

**International Brotherhood of Teamsters, Local 509
(Touchstone Television Productions, LLC d/b/a
ABC Studios) and Thomas Troy Coghill.** Case
11–CB–004020

December 13, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On March 9, 2011, Administrative Law Judge Michael A. Marcionese issued the attached decision in this consolidated unfair labor practice and backpay case. The Respondent, International Brotherhood of Teamsters, Local 509, filed exceptions and a supporting brief. The Acting General Counsel and Charging Party Thomas Troy Coghill filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

We adopt the judge's findings that the Respondent violated Section 8(b)(1)(A) of the Act by failing to place Coghill on its referral list for arbitrary, discriminatory, and invidious reasons and thereafter by failing to refer him for employment, and violated Section 8(b)(2) of the Act by causing the Employer to discriminate against Coghill by not hiring him to work for season three of *Army Wives* because he was not a member of the Respondent local.

The Respondent contends that it did not discriminate against Coghill by denying him placement on the referral list, because it had closed the list to new applicants before season three began. We find this argument unavailing. The manner in which the Respondent maintained the list was itself unlawful and discriminatory. As the judge found, the Respondent operated an exclusive hiring hall that excluded nonmembers such as Coghill. The operation of such a hiring hall violates the Act. See *Morrison Knudsen*, 291 NLRB 250, 259 (1988) (union that oper-

ates an exclusive hiring hall is obligated to refer individuals without regard to their union membership or lack thereof). The Respondent's action in closing the list, purportedly to preserve available work for members currently or, in certain circumstances, previously on the list, merely perpetuated the unlawful effect of its prior maintenance of a members-only, exclusive hiring hall. Further, regardless of whether the list was open or closed, the Respondent would not have placed Coghill, a nonmember, on the list or referred him for employment.³

Accordingly, we find that, by excluding nonmembers, including Coghill, from its movie referral list, the Respondent operated a discriminatory hiring hall and unlawfully encouraged union membership among employees, in violation of Section 8(b)(1)(A) and (2).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Brotherhood of Teamsters, Local 509, Cayce, South Carolina, its officers, agents, and representatives, shall take the action set forth in the Order.

Rosetta B. Lane, Esq., for the General Counsel.

Justin P. Keating, Esq., for the Respondent.

W. James Young, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Charleston, South Carolina, on February 23–25, 2010. Thomas Troy Coghill, an individual, filed the charge in Case 11–CB–004020 on February 9, 2009, and amended it on March 30, 2009. On January 29, 2010, based upon this charge and the two charges that have been severed, the General Counsel issued an amended consolidated complaint and compliance specification, which was subsequently amended further on February 5, 2010. The amended consolidated complaint, as it relates to Charging Party Coghill, alleges inter alia, that International Brotherhood of Teamsters Local 509, the Respondent, violated Section 8(b)(1)(A) and (2) of the Act, in the operation of an exclusive hiring hall, by arbitrarily refusing to place applicants, including Coghill, on its movie referral list, and by refusing to refer Coghill for employment with Touchstone Television Productions, LLC d/b/a ABC Studios, an employer within the meaning of the Act, since November 17, 2008.¹ The compliance specification issued concurrently with the complaint and consolidated for hearing alleges that the Respondent

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

No exceptions were filed to the judge's finding that the Respondent operated an exclusive referral hall.

² For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

³ Our holding here is limited to the facts of this case. Whether, in other circumstances, a union may lawfully close a lawful referral list due to the number of applicants and the amount of available work is not before us.

¹ All dates herein are in 2008, unless otherwise indicated.

owes Coghill \$55,467.62 in net backpay, plus interest, as a remedy for its alleged unfair labor practices.

On February 18, 2010, the Respondent filed an amended answer to the consolidated complaint and compliance specification in which it denied, *inter alia*, that it operated an exclusive hiring hall and that it arbitrarily refused to place applicants on its movie referral list. Although the Respondent admitted that it failed and refused to place Coghill on its movie referral list since November 17, 2008, and failed and refused to refer him for employment by the Employer, ABC Studios, it denied violating the Act by doing so and further denied that it operated its hiring hall in a discriminatory, arbitrary, and capricious manner. With respect to the compliance specification, the Respondent denied that it owed any backpay to Coghill because the Employer had the authority to hire Coghill despite his not being on the referral list. The Respondent further asserts, in answer to the compliance specification, that the Employer was planning not to hire Coghill for the production in question, even if his name was on the referral list. The Respondent's answer also raised issues with the formula used to calculate backpay and with Coghill's interim earnings and mitigation efforts.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Touchstone Television Productions, LLC, d/b/a ABC Studios, the Employer, is a California corporation that has been engaged in the production of a television series titled, *Army Wives*, at a facility in Charleston, South Carolina. The Employer annually purchases and receives at its Charleston facility goods valued in excess of \$50,000 directly from points outside the State of South Carolina. The Respondent admits and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

As noted above, the Employer produces the television series *Army Wives* in and around Charleston, South Carolina. The pilot was filmed in August 2006. Season one was filmed in 2007, season two in 2008, and season three in 2009. Season four was in production at the time of the hearing in early 2010. The dispute in this case concerns the Employer's hiring of drivers for season three.

Respondent Union represents drivers employed by UPS, Owens Corning, AGY, Pet Dairy, and other companies within its geographic jurisdiction. In addition, the Respondent operates a referral service for individuals seeking employment as drivers in the television and motion picture production industry within its territory. The Respondent's geographic jurisdiction encompasses all but the five northern counties of South Carolina. Because of incentives offered by the State of South Carolina,

there has been an increase in the number of production companies using the State as the location for films, television programs, and commercials. There is no dispute that, as a result of this growth in the business, there have been occasions when the Respondent has had an insufficient number of qualified drivers available for referral. There is also no dispute that, at least when the dispute in this case arose, the referral list maintained by the Respondent was a members-only list.

The Employer recognized the Respondent as the exclusive collective-bargaining representative of drivers to be employed on *Army Wives* before any drivers were hired. Although the parties did not execute a collective-bargaining agreement until after production of the pilot episode was completed, there is no dispute that the Employer's transportation coordinator, Lee Siler, contacted the Respondent for a list of qualified drivers when he began staffing the pilot. Siler is a member of Teamsters Local 399 in Los Angeles. He served as the transportation coordinator for the pilot and all four seasons of *Army Wives*. On this production, he reported to Unit Production Manager Barbara D'Alessandro. Both Siler and D'Alessandro testified in this proceeding as witnesses for the General Counsel. I generally found them to be credible witnesses.

The Respondent's president and business agent, L.D. Fletcher, is responsible for administering the Respondent's movie referral service. He also is the union representative who conducts negotiations with producers over the terms of collective-bargaining agreements and processes grievances that arise during production. The evidence indicates that the Respondent utilizes essentially a standard agreement to cover movie and television productions that may be modified to meet the needs of individual employers, which is what happened in this case. The initial agreement negotiated between the Respondent and the Employer for *Army Wives* contained the following referral language:

Article V

Employment

(a) The parties hereto recognize the conditions in this industry require frequent hiring of drivers on a daily non-continuing basis. For this purpose, the Union shall maintain, for the convenience of the Producer and the employee, a referral service which shall in all respects comply with all applicable provisions of law.

(b) The producer agrees to request referrals for all drivers required for work covered by the Agreement, from the Union.

A side letter to the agreement negotiated before the start of production on season one, but after completion of the pilot, contained the following language modifying article V:

It is understood in *Article V Employment*, that the Producer retains the right to reject any applicant referred from the Union.

Siler testified that, in hiring for the *Army Wives* pilot, and each succeeding season, he requested a copy of the Respondent's "movie referral list," as required by the above-contract language. Siler hired Robert Gillis, a member of another local of the Teamsters, to be his captain, running the day-to-day operations. Gillis was not on the Respondent's list. Siler hired two

other employees who were not on the list to operate special equipment, i.e., the honey wagon and the production van. He did this because the Respondent did not have drivers qualified to operate this type of equipment. The Respondent did not object to these hiring decisions. With respect to the rest of the crew, Siler testified that he hires 15–20 drivers each day depending upon production needs, to move equipment and crew members to different shooting sites. Siler testified further that, because he was not familiar with the drivers on the Respondent's list, he called each of them to ascertain their qualifications and experience. According to Siler, he was able to put together a crew for the pilot from the list, notwithstanding limited availability of drivers due to other productions being filmed in the area at that time.

By the time season one started production in January 2007, the parties had completed negotiation of the collective-bargaining agreement with the language referred to above. Siler testified that, due to the filming of a movie called *Leatherheads* in the Respondent's jurisdiction at the same time, many of the drivers on the Respondent's list were not available. In order to fill out his crew, Siler hired drivers from Teamsters Locals 71 and 391 to work on season one. Coghill, a member of Local 391 in Wilmington, North Carolina, was one of these drivers. Production of season two, originally scheduled to begin in January 2008, was delayed due to a writer's strike and did not get underway until March. The parties agreed to extend the collective-bargaining agreement to cover season two and, as required by the above language, Siler contacted the Respondent for its movie referral list before hiring drivers. Again, because many of the drivers on the Respondent's list, including some who had worked for Siler on season one, were already employed on other productions, Siler hired drivers from other Teamster locals to work until those productions ended. Coghill was hired for season two. When one of the other productions, a film called *New Daughter*, ended in April, drivers who were on the Respondent's list who had worked on season one returned to *Army Wives*, and the off-list drivers Siler had hired left for other productions with one exception, i.e., Coghill. Coghill was the only nonmember of the Respondent, other than Captain Gillis and the honey wagon and production van drivers, to work the remainder of season two.

Two drivers who were on the Respondent's referral list, Frankie Padgett and Jeff Corbett, who had worked on season one and were coming off the job with *New Daughter*, were not hired by Siler for full-time positions on season two. Instead, Siler offered them part-time day player work, which they accepted. There is no dispute that Fletcher was not happy with this arrangement and called Siler to complain that non-509 drivers were working full time while his members were part time. According to Siler, at one point in the conversation, Fletcher threatened to picket the production if Siler did not release all non-509 drivers. When Siler refused to agree to this, Fletcher called the Employer's labor attorney in Los Angeles, Laura Legge, and made the same demand. Legge, who had negotiated the collective-bargaining agreement for the Employer, attempted to resolve this dispute by scheduling a meeting in Charleston with Respondent.

The parties met on May 13 at the Employer's production office. D'Alessandro and Siler were present for the employer and Fletcher and Business Agent James Todd represented the Respondent. Fletcher again demanded that the Employer fire any drivers not on the list and replace them with his members. Fletcher admitted at the hearing that he told Siler and D'Alessandro that he "could shut you down, but I'm not going to shut you down." D'Alessandro recalled that Fletcher threatened to picket the production. Regardless of whether such a threat was made, the Respondent never did picket or try to shut down the production and Coghill continued to work the remainder of season two, which ended production in September. Siler testified that he told Coghill, toward the end of production, that if Coghill wanted to work on season three, he should move to South Carolina, establish residency, and join the Respondent.

Coghill has been working as a driver in the movie/television production industry since 1997. In fact, Coghill testified that it was Siler who got him started in the business. Coghill has worked with Siler on a number of productions other than seasons one and two of *Army Wives*. Coghill was first hired to work on *Army Wives* for season one and was assigned by Siler to drive hair and makeup trailer. There is no dispute that this is not considered specialized equipment. When first hired to work within the Respondent's jurisdiction, Coghill signed an application for membership and checkoff authorization as well as a document agreeing to pay 2 percent of gross wages to the Respondent as a service fee.²

Coghill testified that, in November 2008, as advised by Siler, he contacted the Respondent to find out how to go about transferring his membership to the Respondent. According to Coghill, his calls were not returned. On November 14, he wrote to the Respondent and his home local informing them of his intent to relocate to Charleston, South Carolina, and requesting an application to transfer his membership. On November 17, Coghill called the Respondent's office to confirm receipt of his letter. Peggy Chavis, a secretary in the Respondent's office, confirmed that the letter had been received. According to Coghill, she told him that someone would be contacting him. When he did not receive any response, Coghill continued to call the Respondent's office periodically from November until January, without success. Coghill testified that he even made phone calls to the Respondent while he was travelling in India. Only once was Coghill successful in reaching Fletcher. According to Coghill, in response to his inquiries, Fletcher told him that the Respondent's referral list was "closed." Fletcher asked Coghill if Siler had promised him a job on season three. Coghill replied that Siler had told him that it would be easier to hire him if Coghill was a member of the Respondent. Fletcher then told Coghill that he didn't have to worry about Siler because Siler would not be around much longer. When Coghill expressed that he could not understand why he couldn't transfer his membership since he was a member in good standing of

² The service fee agreement signed by Coghill, which is used with all nonmembers working in the movie industry, makes clear that the individual is not joining the Respondent by signing the application for membership. Instead, he retains his membership in his home local.

Local 391 and had been paying service fees to the Respondent while working in its jurisdiction, Fletcher replied that he would send Coghill an application and put his name on the “B” list. Fletcher admitted at the hearing that the Respondent did not maintain a “B” list.

Fletcher’s version of the telephone conversation with Coghill differs in significant respects. According to Fletcher, he had made inquiries concerning Coghill’s transfer request after first receiving a phone message that Coghill wanted to transfer into the local. Fletcher testified that he was told by counsel that a member could only transfer from one local to another if he was already working in the new local’s jurisdiction when the request was made. When Fletcher finally spoke to Coghill on the phone, he relayed this information. Fletcher recalled that Coghill then asked to be placed on the movie referral list. Fletcher admittedly told Coghill that the list was closed and that the Respondent was not accepting any more applicants at that time.³ Fletcher did not specifically deny referring to a B list or telling Coghill that his name would be placed on such a list.

Coghill testified that he returned to the United States on January 3, 2009. A package from the Respondent was waiting for him. The package contained an “Application and Notice” and a memo regarding the Respondent’s service fee. A post-it note was affixed with the handwritten note: “You do not need to send any money now. When your name comes up on the B list, I’ll contact you! Any questions, please call.” The note is not signed but Chavis acknowledged in her testimony that she was the one who sent this package to Coghill. When questioned about the “B” list referred to on the post-it note, Chavis was at a loss. As correctly noted by the General Counsel in her brief, Chavis offered no explanation for her reference to a list that admittedly did not exist. Although she speculated that she might have been referring to a wait list, she did not know when a wait list was created, how long it had been in existence, where it was kept, how long employees had been on the list, what happened to employees whose names were on the list. She did not even know where the list was on the day she testified.

Coghill testified that, upon receiving the above package from the Respondent, he completed the “Application and Notice,” reflecting his new address in South Carolina, and returned it to the Respondent with a copy of his commercial driver’s license and a completed Movie Referral Request seeking placement on the list. Coghill also enclosed a check to cover the \$100 initiation fee and the first month’s administrative fee to maintain his name on the movie referral list. On January 30, 2009, Coghill received a letter from the Respondent’s secretary-treasurer, Powell Caldwell, which stated:

Teamsters Local 509 is in receipt of your request to be placed on the Movie Referral List. At this time, no additional names are being added to the list. Therefore, we are unable to transfer your membership to Local 509. I am returning all of your paperwork and the check you sent.

It is undisputed that the Respondent, through Fletcher and Caldwell, told Coghill that his name could not be placed on the list. These statements to Coghill were based on action that had

³ The closure of the list will be discussed *infra*.

been taken by the Respondent’s executive board on June 14, 2008, while production on season two was in progress. The minutes of that meeting reflect that Fletcher discussed with the board “the number of people needed to have a sufficient movie referral list.” After that discussion, a member of the board, trustee James Todd, moved to “add only those that had been on the list if they became current in dues or administrative fees.” The motion passed. Fletcher testified that he asked the executive board to cap the list at that time in order to preserve work for members already on the list. According to Fletcher, work in the movie industry had slowed since the beginning of season two. Fletcher testified further that he instructed Chavis, after this motion was passed, to keep track of people who called in wanting to be placed on the list. He acknowledged that he did not specifically refer to this as a “wait list” in talking to Chavis. Although Chavis referred to a “waiting list” in her testimony, she did not corroborate Fletcher’s testimony regarding its genesis. In fact, as noted above, she was clueless regarding the creation of the list and other matters one would expect her to know about.⁴

While Coghill was attempting to transfer his membership or get his name on the movie referral list, the Employer was gearing up for the production of season three, scheduled to start in January 2009. In December 2008, Legge contacted Fletcher to begin negotiations for a collective-bargaining agreement to cover season three. She suggested that the parties apply the season two contract until a new agreement could be reached. In accordance with the terms of that agreement, the Employer requested and, on January 2, 2009, was provided a copy of the Respondent’s movie referral list. Coghill’s name was not on the list. Siler testified that he was under instructions to only hire drivers from this list. As in past seasons, the captain and the two specialty equipment drivers who were hired were not on the list. The other drivers hired were on the Respondent’s list. Coghill was not hired for season three. Both Siler and D’Alessandro testified that they would have hired Coghill if his name was on the list.

The parties had one face-to-face collective-bargaining negotiation session on January 21, 2009. Legge attended this meeting with D’Alessandro, Siler, and Executive Producer Harry Bring for the Employer. Fletcher and International Representative Ron Schwab were there for the Respondent. During the meeting, Fletcher held up the movie referral list and said, “this is the list you are hiring from.” It is not clear from the record when the parties reached final agreement on a new collective-bargaining agreement. Correspondence in May 2009 shows that an agreement was in place by then. The new agreement, to cover seasons three and four, contained new language in article V:

(a) The parties hereto recognize the conditions in this industry require frequent hiring of drivers on a daily non-continuing basis. For this purpose, the Union shall prepare and maintain, for the convenience of the Producer and the employee, Refer-

⁴ In her brief, counsel for the General Counsel moved to amend the complaint to allege that the Respondent’s closing of the movie referral list in June 2008 violated Sec. 8(b)(1)(A). I will rule on this motion later in this decision.

ral Lists which the Union represents and warrants are prepared and maintained in compliance with all applicable provisions of law. A copy of the updated Local 509 Referral List is attached hereto as Exhibit A.

(b) The Producer agrees to request referrals for all drivers required for work covered by the Agreement, from the Union.

(c) The Producer agrees that it will offer employment to qualified drivers on the Local 509 Referral Lists before Producer offers employment to persons who are not on the Local 509 Referral Lists. The Producer has the right to hire whomever it chooses from the Referral Lists. If the Referral List (attached as Exhibit A) is exhausted, the Producer shall request from the Local Union, a supplemental Referral List.

D'Alessandro testified that the Employer chose to film *Army Wives* in South Carolina because of incentives offered by the State of South Carolina to encourage this type of business. Although the tax and other incentives are not contingent upon the Employer hiring only residents of the State, there is evidence in the record that State officials were pressuring the Employer and other producers to hire more residents for political reasons. Legge admitted in her testimony that the Employer feared that South Carolina might change or even repeal the incentives in response to concerns that the State was subsidizing the hiring of nonresidents through tax dollars. Email correspondence in evidence shows that the Employer made a concerted effort before season three to increase the proportion of South Carolina residents working on the production. An October 1, 2008 email from D'Alessandro to her superiors in Los Angeles reveals that she specifically discussed Coghill's situation, advising them that transportation, presumably Siler, had agreed that only Siler, transportation captain Gillis and honey wagon driver Stevens would be "distant hires." Although the Respondent argues that this is a reference to hiring of South Carolina residents, "distant hires" also refers to individuals hired from outside the Respondent's geographic jurisdiction. Significantly, this statement from D'Alessandro's email is in the context of her noting that "LD," i.e., Fletcher, "is still making life hell for lee [Siler]. called him this am with lots of cursing and outrageous demands, etc." (sic) It also should be noted that the transportation department was not one of the departments that historically had a disproportionate number of nonresidents of South Carolina. In a January 5, 2009 email, D'Alessandro reported to her superiors that the Employer had increased the ratio of residents to nonresidents on the entire crew from 90:65 to 94:61. One of the changes noted from previous emails on the subject was to change a slot that had been designated for Coghill in September to "TBD," with his position switched from nonresident to resident.

As previously noted, season four of *Army Wives* was filming during the hearing. Coghill was hired to work season four because his name had been placed on the Respondent's movie referral list in June 2009, after the charge had been filed and complaint issued in this case.

B. Analysis

1. The Respondent's exclusive hiring hall

An exclusive hiring hall is an arrangement that requires an employer who is signatory to a collective-bargaining agreement with a union to obtain referrals for employees needed to fill bargaining unit positions from the union. The fact that there are exceptions that allow an employer to hire from outside the hall under certain circumstances does not negate a finding of exclusivity. *Longshoremen Local 1408*, 258 NLRB 132 (1981), enfd. 705 F.2d 1549, 1552 (11th Cir. 1983); *Stage Employees IATSE Local 769 (Broadway in Chicago)*, 349 NLRB 71 (2007). See also *Carpenters Local 608 (Various Employers)*, 279 NLRB 747, 754 (1986), enfd. 811 F.2d 149 (2d Cir. 1987); *Laborers Local 394*, 247 NLRB 97, 101 (1980). Similarly, an employer's retention of the right to reject applicants referred by the Union does not disprove the existence of an exclusive hiring hall arrangement. *Morrison-Knudsen*, 291 NLRB 250, 258 (1988); *Plumbers Local 17 (FSM Mechanical Contractor)*, 224 NLRB 1262, 1263 (1976), enfd. 575 F.2d 583 (6th Cir. 1976). As the Respondent correctly points out, the burden is on the party asserting the existence of an exclusive hiring hall to prove it. *Carpenters Local 537 (E. I. DuPont)*, 303 NLRB 419 (1991), and cases cited therein.

A finding of exclusivity is significant because the Board has long held that a union that operates an exclusive hiring hall violates Section 8(b)(1)(A) and (2) if it refuses to refer applicants for employment because they are not members of the the union. *Longshoremen ILA Local 1423 (Savannah Maritime)*, 306 NLRB 942, 946 (1992). A union that operates a nonexclusive hiring hall owes no duty to assist nonmembers in seeking employment because, presumably, they can solicit work directly from signatory employers. *Carpenters Local 537*, 303 NLRB at 420; *Teamsters Local 460 (Superior Asphalt Co.)*, 300 NLRB 441 (1990).⁵

Applying precedent to the credible evidence in the record, I find that the General Counsel has met the burden of proving the existence of an exclusive hiring hall arrangement in this case. The language in the collective-bargaining agreement negotiated for season two, which applied to the hiring for season three at the time Siler began hiring for that season, clearly stated that the Employer was required to request referrals from the Union for all drivers to be covered under the contract. Although the Employer negotiated a modification to retain the right to reject any referral, what the Respondent describes as "producer's choice," it was clearly expected that the Union would be the first source of employees. The contract negotiated for season three made this even more explicit, requiring the Employer to offer employment to persons on the list before offering employment to persons not on the list, and requiring the employer to contact the Union for additional names if it exhausted the first list of referrals. Significantly, nothing in either contract explicitly gave the Employer the right to hire drivers directly

⁵ A union with a nonexclusive hiring hall may still be found to have violated Sec. 8(b)(1)(A) if it refuses to assist members of the union in finding work in retaliation for the exercise of protected concerted activities. *Carpenters Local 537*, supra.

off the street. The fact that the Employer hired a captain, a couple of specialty drivers, and other nonlist individuals to fill positions when there were an insufficient number of available qualified drivers on the referral list, does not negate the exclusive nature of the arrangement, as found by the Board in the cases cited above. Moreover, Fletcher's communications with the Employer, his actions in filing grievances during his dispute with Siler over Coghill's employment, and his testimony at the hearing, made clear his intention and understanding of the contract as requiring employers to hire drivers off the movie referral list before giving work to other applicants.

The Respondent offered evidence to show that a large number of drivers who were not on the list were employed during the period at issue by this employer and other producers in the movie industry working within its geographic jurisdiction to prove the nonexclusive nature of the arrangement. I find that evidence with regard to the hiring of drivers by employers other than this Employer is irrelevant to the decision in this case. The only issue before me is whether this Employer had an exclusive hiring hall arrangement with the Respondent and whether the Respondent violated the Act in the operation of its referral system vis-a-vis this Employer. Moreover, the evidence in the record shows that, for much of the time that *Army Wives* was filming seasons one through three in the Charleston area, it was competing with other employers for the same types of workers. Under these circumstances, where there was more work than the number of qualified applicants on the referral list, the fact that people were hired who were not on the list would not be surprising, nor a deviation from the exclusivity of the Respondent's referral service.⁶

In sum, I conclude in agreement with the General Counsel and the Charging Party that the Respondent's movie referral list constituted an exclusive hiring hall arrangement. However, I do not find that the Respondent's arbitrary closing of the list in June 2008 violated the Act because counsel for the General Counsel's motion to amend the complaint to allege such a violation was untimely. Although the General Counsel was aware during the investigation that the list had been "closed," no allegation was included in the initial complaint or any subsequent amendments. Even when the issue came up in testimony at the hearing, counsel failed to advise the Respondent that its actions in June 2008 were being challenged as unlawful. Had the Respondent been so notified, it might have called additional witnesses or presented other evidence to justify the decision to close the list. In addition, the Respondent would presumably have addressed the issue in its brief had it known of the amendment. Only after the hearing was closed and briefs were filed did the Respondent get notice of this potential additional violation. Under these circumstances, I find that the issue was not "fully and fairly litigated" and that Respondent was denied due process by the posthearing attempt to amend the complaint.

2. The Respondent's treatment of Coghill

There is essentially no dispute that the Respondent refused to place Coghill's name on its movie referral list in November

⁶ Respondent in effect created this situation by limiting its referral list to its own members, thus limiting the supply of eligible employees to refer.

2008 and, as a result, failed and refused to refer him to employment for season three of *Army Wives*. There is also no dispute that Coghill was not a member of the Respondent and his request to join the Respondent by transferring his membership from Local 391 was rejected by the Respondent. Because the Respondent's movie referral list was a members-only list at the time, this prevented Coghill from getting on the list, which the Employer was contractually required to use as a source for employees. The General Counsel alleges that these actions by the Respondent violated Section 8(b)(1)(A) and (2) of the Act. The Respondent contends that its actions were not unlawful because Coghill was not prevented from seeking employment on his own. The Respondent's argument is predicated upon a finding that the movie referral list was not an exclusive hiring hall arrangement, a claim I have rejected. The evidence in the record shows clearly that the Respondent, through Fletcher, demanded that the Employer only hire from the list for season three and specifically that the Employer not hire Coghill. I credit the testimony of Siler and D'Alessandro that, were it not for these demands, Coghill would have been hired for season three based upon its practice of trying to retain the same crew members season to season. I find that the General Counsel has met the burden of proof here and that the Respondent's treatment of Coghill was arbitrary and discriminatory, and a breach of its duty of fair representation. I find further that this conduct caused the Employer not to hire Coghill for season three.

The Respondent attempted to avoid such a finding by submitting evidence to show that Coghill's loss of employment was not caused by the action of its agents but by the State of South Carolina's efforts to encourage the employment of its residents by producers receiving tax incentives for filming in the State. I am not persuaded by this evidence. As counsel for the General Counsel points out in her brief, had the Respondent placed Coghill's name on the list, or allowed him to transfer his membership as he requested in November, he would have moved to South Carolina and become a resident before anyone was hired for season three. Similarly, the October memo from D'Alessandro referring to "distant hires" would not have applied to Coghill because he would not be a distant hire if he was a member of the Respondent or had been placed on the list. Finally, the January 2009 email in which Coghill's slot was changed from a nonresident hire to a resident hire "to be determined" would not have prevented Coghill being hired if the Respondent had allowed him to join the local or placed his name on the list because he would have become a resident by that time.

Accordingly, I conclude based on the above and the record as a whole that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by its actions toward Coghill.⁷

III. COMPLIANCE SPECIFICATION

In a typical unfair labor practice proceeding, my decision would end here with conclusions of law, a recommended reme-

⁷ In view of my findings above, I need not address counsel for the General Counsel's alternative argument that Respondent's conduct would be unlawful even if the Respondent operated a nonexclusive hiring hall, an allegation not raised in the amended consolidated complaint.

dy, and proposed order. Any issues arising with regard to backpay would be handled in a separate compliance proceeding only after the Board had ruled on any exceptions filed to my unfair labor practice decision. In this case, the General Counsel has chosen to consolidate the compliance proceeding with the unfair labor practice case so I must address backpay issues raised by the Respondent's answer to the compliance specification.

As noted above, the Respondent denied that any backpay was due based on its claim that Coghill would not have been hired for season three even assuming the Respondent was innocent of any unfair labor practice. I have already rejected that claim in making my determination above. In its answer, the Respondent also challenged some of the General Counsel's backpay computations to arrive at gross backpay. At the hearing, the Respondent stipulated that, if an unfair labor practice were found, the amount of gross backpay computed and the General Counsel's method of calculating it by using the earnings of a comparable employee was accurate. The only issue remaining for determination then is whether Coghill satisfied his duty to mitigate damages. As to these issues, the burden is on the Respondent. See *Pope Concrete Products*, 312 NLRB 1171 (1993), *enfd.* 67 F.3d 300 (6th Cir. 1995).

The compliance specification alleges and the Respondent has agreed that the backpay period in this case begins on November 17, 2008, the date the Respondent refused to include Coghill's name on the movie referral list and ended sometime in December 2009 when the Respondent included Coghill's name on the referral list used by the Employer to hire drivers for season four. As noted, the Respondent stipulated that the General Counsel's use of a comparable employee's earnings to calculate what Coghill would have earned during this period was accurate. Using employee Joey Ricker's earnings resulted in a gross backpay calculation of \$66,500.19, which the Respondent has stipulated was accurate. The General Counsel has reported that Coghill had interim earnings in every quarter of the backpay period totaling \$11,032.57. When the interim earnings are deducted from gross backpay on a quarterly basis, they result in net backpay of \$55,467.62, which is the remedy the General Counsel seeks for the unfair labor practice found above.

Coghill testified at the hearing about his efforts to mitigate backpay in response to questions from the Respondent's counsel. The Respondent also had available records kept by Coghill regarding his search for work, including the quarterly Claimant's Expense, Search for Work and Interim Earnings Reports that he had submitted to the Region. At the hearing and in brief, the Respondent narrowed its mitigation defense to a claim that Coghill should be denied backpay for the period May 10 through July 7, 2009, relying on a statement contained in one of the reports he filed with the Region. In the report for the second quarter of 2009, Coghill wrote the following:

I was unemployed and looking for work as directed by Va. Employment Commission. Work with MKC became unavailable and I lived off my savings and tax return as my unemployment was frozen. My records of the job search are too sketchy to document for these proceedings, so I will not try. (sic)

(Emphasis added). Although counsel for the General Counsel

solicited testimony from Coghill regarding his efforts to find work during this period and put in evidence telephone records showing calls made to contacts Coghill had in the movie industry, former employers and other prospects, Respondent argues that the statement on the form show be credited as proof that he failed to look for work during this approximately 2-month period. The Respondent seeks to reduce Coghill's backpay award by \$9,667.70 to reflect this period.

The Board and the courts have consistently held that a discriminatee is only required to make reasonable efforts to mitigate damages and that they are not held to the highest standard of diligence. The burden is not onerous and the fact that an employee was unsuccessful in finding interim employment for part of the backpay period is not fatal. *Pope Concrete Products*, *supra* at 1172, and cases cited therein. See also *Phelps Dodge v. NLRB*, 313 U.S. 177, 199-200 (1941); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965), *cert. denied* 384 U.S. 972 (1966). In addition, an individual's efforts to find other work during the entire backpay period, rather than in any particular quarter, must be considered in determining whether his efforts were reasonable. *Black Magic Resources, Inc.*, 317 NLRB 721 (1995); *Rainbow Coaches*, 280 NLRB 166, 179-180 (1986). The Board has also held that an employee's faulty recollection, poor recordkeeping, or exaggeration with respect to his job search efforts is ordinarily not enough to prove lack of reasonable diligence in seeking other work. *Laredo Packing Co.*, 271 NLRB 553, 556 (1984); *Arduini Mfg. Co.*, 162 NLRB 972, 975 (1967), *enfd.* 395 F.2d 420 (1st Cir. 1968).

Having considered the testimony and other evidence, I find that the Respondent has not met its burden of showing that Coghill did not make reasonable efforts to mitigate damages during the backpay period, notwithstanding the above statement contained on the form he previously submitted to the Region. His testimony at the hearing, supported by the interim earnings he did receive and the phone records in evidence, show that Coghill made reasonable efforts to seek employment and was not idle during any part of the backpay period. The fact that he had a 2-month period when his efforts were not successful does not negate the evidence of his successful efforts before and after this period.

Although the Board, more recently, has accepted prehearing unsworn statements contained in agency reports as proof of lack of diligence when contradicted by sworn testimony at the compliance hearing, that is not the case here. *Domsey Trading Corp.*, 351 NLRB 824, 836 (2007). In *Domsey*, the discriminatee had earlier reported he was physically unable to work but testified at the hearing to the contrary. Coghill's statement on the form was simply that his records were too "sketchy" to document his job search during this particular period, not that he didn't make such efforts. I find that his testimony was not inconsistent with the earlier statement and that, as a whole, Coghill made reasonable efforts to mitigate damages.

Accordingly, based on the above, I find that the net backpay calculated by the General Counsel is the correct amount owed to Coghill as a result of the Respondent's unlawful conduct.

CONCLUSIONS OF LAW

1. By failing and refusing to place the name of Thomas Troy

Coghill on its movie referral list, for arbitrary, discriminatory, and invidious reasons, on and after November 17, 2008, and by failing and refusing to refer him to employment on Army Wives season three, the Respondent has breached its duty of fair representation owed to Coghill and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

2. By the above conduct, the Respondent caused the Employer, Touchstone Television Productions, LLC d/b/a ABC Studios, to discriminate against Coghill by not hiring him to work on Army Wives season three because he was not a member of the Respondent, and has engaged in unfair labor practices affecting commerce in violation of Section 8(b)(2) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because the Respondent has already placed Coghill's name on the movie referral list and referred him to employment with the Employer for Army Wives season four, I shall not recommend an affirmative order requiring the Respondent to place him on the list or refer him for employment. However, I shall recommend that the Respondent be ordered to cease and desist denying nonmembers access to its movie referral list and the employment opportunities that entails. I shall also recommend that the Respondent be ordered to make whole Coghill for the loss he incurred as a result of the Respondent's unlawful conduct toward him by paying him backpay in the amount of \$55,467.62, with interest to be computed daily in accordance with the Board's recent decision in *Kentucky River Medical Center*, 356 NLRB 6, 9–10 (2010). Finally, in accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB 11, 15–16 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. Id, slip op. at p. 3.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, International Brotherhood of Teamsters, Local 509, Cayce, South Carolina, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to place Thomas Troy Coghill, or any other individual seeking employment in the movie industry, on its movie referral list for arbitrary, discriminatory, or invidious reasons.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ous reasons.

(b) Causing or attempting to cause Touchstone Television Productions, LLC d/b/a ABC Studios, or any other employer that is signatory to its "Movie Agreement," to refuse to hire Coghill or any other applicant because they are not a member of the Respondent.

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

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

(a) Make Coghill whole for any loss of earnings and benefits suffered as a result of the Respondent's unlawful refusal to place his name on the movie referral list and refer him to employment on Army Wives season three by paying to him \$55,467.62, with interest computed in accordance with *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

(b) Within 14 days after service by the Region, post at its union office in Cayce, South Carolina, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with employees and members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Touchstone Television Productions, LLC d/b/a ABC Studios, if willing, at all places at the Employer's Charleston, South Carolina facility where notices to employees are customarily posted.

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

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain on your behalf with your employer.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to place Thomas Troy Coghill, or any other individual seeking employment in the movie industry, on our movie referral list for arbitrary, discriminatory, or invidious reasons.

WE WILL NOT cause or attempt to cause Touchstone Televi-

sion Productions, LLC d/b/a ABC Studios, or any other employer that is signatory to our "Movie Agreement," to refuse to hire Coghill or any other applicant because they are not a member of this Union.

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

WE WILL make Coghill whole for any loss of earnings and other benefits resulting from our unlawful conduct toward him, less any net interim earnings, plus interest, as set forth in the Board's order.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 509 (TOUCHSTONE TELEVISION PRODUCTIONS,
LLC D/B/A ABC STUDIOS)