

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15**

<u>THE INTERNATIONAL ALLIANCE OF</u>)		
<u>THEATRICAL STAGE EMPLOYEES AND</u>)		
<u>MOVING PICTURE TECHNICIANS,</u>)		
<u>ARTISTS AND ALLIED CRAFTS OF THE</u>)		
<u>UNITED STATES, ITS TERRITORIES AND</u>)		
<u>CANADA, AFL-CIO, CLC, LOCAL 142</u>)		
)		
and)	Case Nos.	15-CB-005871
)		15-CB-005924
RANDALL H. FINCH, an Individual)		15-CB-072526
)		
and)		
)		
JONATHAN W. MUDRICH, an Individual)		15-CB-005894
)		
and)		
)		
JAMES P. VACIK, an Individual)		15-CB-070725
)		

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

TO: National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

April 30, 2014

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Respondent has never operated an exclusive hiring hall. Moreover, even though Respondent has been chartered since 1908 (GC Ex. 5, at 1) and its members have worked for multiple employers within Respondent's jurisdiction, Respondent has only had a collective bargaining agreement with one employer, SMG. (Tr. 404:20 – 22, 405:7 - 13; GC Ex. 2; GC Ex. 13). Though it may seem undesirable to an outsider for a labor organization to operate in this manner, it has served Respondent well in its 106 years of operation. It is with this understanding that the Board should view the evidence in this case, especially the evidence concerning the issue of whether the collective bargaining agreements ("CBAs") with SMG or any practice created an exclusive referral hiring hall with Respondent. Respondent and SMG purposefully negotiated CBAs that preserved the intentionally non-exclusive referral relationship that Respondent has maintained with all entities to whom it has provided referral services.

I. Argument and Authorities

Administrative Law Judge Michael A. Marcionese ("ALJ") found that Respondent did not operate an exclusive hiring hall by contract or by practice. The Counsel for the General Counsel ("GC") has failed to meet its burden to offer the evidence necessary to overrule the ALJ. Therefore, in operating its hiring hall, Respondent owed no duty to the charging parties other than a duty not to retaliate against them for engaging in protected activity. The record shows, and the ALJ found, that Respondent did not retaliate against the charging parties. Accordingly, Respondent respectfully requests that the Board overrule the exceptions filed by the GC and adopt the rulings, findings and conclusions of the ALJ.

The GC relies on *Denver Theatrical Stage Employees' Union No. 7*, 339 NLRB 214 (2003) to support its argument that Respondent had an exclusive hiring hall arrangement with SMG. The GC's citation to that case in the first paragraph of the argument section of its brief is

a thinly veiled invitation to the Board to conclude that simply because the same employer and a similar union had an exclusive referral relationship in that case, there must have been an exclusive hiring hall relationship between Respondent and SMG in the present case. As explained below, a comparison between the facts in that case and the record evidence in the present case will lead the Board to the inescapable conclusion that the two cases bear no substantive resemblance to one another whatsoever and that the GC failed to carry its burden to offer sufficient evidence to overrule the ALJ's finding that Respondent did not operate an exclusive hiring hall with SMG or any other employer.

A. The Judge did not err in his finding that the Respondent Union does not operate an exclusive hiring hall with respect to SMG Worldwide (Respondent's Answer to Exception Nos. 1 – 8 and 16 – 17).

The GC has failed to show any error in the ALJ's finding that Respondent did not operate an exclusive hiring hall. The GC contends that Respondent, "by agreement and by practice, has an exclusive hiring hall arrangement with SMG." GC Br., at 31. The ALJ found to the contrary and his finding is supported by the record.

1. The CBAs did not create an exclusive hiring hall

The GC argues that section 1.4 of the CBAs¹ "indicates SMG recognized it is required to use the Union as the primary source for stagecraft employees for jobs not performed by SMG's core complement of employees at the SMG Mobile facilities." (GC Br., at 31). Section 1.4 is merely one rule in the series of rules under Article 1 of the CBAs (all of which were considered by the ALJ on pages 4 through 6 of his opinion). This particular provision simply preserves the

¹ That section states in full: "In the event an electrician is needed to perform general maintenance or repair work in the entertainment and theatrical areas, the Employer may subcontract such work or may assign a qualified, regular employee of The Mobile Civic Center to perform the necessary work, as in the past. If the Employer assigns an electrician who is a regular full-time or regular part-time employee of The Mobile Civic Center, such employee shall be paid in accordance with the terms and conditions of employment, normally applicable to such full-time or part-time employee." (CGC Ex. 2, at 3; CGC Ex. 13, at 3).

pre-contract practice of assigning certain maintenance and repair work as indicated by the phrase “as in the past,” which the GC failed to quote. This provision concerns division of labor, and has no bearing whatsoever on how stagehands come to be employed by SMG. That is, whether a stagehand was hired directly by SMG, one of SMG’s contractors, one of the events at SMG’s venues, or referred through Respondent’s hiring hall, section 1.4 permits SMG to assign the subject maintenance or repair work that might otherwise be performed by that stagehand to a subcontractor or regular SMG employee.

Next, the GC offers paraphrased testimony from Jay Hagerman, Philip Tapia, and James Vacik to support its contention that the CBAs required SMG to use Respondent’s hiring hall as the primary source for stagecraft labor. (GC Br., at 31 – 32). The GC states that Mr. Hagerman testified that “Paul Bucannon, the stage manager at the Civic Center, contacts the Respondent Union for stage craft employees as often as SMG has events requiring such employees, which is sometimes daily” and that “Bucannon contacts the production manager for events to be held at the Civic Center; determines how many and what craft employees the event may need, and then contacts the Respondent Union and requests the necessary employees.” (GC Br., at 31 (citing Tr. 819, 844)). Mr. Hagerman’s testimony concerning the frequency with which SMG requests referrals from Respondent is more indefinite than the GC would have the Board believe. When asked how he is familiar with Respondent, Mr. Hagerman testified that SMG “employ[s] them on a *part-time basis* to work *some* events at the facility.” (Tr. 808:18 – 21) (emphasis added). While Mr. Hagerman testified that Mr. Bucannon “inquires with [the production manager or production director for the event in order to determine] what assistance they may *or may not* need from local IATSE stagehands, and he passes -- he calls the local business agent when those requests are needed,” he also testified that, under the CBAs, SMG is not required to notify

Respondent if an event requiring stagecraft work is coming to SMG's venues or to call Respondent first to staff events requiring stagecraft workers. (Tr. 811:8 – 14, 819:15 – 15) (emphasis added). He further testified that “[w]e have *several* events that come into the building that bring in their own production crews, for instance, Ringling Brothers/Barnum & Bailey Circus. They come in and they provide *all their own crew* for unloading their equipment, setting up their equipment. They only *do their own rigging*.” (Tr. 818:15 – 19) (emphasis added). He further testified that production companies, such as Dorsett Productions and Sound Associates, “provided sound and lights for several events” at SMG’s facilities and supplied stagehands to perform stagecraft work at SMG’s facilities that might otherwise be performed by stagehands referred by Respondent. (Tr. 816:13 – 818:11). Thus, it is clear that Mr. Hagerman’s testimony does not show that SMG relied on Respondent’s hiring hall as the primary source of labor.

The summarized testimony of James Vacik (a charging party) is no more helpful on this issue. (GC Br., at 31 – 32 (citing Tr. 554, 616)). While Mr. Vacik did testify that Respondent was the primary source of stagecraft labor for SMG, his testimony lacked adequate foundation, was contradicted by other evidence and testimony, and the ALJ discredited his testimony concerning his expertise and qualifications. Consider the following exchange between the GC and Mr. Vacik:

Q: And during the time you were business agent, did Mr. Hagerman or any other official with SMG contact the union for services?

A: Yes.

Q: And how often did that happen?

A: Very often. I mean, *anytime there was something in the building, we were contacted and provided a work order to supply labor for each one of these venues for each specific thing that was going on.*

(Tr. 554:15 – 23) (emphasis added).

This testimony is clearly an exaggeration that far exceeds Mr. Vacik's actual knowledge. Aside from the fact that he was testifying in support of his own ULP charges in which he is seeking back pay, there is no evidence that Mr. Vacik ever held any position that would allow him to track each and every event that came to SMG's venues.

Further, on cross-examination, Mr. Vacik was shown two SMG work orders (one at each SMG venue in Mobile) for events where no referrals were requested from Respondent. (Tr. 588:16 – 592:17; R Ex. 12; R Ex. 13). These work orders prove that Mr. Vacik's testimony that SMG requests referrals from Respondent for each event at each of SMG's venues is not credible.

Further, Mr. Vacik's testimony is directly contrary to Mr. Hagerman's testimony that "[w]e have *several* events that come into the building that bring in their own production crews... provide *all their own crew* for unloading their equipment, setting up their equipment..., [and] *do their own rigging.*" (Tr. 818:15 – 19) (emphasis added). Unlike Mr. Vacik, Mr. Hagerman is completely neutral in this matter.

Finally, the ALJ discredited Mr. Vacik's testimony concerning his own expertise and experience, because Mr. Vacik's "testimony about work he performed at ... the Saenger Theater... was not corroborated by the production manager at that facility, Mitch Teeple, who testified that another individual actually performed the work that Vacik claimed to have done." (ALJD, at 11 – 12). For these reasons, Mr. Vacik's testimony is simply unreliable.

The testimony of Mr. Tapia at page 232 of the transcript does not advance the GC's argument any better. Without laying sufficient foundation, the GC had the following exchange with Mr. Tapia:

Q: Okay. Now, are you aware the union operates the hiring hall through which it serves as the primary source of referrals for employees who are employed at the Mobile Convention Center and the Mobile Civic Center?

A: Primary, yes.

(Tr. 232:16 – 20).

This exchange was not predicated upon or followed by any testimony showing a definite (or even approximate) number of events at SMGs venues during the charging period or a definite (or even approximate) number of events at SMGs venues to which Respondent made during that same period. In fact, when asked “[h]ow often does the union receive work with the various employers and venues? How often does the union receive those work orders?,” Mr. Tapia could not specify any frequency with which any employer requests referrals from Respondent stating only that “[i]t's extremely seasonal. It rises and falls. It depends on the time of the year. It depends on other events.” (Tr. 249:13 – 17).

The GC next contends “Respondent, by the testimony of Tapia during the hearing, admitted that SMG operates the Mobile Civic Center and Convention Center and that for SMG, the Respondent Union operates an exclusive hiring hall through which it makes referrals for employment at SMG’s Mobile facilities.” (GC Br., at 31 – 32 (citing TR 740 – 741)). In fact, Mr. Tapia made no such admission. Rather, the GC read one excerpt from a position statement dated August 13, 2009 that was written and submitted by Respondent’s attorneys to an NLRB agent during the course of the investigation of some of the charges in this matter. (Tr. 739:1 – 740:25). The GC did not mark this position statement as an exhibit and did not enter it into the record. (Tr. 739:1 – 2). Moreover, that position statement is inadmissible attorney work-product. *See Unite Here (Boyd Tunica, Inc. d/b/a Sam’s Town Hotel and Gambling Hall Tunica)*, No. 26-CB-5146, 2010 NLRB LEXIS 519, at *15-16 (Dec. 28, 2010) (citing *Kaiser Aluminum & Chemical Corp.*, 339 NLRB 829 (2003) and Fed. R. Civ. P. 26(b)(3)). Mr. Tapia testified that the position statement was not a sworn statement of his, that he did not write it, that

he did not verify it before it was sent, and that he does not agree with the statement. (Tr. 741:12 – 23).

The GC next argues:

SMG also requires clients and contractors who use the Civic Center and Convention Center and who need to supplement their staff employees to acquire needed stagecraft employees through the Respondent Union’s hiring hall. For instance, Leslie James, who handles planning events for Alabama Power Company, testified without contradiction that when Alabama Power hosts events at the Civic Center, it is required to use stagecraft employees referred through the Respondent Union. Additionally, the evidence reflects that other SMG clients and contractors, such as Dorsett Productions, Sound Associates, and Zimblich [sic] Brothers Florists, also are required to use stagecraft employees referred through the Respondent Union if they need to supplement their core staff employees.

(GC Br., at 32 (citing GC-25; TR 541, 543, 762)).

Mr. James testified that when Alabama Power hosts events, there is no agreement that obligates Alabama Power to use stagehands referred by Local 142 exclusively. (Tr. 759:9 – 12). Moreover, his testimony is insufficient to establish any *regular* practice of SMG. He testified that Alabama Power only hosts one or two events annually in the Mobile area that require stagehand labor and that Respondent’s hiring hall is not even used for each of these events. (Tr. 761:18 – 762:3). He further testified that Alabama Power does not host any events at the Mobile Civic Center. (Tr. 762:15 – 17). So, at best, the testimony of Mr. James cited by the GC shows that at some unspecified event (which may not have occurred during the charging period), SMG required Alabama Power to use stagehands referred by Respondent at the Convention Center for the provision of “additional labor” to supplement a cadre of stagehands supplied from some other source. (Tr. 762:10 – 14). This evidence does not show any *regular* practice of SMG.

Nothing in the testimony of named discriminatee Jon P. Mudrich on page 541 of the transcript could be read to support the GC’s argument that Sound Associates or any other

contractor was *regularly* required to hire stagehands through Respondent’s hiring hall. (Tr. 541). The testimony on that page is internally inconsistent and confused, as was much of Mr. Mudrich’s testimony. At best, that testimony shows that, for at least one event (Frankie Beverly & Maze), stagehands hired through Respondent’s hiring hall (or by the contractor or event directly) worked alongside full time stagehands employed by the contractor or event at the Mobile Civic Center. (Tr. 540:4 – 541:24). That testimony does not even come close to showing any requirement that contractors hire stagehands through Respondent’s hiring hall to supplement their own cadre of stagehands. Moreover, the GC points to no evidence that the Frankie Beverly & Maze event even occurred during the charging period.

The testimony of Mr. Mudrich on page 543 of the transcript is no more helpful. There, Mr. Mudrich responded “yes” to the question “is th[e] contract between the local and SMG still applicable” during “periods of time when Sound Associates and Metallica and any other subcontractor come into the... Civic Center and the Convention Center.” (Tr. 543:3 – 7). At best it merely shows that one or more of the CBAs was in effect when Sound Associates, Metallica and other subcontractors come to SMG’s venues. That falls short of showing that SMG’s clients and contractors were *regularly* required to hire stagehands through Respondent’s hiring hall to supplement their own crews of stagehands.

The GC next argues that “[i]n situations such as those present in this case where the totality of the evidence reflects that SMG contacts the Respondent Union for stagecraft employees to work at SMG’s Mobile facilities, the Board has found an exclusive hiring hall arrangement exists by virtue of the parties’ conduct in interpreting the agreement.” (GC Br., at 32 (citing *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690 (1976))). Respondent disagrees for two reasons. First, the GC has failed to identify sufficient ambiguity in the terms of

the CBAs to justify an examination of the parties' conduct to interpret the CBAs. *See Jefferson Stores, Inc.* 253 NLRB 353, 354 n.3 (1968) (the Board does not examine parol evidence (including the practice of the parties) to determine the meaning of an unambiguous contract).² Second, as shown by this answering brief, the record evidence (i.e., the totality of the circumstances) shows there was no exclusive referral relationship between SMG and Respondent.

Refocusing on whether the CBAs created an exclusive referral arrangement, *Teamsters Local 174* does not support a finding here that the actual language of the CBAs created an exclusive hiring hall. In that case, the Board found that “the literal language of the [CBAs’ referral provision] does not invest Respondent with an exclusive right of referral.” *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690 (1976).

Even if the Board found otherwise in *Teamsters Local 174*, that finding would not support a finding here that the actual language of the CBAs created an exclusive hiring hall. The CBA at issue in *Teamsters Local 174* “requires the Company to provide Respondent 3 days’ notice when additional employees are needed, grants Respondent the right to ‘nominate’ individuals for employment during that 3-day period, and requires the Company to give ‘fair consideration’ to Respondent’s nominees.” *Id.* The CBAs here contain no such similar mandates. Jay Hagerman (general manager for SMG and the only neutral witness in this case that negotiated both CBAs) testified that, under the CBAs, SMG was not required to notify Respondent if an event requiring stagecraft work is coming to SMG’s venues and not required to

² Further, the GC’s argument should be analyzed under the heading “The Hiring Hall is also Exclusive by Practice” section of GC’s brief beginning on page 34. By asking the Board to examine the “parties’ conduct in interpreting the agreement” here, the GC has conflated its arguments of (1) exclusivity by agreement; and (2) exclusivity by practice. (Tr. 907:7 – 12; GC Br., at 30 – 37). The Board should defer its analysis of the practice or conduct of the parties until the following subsection. Otherwise, the analysis of whether an exclusive hiring hall was created by practice subsumes the analysis of whether an exclusive hiring hall was created by the actual language of the CBAs.

call Respondent first to staff events requiring stagecraft workers. (Tr. 805:6 – 15, 809:6 – 810:21; 811:8 – 14; GC Ex. 2, at 15 – 16; GC Ex. 13, at 16). Thus, it is clear that *Teamsters Local 174* provides no support for any argument that the actual language of the CBAs here creates an exclusive hiring hall.

The GC next argues that:

Indeed, the language in the CBA that SMG “recognizes the Union as the sole and exclusive bargaining agent for all Personnel [stagehands, riggers, sound, wardrobe]” would be rendered meaningless by any interpretation other than SMG intended to seek such employees first and primarily through the Respondent Union’s hiring hall, particularly since Respondent “submitted proof and the Employer is satisfied that the Union has been designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes.” (GC-2, 13, pp. 2 and 3, Article 1.1)

(GC Br., at 32 – 33).

This argument is predicated on the erroneous proposition that SMG would not recognize Respondent as the Section 9(a) representative unless it expected Respondent to serve as the first and primary source for referrals. Section 9(a) does not carry any obligation to create and operate a hiring hall or act as the primary source of employees. The creation and operation of a hiring hall is a mandatory subject of bargaining under Section 8(d). *See Houston Chapter, Associated General Contractors of America, Inc.*, 143 NLRB 409, 411-13 (1968). Thus, the only reasonable expectation SMG could have had in recognizing Respondent as the Section 9(a) representative was that a hiring hall could be bargained for, not that Respondent must serve as the exclusive or even primary source of referrals.

The GC next argues that “[t]he fact there are limited circumstances when SMG and its clients and contractors do not contact the Union for stagecraft employees, such as when their own core staff employees can perform some of the work, does not negate a finding of exclusivity.” (GC Br., at 33 (citing *Carpenters Local 608 (Various Employer)*, 279 NLRB 747

(1986)). *Carpenters Local 608* is easily distinguishable from the CBAs in the present case. In *Carpenters Local 608*, the CBA *guaranteed* that half of the bargaining unit work would come from the union’s hiring hall and the other half hired by the employer directly. *Carpenters Local 608*, 279 NLRB at 748. The CBAs with SMG contain no similar guarantee. (GC Ex. 2; GC Ex. 3). Further, the GC offered no evidence showing that a specific (or even approximate) fixed proportion of SMG’s stagecraft work was performed by individuals referred through Respondent’s hiring hall. This lack of any guarantee undermines the import of the GC’s contention that exclusivity may still exist even though SMG may reserve stagecraft work for employees other than those referred by Respondent for two reasons. It shows that Carpenters Local 608 always had some contractual power, which if abused, could be used to keep at least half of the work at issue out of the reach of the charging parties in that case. Respondent had no such similar power under the CBAs in the present case. SMG retained complete discretion as to whether it would hire stagehands through Respondent’s hiring hall. Jay Hagerman (general manager for SMG and the only neutral witness in this case that negotiated both CBAs) testified that under the CBAs that SMG retained complete discretion as to whether any stagehands would be hired through Respondent’s hiring hall. (Tr. 805:6 – 15, 809:6 – 810:21, 846:21 – 847:15; GC Ex. 2, at 1, 15 – 16; GC Ex. 13, at 1, 16). As the ALJ found, “[i]n *all* cases, SMG has the final say as to the source of labor.” (ALJD, at 6 (emphasis added)). Thus, it is patently clear that the CBAs in the present case do not reserve some or even any portion of work to be referred through Respondent’s hiring hall as does the CBA in *Carpenters Local 608*.

The GC next argues that “the Board has found an exclusive hiring hall arrangement exists even when production companies bring their own wardrobe personnel to work at the Broadway in Chicago where the collective-bargaining agreement provides the union agrees to furnish

competent wardrobe attendants satisfactory to the employer to perform work as required.” (GC Br., at 33 (citing *Theatrical Wardrobe Union Local 769 (Broadway In Chicago)*, 349 NLRB No. 12 (2007))). In that case, ALJ found exclusivity based on several pieces of evidence including the testimony of the employer’s VP of operations that “the Union has been the *sole source* of referrals for Wardrobe Attendants to staff shows ... that are subject to the parties’ collective-bargaining agreement.” *Theatrical Wardrobe Union Local 769 (Broadway In Chicago)* 349 NLRB 70, 73 (2007) (emphasis added). There is no testimony from any employer in the present case that Respondent was the “*sole source* of referrals” for stagecraft work for that employer. Moreover, in rejecting the respondent union’s argument of non-exclusivity due to the production companies’ use of its own personnel, the ALJ relied on evidence of industry custom, which is completely lacking in the present case. *Id.*

2. An exclusive hiring hall was not created by practice

Perhaps the greatest shortcoming in the GC’s argument that an exclusive hiring hall was created by practice is that the GC failed to offer evidence of: (1) the total (or even approximate) number of stagecraft jobs that were performed at SMG’s venues during the charging period; and (2) the total (or even approximate) number of such jobs that were filled by referrals from Respondent’s hiring hall. In fact, it appears that the GC never subpoenaed SMG for such evidence. Without such evidence, it cannot be ascertained what percentage or proportion of the stagecraft jobs at SMG’s venues were filled by Respondent.

Instead, as shown above, the GC has relied on testimony (most, if not all, of which is lacking adequate foundation or contradicted by other testimony) to show that Respondent purportedly acted as the “primary” source of stagecraft labor at SMG’s venues.³ The GC failed

³ Relying on any testimony stating only that Respondent was the “primary” source of stagecraft workers for SMG is particularly troubling given the ambiguity of that term.

to convince the ALJ, who found that “even as to SMG, the Union did not operate a ‘de facto’ exclusive hiring hall.” (ALJD, at 8). The evidence cited by the GC should not convince the Board either.

The whole point of inquiring into whether Respondent operated an exclusive hiring hall is to determine whether Respondent had the power to keep stagecraft work at SMG’s venues out of reach of the charging parties and alleged discriminatees. “No duty of fair representation attaches... to a union’s operation of a nonexclusive hiring hall because that union lacks the power to put jobs out of the reach of workers.” *Carpenters Local 537 (E. I. DuPont)*, 303 NLRB 419, 420 (1991) (citing *Miranda Fuel Co.*, 140 NLRB 181 (1962); *Teamsters Local 460 (Superior Asphalt Co.)*, 300 NLRB No. 43 (Sept. 28, 1990). As shown above, the CBAs do not empower Respondent to put jobs out of reach of stagecraft workers. The practice of SMG and Respondent confirms the lack of such power. The record shows that much of the stagecraft work at SMG’s venues was performed by individuals other than those referred by Respondent.

When SMG chooses to hire workers through Respondent’s hiring hall, those workers perform duties as stagehands, riggers, sound engineers, lighting controllers, loaders, forklift operators, and electricians. (Tr. 811:21 – 812:3). Much of this work, however, is performed by workers not referred by Respondent. (Tr. 813:11 – 18). For example, SMG’s staff (who are not referred by Respondent) assemble pipe and drape, set up risers and other equipment, and hook up power for events and people that use the Mobile Civic Center. (Tr. 813:5 – 18, 815:7 – 816:12; R Ex. 19). Employees of production companies (contractors) such as DPU and Sound Associates (who are not referred by Respondent) assemble and put together lighting and sound systems for SMG clients. (Tr. 816:16 – 818:11). SMG’s staff or the event’s staff performs stagecraft work at SMG’s venues (such as setting up pipe and drape and setting up audio visual

(“AV”) equipment) without the assistance of any individuals referred by Respondent. (Tr. 820:5 – 12; 824:2 – 826:3; R Ex. 12; R Ex. 13). As noted above, Mr. Hagerman testified that “[w]e have *several* events that come into the building that bring in their own production crews... provide *all their own crew* for unloading their equipment, setting up their equipment..., [and] do their own rigging.” (Tr. 818:15 – 19) (emphasis added). For example, SMG requested the referral of six stagehands from Respondent for an event only to later cancel that request and allow its client to reassign the work that would have been performed by those six stagehands to individuals that were not referred by Respondent. (Tr. 800:9 – 802:13).

Even when SMG does decide, in its sole discretion, to obtain referrals through Respondent’s hiring hall, SMG retains the authority to select individuals by name for referral. Mr. Hagerman testified that the section 1.2(e) of the CBAs permits this practice and that Respondent has cooperated with this practice. (Tr. 820:13 – 821:21, 843:19 – 23, 844:14 – 18, 845:23 – 846:20). When this happens, the determination of which stagehand is referred is made not by Respondent, but by SMG, its contractors, or its clients. For this reason, and because stagecraft work at SMG’s venues could be acquired by working directly for SMG, for one of SMG’s contractors, or for the events themselves, it is clear that Respondent lacked the power to put all (or even a certain portion) of the stagecraft jobs at SMG’s venues out of reach of stagecraft workers.

The GC argues:

The Board has found that an exclusive hiring hall can lawfully be based on oral understandings, course of conduct, or practice between the parties. *Teamsters Local 200 (Bechtel Construction)*, 357 [sic] No. 192 (2011) citing *Longshoremen ILWU Local 19 (Albin Stevedore Co.)*, 144 NLRB 1443 (1963); *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB 777 (1984) enfd. Mem. 782 F.2d 1030 (3d Cir. 1986); *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690 (1976); *Teamsters Local 293 (Beverage Distributors)*, 302 NLRB 403 (1991).

(GC Br., at 34).

The GC cited these same cases to the ALJ, who found them “distinguishable from the facts here which show... that SMG retained discretion to determine when and whether to use the Union’s referral service.” (ALJD, at 8). The GC does not contest this distinction.

The GC next argues that:

As noted above, the cumulative record evidence demonstrates that SMG’s conduct shows it recognized the Union as the first and primary source of stagecraft employees for events held at the Mobile Civic Center and the Mobile Convention Center. Further, SMG requires clients and contractors that use its Mobile facilities, such as Dorsett Productions, Sound Associates, and Zimblich [sic] Brothers Florists, to also use the Union as the primary source of stagecraft employees to supplement their core staff of employees for events held at SMG’s Mobile facilities.

(GC Br., at 34). As Respondent showed above, the record falls far short of showing the total (or even approximate) number of stagehand jobs at SMG’s venues during the charging period, and the proportion of those that were filled by referrals from Respondent. Further, as shown above, the evidence relied upon by the GC does not show that SMG required its clients and contractors to use Respondent as the primary (or even secondary) source of stagecraft labor on any regular basis.

The cases cited by the GC to support its argument that “where there is consistency in hiring employees referred by the union and where the union is aware of such practice, an exclusive hiring arrangement exists” are not helpful. (GC Br., at 34 (citing *Teamsters Local 328*, (*Blount Brothers*), 274 NLRB 1053, 1057 (1985) citing *Plumbers Local 17 (FSM Mechanical)*, 224 NLRB 1262, 1263 (1976); *Carpenters Ohio Valley Council (Catalytic, Inc.)*, 267 NLRB 1223, 1226 (1983))).

The record in the present case shows no consistency in hiring employees referred by the union. Assuming, without conceding, that it did, the level of “consistency in hiring employees

referred by the union” found in the cases cited by the GC far exceeds anything reflected by the record in the present case. In *Teamsters Local 328*, the employer (Blount) testified through its industrial relations manager that Blount “requisition[ed]... project workers... by exclusive reference to the appropriate labor organization referral systems” and that “with one exception in 1983, Blount utilized the Respondent as the *sole* referral source for construction drivers and warehousemen at Quinnesec.” *Teamsters Local 328 (Blount Brothers)*, 274 NLRB at 1054 (emphasis added). In fact, the union’s representative responsible for servicing the project agreement with Blount testified that “he was not aware of *any* drivers employed by Blount at the project except those whom he had referred.” *Id.* (emphasis added). There is no similar testimony here from either SMG or Respondent. To the contrary and as noted above, multiple witnesses in this case testified that stagecraft work at SMGs venues was performed by numerous individuals other than those referred by Respondent. Thus, *Teamsters Local 328* does not support the GC’s case.

In *Carpenters Ohio Valley Council*, the employer’s representative “testified that *all* of the employees hired by [the employer] have been hired through the hiring hall, and that such practice is a result of the referral policies in their agreement with the Union.” *Carpenters Ohio Valley Council (Catalytic, Inc.)*, 267 NLRB at 1226 (emphasis added). There is no similar evidence in the present case.

The GC’s reliance on *Plumbers Local 17* is equally unavailing. There, the Board overruled the ALJ’s finding no exclusive hiring hall based on the evidence that the union admitted that “the referral system is much more than ‘an availability service,’ [that] it [was] the consistent practice of [the employers] to hire those cleared or referred by [the union], and the [the union was] aware of this practice, [that the union]... subject[ed] members to fines if they

work[ed] with nonmembers[, which was] obviously designed to make sure the practice continues.” *Plumbers Local 17 (FSM Mechanical)*, 224 NLRB at 1262-63. In fact, the Board noted that the union’s business agent answered “yes, sir” in response to the question “would it be a fair statement to say that employers with whom you have a contract do hire exclusively through the union.” *Id.* at 1262 n.3. Respondent made no such admission during the trial of the present matter. Further, there is absolutely no evidence in the present case that SMG made any effort to clear anyone with Respondent before hiring stagecraft workers to work at SMG’s venues. Moreover, the record is devoid of any evidence that Respondent took any punitive measures against anyone for the purpose of preserving the referral relationship with SMG. Contrary to the GC’s contention that “the Board’s reasoning in *Plumbers Local 17* is also applicable in the instant case,” it is clear that the evidence relied upon by the Board to find exclusivity in *Plumbers Local 17* is absent from the present case.

The GC next asks the Board to: (1) disregard “ALJ Marcionese’s decision to ‘credit the testimony of Hagerman over any contradictory testimony offered by the Charging Parties that would suggest that an exclusive hiring hall arrangement existed in practice’ [because it] is in contravention to the record evidence;” and (2) conduct a “*de novo* review of the entire evidentiary record.” (GC Br., at 35 (citing ALJD 7 at 41-43; *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950))). “The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.” *Teamsters Local 328, (Blount Brothers)*, 274 NLRB 1053 n.1 (1985) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)). The ALJ credited Mr. Hagerman’s testimony over any contrary testimony from other witnesses for good reason. As shown above, the testimony of Mr. James,

Mr. Vacik and Mr. Tapia does little, if anything, to establish an exclusive hiring hall by practice. There is nothing “inexplicable” about the ALJ’s findings with respect to Mr. Hagerman’s testimony because, for the reasons discussed above, his testimony concerning Mr. Buccanon does little if anything to establish exclusivity. For one, the GC’s summary of that testimony is misleading. Mr. Hagerman did not testify that Mr. Buccanon contacted the Respondent “on almost a daily basis for the referral of stagecraft employees.” (GC Br., at 35). Rather, when Mr. Hagerman was asked if SMG contacted Respondent for referrals daily, Mr. Hagerman merely responded “could be.” (Tr. 844:7 – 13). This does not mean that SMG called Respondent every day. Rather, it is more consistent with Mr. Tapia’s testimony that the employer’s use of Respondent’s hiring hall was intermittent. As noted above, when Mr. Tapia was asked “[h]ow often does the union receive work with the various employers and venues? How often does the union receive those work orders?,” Mr. Tapia could not specify any frequency with which any employer requests referrals from Respondent stating only that “[i]t’s extremely seasonal. It rises and falls. It depends on the time of the year. It depends on other events.” (Tr. 249:13 – 17).

The GC next argues that:

However, the record evidence, including the testimony given by Jay Hagerman, establishes that the only way stagecraft employees are hired to work events hosted at the Mobile Convention Center and the Mobile Civic Center, both of which are operated by SMG, is to be referred through the Respondent Union or 1) be part of SMG’s core employee crew; 2) be part of a crew traveling with a production that uses the Convention or Civic Center for an event, or 3) be an employee of one of SMG’s clients or contractors who perform certain tasks at the Convention or Civic Center. It is critical to note that individuals who are employed by and travel with a production company that visits the SMG facilities are not employees of SMG. Likewise, SMG’s clients and contractors are not employees of SMG. The very essence of SMG utilizing the services of a contractor to perform work at its Mobile facilities is not the same as SMG hiring an employee to perform stagecraft work at the SMG facilities. The record does not contain any evidence that SMG hires stagecraft employees directly off the street who were not referred through the Respondent Union’s hiring hall.

Given that the only way stagecraft employees not employed by SMG or a traveling production company or a SMG client/contractor are hired to work events hosted at SMG's facilities is to go through the Respondent Union's hiring hall, it is urged that the Board conclude Respondent Union operates an exclusive hiring hall with SMG, and as such, it cannot discriminatorily and/or arbitrarily apply its hiring hall rules in making referrals to SMG. To apply the reasoning of the ALJ that the Respondent's hiring hall is not exclusive when the totality of the evidence establishes at the very least the Respondent Union operates a de facto exclusive hiring hall for SMG will result in an effect on employees not envisioned within the meaning of the Act. Indeed, in unionized work settings, it is common for work performed by union employees to be subcontracted out and in those situations the unionized employees do not lose protection of the Act just because part of the work they perform is subcontracted out. The same concept should be applicable in this case.

(GC Br., at 35 – 36).

This argument should be rejected. First, the GC admits three methods of acquiring stagecraft work at SMG's venues other than using Respondent's hiring hall.

Second, the GC's attempt to appeal to some vague notion of injustice that could result if unionized employees' work is subcontracted out is inappropriate. Without citing any legal authority, the GC wants the Board to limit the universe of jobs considered for the purpose of determining exclusivity to those stagecraft jobs where SMG is the "employer." Following the GC's logic, if one hundred stagecraft jobs were available at an SMG venue, and SMG hired five stagehands through Respondent's hiring hall and subcontracted for the remaining ninety five, Respondent would nonetheless operate an exclusive hiring hall. This result is plainly unjustified.

Even if the GC's preferred limitation is applied, which it should not be, the GC admits that SMG's *own* employees perform stagecraft work that might otherwise be performed by stagehands referred by Respondent. This admission destroys any significance of the distinction drawn by the GC between employees of SMG on the one hand and employees of events, subcontractors, clients, etc. on the other hand.

Perhaps recognizing this weakness in its argument, the GC contends there is no "evidence

that SMG hires stagecraft employees directly off the street who were not referred through the Respondent Union’s hiring hall.” This is an attempt to misallocate the burden of proof to show an exclusive hiring hall. *See Carpenters Local 537 (E.I. Dupont)*, 303 NLRB 419, 420 (1991) (“The judge also relied on the fact that the Respondent had not presented evidence that, in practice, [the employer] had directly hired applicants not referred by the Respondent. In so doing, the judge appears to have misallocated the burden, properly placed on the General Counsel, of proving an exclusive hiring arrangement as an essential element of the violation alleged.”). Thus, the lack of evidence that SMG hires stagehands directly creates a doubt that should be resolved in Respondent’s favor.

Third, the parties negotiated the CBAs... twice. As shown above and as admitted by the GC, the CBAs empower SMG to subcontract stagecraft work and there is no evidence that the charging parties or anyone else opposed ratification of the CBAs. When stagecraft work is subcontracted, it is SMG, not the Respondent, who makes that determination. Thus, any unfairness resulting from subcontracting stagecraft work is not the result of any decision made by Respondent.

Fourth, non-exclusivity due to subcontracting stagecraft work (and performance of stagecraft work by events and SMG’s own employees) does not strip the charging parties of protection under the Act. *See Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500 n. 2 (1993) (“Even without an exclusive hiring hall arrangement, however, a union violates Sec. 8(b)(1)(A) where ... it discriminates against members in retaliation for their protected activities.”).

Next, the GC attacks the ALJ’s reliance on *Development Consultants*, 300 NLRB 479 (1990) to support his decision. (GC Br., 36 – 37 (citing ALJD, at 8:38 – 46)). The GC argues

that:

[T]o the extent ALJ Marcionese cites the Board's decision in *Development Consultants*, 300 NLRB 479 (1990), to support his decision that Respondent Union does not operate an exclusive hiring hall with SMG; the ALJ's dismissal of SMG's alleged discrimination in making referrals based on an applicant's non-membership in the union or based upon the Respondent's failure to follow its hiring hall rules or other objective criteria in making referrals to SMG is misplaced.

(GC Br., at 36 (citing ALJD, at 8:38 – 46)).

Reviewing the portion of the ALJ's decision cited by the GC, it does not appear that he actually relied on *Development Consultants* as authority to support a finding of non-exclusivity. Rather, it appears that he was relying on *Development Consultants* and other authorities⁴ for the proposition that where it has been found that a union operates a non-exclusive hiring hall, that union has no duty of fair representation with respect to its operation of that hiring hall as a matter of law. (ALJD, at 8:38 – 46). This reliance is entirely proper. *See Development Consultants*, 300 NLRB 479, 480 (1990). Assuming, without conceding, that *Development Consultants* is distinguishable on any facts determinative of exclusivity, that does not change the fact that the Board holds as a matter of law that where a union operates a non-exclusive hiring hall it owes no duty of fair representation in the operation of that hiring hall. At the point that the ALJ cited *Development Consultants*, he had already found that Respondent operated a non-exclusive hiring hall. (ALJD, at 8). He did not cite *Development Consultants* for the purpose of analogizing facts in that case to facts in the present case to find nonexclusivity. Instead, he cited *Development Consultants* to reach the legal conclusion that Respondent owed no duty of fair representation with respect to the operation of its non-exclusive hiring hall. There is nothing misplaced about this reliance.

⁴ The ALJ also cited *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174 (2000) and *Carpenters Local 537 (E. I. duPont)*, 303 NLRB 419 (1991).

As shown above, the ALJ made no error in finding that the evidence fails to establish that, by contract or practice, Respondent operated an exclusive hiring hall with SMG. Accordingly, Exception Nos. 1 – 8, and 16 – 17 should be overruled and the ALJ’s rulings, findings, and conclusions should be adopted by the Board.

B. The Judge did not err in his finding that the Respondent Union did not discriminatorily and/or arbitrarily make referrals to Charging Party Randall Finch (Respondent’s Answer to Exception Nos. 9 – 12, 15 and 18).

Respondent did not violate Section 8(b)(1)(A) by failing to refer Mr. Finch. The GC does not challenge the ALJ’s finding that Respondent operated a nonexclusive hiring hall with Alabama Power, the Wharf, BayFest, the Exploreum, and DPU. (ALJD, at 8:15 – 18). As found by the ALJ and as shown above, Respondent operated a nonexclusive hiring hall with SMG. Consequently, Respondent was not required to follow its hiring hall rules.⁵ *See Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500 n. 2 (1993) (citing *Carpenters Local 537 (E.I. Dupont)*, 303 NLRB No. 67 (1991)). Thus, the only way the GC could conceivably show that Respondent discriminated against Mr. Finch in violation of Section 8(b)(1)(A) is by showing that Respondent retaliated against Mr. Finch because he engaged in protected activity. *Id.*

Respondent could not have retaliated against Mr. Finch by failing to refer him to any job at the Mobile Civic Center or to the Boat Show event at the Mobile Convention Center, because SMG banned Mr. Finch from working at the Civic Center and the Boat Show during the entire charging period. (Tr. 369:19 – 373; R Ex. 6; R Ex. 7; ALJD, at 9:23 – 32). Mr. Finch admitted that on three separate occasions, employers have barred him from working at their venues or events. (Tr. 717:5 – 7).

⁵ Even if the Board were to overturn the ALJ’s findings of nonexclusivity and that Respondent was not required to make referrals in a nondiscriminatory manner, the GC would be have to prove that Respondent’s failure to follow its hiring hall rules was something more than negligence or mistakes. *See Boilermakers Local 374*, 284 NLRB 1382, 1383 (1987).

Further, Respondent could not have retaliated against Mr. Finch by failing to refer him for any rigging job as it is apparent that his testimony concerning his qualifications to perform such work is dubious at best. Mr. Finch believes that Respondent's hiring hall rules require that "the most senior person *with the qualifications*" be referred. (Tr. 701:11 – 21) (emphasis added). While he claimed "knowledge in all aspects of theatre stages including audio, lighting, spotlights, electrical, and carpentry," Mr. Finch failed to list any rigging experience in his May 18, 2008 résumé. (Tr. 367:25 – 369:15; R Ex. 5). While he claimed during the hearing that he performs certain limited types of up-rigging work, he denied that he performs *any type* of up-rigging work his May 6, 2009 affidavit to the NLRB when he said, "I don't do up-rigging work anymore..." (Tr. 697:2 – 699:20). Mr. Finch never submitted any grievance to Respondent's hiring hall complaining that he was denied referrals for rigging work for which he was qualified. (Tr. 378:3 – 6; GC Ex. 5, Sec. XII). It is not surprising the ALJ found Mr. "Finch's testimony was not entirely credible..." (ALJD, at 11:1).

The GC argues:

ALJ Marcionese reasoned that despite the incidents of non-referral, Finch received multiple other referrals during the period of time he filed charges against the Respondent and such referrals belie any claim that the Respondent was intent on retaliating against Finch for unlawful reasons. (ALJD 11 at 7-11) ALJ Marcionese's reasoning is flawed as the Board has recognized that even if a union continues to refer an employee who engages in protected activity, a union's arbitrary reduction in referrals given to an employee violates the Act. *Denver Theatrical Stage Employees' Union No. 7*, 339 NLRB 214, 220 (2003).

(GC Br., at 40).

The ALJ's reasoning is sound and not inconsistent with *Denver Theatrical Stage Employees' Union No. 7*. That case is easily distinguishable from the present case. There, unlike here, the ALJ found that the union operated an exclusive hiring hall. *Denver Theatrical*

Stage Employees' Union No. 7, 339 NLRB 214, 216 (2003).⁶ Therefore, the union there was under a duty to operate its hiring hall in a nonarbitrary manner. Because Respondent operates a nonexclusive hiring hall, it had no similar duty. See *Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500 n. 2 (1993) (citing *Carpenters Local 537 (E.I. Dupont)*, 303 NLRB No. 67 (1991)). Therefore, even assuming, without conceding, that the record evidence showed a reduction in Mr. Finch's referrals for arbitrary reasons, Respondent was under no duty to operate its hiring hall in a nonarbitrary manner.

Second, there was no allegation or finding of retaliation in *Denver Theatrical Stage Employees' Union No. 7*. *Id.* Accordingly, that case creates no bar to reliance on evidence that a charging party received multiple referrals from a respondent union to infer a lack of retaliatory intent. In fact, Respondent respectfully urges the Board to adopt the very same reasoning applied by the ALJ. As the ALJ recognized, Mr. Finch was referred to multiple stagecraft jobs by Respondent during the charging period. (ALJD, at 11:7 – 11). If Respondent wanted to retaliate against Mr. Finch, why refer him *at all*?

Indeed, the record is devoid of sufficient evidence to find that Respondent retaliated against Mr. Finch. Even if the Board accepts the ALJ's finding that "[t]here is some evidence in the record that some officials of the Respondent bore animus toward Finch" (ALJD, at 9:34 – 35), there is insufficient record evidence to show a nexus between such animus and the alleged

⁶ The basis for a finding of exclusivity in that case is absent from the present case. There, the ALJ found that the collective bargaining agreements at issue required: (1) "the employer 'will give the Union first opportunity to furnish, and the Union agrees to furnish, applicants for employment with the requisite skills,'" and (2) the employees to "'obtain a registered referral slip from the Union before going to work'" if the employer hired the employee directly. *Denver Theatrical Stage Employees' Union No. 7*, 339 NLRB at 216. As shown above, the CBAs in the present case do not require SMG give Respondent any opportunity to furnish stagehands. SMG is not even required to notify Respondent when events with stagecraft work come to SMG's venues. Additionally, there are no provisions in the CBAs that require stagecraft workers that obtain at SMG's venues through some method other than referral by Respondent to obtain any type of referral slip from Respondent. Thus, it is patently clear that *Denver Theatrical Stage Employees' Union No. 7* provides no support for a finding that Respondent operated an exclusive hiring hall.

retaliatory acts. Even assuming the GC had identified record evidence showing that Mr. Finch engaged in protected activities,⁷ there is insufficient record evidence to show disparate treatment by Respondent. That is, the GC points to no evidence that Respondent treated Mr. Finch any differently than stagehands who did not engage in protected activity. Given this lack of evidence of retaliation, it is not surprising that the GC does not contest the ALJ's findings of no retaliation more fiercely.

For these reasons, Respondent respectfully urges the Board to affirm the ALJ's finding that Respondent did not fail to make referrals to Charging Party Randall Finch for discriminatory and/or arbitrary reasons. Accordingly, Exception Nos. 9 – 12, 15 and 18 should be overruled and the ALJ's rulings, findings, and conclusions should be adopted by the Board.

C. The Judge did not err in his finding that the Respondent Union did not discriminatorily and/or arbitrarily make referrals to Charging Party James A. Vacik (Respondent's Answer to Exception Nos. 10, 13 – 15 and 18).

The Board should adopt the ALJ's rulings, findings, and conclusions with respect to Mr. Vacik. As with Mr. Finch, Respondent did not violate Section 8(b)(1)(A) or 8(b)(2) by failing to refer Mr. Vacik. As the CG's arguments in support of its exceptions concerning Mr. Vacik mirror those made in support of the exceptions concerning Mr. Finch, Respondent incorporates by reference its arguments made above in opposition to the CG's arguments made in support of the exceptions concerning Mr. Finch.

⁷ Filing unfair labor practice ("ULP") charges with the NLRB is protected activity. However, Respondent did not retaliate against Mr. Finch because he filed a ULP charge with the NLRB. The allegedly retaliatory act at issue is the failure to refer Mr. Finch for work, which, according to the charges and amended charges filed by Mr. Finch with the NLRB began on October 23, 2008 and continued thereafter. (CGC Ex. 1(a), 1(n), 1(p)). Mr. Finch did not file his original charge (No. 15-CB-5871) until April 23, 2009. (CGC Ex. 1(a)). There is no evidence that Mr. Finch filed any ULP charges with the NLRB prior to April 23, 2009. Moreover, there is no evidence that Respondent had any prior notice that Mr. Finch would or intended to file a ULP charge on April 23, 2009. Thus, any failure to refer Mr. Finch prior to April 23, 2009 could not possibly have been motivated by an intent to retaliate against Mr. Finch for filing an unfair labor practice charge. During the six months preceding April 23, 2009, Respondent had no knowledge that Mr. Finch would file charge no. 15-cb-5871 or any other charge with the NLRB. Therefore, any failure to refer Mr. Finch could not have been motivated by retaliation for filing ULP charges. Moreover, the GC offered no evidence that the rate at which Finch was referred changed after he filed his charge.

Additionally, Respondent notes that the ALJ found that Mr. Vacik's testimony was of "questionable credibility" (ALJD, at 11:41 – 12:2) and the CG has failed to meet its burden to show that "the clear preponderance of all the relevant evidence" shows that such credibility determination was incorrect. *Teamsters Local 328, (Blount Brothers)*, 274 NLRB 1053 n.1 (1985) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)). Consequently, no exception should be overruled on the basis of Mr. Vacik's discredited testimony.

For these reasons, Respondent respectfully urges the Board to affirm the ALJ's finding that Respondent did not fail to make referrals to Charging Party James Vacik for discriminatory and/or arbitrary reasons. Accordingly, Exception Nos. 10, 13 – 15 and 18 should be overruled and the ALJ's rulings, findings, and conclusions should be adopted by the Board.

D. The Judge did not err in concluding that the Respondent did not violate the Act in any manner alleged in the Complaint and in issuing a recommended Order dismissing the Complaint (Respondent's Answer to Exception Nos. 19 and 20).

The Board should adopt the ALJ's conclusion that Respondent has not violated the Act in any manner alleged in the Complaint. The CG has failed to offer record evidence and sufficient legal authority to overrule this conclusion. Consequently, Exception Nos. 19 and 20 should be overruled.

The GC urges the Board to disregard the ALJ's finding of nonexclusively and conclude that Respondent violated Section 8(b)(1)(A) and 8(b)(2), regardless of whether it operated an exclusive hiring hall.

The GC argues:

A union operating a hiring hall, irrespective of whether it is exclusive or nonexclusive, owes referral applicants a duty of fair representation and is obligated to operate the hiring hall in a manner free from any arbitrary or

invidious considerations. *Teamsters Local 200*, [357 NLRB No. 192], citing *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898 (1985); *Operating Eng'rs Local 4 (Carlson Corp.)*, 189 NLRB 366 (1971). Respondent Union's departure from clear and unambiguous referral procedures by refusing to refer qualified employees in the proper order in accordance with its hiring hall rules violates Section 8(b)(1)(A) and 8(b)(2) of the Act. *Operating Eng'rs Local 18 (Ohio Contractors Assn.)*, 200 NLRB 147 (1975) [sic];⁸ *Plumbers Local 44 (Welded Construction)*, 313 NLRB 1 (1993).

(GC Br., at 42).

The CG completely misstates the law. It is true that the ALJ in *Teamsters Local 200* said, "A union operating a hiring hall--irrespective of whether it is exclusive or nonexclusive--owes referral applicants a duty of fair representation and is obligated to operate the hiring hall in a manner free from any arbitrary or invidious considerations." *Teamsters Local 200*, 357 NLRB No. 192, 2011 NLRB LEXIS 800, at *34 – 35 (NLRB Dec. 29, 2011) (citing *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898 (1985)). However, in reviewing the ALJ's decision in *Teamsters Local 200*, the Board said, "[w]e adopt the judge's finding that the Respondent's hiring hall is exclusive. *We thus find it unnecessary to pass on the judge's statement that a union operating a hiring hall owes referral applicants a duty of fair representation regardless of whether the hiring hall is exclusive or nonexclusive.*" *Id.* at *4 n.3 (emphasis added).

Further, a review of *Teamsters Local 519* shows that the ALJ's citation to that case in *Teamsters Local 200* was misplaced. Nowhere in *Teamster Local 519* did the Board conclude that a union operating a hiring hall--irrespective of whether it is exclusive or nonexclusive--owes referral applicants a duty of fair representation and is obligated to operate the hiring hall in a manner free from any arbitrary or invidious considerations. To the contrary, the ALJ in *Teamsters Local 519* recognized that "a union which operates, as in the instant case, an *exclusive* hiring hall must represent all users of the hall in a fair and impartial manner," and "a fiduciary

⁸ This case is actually reported at 204 NLRB 681.

duty on the part of the union not to conduct itself in an arbitrary, invidious, or discriminatory manner” arises “when it acts as the *exclusive* agent of users of a hiring hall.” *Teamsters Local 519 (Rust Engineering)*, 276 NLRB at 907 – 08 (emphasis added). With few modifications, none of which are relevant to the issue here, the Board adopted the rulings, findings, and conclusions of the ALJ. *Id.* at 898.

Likewise, nowhere in *Operating Eng’rs Local 4 (Carlson Corp.)* did the Board conclude that a union operating a hiring hall--irrespective of whether it is exclusive or nonexclusive--owes referral applicants a duty of fair representation and is obligated to operate the hiring hall in a manner free from any arbitrary or invidious considerations. Instead, the Board found that the respondent union violated Section 8(b)(1)(A) when it *retaliated* against the charging party (failed to help her acquire employment through its nonexclusive hiring hall consistent with standard procedure) because the charging party engaged in protected activity. *See Operating Eng’rs Local 4 (Carlson Corp.)*, 189 NLRB 366, 367 (1971). In other words, the Board’s holding that the respondent union violated Section 8(b)(1)(A) was not based on a finding that the respondent union deviated from its standard referral procedures *alone*, but rather a finding that it deviated from that procedure in an effort to *retaliate* against the charging party. *Id.* Thus, the holding in *Operating Eng’rs Local 4 (Carlson Corp.)* does not stand for the proposition for which the GC cites it here. That is, there is no Section 8(b)(1)(A) violation where a union operating a nonexclusive hiring hall fails to refer an applicant for arbitrary or invidious reasons, without some additional showing that the union retaliated against him/her because s/he engaged in protected activity.

Operating Eng’rs Local 18 (Ohio Contractors Assn.), 204 NLRB 681 (1973)⁹ and

⁹ CG incorrectly cites this case as *Operating Eng’rs Local 18 (Ohio Contractors Assn.)*, 200 NLRB 147 (1975).

Plumbers Local 44 (Welded Construction), 313 NLRB 1 (1993) are equally unhelpful to the GC. The hiring halls at issue in both *Operating Eng'rs Local 18* and *Plumbers Local 44* were found to be exclusive and the Board made no pronouncement of any kind in either case that it would have found violations of Section 8(b)(1)(A) or 8(b)(2) regardless of whether the unions' hiring halls were exclusive or nonexclusive simply by virtue of the unions' departure from their hiring hall rules. *Operating Eng'rs Local 18 (Ohio Contractors Assn.)*, 204 NLRB at 681-85; *Plumbers Local 44 (Welded Construction)*, 313 NLRB at 1 – 11.

Compounding the GC's failure to adequately support GC's contention that "a union operating a hiring hall, irrespective of whether it is exclusive or nonexclusive, owes referral applicants a duty of fair representation and is obligated to operate the hiring hall in a manner free from any arbitrary or invidious considerations," is the GC's failure to address the ALJ's reliance on *Carpenters Local 370 (Eastern Contractors Assn.)*, *Carpenters Local 537 (E. I. duPont)*, and *Development Consultants* to support his finding that "[e]ven as to SMG, because the Respondent operated a nonexclusive hiring hall, it was not required to make referrals in a nondiscriminatory manner nor was the Union required to follow objective criteria in the operation of the hiring hall." (ALJD, at 8:38 – 43 (citing *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174 (2000); *Carpenters Local 537 (E. I. duPont)*, 303 NLRB 419 (1991); *Development Consultants*, 300 NLRB 479 (1990)).

Instead, the GC repeats GC's attack on the ALJ's analysis of the facts in the case. For the reasons shown above, the ALJ's analysis is sound and the record evidence does not support any finding that Respondent operated an exclusive hiring hall or retaliated against the charging parties. Without any evidence to support such findings, there can be no holding that Respondent violated Section 8(b)(1)(A) or 8(b)(2).

For these reasons, Respondent respectfully urges the Board to affirm the ALJ's finding that Respondent did not violate the Act in any manner alleged in the Complaint and in issuing a recommended Order dismissing the Complaint. Accordingly, Exception Nos. 19 and 20 should be overruled and the ALJ's rulings, findings, and conclusions should be adopted by the Board.

II. Conclusion

The ALJ found that Respondent did not operate an exclusive hiring hall by contract or by practice. The GC has failed to meet its burden to offer the evidence necessary to overrule the ALJ. Therefore, in operating its hiring hall, Respondent owed no duty to the charging parties other than a duty not to retaliate against them for engaging in protected activity. The record shows, and the ALJ found, that Respondent did not retaliate against the charging parties.

Accordingly, Respondent respectfully requests that the Board overrule the exceptions filed by the GC and adopt the rulings, findings and conclusions of the ALJ.

Dated: April 30, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2014 a true and accurate copy of the foregoing brief was sent by electronic transmission *via* the NLRB's E-File System, to:

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