

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

DATE: October 14, 2015

TO: Margaret Diaz, Regional Director  
Region 12

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

SUBJECT: International Association of Longshoremen,  
Local 1402 (Tampa Maritime Association)  
Case 12-CB-153708

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The Region submitted this case for advice as to whether the Union's rules governing its exclusive hiring hall violate Section 8(b)(1)(A) and (2). We conclude that one of the Union's rules—which requires former members of a defunct local to accept work at a particular port regardless of their seniority or eligibility for work at another port—is facially invalid because it discriminates on the basis of membership in a particular local, and therefore violates Section 8(b)(1)(A). Further, we conclude that the Union breached its duty of fair representation by intentionally deviating from its hiring hall rules in refusing to refer the Charging Party for work, in violation of Section 8(b)(1)(A) and (2).

**FACTS**

The Union, International Longshoremen's Association Local 1402, operates an exclusive hiring hall through which employers staff two Tampa-area ports. Prior to 2007, ILA Local 1402 represented the longshore workers who work for the members of the Tampa Maritime Association, a multi-employer association that represents the stevedoring employers operating at Port Tampa Bay ("Tampa"). ILA Local 1759 represented the workers employed by Logistec USA, the sole Employer at the nearby Port of Manatee ("Manatee"). In 2007, Local 1759 was merged into Local 1402, and Local 1402 now represents the employees at both ports.

Historically, Local 1759 had struggled to provide a sufficient number of workers to meet the labor demands of Logistec at Manatee. According to the Union, the locals'

leadership believed that a merged union would be better able to meet the Manatee labor demands because casual employees who had been working in Tampa could instead work steadily at Manatee. The two locals executed an agreement setting forth the seniority principles for operation of the merged hiring hall as follows:

13. The following seniority principles will be in effect:
  - employees on the seniority lists of Locals 1759 and 1402 will have **first** preference for jobs within their local's former jurisdiction, respectively;
  - **second** preference for work in a Local's former jurisdiction will be to all other employees from the other local by seniority;
  - **third** preference for work in either Local to employees on the combined seniority list and
  - **fourth** preference to casual employees after exhaustion of the combined seniority list.  
. . . .
  - If a former Local 1402 member declines a job in the local's former jurisdiction, (s)he will be eligible for work in the former jurisdiction of Local 1759 and vice versa.
  
14. Notwithstanding the above, members of the former Local 1759 can be required to accept work in the Port of Manatee, Florida in order to ensure that a full experienced labor force is available. If a former Local 1759 member rejects available work in the Port of Manatee (s)he will not be eligible for other work until all Port of Manatee positions are filled. . . .

Since the merger, the Union has continued to struggle to supply sufficient labor to meet Logistec's demand at Manatee. Logistec periodically threatens to terminate its collective-bargaining agreement with the Union if the staffing problems continue.

The two ports operate under different collective-bargaining agreements and afford different terms and conditions of employment. Notably, employees at Manatee need to work 900 hours in a year before becoming eligible for seniority credit and fringe benefits, while the employees at Tampa need only work 700 hours. Moreover, there are two types of work available at Tampa—cargo and cruise ship—and hourly pay ranges from \$17.25 to \$32.25. Manatee, by contrast, only offers cargo ship work and the hourly pay ranges from approximately \$15.00 to \$22.00.

The Charging Party began working through the Union's exclusive hiring hall in [REDACTED] after the merger, and joined the Union in [REDACTED]. [REDACTED] initially accepted a regular

position on a (b) (6), (b) (7)(C) at Manatee, and for (b) (6), (b) (7) years (b) (6), (b) (7) worked enough hours to achieve seniority. In (b) (6), (b) (7)(C), however, (b) (6), (b) (7) gave up (b) (6), (b) (7) position on the Manatee (b) (6), (b) (7)(C) in order to pursue work at Tampa. (b) (6), (b) (7) cited the better benefits and bonuses at Tampa as well as unspecified health concerns as motivation for the switch.

The Charging Party apparently worked at Tampa without incident between (b) (6), (b) (7)(C) and late (b) (6), (b) (7)(C), only picking up work at Manatee when (b) (6), (b) (7) schedule allowed. But on (b) (6), (b) (7)(C),<sup>1</sup> (b) (6), (b) (7) was inside the hull of a ship in Tampa when (b) (6), (b) (7) received a phone call from the Union's vice-president and business agent for Manatee asking why (b) (6), (b) (7) was not working at Manatee. The vice-president/business agent read the Charging Party excerpts from the merger agreement, including Provision 14 (quoted above), and explained that the Charging Party was required to work at Manatee when there were unfilled positions there. The Charging Party protested that the provision did not apply to (b) (6), (b) (7) because (b) (6), (b) (7) had been hired after the merger and was not a former member of Local 1759. Nonetheless, the vice-president/business agent stated that (b) (6), (b) (7) was required to work at Manatee when needed because (b) (6), (b) (7) qualified for benefits there. According to the vice-president/business agent, this requirement only applied to workers who qualified for benefits at Manatee but not to any Tampa-qualified workers or casuals. Any workers who qualified at both Manatee and Tampa were permitted to choose between the two ports.

Later that day, the Charging Party went to the Union's hiring hall to pick up (b) (6), (b) (7) check and was greeted by the Union president and vice president. They showed (b) (6), (b) (7) the merger agreement and reiterated the message that had been relayed earlier: namely, that the Charging Party was required to accept work in Manatee when there was an unmet need. When the Charging Party pointed out that the agreement didn't apply to (b) (6), (b) (7) the president stated that (b) (6), (b) (7) was the president and the Charging Party would do as (b) (6), (b) (7) was told.

The following day, March 26, the Charging Party reported to the hiring hall to seek work on a Tampa cruise ship. The vice-president/business agent told the officer running the check-on not to refer the Charging Party for the Tampa job and informed (b) (6), (b) (7) that (b) (6), (b) (7) needed to work at Manatee, which was short-staffed that day. The Charging Party refused to go to Manatee and instead chose to file an internal grievance. According to the Charging Party, nine casual employees were referred to

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<sup>1</sup> All subsequent dates are in 2015 unless otherwise specified.

work at Tampa that day; as someone with seniority on the Manatee list, (b) (6), (b) (7)(C) would have been referred ahead of them according to seniority.<sup>2</sup>

On (b) (6), (b) (7)(C), the vice-president/business agent and vice-president once again prevented the Charging Party from working at Tampa. The Union referred four casuals and one regular employee with less seniority than the Charging Party that day. The Charging Party added this incident to (b) (6), (b) (7)(C) outstanding grievance.

The Union's executive board met on (b) (6), (b) (7)(C) to adjust the Charging Party's grievance. After hearing from the Charging Party and the president, the executive board chose to award the Charging Party an amount roughly equivalent to one day's lost wages, although they explained in their written decision, dated (b) (6), (b) (7)(C) that only the president had the authority to disburse the funds. The decision does not lay out the board's reasoning for upholding the grievance, nor for awarding the Charging Party one day's pay rather than two. When the Union's leadership learned of the decision, the president told the vice-president/business agent and vice-president that the Union would continue to interpret and enforce Provision 14 to require Manatee-qualified workers to accept work at Manatee whenever there were unfilled positions.

On (b) (6), (b) (7)(C) the Charging Party asked the president about (b) (6), (b) (7)(C) back pay and was informed that it would not be paid because the president believed the executive board had made a mistake. (b) (6), (b) (7)(C) told the Charging Party to go to the Labor Board if (b) (6), (b) (7)(C) was unhappy.

Between (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C), the Charging Party was referred to Tampa without incident. But on (b) (6), (b) (7)(C), when the Charging Party lined up to check on for work at Tampa, the vice-president/business agent once more refused to refer (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) was offered work at Manatee instead. When the Charging Party pointed out that (b) (6), (b) (7)(C) had just won an internal grievance on this very matter, the vice-president/business agent said that (b) (6), (b) (7)(C) didn't care and that the Charging Party should go to the Labor Board if (b) (6), (b) (7)(C) didn't like it.

### ACTION

We conclude that Provision 14 of the Union's merger agreement violates Section 8(b)(1)(A) because it discriminates against former members of Local 1759 on the basis of their former union affiliation. On its face, the provision limits their referral options while allowing former members of Local 1402 unfettered choice in employment. We

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<sup>2</sup> Despite the provision in the merger agreement stating that the Union would establish a joint seniority list for employees hired after the merger, the Union was still operating off of separate lists for each port.

further conclude that the Union breached its duty of fair representation in violation of Section 8(b)(1)(A) and (2) by deliberately departing from its established referral rules.

Provision 14 violates Section 8(b)(1)(A) on its face.

Unions are subject to a fiduciary duty to refrain from acting in an arbitrary, invidious, or discriminatory manner when representing employees who wish to be referred for employment because of the nearly-unfettered influence a union holds over employees' livelihoods when it operates an exclusive hiring hall.<sup>3</sup> This "code of acceptable conduct" extends to the institution of any referral rules, and the referral rules themselves cannot be arbitrary or discriminatory.<sup>4</sup> More specifically, "it is well established that a labor organization which operates a hiring hall . . . as the exclusive source of employees for that employer is obligated to refer users of the hiring hall without regard to their union membership or loyalty."<sup>5</sup> Thus, even absent evidence of actual discrimination, the Board will find unlawful a contractual referral policy that on its face preferences the members of one local union over another.<sup>6</sup> Nor may a union favor one faction of its members over another.<sup>7</sup>

The Union's Provision 14 explicitly discriminates against the former members of Local 1759 by constraining their ability to work at the port of their choosing while permitting the members of the pre-merger Local 1402 unfettered choice. Accordingly, the Union's merger agreement violates Section 8(b)(1)(A) on its face insofar as it

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<sup>3</sup> See, e.g., *Boilermakers Local 374 (Construction Engineering)*, 284 NLRB 1382, 1383 (1987) (union requirement that hiring hall applicants post \$100 appeal bond before it processed grievances concerning the operation of its exclusive hiring hall was arbitrary and violated Section 8(b)(1)(A)), *enforced*, 852 F.2d 1353 (D.C. Cir. 1988); *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985) (union violated 8(b)(1)(A) and (2) by significantly changing its established hiring hall referral system without giving adequate and timely notice of the change to hiring hall users), *enforced mem.* 843 F.2d 1392 (6th Cir. 1988).

<sup>4</sup> *Boilermakers Local 374*, 284 NLRB at 1383 (citing *Laborers Local 304 (AGC of California)*, 265 NLRB 602 (1982)).

<sup>5</sup> *Teamsters Local 519*, 276 NLRB at 907.

<sup>6</sup> See, e.g., *Tri-County Roofing*, 311 NLRB 1368, 1373–74 (1993) (union policy that denied members of its sister local access to its hiring hall "itself" violated Section 8(b)(1)(A)).

<sup>7</sup> *Id.* at 1373.

places referral restrictions on former members of Local 1759 that do not apply to the other hiring hall applicants.

The Union's application of Provision 14 violates its duty of fair representation.

A union, in the role as the exclusive representative of a bargaining unit, has the "statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."<sup>8</sup> In the discharge of this obligation, a statutory bargaining representative must be allowed a "wide range of reasonableness . . . in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."<sup>9</sup> A union breaches its statutory duty of fair representation when its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.<sup>10</sup>

This three-pronged *Vaca v. Sipes* standard applies to all union activity, including the operation of a hiring hall.<sup>11</sup> A union owes a duty of fair representation to all hiring hall applicants.<sup>12</sup> A union's administration of its hiring hall may breach the duty without discriminating on the basis of union membership or activity: "a union commits an unfair labor practice if it administers the exclusive hall arbitrarily or

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<sup>8</sup> *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

<sup>9</sup> *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

<sup>10</sup> *Vaca v. Sipes*, 386 U.S. at 190.

<sup>11</sup> See, e.g., *Air Line Pilots Assoc. v. O'Neill*, 499 U.S. 65, 77 (1991); *Breining v. Sheet Metal Workers Local 6*, 493 U.S. 67, 69 (1989); *Electrical Workers Local 48 (Oregon-Columbia Chapter of NECA)*, 342 NLRB 101, 105 (2004), modified in part on other grounds, 344 NLRB 829 (2005); *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549, 551 (2001), petition for review denied sub nom. *Jacoby v. NLRB*, 325 F.3d 301 (D.C. Cir. 2003).

<sup>12</sup> See *Miranda Fuel Co.*, 140 NLRB 181, 184–185 (1962) (noting that unions are agents "of all the employees, charged with the responsibility of representing their interests fairly and impartially" and that referrals under an exclusive hiring hall must be free from arbitrary, unfair, or disparate considerations (quoting *The Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944))).

without reference to objective criteria and thereby affects the employment status of those it is expected to represent.”<sup>13</sup>

The Board has held that any deliberate departure from a union’s exclusive hiring hall referral procedure resulting in the denial of employment to an employee falls within the class of conduct that inherently encourages union membership because it demonstrates the union’s power over employees’ livelihoods.<sup>14</sup> Such a deliberate departure constitutes a violation of the duty of fair representation.<sup>15</sup> Unless the union can demonstrate that the deviation from the referral procedure is pursuant to a valid union-security provision or is “necessary to the effective performance of its representative function,” the inconsistent referral will violate Section 8(b)(1)(A) and (2).<sup>16</sup>

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<sup>13</sup> *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988) (enforcing Board order finding that a union’s arbitrary conduct in the operation of an exclusive hiring hall violated the duty of fair representation). The D.C. and Ninth Circuits have stated that a union’s duty of fair representation is subject to a heightened standard in the context of an exclusive hiring hall because of the control the union holds over workers’ livelihoods. *See, e.g., Jacoby v. NLRB*, 325 F.3d 301, 308–309 (D.C. Cir. 2003) (holding that, in the context of an exclusive hiring hall, a union must act in accordance with objective and consistent criteria in addition to the three-pronged *Vaca* standard for duty of fair representation, but agreeing with the Board that one isolated negligent referral did not breach this heightened duty); *Lucas v. NLRB*, 333 F.3d 927, 935 (9th Cir. 2003) (holding that, because of the union’s increased control over workers’ access to employment opportunities “in administering a hiring hall, a union has a heightened duty of fair dealing that requires it to operate by reference to objective criteria”). The Board has subsequently applied this heightened standard in hiring hall cases alleging negligent departure from referral standards without explicitly adopting it. *See, e.g., Electrical Workers Local 48*, 342 NLRB at 105, n.3, 108–109 (declining to decide which standard should apply because the union’s gross negligence in operating its hiring hall violated its duty of fair representation under either the traditional or heightened standard).

<sup>14</sup> *See, e.g., Electrical Workers Local 48*, 342 NLRB at 105 (union’s deliberate out-of-order referrals, which favored employees who helped the union organize, violated duty of fair representation).

<sup>15</sup> *Id.*

<sup>16</sup> Compare *Electrical Workers Local 48*, 342 NLRB at 105–107 (union’s deliberate out-of-order referrals in favor of workers who had helped union organize was neither necessary to effective performance of its representative function nor pursuant to a valid union security clause) with *Sheet Metal Workers Local 27*, 316 NLRB 419, 422–

Here, the Union deliberately deviated from the referral rules sets forth in the merger agreement to deny the Charging Party work at Tampa. According to Provision 13 of the agreement, employees on the seniority list for either port are to be referred ahead of casual employees. The Union did not follow this referral procedure. Although the facially-unlawful Provision 14 refers only to former members of Local 1759, the Union relied upon it to force all workers who qualified for benefits at Manatee but not at Tampa to accept assignments at Manatee, regardless of whether or not they were former members of Local 1759. The result was that casual employees were referred to work at Tampa while the Charging Party—who was on the Manatee seniority list—was denied a referral. The fact that the Union’s Executive Board upheld the Charging Party’s grievance and awarded (b) (6), (b) (7) a day’s backpay is further evidence that this application of Provision 14 was inconsistent with the Union’s referral rules.

The Union does not contend that this departure was compelled by a union-security clause. Even assuming, *arguendo*, that providing sufficient workers for Manatee is critical to the effective performance of the Union’s representative function, the Union could have referred casual employees to Manatee, consistent with the established hiring hall rules, rather than deviating from those rules in an attempt to compel the Charging Party to accept a less-desirable assignment. Accordingly, we conclude that the Union’s operation of its hiring hall in this manner violated Section 8(b)(1)(A) and (2).

Complaint should issue, absent settlement, consistent with the analysis herein.

/s/  
B.J.K.

ADV.12-CB-153708.Response.Tampa Maritime Association. (b) (6), (c)

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23 (1995) (union’s out-of-order referrals pursuant to a collectively-bargained exception to the hiring hall procedure were intended to capture work for its members and were necessary to effective performance of representative function).