that it represents.” *Plumbers & Pipe Fitters Local Union No. 32*, 50 F.3d at 34.

Arbitrary administration of an exclusive hiring hall, even in the absence of specific discriminatory intent, is unlawful because of its tendency to coerce potential workers in the exercise of their Section 7 rights. *See Boilermakers Local 374*, 852 F.2d at 1358 (citations omitted); *NLRB v. Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers, Local 433*, 600 F.2d 770, 777 (9th Cir. 1979). It follows, logically, that conditioning access to the hiring hall on union membership is unlawful, as is requiring nonmembers to complete more onerous steps to obtain referral than union members. *See Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8, 12–13 (D.C. Cir. 1985); *Plumbers Local 198 v. NLRB*, 747 F.2d 326, 330–31 (5th Cir. 1984); *NLRB v. Local Union 633, Plumbers & Pipefitters*, 668 F.2d 921, 922–23 (6th Cir. 1982); *Local 367, IBEW*, 230 NLRB 86, 86 n.1, 93–94 (1977) *enforced mem.*, 578 F.2d 1375 (3d Cir. 1978). These principles are equally applicable to union discrimination against travelers. *See Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers, Local No. 111 v. NLRB*, 792 F.2d 241, 244–45 (D.C. Cir. 1986); *Local No. 948, IBEW v. NLRB*, 697 F.2d 113, 116–19 (6th Cir. 1982).

Union conduct that prevents hiring—such as refusing to refer an applicant for employment—“demonstrates the union’s power so dramatically that its illegality is presumed.” *Road Sprinkler Fitters Local Union No. 669*, 778 F.2d at 11; *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1170–71 (2006), *enforced*, 315 Fed. App’x 318 (2d Cir. 2009). “Merely demonstrating that it would be ‘convenient for the union, in enforcing its own internal rules of conduct, to have available an employment related sanction’ is insufficient” to rebut the presumption of illegality. *Road Sprinkler Fitters Local Union No. 669*, 778 F.2d at 11 (quoting *Operating Engineers, Local 18*, 204 NLRB 681, 681 (1973)). Rather, a union must demonstrate that its efforts to prevent an employee’s hiring are driven by neutral considerations, such that its actions were “necessary to the effective performance of its function of representing its constituency.” *Id.*

**C. Local 509 Operated a Hiring Hall that Discriminated Against Applicants on the Basis of Union Status**

Coghill’s absence on the referral list is a product of the discriminatory practices of Local 509 in operating its movie referral list. Section C of this Brief explains how Local 509 operated the referral list in a manner that discriminated against all travelers, including Coghill. Section D lays out how these discriminatory policies unlawfully denied Coghill placement on

the referral list and prevented his employment on Season Three of *Army Wives*.

Substantial evidence supports the Board's finding that Local 509's movie referral list discriminated against travelers on the basis of their nonmember status. The administrative law judge found that there was "no dispute that, at least when the dispute in this case arose, the referral list maintained by [Local 509] was a members-only list." (A. 822.) The Board agreed, finding that Local 509 "operated an exclusive hiring hall that excluded nonmembers such as Coghill." (A. 821.) As discussed below, these findings are supported by substantial evidence in the record. Indeed, Local 509's policies and conduct create no doubt that travelers were in fact discriminated against when compared to the treatment that Local 509 members received.

Local 509's attempt (Br. 34–35) to characterize the Board's conclusion that Local 509 discriminated against nonmembers in its hiring hall practices as "*post hoc propter hoc*"—*i.e.*, that the Board concluded that the list was a "members-only" list because only Local 509 members were on the list—is unavailing. While it is indisputably true that only Local 509 members were on the referral list prior to complaint issuing in this case (A. 821–22; 94, 187, 201, 214, 227, 387), this is far from the only evidence

supporting the Board's conclusion. As discussed below, Local 509 maintained written policies that treated travelers as second-class workers and then ensured that the Employer would follow these policies by threatening to shut down the *Army Wives* production if preference were not given to Local 509 members over travelers. The composition of the referral list merely drives home the effectiveness of Local 509's discriminatory policies and practices.

Local 509's failure to treat Local 509 members and nonmembers equally is facially apparent from the referral-list form that Local 509 required Coghill and other travelers to sign before working on any new production.<sup>10</sup> (A. 45–48, 149.) The first sentence on the form establishes that Coghill and other travelers would only receive employment “once [the] active movie referral list is depleted.” (A. 590, Add. 1.) This placed

---

<sup>10</sup> Local 509's contention (Br. 5) that some employees “lawfully decline[d] to sign both forms” is unsupported by the record. To attempt to support this contention, Local 509 cites Fletcher's testimony (A. 198); the cited testimony, however, says nothing about employees refusing to sign the forms provided by Local 509. The Board found that the “service fee agreement signed by Coghill . . . is used with all nonmembers working in the movie industry” (A. 823 n.2), and this finding is amply supported by record evidence. (A. 46–48, 148–49, 590–91, 741, Add. 1.) Local 509 also enforced this requirement, as evidenced by Fletcher's complaints to Siler at the opening of their May 13 meeting, where Fletcher complained to Siler, who is also a traveler from a sister local, about not paying his two-percent service fee. (A. 648.)

travelers in an impermissible “second-tier” merely on the basis of their status as nonmembers. The very next sentence on the traveler’s movie referral form crystallizes the status of travelers as second-class employees, as it requires a traveler to “agree that I am by no means transferring to [Local 509’s] referral list.” (A. 590, Add. 1.)

While this alone would create a forceful argument that travelers were not being placed on the movie referral list by virtue of their nonmembership in the local, the policy actually goes a step further and explicitly connects non-placement on the list with the traveler’s membership in another local. The reason that the traveler cannot be placed on the referral list is because the traveler “desire[s] to remain a member of the Local Union that [the traveler] presently work[s] out of.” (A. 590, Add. 1.) The logical reading of this form creates a two-tiered system based entirely on membership in the correct union, one where employees on the referral list—consisting entirely of Local 509 members—must be employed before the less-favored travelers will receive work. And by virtue of their “agreement” to remain members of their home Local, travelers are precluded from placement in the hiring hall. This form, which Local 509 required drivers to sign throughout the *Army*

*Wives* filming, discriminatorily denied Coghill, and other travelers, the opportunity to be placed on the referral list because they were travelers.<sup>11</sup>

Local 509's movie referral policy itself provides additional evidence that Local 509 limited access to the list only to Local 509 members. As Local 509's brief points out (Br. 35), the policy continually equates individuals on the list with "members."<sup>12</sup> (A. 535–36.) Further, at least one of the rules in the policy would be unlawful if applied to nonmembers. Rule six of the policy requires individuals on the referral list to pay two percent of their gross wages to Local 509 whenever they receive employment outside Local 509's jurisdiction. This rule, if applied to nonmembers as a service

---

<sup>11</sup> Local 509 argues (Br. 37) that because it was Siler, and not a Local 509 official, who physically distributed these forms to employees, Local 509 cannot be held liable for their discriminatory effect. Local 509, however, provided these forms to the Employer to be passed out to the employees and expected the Employer to return the forms to Local 509 after employees filled them out. (A. 45–48.) Local 509's action in sending these forms to the Employer, with the expectation that they would be distributed to employees, does not insulate Local 509's conduct. Further, the attenuated argument (Br. 37) that it would be redundant for Local 509 to distribute the membership and dues check-off form (A. 591, Add. 2) to Local 509 members is simply wrong, as each new employer would require the dues check-off form portion in order to institute automatic dues deductions to Local 509. (A. 194.)

<sup>12</sup> Local 509 claims (Br. 35–36) that the lawfulness of the policy is established by its bare claim that "[a]ll referral list [sic] will be made in a nondiscriminatory basis." Such savings clauses, however, will not rescue an otherwise unlawful union policy. *See Int'l Union of Elevator Constructors Local Union No. 8 v. NLRB*, 665 F.2d 376, 380–82 (D.C. Cir. 1981).

fee for the operation of the hiring hall, would be unlawful as Local 509 can only charge nonmembers hiring hall costs when they “gain employment” through the efforts of Local 509. *See, e.g., Highway & Local Motor Freight Emps., Local Union No. 667 (Spector Freight)*, 248 NLRB 260, 261–62 (1980); *Detroit Mailers Union No. 40 (Detroit Newspaper Publishers Ass’n)*, 192 NLRB 951, 951, 962–63 (1971).

Local 509 worked to ensure that the discriminatory preference provided to Local 509 members would be respected by employers. When Fletcher discovered that Coghill was working full-time on *Army Wives* Season Two, while Local 509 members were working only part-time, he immediately called Siler to complain. In making his complaint, he tellingly did not object to the fact that the Employer was not utilizing the exclusive referral system as required by the contract; rather, he complained that Coghill was working while *Local 509 members* were working part-time and demanded that Coghill be released. (A. 823; 71, 115, 214.) When Siler did not comply with his demands, Fletcher repeated the same demand to Laura Legge, the Employer’s labor attorney. (A. 823; 214–15.) After these calls did not result in Coghill’s replacement, Fletcher met with Employer Representatives D’Alessandro and Siler on May 13 to discuss problems regarding the staffing of drivers on *Army Wives* Season Two. (A. 823; 74–

75, 216–17, 302–03.) Local 509’s notes from the meeting reflect that Fletcher said, among other things: “You have [travelers] working while our people [are] not working, that is not going to happen”; “[N]ow you work [travelers]—I got a problem with that”; and “The [p]roblem is that you need to use [Local 509] people, not necessarily [these two members], before using people out of jurisdiction.” (A. 650, 651, 654).<sup>13</sup> Fletcher backed up these statements by threatening to shut down production on *Army Wives* if Siler did not start complying with his demands to employ Local 509 members over travelers. (A. 823; 412, 652.)

The subjective understandings of the Employer and Coghill also support the Board’s finding that the referral list was discriminatorily administered. *See Int’l Union of Elevator Constructors Local Union No. 8 v. NLRB*, 665 F.2d 376, 381–82 (D.C. Cir. 1981) (citing *Red Star Express Lines v. NLRB*, 196 F.2d 78 (2d Cir. 1952)). Siler, the Employer representative who most regularly dealt with Fletcher and the referral list,

---

<sup>13</sup> The notes from the meeting also record the following statements by Fletcher: “Unwritten rule—you can’t work people out of another jurisdiction until you work our people”; “I don’t want you to work out of [other locals] [unreadable] when our people are not working”; “Why didn’t you let [travelers] work and go home and let our people work. But you did the opposite”; “You know that you can’t work people from other jurisdiction[s w]hen our people are not [w]orking”; and “I think I can make this go away, if you get [unreadable] of other people and work [Local 509] people.” (A. 650, 652, 653, 655).

told Coghill that if he wanted to work on Season Three, he should transfer his membership in order to get on Local 509's movie referral list. (A. 823; 77, 90, 154.) Transferring membership from one Local to another is no small task. Indeed, under the Teamsters Constitution, Coghill was prohibited from transferring membership without maintaining employment in Local 509's jurisdiction.<sup>14</sup> (A. 543.) And the difficult task of transferring membership would be completely unnecessary if the list operated in a lawful, neutral manner that did not equate placement on the list with Local 509 membership. Yet Siler, after his conversations with Fletcher and experiences running the movie referral list for 2 years, clearly thought it was necessary for Coghill to transfer his union membership in order to get on Local 509's referral list and he so advised Coghill. Coghill shared this subjective understanding. In his conversation with Fletcher, he also equated placement on Local 509's referral list with membership in Local 509. (A. 824; 163–64, 225.)

---

<sup>14</sup> Local 509 attempts to argue (Br. 36) that this "job first, membership second" rule somehow precludes the existence of a referral list conditioned on Local 509 membership. Local 509, however, clearly did not rely on this rule at the time, as the record shows that its leadership did not even know about the rule until Fletcher consulted with Local 509's attorney in November, an event which occurred after the list had closed and which was prompted by Coghill's attempts to transfer his membership. (A. 823–24; 364–65, 395–98, 440.)

**D. Local 509's Discriminatory Policies Unlawfully Prevented Coghill's Placement on the Referral List and Precluded Him from Receiving Employment**

Substantial evidence supports the Board's findings that Local 509 unlawfully discriminated against Coghill under Section 8(b)(1)(A) of the Act by failing to place Coghill on its referral list for arbitrary, discriminatory, and invidious reasons, and that this discrimination caused the Employer not to hire Coghill for Season Three of *Army Wives* in violation of Section 8(b)(2) of the Act.

As demonstrated above, Local 509's referral system discriminated against travelers by denying them the opportunity to apply and gain access to Local 509's exclusive referral list. As a traveler, Coghill was denied access to Local 509's list on the basis of these unlawful discriminatory policies. Such conduct violates Section 8(b)(1)(A) of the Act. *See* cases cited *supra* p. 22.

Coghill did not receive employment on *Army Wives* Season Three because he was not on Local 509's movie referral list. Both Siler and D'Alessandro credibly testified that if Coghill had been on the referral list, they would have hired him for Season Three. (A. 824–25; 95, 173, 327, 331.) Local 509, by not placing Coghill on the referral list, thereby caused the Employer not to employ Coghill for Season Three. This conduct raises a

presumption under the Act that Local 509 has acted unlawfully. *See Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8, 11 (D.C. Cir. 1985); *see also Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988) (“[A] union may not cause an employer to discriminate against employees whose union membership has been denied or terminated . . .”).

A union can, of course, rebut this presumption by pointing to the application of neutral rules as the basis for the decision not to refer the employee and thereby rebut the presumption of unlawfulness. *Road Sprinkler Fitters Local Union No. 669*, 778 F.2d at 11. Local 509 (Br. 39) attempts to use its June 2008 decision to close the hiring hall to new applicants as a “neutral” rule that rebuts this presumption, and subsequently privileges its conduct towards Coghill.<sup>15</sup> This argument, discussed below, fails. Therefore, Local 509’s failure to place Coghill on the referral list violated Section 8(b)(1)(A), and this failure prevented Coghill from being hired for Season Three in violation of Section 8(b)(2) of the Act.

---

<sup>15</sup> Local 509 also points out (Br. 8 n.3) that the Employer was facing pressure from South Carolina, which was providing tax incentives to the Employer, to increase the number of in-state hires. (A. 825; 321.) Coghill, as an out-of-state “distant hire,” potentially fell within the class of employees who would not be rehired for Season Three on this basis. (A. 825; 690.) The Employer, however, planned to re-hire Coghill for Season Three despite the pressure from the state and would have done so had his name been on the referral list. (A. 825–26; 117–19, 299–301, 331.)

**E. Local 509's Defenses Are Meritless**

**1. Local 509's decision to close the hiring hall does not rebut the presumption of unlawfulness, as the closing would not have affected Coghill had the list been operated lawfully**

If Local 509's referral list had been administered lawfully, Coghill should have been given the opportunity to be placed on the list *prior* to the June 2008 closing of the list. *See Plumbers & Pipe Fitters Local Union No. 32 v. NLRB*, 50 F.3d 29, 34 (D.C. Cir. 1995) (union has a "fiduciary duty to treat applicants 'even-handedly,' to inform all potential applicants of relevant hiring hall rules, and to allow qualified individuals to register for work."); *see also Castleman & Bates*, 200 NLRB 477, 477, 479, 483 (1972). And if Coghill had been given that opportunity, his conduct amply demonstrates that he would have availed himself of it and placed his name on the referral list, as he regularly paid two percent of his gross wages as a service fee even though he was being denied access to the list. (A. 590, 658, Add. 1-2.) Had his name been on the list, there is no dispute that Local 509's act of closing the list would have had no adverse affect on Coghill. He would have been able to work on *Army Wives* Season Three.

Thus, although the Board did not pass on whether Local 509's closing of the list was lawful or not, it nevertheless was able to conclude (A. 821) that even a lawful closing of the list would not be permitted to "perpetuate[]

the unlawful effect of the [Local 509's] prior maintenance of a members-only, exclusive hiring hall.” Accordingly, the Board rejected Local 509’s argument that somehow the June 2008 closing of the list could serve as a defense to why Coghill should not have been allowed to be on the list in November 2008. This finding is supported by substantial evidence and falls within well-established precedent.

Local 509’s related claim (Br. 39), that its discriminatory treatment towards Coghill is somehow privileged by the fact that Coghill did not technically apply for admittance to the hiring hall until after the referral list was closed, is unavailing. Although unlawfully excluded from the list during Seasons One and Two, Coghill was not affected by the exclusion because in those years the list was insufficient to fulfill the demand for drivers at *Army Wives*. Thus, Coghill had no reason to insist on inclusion on the list because he was able to get a job those years without being on the list.

In any event, where, as here, a union makes it clear through its conduct and policies that only those who are “approved” as union members will receive access to preferential placement in a hiring hall, the Board has held, with court approval, that a discriminatee is not required to “test” those policies by going through the futile step of applying for placement on the list. *See NLRB v. IBEW Local 322*, 597 F.2d 1326, 1330–31 (10th Cir.

1979); *IBEW, Local 581*, 287 NLRB 940, 940, 946–47 (1987), *enforced mem.* 862 F.2d 309 (3d Cir. 1988);<sup>16</sup> *Permanente Steamship Corp.*, 107 NLRB 1111, 1113–14 (1954) (“In view of the existence of these discriminatory conditions of employment, . . . the complainants were not required to seek referral from Local 509 in order to hold it responsible for the normal consequences of its acts.”). Coghill’s failure to undertake the unnecessary and futile effort of asking, as a nonmember, to be placed on a referral list—that only accepted Local 509 members before it was closed—is irrelevant to finding a violation of the Act.

Local 509 also argues (Br. 38–39) that Coghill’s failure to pay the \$15 monthly administrative fee was a conscious decision by Coghill not to seek

---

<sup>16</sup> *IBEW, Local 581* provides a particularly apt comparison to the present case. In *IBEW, Local 581*, the union’s referral list contained the facially-lawful requirement that applicants in the top referral group take a union-administered examination; the union’s widely-known practice, however, was to administer the test only to union members. 287 NLRB at 941–42. The discriminatee in that case applied for membership in the union, was denied, and then failed to make a separate request to take the required examination. *Id.* at 943–44. The union argued that the discriminatee’s failure to separately request the examination, apart from applying for union membership, privileged the union’s failure to administer the examination to him. *Id.* at 946. The Board found this argument “unpersuasive,” as the record established that only union members could take the examination and there was no evidence presented that nonmembers were ever allowed to take the exam. *Id.* at 940, 946–47. Similarly, in the present case, there is no evidence that nonmembers were allowed to join the hiring hall list, so it is of no moment that Coghill failed to formally request placement on the list.

placement on the referral list for financial reasons. This argument is misguided, both as a matter of law and logic. First, as a matter of law, Coghill was not required to request to do something that Local 509's policies clearly prevented him from doing—i.e. futilely request to pay the administrative fee to join a list that Local 509's policies clearly prevented him from joining. *See* cases cited *supra* pp. 34–35. Second, as a matter of logic, it makes no sense that Coghill would willingly choose to forgo paying this relatively small fee at the cost of endangering his future employment. The fee to remain on the referral list was a mere \$15 per month, which paled in comparison to the amount of money that Coghill paid Local 509 every month that he worked on *Army Wives* as part of the “service fee” agreement. (A. 658.) It is simply illogical to suggest that, if given the opportunity to join the referral list, he would have failed to do so in order to avoid paying a \$15 monthly administrative fee.

**2. Local 509's due process arguments rest on the erroneous assumption that the Board found the decision to close the referral list was unlawful**

Local 509's due process and notice arguments (Br. 22–25, 31–33) rely on the proposition that the Board found that the closing of the referral list violated the Act. The Board did not make this finding. (A. 821.) Rather, the Board found that Local 509 unlawfully refused to place Coghill on its

referral list, and in so finding, the Board correctly rejected Local 509's argument that the closing of the list served as a valid *defense* to this conduct.

(A. 821.) The Board plainly could, and did, find that the failure to place Coghill on the referral list violated the Act without making a finding on the lawfulness of the list closure.

Local 509 repeatedly cites (Br. 12, 18, 21) to a stray statement in the fact section of the administrative law judge's decision that Local 509's failure to place Coghill on the referral list was "based on" Local 509's decision to close the referral list. (A. 824.) Local 509 then attempts to extrapolate this statement into an argument that the Board necessarily ruled on the lawfulness of the list closure in making its ultimate finding that Coghill was unlawfully denied access to the referral list. This argument, however, is unavailing. The closure of the list does not form the basis of either the administrative law judge's or the Board's finding. Although the administrative law judge did make the above-referenced statement when reciting the facts of the case, in his analysis he found that Local 509 violated the Act by failing to put Coghill on the referral list. (A. 826–27.) This demonstrates that even the administrative law judge who made the stray statement did not find it necessary to rule on the closure of the list in finding Local 509's actions to be unlawful. Moreover, the Board's decision

specifically addressed the closure of the list in its proper scope, as a potential defense to Local 509's failure to place Coghill on the list. And, as discussed above, this closure did not affect the underlying violation of failing to place Coghill on the list.

Local 509 also argues (Br. 31–33) that the General Counsel's complaint failed to put it on notice that the operation of its hiring hall was being challenged before July 9, 2008. This argument is similarly without merit, and this Court's decision in *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8 (D.C. Cir. 1985), illustrates why. In the underlying decision in *Road Sprinkler Fitters*, the Board found that the union violated the Act by requesting that the employer fire a non-union employee. *Id.* at 12–13. To support its finding, the Board cited to evidence that the union told the employee that he would not be allowed to join the union until all union members had received work; it did not, however, find that the failure to allow the employee to join the union violated the Act. *Id.* at 13. The union argued on appeal that the Board should be precluded from using this failure to allow the employee to join the union as evidence of unlawful discrimination. *Id.* at 13 n.2. The Court rejected this argument, stating “[i]t is true, as Local 669 points out, that no charge of unlawful refusal to permit

Woodruff to join the union was filed. But that does not render the evidence inadmissible for its probative value with regard to the charged offense.” *Id.*

Similarly, in the instant case, evidence of how Local 509 ran its referral list, though not alleged as violative of the Act in the complaint, is used to illuminate the event that was alleged as a violation without running afoul of the Act or fundamental principles of notice and due process. It bears repeating: the Board’s decision in this case found that the failure to place Coghill on the list was unlawful and did not pass on the lawfulness of the decision to close the list. To put it plainly, Local 509 relies on its misapprehension of the Board’s decision to fabricate due process issues where none exist.

**3. Section 10(b) does not bar the Board’s finding because the initial unfair labor practice charge was filed within six months of Local 509’s failure to place Coghill on the referral list**

Local 509’s argument (Br. 27–29) that the violation is barred by Section 10(b) of the Act (29 U.S.C. § 160(b)) in this case should also be found wanting. Section 10(b) of the Act provides “[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” 29 U.S.C. § 160(b). The violation is based on events that occurred in November 2008 through January 2009. (A. 823.) The charge was filed on February 9, 2009, well

within the six-month statutory limitation period. 29 U.S.C. § 160(b). Thus, a Section 10(b) defense is inapplicable.

The cases that Local 509 cites in support of its Section 10(b) theory are easily distinguishable. *Ross Stores v. NLRB*, 235 F.3d 669 (D.C. Cir. 2001), involved the question of whether alleged violations, that were first raised in an amended charge and occurred outside the Section 10(b) period, “related back” to the alleged violations that occurred within the Section 10(b) period in the original charge. 235 F.3d at 674–75; *see* 235 F.3d at 678–70 (Randolph, J., concurring). There is no relation-back issue in the present case, and thus the case is not relevant to a charge that alleges violations that occurred *within* the 10(b) period.

Local 509’s reliance on *Machinists Lodge 1424 v. NLRB (Bryan Manufacturing)*, 362 U.S. 411 (1960), is similarly unavailing. In *Bryan Manufacturing*, the Supreme Court found that Section 10(b) barred a charge alleging that a union and an employer had violated the Act by entering into a collective-bargaining agreement at a time when the union did not represent a majority of employees. The Court reasoned that the collective-bargaining agreement could only be found to be unlawful by looking back to the union’s minority status at the time the agreement was signed, an event that occurred outside the six-month limitation period. *Id.* at 417. In the instant

case, although events outside the six-month period “illuminate” Local 509’s failure to place Coghill on the referral list, the violation itself occurred in November and thus the Court’s admonition in *Bryan Manufacturing* does not bar the Board’s finding in this case.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny Local 509's petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing in full the Board's Order in this matter.

s/ Robert J. Englehart  
ROBERT J. ENGLEHART  
*Supervisory Attorney*

s/ Tyler James Wiese  
TYLER JAMES WIESE  
*Attorney*

National Labor Relations Board  
1099 14th St., NW  
Washington, D.C. 20570  
(202) 273-2978  
(202) 273-3847

LAFE E. SOLOMON  
*Acting General Counsel*  
CELESTE J. MATTINA  
*Deputy General Counsel*  
JOHN H. FERGUSON  
*Associate General Counsel*  
LINDA DREEBEN  
*Deputy Associate General Counsel*  
National Labor Relations Board

May 2012

## **ADDENDUM**





# APPLICATION AND NOTICE For Membership in Local Union No. \_\_\_\_\_

Affiliated with the International Brotherhood of Teamsters  
UNION DUES AND/OR SERVICE FEE

2% OF GROSS WAGES

I voluntarily submit this Application for Membership in Local Union \_\_\_\_\_, affiliated with the International Brotherhood of Teamsters, so that I may fully participate in the activities of the Union. I understand that by becoming and remaining a member of the Union, I will be entitled to attend membership meetings, participate in the development of contract proposals for collective bargaining, vote to ratify or reject collective bargaining agreements, run for Union office or support candidates of my choice, receive Union publications and take advantage of programs available only to Union members. I understand that only as a member of the Union will I be able to determine the course the Union takes to represent me in negotiations to improve my wages, fringe benefits and working conditions. And, I understand that the Union's strength and ability to represent my interests depends upon my exercising my right, as guaranteed by federal law, to join the Union and engage in collective activities with my fellow workers.

I understand that under the current law, I may elect "nonmember" status, and can satisfy any contractual obligation necessary to retain my employment by paying an amount equal to the uniform dues and initiation fee required of members of the Union. I also understand that if I elect not to become a member or remain a member, I may object to paying the pro-rata portion of regular Union dues or fees that are not germane to collective bargaining, contract administration and grievance adjustment, and I can request the Local Union to provide me with information concerning its most recent allocation of expenditures devoted to activities that are both germane and non-germane to its performance as the collective bargaining representative sufficient to enable me to decide whether or not to become an objector. I understand that nonmembers who choose to object to paying the pro-rata portion of regular Union dues or fees that are not germane to collective bargaining will be entitled to a reduction in fees based on the aforementioned allocation of expenditures, and will have the right to challenge the correctness of the allocation. The procedures for filing such challenges will be provided by my Local Union, upon request.

I have read and understand the options available to me and submit this application to be admitted as a member of the Local Union.

PRINT \_\_\_\_\_ Occupation \_\_\_\_\_  
(LAST NAME) (FIRST NAME) (MIDDLE INITIAL)  
 Street \_\_\_\_\_ Phone \_\_\_\_\_  
 City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_  
 Employer \_\_\_\_\_ Employment Date \_\_\_\_\_  
 Street \_\_\_\_\_ Phone \_\_\_\_\_  
 City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_  
 Initiation Fee \$ \_\_\_\_\_ Paid to \_\_\_\_\_  
 Date of Birth \_\_\_\_\_ Social Security No. \_\_\_\_\_  
 Have you ever been a member of a Teamster Local Union? \_\_\_\_\_  
 If yes, what Local Union No. \_\_\_\_\_

DATE OF APPLICATION \_\_\_\_\_

SIGNATURE OF APPLICANT \_\_\_\_\_

White Copy to Local Union

Yellow Copy to Local Union

Pink Copy to Applicant



## CHECKOFF AUTHORIZATION AND ASSIGNMENT

I, \_\_\_\_\_ (Print Name) hereby authorize my employer to deduct from my wages each and every month an amount equal to the monthly dues, initiation fees and uniform assessments of Local Union \_\_\_\_\_ and direct such amounts so deducted to be turned over each month to the Secretary-Treasurer of such Local Union for and on my behalf.

This authorization is voluntary and is not conditioned on my present or future membership in the Union. This authorization and assignment shall be irrevocable for the term of the applicable contract between the union and the employer or for one year, whichever is the lesser, and shall automatically renew itself for successive yearly or applicable contract periods thereafter, whichever is lesser, unless I give written notice to the company and the union at least sixty (60) days, but not more than seventy-five (75) days before any periodic renewal date of this authorization and assignment of my desire to revoke same.

Signature \_\_\_\_\_  
 Social Security Number \_\_\_\_\_ Date \_\_\_\_\_  
 Address \_\_\_\_\_  
 City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

643

## STATUTES

### **Sec. 7 of the Act (29 U.S.C. § 157) provides:**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

### **Sec. 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:**

It shall be an unfair labor practice for an employer -

\*\*\*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

### **Sec. 8(b) of the Act (29 U.S.C. § 158(b)) provides in relevant 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 the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

**Sec. 10 of the Act (29 U.S.C. § 160) provides in relevant part:**

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

\*\*\*

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if

supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

TEAMSTERS LOCAL UNION NO. 509	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 12-1002 & 12-1103
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	11-CB-4020
	)	
and	)	
	)	
THOMAS TROY COGHILL	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,619 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 11th day of May, 2012

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

TEAMSTERS LOCAL UNION NO. 509	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 12-1002 & 12-1103
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	11-CB-4020
	)	
and	)	
	)	
THOMAS TROY COGHILL	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Jonathon G. Axelrod  
Beins, Axelrod, P.C.  
1625 Massachusetts Ave., N.W. Suite 500  
Washington, D.C. 20036

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

/s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 11th day of May, 2012