

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 22, 2014

TO: George Velastegui, Regional Director
Region 32

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: *IATSE Local 16* 536-2545-0000
Case No. 20-CB-090776 536-4545-0600
536-2545-2900
536-2581-0000

The Region submitted this case for advice as to whether the Union violated Section 8(b)(1)(A) and (2) of the Act by operating an exclusive hiring hall where it makes referrals based on objective criteria, but neither maintains written rules on the criteria it utilizes, communicates the criteria it relies on to hiring hall users when making referrals, nor keeps written records of users' previous positions on the referral list. We conclude that the Union's operation of its hiring hall does not violate the Act.

FACTS

IATSE, Local 16's ("the Union") written hiring hall referral rules are set forth in a one-page document dated April 1, 2000 and entitled "Local 16's Referral List Criteria." The document explains, among other things, that the Union provides a referral system to "employers who need qualified individuals in the crafts," how users can get on the out-of-work list, and that the list will be available for inspection to all users upon request. However, the document does not otherwise list any of the criteria that the Union utilizes when making referrals. The Union's only other written documentation regarding the referral process is an online pamphlet advising users what to wear and how to behave when referred for a job.

An individual seeking to be referred is responsible for maintaining a current list of qualified craft skills with the Union. Individuals who have been referred to a job requiring a specific craft skill prior to April 1, 2000 are presumed to have retained that skill and are "grandfathered" in the Union's database. Otherwise, in order to be referred for a particular craft skill, the individual must have at least three journeymen write a letter to attest to the individual's specific skill. The Union is also in the process of creating a third route for skill certification – providing a certification exam for a particular skill that an individual can take upon request, passage of which would result in the skill being associated with the individual in the Union's database.

Other than this planned test, the Union has not changed the way it refers applicants from the out-of-work list since issuing the April 1, 2000 document.

In order to get on the referral list, individuals must call in or electronically register an availability to work. They remain on the list for seven days, after which they must renew their availability or they will be removed from the list. As long as they renew their availability, they maintain their chronological spot. Individuals selected for referral but whom the Union cannot contact or who refuse the referral are not penalized; are not removed from the list; and do not lose their chronological place on the list. Because the seven-day period is based on the availability of each applicant, the list is constantly being updated and never exists in a static state.

The Union employs five Assistant Business Agents (ABAs) who receive and process labor requests from employers. Upon receiving a labor request from an employer, the ABA typically first reviews it with the employer. The ABA then processes the request by inputting job details, such as duration, location, event name, labor requirements, and any specific name requests, into the Union's hiring hall database program. The program then assigns a job number to the labor request and generates a list of all individuals who possess the requisite skills from the pool of individuals who have registered their availability. The names generated by the program are listed in the chronological order in which they registered their availability for work.

When choosing which individuals to refer out, the Union maintains a policy of always referring "the most qualified applicant" from the referral list. The ABA first selects individuals from the referral list that were specifically requested by the employer. Then, the ABA sorts through the remaining individuals on the list to determine who has the most work history or experience in the particular field or with the particular piece of equipment the employer needs operated. When ABA's are not personally familiar with an individual's credentials or work history, they review the individual's file in the computer database, which includes the individual's skill set, work history, and previous referrals. When an ABA determines that individuals are equally skilled, the ABA refers the individual who has been on the referral list the longest.

Because of the variables associated with each labor request (such as which individuals, if any, that employer will request by name, which other individuals on the list have the necessary skill sets, and which individuals have been on the referral list the longest), the Union cannot know, in advance of a specific labor request, any individual's placement on the list for that job. The only way the Union can give

individuals their approximate placement on the list is to create a hypothetical work request, which then generates a list of qualified applicants for referral.¹

ACTION

We conclude that the Union's operation of its exclusive hiring hall does not violate Section 8(b)(1)(A) and (2) of the Act where it relies on objective criteria in making hiring hall referrals and provides information about the hiring hall criteria to users upon request, even though it does not maintain written records of its referral criteria or of applicants' previous positions on the referral list.

A union operating a hiring hall owes referral applicants a duty of fair representation and is obligated to operate the hiring hall in a manner free of any arbitrary or invidious discrimination.² A Union must give timely notice to hiring hall users if it modifies the criteria it relies upon to make referrals,³ and it must also provide information about the criteria it utilizes to a user, upon request.⁴ Further, the union bears the burden of establishing that its referrals are made pursuant to a valid hiring hall provision, or that its conduct was necessary for the effective performance of its representation function.⁵ Thus, a union that operates an exclusive hiring hall without reference to objective criteria,⁶ or that fails to follow its referral rules and

¹ Similarly, because the Union's referral list is constantly changing (as people renew their place on the list, are referred out, or fail to renew their spot on the list), once a referral has been made the Union has no way to provide a "snapshot" of where on the list a particular individual was regarding a previous referral.

² *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898 (1985), *enf'd. mem.* 843 F.2d 1392 (6th Cir. 1988).

³ *Electrical Workers IBEW Local 11 (Los Angeles NECA)*, 270 NLRB 424, (1984), *enf'd.* 772 F.2d 571 (9th Cir. 1985).

⁴ *Electrical Workers IBEW Local 575 (Coleman Electric)*, 270 NLRB 66 (1984), *enf'd.* 773 F.2d 746 (6th Cir. 1985).

⁵ *Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1170 (2006), *enf'd.* 315 Fed. Appx. 318 (2d Cir. 2009).

⁶ *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50 (1982), *enf'd.* 701 F.2d 504 (5th Cir. 1983).

procedures,⁷ violates the Act. However, the Board does not require that hiring hall rules and procedures be written;⁸ nor does it require, absent a contractual agreement, that referral rules be posted or incorporated into a contract.⁹ Similarly, the Board does not require that a union keep written records of past referrals.¹⁰

The Board has recognized several objective factors that unions may rely on when categorizing or prioritizing applicants for referral. In *Asbestos Worker, Local 42 (Catalytic Construction Co.)*, the Board affirmed an Administrative Law Judge's finding that the union's preference for referring workers with four years of experience in the trade and who have passed a journeyman's examination given by the union over those with only the requisite experience who had not passed the exam was a proper objective criterion on which to prioritize employees for referral.¹¹ Similarly, in *Morrison-Knudsen Company*, the Board upheld the union's unwritten policy of giving preferential referral to applicants based on their greater skill and work experience as determined by the union representative making the referrals.¹² The Board stated that while such referral practices could allow a union to disguise favoritism or patronage in referrals, the Board was not going to find the practice invalid absent evidence, or even an allegation, that the union preferred its own members or supporters in its referrals.¹³

However, a union may not claim to make referrals based on objective criteria, but in reality permit union referral agents unfettered discretion as to what criteria they utilize. In *United Association of Plumbers and Pipefitters, Local 619 (Bechtel Power)*,

⁷ *Boilermakers Local 374 (Construction Engineering)*, 284 NLRB 1382 (1987) *enf'd*. 852 F.2d 1353 (D.C. Cir. 1988); *See also United Association of Plumbers and Pipefitters, Local 619 (Bechtel Power Corp.)*, 268 NLRB 766 (1984).

⁸ *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690, 700 (1976).

⁹ *Iron Workers Local 505 (Snelson-Anvil)*, 275 NLRB 1113 (1985), *enf'd* 794 F.2d 1474 (9th Cir. 1986).

¹⁰ *Laborers, Local 394 (Wakil Abdunafi Contractors Ass'n of NJ)*, 247 NLRB 97 (1980), *enf'd*. 659 F.2d 252 (D.C. Cir. 1981), *cert. den'd*. 454 U.S. 861 (1981).

¹¹ 164 NLRB 916 (1967).

¹² 291 NLRB 250 (1988).

¹³ *Id* at 250.

the Board found unlawful a hiring hall arrangement where the union referred individuals based on their economic situation and their need for work.¹⁴ Similarly, in *Denver Theatrical Stage Employees' Union No. 7*, the Board found that a union's referral criteria based on whether an applicant's work in the industry was his or her primary occupation was not a lawfully objective factor.¹⁵ Further, if a union establishes validly objective criteria for prioritizing and making referrals, it must make a good faith attempt to use those criteria in determining which applicants on the list to refer. Thus, in *Plumbers and Pipefitters Local Union No. 32 (Alaska Continental Pipeline, Inc.)*, the Board affirmed the Administrative Law Judge's finding that although the union relied upon the objective factors of "dependable" and "qualified" when it sought to make referrals, it only referred those applicants personally known to the union agent, or referred to him from someone he personally knew.¹⁶ The union's failure to determine whether all candidates on the list possessed the requisite criteria, and its reliance on subjective criteria – i.e. personal knowledge of the candidate's attributes – rendered the referrals unlawful.¹⁷

Here, although the Union does not maintain written records of the criteria it employs, or of applicants' positions on the list for past referrals, the Act does not require it to do so. Further, there is no evidence or allegation that the Union has either made changes to its referral policy since the issuance of its April 1, 2000 guidance to users, or that it has ever denied an employee access to, or an explanation of how the hiring hall and its referral process operates. Nor is there any evidence that the Union intentionally keeps the operation of the hiring hall unavailable to inquiring applicants.

Additionally, although unwritten, the Union has shown that it relies upon validly objective criteria when determining in what order individuals are referred. The Union maintains a policy of sending the best qualified applicant, as determined by the applicant's work history, skillset, and experience with equipment. The ABAs do not simply refer the candidates with whom they are personally acquainted (as the union agents did in *Alaska Continental Pipeline*¹⁸), but routinely check the profiles of

¹⁴ 268 NLRB 766 (1984).

¹⁵ 339 NLRB 214 (2003).

¹⁶ 312 NLRB 1137 (1993), *enf'd* 50 F.3d 29 (D.C. Cir. 1995), *cert. den'd.* 516 U.S. 974 (1995).

¹⁷ *Id.* at 1138-39.

¹⁸ 312 NLRB 1137.

candidates they do not personally know to determine whether those candidates possess the requisite skills and have the work history or experience that would make them the most qualified candidate for referral. Further, when individuals are equally skilled, the ABA refers the individual who has been on the referral list the longest.

Accordingly, we conclude that the Union's referral process follows lawfully objective criteria, and that the operation of its hiring hall does not violate Section 8(b)(1)(A) and (2) of the Act. Thus, the charge should be dismissed, absent withdrawal.

/s/
B.J.K.