UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

TEAMSTERS LOCAL UNION NO. 727,

Respondent

and **Case: 13-CB-60708**

RONALD MAXWELL, an individual

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

Respectfully submitted:

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Now comes Kevin McCormick, Counsel for General Counsel, who, pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, files this Answering Brief in response to Respondent's Exceptions to the Decision of Administrative Law Judge Jeffrey D. Wedekind, dated November 29, 2011.[1]

I. INTRODUCTION

The ALJ found, based on overwhelming evidence, that both the Respondent's trade show and movie and television referral systems are exclusive hiring halls under the Act. His decision was logical, took all relevant facts into account and applied correct Board law. Since approximately 2009, Respondent has operated a trade show and a movie and television referral system for its members. This referral system is operated out of McCormick Place in Chicago. The facts are undisputed that Respondent has maintained collective-bargaining agreements with trade show companies such as Global Experience Specialists (GES) and Freeman. The plain language of the agreements with Respondent and Board precedent prove the referral system is exclusive.

The ALJ's decision also clearly demonstrates that the Respondent failed to adequately and timely notify the members on its trade show referral list that it's "will call" rule allows members to be on that status for no more than 12 months. Thus, suspending Charging Party Ron Maxwell pursuant to Respondent's interpretation of the "will call" rule violated the Act. Furthermore, believing that Charging Party Ron Maxwell was an owner of CCS, a company

[1] Hereinafter the Administrative Law Judge will be referred to as the "Judge" or "ALJ"; the National Labor Relations Board hereinafter is the "Board"; the National Labor Relations Act hereinafter is the "Act"; Teamsters Local Union No. 727, hereinafter is "Respondent"; Ron Maxwell hereinafter is "Maxwell"; citations to the Judge's decision will be referred to as "ALJD__"; citations to the transcript are designated as "Tr. __"the General Counsel's Exhibits are hereinafter referred to as "GC__"; Respondent's Exhibits are hereinafter referred to as "R__". Joint Exhibits are hereinafter referred to as "JT __."

Respondent was organizing, Respondent suspended Maxwell and refused to refer him for work using this ambiguous rule in a discriminatorily fashion thereby violating Section 8(b)(1)(A) and (2) of the Act.

II. GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S FACTUAL ASSERTIONS

Respondent excepts to the some factual findings of the ALJ, and has filed a lengthy brief in support of those exceptions. Respondent's exceptions do not present any new arguments or facts that were not previously considered by the ALJ. The ALJ's decision explains in exacting detail the facts and reasoning supporting his decision that the Respondent violated the Act. Nothing contained within the Respondent's exceptions or brief in support thereof detracts from his factual findings, conclusions or legal analysis. As shown below, the ALJ's findings of fact, credibility resolutions and conclusions of law rely upon the evidence contained in the record and are amply supported by legal precedent.

At the outset, the General Counsel notes that Respondent filed fifteen (15) exceptions to the Administrative Law Judge's decision. Because of the nature and the sheer volume of exceptions some of which contain overlapping arguments, the General Counsel will address the exceptions in thematic groupings.

A. The Trade Show and Movie Referral Systems are Exclusive Hiring Halls.

Most of Respondent's Exception 1 makes the claim that if an exclusive hiring hall allows for some exceptions, then it must be a non-exclusive hiring hall. Since the GES and Freeman collective-bargaining agreements allow for some limited exceptions when the employers can hire outside of the hiring hall, Respondent insists the ALJ should have found the trade show hiring hall to be non-exclusive. This assertion is contrary to Board law.

As the ALJ correctly pointed out in his decision, the Respondent failed to address any of the precedent regarding hiring halls. ALJD 3. A hiring hall or referral system is utilized by employees, unions and employers to coordinate their working requirements. Hiring halls come in two varieties: non-exclusive and exclusive. A non-exclusive hall allows employees to go outside of the referral system and directly apply for employment with employers. 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 370 (Eastern Contractors Assn.*), 332 NLRB 174, 174 (2000).

Under an exclusive hiring hall, the union in most cases will be the sole source of referral for applicants for employment with the employer that the union has a collective bargaining relationship. The employer thus gives up its right to hire from any other source. *Teamsters "General" Local Union No. 200, supra.* 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 organization but also through oral understandings or course of conduct or practice between the parties. *Id.* 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. *Teamsters "General" Local Union No. 200*, 357 NLRB No. 192 (2011)(citing *Laborers Local 334 (Kvaerner Songer)*, 335 NLRB 597, 599 (2001).

A union operating an exclusive hiring hall 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, 907 (1985). It is just as well established that the hiring hall rules themselves must be reasonable and

nondiscriminatory, and the union must apply them fairly and in good faith. *Teamsters Local 631 (Vosberg Equipment, Inc. and Bechtel Nevada, Inc.)* 340 NLRB 881, 883 (2003) Furthermore, the Board in *Boilermakers Local 374 (Construction Engineering)*, 284 NLRB 1382, 1383 (1987), enfd. 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." *Construction & General Laborers Local 304 (AGC of California)*, 265 NLRB 602, 602 (1982).

Respondent first relies on *Laborers Local 190 (VP Builders,Inc.)*, 355 NLRB No. 90 (2010). However, its characterization of *Local 190* is misleading. Although it is true a union may lawfully insist on an employee's discharge if he or she was hired without a referral from the union, this is only true with an exclusive hiring hall. More importantly, an exclusive hiring hall can have limitations or exceptions that do not defeat its exclusive nature. See *Morrison-Knudson Co.*, 291 NLRB (1988).

Most of Respondent's Exception 1 relies on *NLRB v. Laborers Local 334*, 481 F.3d 875 (6th Cir. 2007).[2] This is not a new argument by the Respondent. Respondent presented the same argument in its post-trial brief. The ALJ addressed *Local 334* specifically in his decision. ALJD 3-4. The ALJ explained that although the Board found a non-exclusive hiring hall, the Board did not base its finding on the fact that the agreement allowed employers to make direct hires if the union did not fill a call within 48 hours. ALJD 3-4. Instead, the Board based its finding of non-exclusivity because the agreement required hiring "in accordance with the hiring procedure existing in the territory" where the work is performed. ALJD 4 (citing *Kvaener Songer, Inc.*, 343

[2] Respondent simply ignores the fact that the circumstances of the immediate case occurred in the 7Th Circuit.

NLRB 1343 (2004) at 1345; and 481 F.3d at 881). The evidence established local area employees regularly sought and secured employment without going through the union. ALJD 4. In the immediate case, the agreements with GES and Freeman contain no such "territory" clauses, and no evidence was presented of employees being hired outside of the union's procedures. Instead the evidence showed the opposite.

Respondent claims that the ALJ misinterpreted the holding of *Local 334* but offers no cases in support of its position whatsoever. Respondent argues that consideration of the language regarding, "hiring procedures existing in the territory," was triggered only after the union in *Local 334* failed to timely comply with a labor call, the trade show agreement in that case effectively had a two step process.

Respondent's interpretation of *Local 334* twists both the plain language of the case and Board law. The Board, in its analysis, did not go through the two step process in the way and order the Respondent urges. As the Board stated, "[t]hus the relevant inquiry is whether the local hiring *procedure* for the territory involved herein was exclusive or nonexclusive." Id. at 1345. The Board explained this does not end the inquiry. "A second clause of this NMA provision states: '[H]owever, in the event the Local Union is unable to fill the request of the Employer for employees within a forty-eight (48) hour period after such request for employees ... the Employer may employ workmen from any source.' This second clause also does not create an exclusive arrangement. It means only that *even if* a particular local hiring procedure is exclusive, the Employer may nevertheless hire from any source if, after 48 hours, the Union is unable to fill a request." Id. at 1345. Thus, Respondent's incredulous argument regarding the *Local 334* case should be rejected.

Respondent's Exception 2 strangely claims that the ALJ erred in finding that the Movie Book was an exclusive hiring hall. Respondent characterizes the Movie Book as a non-exclusive alphabetized collection of applications for the Producer's perusal. The ALJ in his decision never found that the Movie Book itself was an exclusive hiring hall. He found that the Movie Book was evidence of an exclusive hiring hall. As stated in his decision, "[i]t is likewise undisputed that, consistent with the rules, the Union has maintained a 'Movie Book' of alphabetized 'Application[s] for Referral-Movie,' which is provided to the transportation coordinator for hiring." ALJD 4.

Respondent erroneously claims that once the Movie Book is given to the transportation coordinator, at all times he retains the right to hire from that book or outside the book. Respondent relies heavily on the testimony of William Hogan III for this claim. However, although Hogan testified that he does not use the Movie Book often when serving as transportation coordinator and that he could hire guys "off the street", he admitted that he mostly uses the same workers over and over on productions and they must be associated with the Respondent. Tr. 254. Additionally, Hogan stated that all the people he hires "off the street" are sent down to the Respondent to fill out an application. Tr. 254-255. Respondent points to "off the street" examples Mike McCarthy, John Gazinsky and Rick Shelley in claiming that Hogan could hire anyone he wanted to. However, as the ALJ recognized and as Mr. Hogan admitted to on redirect examination, McCarthy, Gazinsky and Shelley had all been through the process of filling out applications at Respondent's hall and it was only after that he hired them. ALJD 5; Tr. 270. In addition to the Hogan testimony, the ALJ correctly relied on the fact that the parties stipulated that there was no advertising for Chicago drivers, and no drivers were hired "off the street' or outside the union list, for the "Autumn Frost" production or for any other production by

a Warner Bros.-affiliated company in the Chicago metropolitan area. ALJD 4-5. If someone who is not on the list was interested in working as a driver, they were referred to the Respondent to put their name on the list. (GC 8)

Respondent compares its movie and television production hiring hall to that in *Big Moose, LLC*, 2012 WL 344901. Respondent argues that the ALJ erred in not considering the so-called similarity in facts. The facts of that case are clearly distinguishable in that the parties stipulated that the hiring hall was not exclusive. *Id.* at 2. Also, Respondent conveniently neglects to mention that *Big Moose, LLC*, has not been reviewed by the Board, and thus, of no precedential value. The ALJ had no responsibility to consider the case in his decision. Respondent, points to the language in the "Autumn Frost" agreement that the producer of the film retains the right to reject employees. (GC 2) This language, according to Respondent, defeats any finding of exclusivity. However, as the ALJ explained in his decision, a finding of exclusivity under Board precedent is not defeated when an employer retains the right to reject an employee or "producer's choice." *International Brotherhood of Teamsters Local 509, (Touchstone Television Productions, LLC d/b/a ABC Studios)*, 357 NLRB No. 138 (2011). See also *Morrison-Knudson Co.*, 291 NLRB 258 (1988). ([A]n employer's retention of the right to reject applicants referred by the [u]nion does not disprove the existence of an exclusive hiring hall arrangement.) Accordingly, Respondent's reliance on this language is not dispositive.

B. The ALJ Properly Found that the Respondent Failed to Adequately Notify Members that Violations of the Trade Show Referral Rules Could Result in Suspension.

Respondent's Exceptions 3 through 6 all basically revolve around the same argument: that the ALJ erred in his decision regarding the Trade Show Referral Rules, "12 month" and the "will call" rule. The ALJ's findings regarding the Respondent's rule are well supported by the

evidence and Board law. As the ALJ pointed out in his decision, the "will call" rule has been around the hiring hall for at least 30 years, well before the Respondent took over the hall from its predecessor union. ALJD 6. Although it is unwritten, the record indicates that most employees are familiar with it to the extent that it allows individuals to inform the hiring hall that they are unavailable for work and will inform the hall when they become available.

Similar to the "will call" rule, the 12-month rule is unwritten; however, it is of more recent vintage, more vague, and relatively unknown to individuals using the hiring hall. Neither the "will call" rule nor the 12-month rule is written anywhere including in the Trade Show Referral Rules, and the record shows no one using the hiring hall was made aware that the 12-month rule was a limitation applied to being on "will call". Notwithstanding this lack of actual notice to hiring hall users, the Respondent points to a more general rule as providing notice and justification for suspending Ron Maxwell. That rule narrowly states, "[b]y agreeing to take a call, those referred must...[n]ot refuse the type of work to which you have registered to perform." R 1, p. 2, par. (c). Respondent states in its Exceptions that the "will call" rule is one way referrals may violate Referral Rule of Conduct par. (c) in the Trade Show Referral Rules. The Respondent claims that the "12 month" rule is derived from the same Trade Show Referral Rule. ALJD 6; Tr. 13. Respondent's arguments in its brief in support of exceptions fails to overcome the common sense reading that Referral Rule of Conduct par. (c) and does not give hiring hall users notice that they can not be on "will call" for longer than 12 months.

The ALJ pointed out evidence in the record showing that Respondent failed to take reasonable steps to notify members of any connection between the rules. ALJD 7. The Trade Show Referral Rules say nothing about the "will call" and "12 month" rules. R 1. p. 2, par. (c). The plain language of the Trade Show Referral Rule appears to be directed to referred employees

who have indicated that they are available to take a call and have been referred to a job, not individuals like Maxwell who indicated he was unavailable. R. 1, p. 2, par. (c). Also, no evidence was presented that the Respondent directly told any referral employees that the relevant Trade Show Referral Rule meant that they cannot be on "will call" for more than one year. Out of Maxwell and the five member witnesses called by Respondent, only two witnesses testified that they had even heard generally of a 12 month rule and this was by "word of mouth." Tr. 56, 81.

Board law thoroughly supports the ALJ's decision. See *Operating Engineers Local* 406, 262 NLRB 50 (1982)(Failure to give timely notice of a significant change in referral procedures is arbitrary and a breach of a union's duty to represent job applicants fairly by keeping them informed about matters critical to their employment status.) *Local Union No. 38, United Ass'n of Journeymen qnd Apprentices of* ..., 306 NLRB 511 (1992)(Respondent violated Section 8(b)(1)(A) of the Act by failing to notify job applicants adequately prior to implementing certain modifications of its contractually established hiring hall rules.) Accordingly, Respondent's arguments regarding the rules should be rejected.

C. The ALJ's Conclusions Regarding Ron Maxwell's Suspension are Supported by the Record and Board Law.

Respondent argues in its Exceptions 7 through 15 that the ALJ erred in finding: 1) the Respondent's Executive Board did not take action against Maxwell at its May 31, 2011, meeting; 2) William Hogan was treated differently than Maxwell; 3) Respondent's suspension of Maxwell was related to Convention Cartage Systems; and 4) the ALJ ordered an inappropriate remedy. All of the ALJ's reasoning regarding these issues is sound and supported by Board precedent.

Respondent's first two arguments are completely without merit and easily disposed of. First, the ALJ stated in footnote 11, cited by Respondent, that the "minutes do not indicate that the executive board 'adopted' the previous, April 28 phone poll or took any additional action at the May 31 meeting regarding Maxwell's suspension." ALJD 14, fn. 11. Additionally, Respondent's records confirm that Maxwell was suspended prior to either the executive board's reported April 28 phone poll or his 12-month "will call" anniversary in May. ALJD 9; GC 14, #271.

Similarly, the record proves William Hogan was treated differently than Maxwell. Hogan stated during the trial that he had worked on movie productions back-to-back from the spring of 2010 until November or December of 2011, over a year, and he was never suspended. Tr. 267-268; GC 13-22 (which list him as either on a movie, "N/A" or "will call" during that period.)

Exceptions 11 through 13 present Respondent's argument that the ALJD erred in determining that Maxwell's suspension was related to his involvement with CCS.[3] Respondent claims that the General Counsel's entire discrimination case relied upon Maxwell's speculation and uncorroborated hearsay statements by John Coli Sr. Respondent's argument is a fallacious oversimplification of the evidence. The ALJ relied on credited testimony and clearly rejected offers of proof for hearsay statements presented by the General Counsel at trial.

It is undisputed that the Respondent was organizing the company CCS. Maxwell began at CCS in 1994 and was an original owner and president. Tr. 140. Because of financial

[3] Before address Exceptions 11 through 13, Respondent spends some time continuing to justify its rules. Respondent ignores that the ALJ did not find its rules illegal. He found that the Respondent failed to give adequate notice of the "will call" and "12 month" rule and how they related to the Trade Show Referral Rules relying instead on word of mouth. Respondent also argues that the ALJ should not have relied on Respondent's records as dispositive proof of when Maxwell was suspended. It's clear from reading the ALJD that this was not the only evidence he relied on as the ALJ cited to testimony from both the General Counsel and the Respondent's witnesses.

difficulties, Maxwell sold the company around 2000 to his brother-in-law. He did continue to work as a freight manager off and on up to the date of the relevant events herein. Tr. 140-143, 152. Maxwell first heard a rumor that he was suspended in March, 2011, obviously before the executive board's phone poll vote or his actual 12-month "will call" anniversary date in May.[4] Tr. 152-155. Thus, Maxwell called the Respondent's office and eventually spoke to Michael Jain, a union business agent. Jain told Maxwell that he was off the list, "because we believe you have ownership in CCS." Tr. 159-160. Maxwell denied having any ownership in CCS. Jain replied that the Respondent had, "seven lawyers that can prove otherwise." Maxwell asked Jain to prove that he was an owner, but Jain stated that it was up to Maxwell to produce documentation that he did not have an ownership stake. Tr. 159-160.

Maxwell did send what he called a "sworn statement" to the union after that stating that he did not and never had an ownership stake in "A Tractor Co. DBA-CCS." The letter requested all correspondence related to his suspension. The union never responded. GC Ex. 6; Tr. 161-162. Maxwell's letter corroborated the conversation he had with Jain. Based on the witnesses' demeanor and the totality of the evidence, the ALJ credited Maxwell's testimony and not Michael Jain's regarding these events. See *Standard Drywall Products* , 91 NLRB 544 (1950). The claims by Respondent that the ALJ relied on inadmissible hearsay are clearly untrue. Additionally, Jain's statements showed the Respondent's animus towards Maxwell for not supporting its efforts to organize CCS. Therefore Respondent's use of its ambiguous rule system to suspend Maxwell was a pretext for its actual reason, that it wanted to punish Maxwell for supposedly owning CCS and failing to support the Union's organizing efforts. See *Golden State*

[4] The steward, Bob Voss, told Maxwell of the rumor. This testimony was merely offered for knowledge, not for hearsay purposes. Tr. 154-155.

Food Corp., 340 NLRB 382 (2003)(A finding of pretext defeats any attempt by the employer (or union) to show that it would have not referred the discriminate absent his protected activities.)

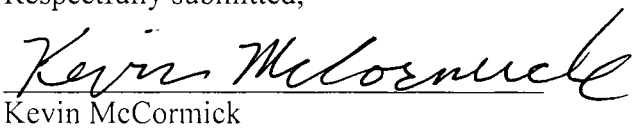
In Exception 15, Respondent argues that the ALJ erred by ordering a make whole remedy with back pay and retroactive benefits. Respondent claims that because Maxwell was on "will call" before he was suspended, he should be put back on that status and no money is owed to him. Respondent ignores that Maxwell was ready to take referrals, for example his April 28 letter to the Union noted that he wanted a speedy response from the Union as he was already losing referral opportunities due to his suspension. Tr. 216, 222. Thus, the Union was on notice that Maxwell was seeking referrals. The remedy granted by the ALJ is the remedy traditionally given for a union's unlawful failure to refer discriminatees and is the remedy requested by the General Counsel in the Complaint. The only issue regarding Maxwell's entitlement to backpay is a compliance determination of what jobs he should have been referred absent his unlawful suspension and how long those jobs lasted. Finally, Respondent shouldn't be allowed to escape the consequences of its unlawful actions because Maxwell took advantage of a right he had as a member to be on "will call." Accordingly, Respondent's arguments regarding the remedy are meritless.

III. CONCLUSION

Based on the foregoing, Respondent's Exceptions to the Decision of the Administrative Law Judge are all without merit and should be rejected by the Board. Therefore, Counsel for General Counsel respectfully requests that Respondent's Exceptions be overruled in their entirety.

DATED at Chicago, Illinois, this 9th day of May, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge have been served this 9th day of May, 2012, in the manner indicated, upon the following parties of record.

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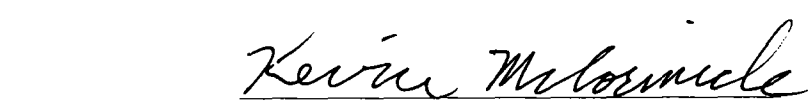

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