

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

TRUCK DRIVERS, CHAUFFEURS AND	:	
HELPERS LOCAL UNION NO. 100,	:	
AFFILIATED WITH THE	:	
INTERNATIONAL BROTHERHOOD OF	:	CASE NO. 9-CB-214166
TEAMSTERS (Wicked Films, LLC),	:	
	:	
Respondent,	:	
	:	
and	:	
	:	
SAMUEL J. BUCALO, AN INDIVIDUAL,	:	
	:	
Charging Party.	:	
	:	

**RESPONDENT’S BRIEF IN SUPPORT OF ITS EXCEPTIONS
TO THE RECOMMENDED DECISION AND ORDER
OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

This matter arose from an unfair labor practice charged filed against Respondent Teamsters Local Union No. 100, an affiliate of the International Brotherhood of Teamsters (“Respondent,” “Local 100,” or “the Union”) (referred to in the case caption as Truck Drivers, Chauffeurs and Helpers Local Union No. 100) by former officer and member Samuel J. Bucalo. The charge, and the subsequent complaint, alleged that the Union in its hiring hall services for truck-driving work in the film industry did not refer him for certain work in January and February 2018 due to his claimed “union dissident activity” or otherwise not for valid reasons.

The case was tried before Administrative Law Judge Andrew S. Gollin on July 30 and 31, 2018, in Cincinnati, Ohio; the ALJ issued a Recommended Decision and Order on September 11, 2018, JD-55-18, concluding that the Union breached its duty of fair representation by failing

to refer Mr. Bucalo, a retiree, to work on a single film after an informal request by the employer, out of order and ahead of non-retired, out-of-work drivers with more experience and seniority in the film industry and also ahead of other retirees, either based on animus against him or otherwise “without a legitimate reason for doing so.” The Respondent has filed Exceptions to this recommended Decision and respectfully submits that the evidence does not establish that the Union’s actions were arbitrary, discriminatory, or in bad faith and, specifically, that the evidence does not show it acted out of any animus toward Mr. Bucalo.

II. BACKGROUND

Local 100 is a large local union with approximately 4,800 members in the greater Cincinnati area; employees of United Parcel Service (“UPS”) constitute the largest group of its members, numbering approximately 2,300. The Charging Party, Mr. Bucalo, was an employee of UPS and became a member of the Union in March 1979. He served as a Union steward or alternate periodically for some 25 years during his employment; he was elected to the office of Secretary-Treasurer of Local 100, a full-time Union position, for a three-year term beginning January 1, 2011, and re-elected to a second, three-year term beginning January 1, 2014.

In early 2011, shortly after his initial election, Mr. Bucalo voluntarily retired from his employment at UPS; he was not “forced” to retire, as the ALJ’s Decision states. Decision at 2-3. He did so in settlement of a grievance over his discharge for “no-call/no-show” when he failed to take a leave of absence from work and started to serve as a Union officer.¹ Mr. Bucalo began

¹ Mr. Bucalo testified that, once he was elected, he wanted to work one day per week at UPS and the remainder of the week in his position at Local 100, purportedly to save the Union money by obtaining his health insurance benefits through UPS instead of the Union. Such an arrangement was unprecedented at Local 100 and, as Union President Dave Webster testified, would have been unworkable because the Secretary-Treasurer position is a highly demanding, full-time job. Tr. 55-56 (Bucalo), 241-42, 255-26 (Webster).

receiving a pension from UPS, which he described as “early” retirement benefits; based on his age and years of service, the monthly amounts he receives in pension total \$2,323.

Mr. Bucalo ran for the position of Local 100 President at an election held in late 2016 for a term to begin January 1, 2017. He was not successful in that election and thereafter has held no other Union office. After Mr. Bucalo left office at the end of December 2016, Local 100 deemed him to be a retired member and has treated him as a retiree, both for purposes of his eligibility for membership *vel non* and with regard to his placement on the film work referral list. His status as a retired Local 100 member is not at issue in the present case. Stipulations, Jt. Ex. 1, ¶¶, 1-5; Tr. 55-59, 105-06 (Bucalo).

Film production work in the greater Cincinnati area is very limited and quite sporadic; on occasion, there have been a handful of productions in a single year, but there was also at least one period of nearly a year when there was no movie or television work at all. Drivers performing movie industry work represent a tiny percentage of the employment within Local 100’s jurisdiction, with the complement of drivers on a film ranging from six to ten to as many as 25. Some drivers attempt to make a career of the work, which pays quite well but is neither consistent nor reliable; the Union’s Transportation Captain, Craig Metzger, testified he worked a total of only five or six months in all of 2017. While the work might be considered desirable because of the pay, it is available only to drivers who do not have other, steadier employment because of the weeks of long hours it involves; many retired drivers are not interested because of the hours and the need to work nights and weekends.

Local 100 uses standard Teamster contracts for film and television productions that are shot in its geographical jurisdiction, with the terms based on the size of the production and its budget. The contracts establish an exclusive referral and hiring process for drivers for this work,

although they do not specify how the hiring hall is to be operated, and different local unions may have different procedures. The one exception to the exclusivity of the hiring through Local 100 is for the driving of highly specialized vehicles, such as a truck known as a “honey wagon” that might include restrooms, offices and dressing rooms; the vendors who rent these vehicles for use in a film production require that they be driven only by the vendors’ own drivers. Tr. 269 (Webster), 333, 389-90, 399, 423-33 (Metzger); Ex. GC 15.

Over the years, the referral procedures in place in the Cincinnati area have been largely informal and unwritten. However, whether in writing or kept in the smart phone and in the memory of the driver who serves as the Local’s Transportation Captain, the Union has maintained two separate groups for referring drivers to film production work for at least the past four years. The first consists of individuals sometimes referred to as active or out-of-work drivers – meaning those who have been laid off or discharged from another job or who attempt to make a career of the film work and who are not receiving any pension benefits – who are referred for work first. The second group are individuals who are receiving retirement benefits; they are referred to work only after the first list is exhausted (or if the job requires specific skills, namely experience in car hauling). Mr. Bucalo has been placed on the retiree list. (Although the parties stipulated that the use of two lists and Mr. Bucalo’s placement on the retiree list are not at issue in the present case, he attempted to continue to dispute these matters in his testimony.) Stipulations, Jt. Ex. 1, ¶ 6; Tr. 344, 354, 394-95, 445-48 (Metzger).

Craig Metzger has managed the film work referrals since approximately 2014, when he was appointed as the Transportation Captain after having worked in the industry for some two years following a lay-off from freight company YRC. The prior Captain had been terminated by the production company making the film “Carol” for being unable to perform adequately the

administrative and logistical tasks of the job, and the next driver assigned to this role similarly was unsuccessful. President Webster learned that Mr. Metzger, whom he did not know personally, had taken on many of these tasks informally and the other drivers believed he would do well as Captain, so Mr. Webster appointed him to that position.

Mr. Webster and Mr. Metzger testified, consistently and credibly, that the Union President never gave the Transportation Captain any instructions about how to treat Mr. Bucalo, other than to put him on the retiree list as the Union's office staff had said, nor about whether or not to refer him to any particular job. Indeed, Mr. Webster never gave Mr. Metzger *any* specific instructions about the film referral work with regard to any individuals, other than to refer out-of-work drivers to Mr. Metzger for placement if and when work was available or to ask him to put a name on the list if an unemployed member requested it. When Mr. Webster first took office and learned about the existence of the occasional movie project, he contacted someone at the International Brotherhood of Teamsters, who told him that generally a Local Union's Transportation Captain would handle the work. He therefore did not involve himself in the day-to-day details of the film industry projects but relied on the Captain to administer the process fairly and in accordance with the existing procedures. Tr. 246-52, 254-55, 257, 282 (Webster), 352, 400-01, 408-09 (Metzger).

In addition to serving as a driver, the Captain manages the referrals, tracks which drivers have what skills and experience for purposes of assigning them to specific driving positions, deals with payroll and scheduling, and handles "a lot of logistics" during a production. The Captain generally begins work before the other drivers, except the one assigned to work with the set decoration crew, as will be discussed further; he receives no pay from the Union for his administrative work. He meets with a production company representative to find out how many

trucks and of what types are to be used, then reviews his list, which is in order of experience in the industry, to assign drivers by seniority and qualifications. For example, Mr. Metzger explained that he knows the first six drivers by seniority can “drive about anything,” but that some others are not fully competent to drive a tractor-trailer, even though they have the applicable license. One driver is also a mechanic and may be referred first where that skill is required. If all of the employees on the main list are working or have declined an offer, the Captain moves to the retiree list. Mr Metzger testified that he had kept the list of active/out-of-work drivers on paper, in various forms, since he started as Captain; since there were only two or three retirees, and he knew all of them and their length of experience, he did not have a need to write out that list. Tr. 246-48, 281, 293-95 (Webster), 329-32, 340, 383-84, 389-94, 403-07, 470-75 (Metzger).

Mr. Bucalo asserted that on his last day in office, December 30, 2016, he asked Mr. Webster to put his name on the referral lists for both construction and film work (which he said he believed were in a single list); Mr. Webster denied this and testified that he first learned Mr. Bucalo wished to be placed on the list when he received a letter from Mr. Bucalo dated April 21, 2017. The evidence showed that the only films in the Cincinnati area in the first half of 2017, before Mr. Bucalo’s name was put on the list, either did not have enough work for all the out-of-work drivers on the list, much less the retirees, or used retirees only because, unlike Mr. Bucalo, they were trained car-hauler drivers who could transport the “picture cars,” vintage or other automobiles that are driven by the actors or otherwise appear in the film.² Tr. 68-69 (Bucalo),

² Mr. Bucalo’s position on whether he should be assigned to drive a car-haul trailer was unclear. He initially told Mr. Metzger he could do this work – which does not require a special license but does take specific knowledge and experience, particularly given the value of some of the picture cars – even though he had spent his entire career driving for UPS. Later, though, Mr. Bucalo implied that Mr. Metzger was in some way threatening him by suggesting he might need to drive a car-haul trailer for a film in the summer of 2018, since he did not have the experience and would not feel comfortable doing so. The Transportation Captain testified he would have tested Mr.

252 (Webster), 475-78 (Metzger); Ex. R-12. However, nothing relating to the claimed delay in placing Mr. Bucalo's name on the list or to any film work in 2017 is at issue in this case.

Mr. Bucalo was placed on the retiree list for film work referrals – which Mr. Metzger then put in writing, as the list was growing – on June 9, 2017, after Mr. Webster referred him to Mr. Metzger. Two films were produced in Cincinnati or adjacent Northern Kentucky in the fall of 2017, requiring the Captain to turn to the retiree list for drivers. He referred Mr. Bucalo to one of them, “Donnybrook,” starting in October. Mr. Bucalo was assigned to work as the driver for the set decoration department (generally referred to at the hearing as “set dec”), driving a 24- or 26-foot box truck. Another, more experienced film driver, Mike Lilly, Sr., usually did set dec driving, but he already was working on the other production and Mr. Metzger concluded Mr. Bucalo easily would be able to handle the smaller truck used for set dec. (Indeed, Mr. Bucalo later commented he was glad of this assignment and had been afraid he might be asked to drive one of the very large vehicles.) Because the set dec department is involved in preparing the sets before filming starts, the driver assigned to that department generally starts work earlier than the other drivers; in this case, Mr. Bucalo started work a week or two before even Mr. Metzger. Tr. 394, 409-12, 449-52 (Metzger), 76-78, 115 (Bucalo); Ex. GC 6.

Mr. Bucalo was employed approximately seven weeks on “Donnybrook,” working daily with the production's Set Dresser Lead, Leyna Haller. There were no significant problems in his performance, although Mr. Metzger testified that twice he got “stuck” driving his truck into too narrow a spot. Mr. Bucalo also called off from work one day, which Mr. Metzger testified no other driver had ever done. The Captain previously had told him calling off was not acceptable in the film industry. Mr. Bucalo also improperly reported his absence only to Ms. Haller, not to the

Bucalo before permitting him to drive a car-haul trailer with picture cars. Tr. 80-82, 112 (Bucalo), 405-07 (Metzger).

production company's Transportation Coordinator or to Mr. Metzger as the Captain so he could be replaced promptly. By luck, a driver recently laid off from another job had just asked Mr. Metzger about work and had come in to complete paperwork, so Mr. Metzger happened to have someone available to take Mr. Bucalo's place that day; had there been no spare driver, Mr. Metzger testified, the absence would have created a serious problem. However, these issues were not significant enough for the Captain to remove Mr. Bucalo from the production or take any other action against him. Tr. 118-19 (Bucalo), 200-01 (Haller), 413-16, 470 (Metzger); Ex. GC 6 at 6, 9.

The next film production in the Cincinnati area, "Extremely Wicked, Shockingly Evil and Vile" (usually referred to at the hearing simply as "Wicked"), was to begin shooting in early January 2018. Mr. Metzger met with the Transportation Coordinator for that film, Tony Ruiz, in mid-December when Mr. Ruiz had come to town from Los Angeles. It was unclear at that time how many drivers would be needed; the Captain explained that producers often overestimate the number of vehicles and drivers they will need and that transportation is often the first budget area to be cut. Tr. 370-71, 396-97, 417-18 (Metzger).

Ms. Haller, who happened to be working on "Wicked," testified that she had worked well with Mr. Bucalo on "Donnybrook" and hoped to work with him again when she returned to Cincinnati. When "Wicked" was in pre-production in Cincinnati, she went to the head of the film company's³ Transportation Department, Tony Ruiz, and said something to the effect of: "I don't know if it's possible, but I'd love to work with Sam again." He responded that "he would see what he could do, but he couldn't guarantee anything." Ms. Haller, who is covered by a collective bargaining agreement under the jurisdiction of IATSE, testified she has no authority to

³ The employer for this film was Wicked Film, LLC. Ms. Haller explained there is a different employer for each movie project; the producers involved in a film form a separate LLC specifically for that project only. Tr. 196 (Haller).

hire or assign drivers on any film production; normally, she simply requests the number and types of trucks needed for her portion of the work and the head of transportation “will assign a driver to us.” She knew it was possible she would not have Mr. Bucalo assigned to work with her crew and acknowledged that “it’s not up to me, ultimately.” Tr. 198, 207-08, 228, 231-32 (Haller).

In a phone conversation in late December, Mr. Ruiz passed Ms. Haller’s request on to Mr. Metzger. He was surprised by this and testified that, in his six years working in the film industry in Cincinnati and four years as Captain, he had never known of anyone from a production company asking about a driver by name or requesting that a specific individual be assigned to a certain job. He did not contact the Local Union President or anyone else but responded immediately to Mr. Ruiz, in that same, very brief phone call, that he could not refer Mr. Bucalo out of order. He explained that the Local Union’s practice was to follow a seniority list and to refer out-of-work drivers before getting to the retiree list. Mr. Ruiz responded simply “okay;” he did not press the point, and there was no further discussion about it. Tr. 370-72, 423-24 (Metzger). Mr. Metzger did not mention the issue to Mr. Webster until some time later, well after he already had made and communicated the decision to Mr. Ruiz based on his interpretation of the existing practices. Tr. 256-57 (Webster), 444-45 (Metzger).

Mr. Lilly was assigned to the set decoration driving position on “Wicked,” with no complaint from Mr. Ruiz or Ms. Haller. No retirees were referred to the project until a couple of weeks into the filming, which began around January 12 or 15. By late January, an extra driver was needed, to be less than full-time, to cover additional work for the set decoration and construction departments. After the main list was exhausted and two other out-of-work drivers, Joe Hensley and Dan Matthews, were offered work, Mr. Metzger turned to the retiree list. He

first contacted James Downtown, the most senior person on the retiree list, but he declined the job. Ralph Metzger, the second most senior person on the list (who happens to be Craig Metzger's father) accepted the offer and worked as a "day player," coming in only when called as needed by the production company. Tr. 345-50, 362-71, 373, 275, 424-25, 427-32, 438, 479-81 (Metzger), 496-505 (Haller).

Mr. Bucalo filed the present charge⁴ on February 2, 2018, asserting that Local 100 improperly failed to refer him for work on "Wicked." The Regional Director of Region 9 on April 30, 2018, issued a complaint alleging that the Union's action was because of Mr. Bucalo's alleged "dissident union activity" or was otherwise not for valid reasons and that it had caused an employer to discriminate against him. Exs. GC 1(a), 1(c).

The ALJ on September 11, 2018, issued a Recommended Decision and Order, JD-55-18, concluding that the Union breached its duty of fair representation by refusing to refer him out of order and ahead of drivers with more experience and seniority in the film industry when informally requested by the employer, either based on animus against him or otherwise "without a legitimate reason for doing so." Decision at 15. Local 100 excepts to many of the findings of fact and conclusions of law set forth in that Decision and respectfully urges the Board to reject the ALJ's recommendations and to dismiss the underlying charge.

⁴ Between May 18, 2017 and February 2, 2018, Mr. Bucalo filed 10 other charges against Local 100 related to the film and TV work and its hiring hall. The Region found merit to his allegations in two of the cases that Local 100 operated a film and TV referral list without using written objective criteria in referring applicants for employment, that the Union failed and refused to register him promptly for employment on the Union's film and TV referral list for arbitrary, discriminatory or invidious reasons, that the Union failed to keep adequate records of the film and TV referral list, that the Union failed to provide access to the film and TV referral list, and that the Union failed to provide a copy of the film and TV referral list upon request. Local 100 entered into a non-admission Settlement Agreement with the Region to resolve those issues; Mr. Bucalo has objected to that agreement. All other portions of the charges and all of his other charges relating to film industry work, including those relating to his placement on the retiree list, have been dismissed by the Regional Director, with many of the dismissals upheld by the General Counsel's office. Even though the Settlement Agreement has not been finalized, Local 100 has begun to comply and has prepared and disseminated a formal policy with detailed written procedures. Stipulations, Jt. Ex. 1, ¶¶ 7-9; Jt. Ex. 1(a); Ex. GC 14; Tr. 268-69 (Webster).

III. ARGUMENT

Contrary to the conclusions of the ALJ's Decision, the General Counsel did not meet its burden of proving that the Union's conduct in this case was arbitrary or, most significantly, that there was any animus toward Mr. Bucalo because of his protected activity, much less that there was a nexus between any alleged animus and failure to refer him for work to a specific job. See Brand Mid-Atlantic, Inc., 304 N.L.R.B. 853, 855 (1991). The Respondent does not dispute the ALJ's review of the applicable case law regarding the duty of fair representation or the operation of exclusive hiring halls. However, the Union respectfully submits that the Decision made factual errors and improperly applied the legal analysis, including the issues of alleged pretext and the requirement of proving a nexus between alleged animus and any action taken regarding the Charging Party to the record evidence.

A. The evidence did not establish actual animus toward the Charging Party by the Union as an entity or, most significantly, by the decision-maker on the referral, nor any nexus to the actual decision.

It is clear from his testimony and otherwise that Mr. Bucalo sees hostility and animus against him in nearly every corner. However, the General Counsel's evidence in this case did not show that anyone in authority at Local 100 – much less the individual who actually made the decision not to refer him to work on the film “Wicked” – actually had such animus against him.

1. The General Counsel did not establish actual animus toward Mr. Bucalo.

The Charging Party has a history of negative interactions and relationships with nearly all of the other officers and representatives of Local 100 over a period of many years. He and Mr. Webster, the current Union president whom Mr. Bucalo blames for the actions at issue here, actually had been running mates in 2013, campaigning on the same slate in the election that year. However, a year or a year-and-a-half into their joint term in office – Mr. Bucalo already had

served three years in the Secretary-Treasurer position before that election – the relationship deteriorated. Mr. Bucalo accused Mr. Webster of various types of misfeasance, including in campaign literature distributed in relation to the 2016 election when he ran against Mr. Webster for the office of President. Tr. 35-36, 43-49, 127-28, (Bucalo), 243-46, 286-87 (Webster); Ex. GC 3. Mr. Bucalo had a similar history with the immediate past President of Local 100, who also once had been his running mate but with whom he later fell out. Tr. 40-43, 128, 142-52, 154 (Bucalo); Exs. R-2, R-3 & R-4. Notably, *all* of the vitriol evidenced in exhibits in this case, see, e.g., Exs. GC 2-4, R-2, R-3 & R-8, was directed from Mr. Bucalo to Mr. Webster and other opponents – not from anyone else toward Mr. Bucalo.

The only alleged evidence of animus on the part of Mr. Webster the ALJ’s Decision cites is his comment in reply to a lengthy tirade against him on Facebook after the 2016 Union election. Decision at 15-16. Mr. Bucalo posted on his campaign Facebook page a lengthy “open letter” to the Union membership accusing Mr. Webster and his “evil minions” of dishonesty, “selling-out [sic] the membership,” fostering corruption, displaying “weak leadership,” paying off other candidates to act as “spoilers,” and violating federal laws in relation to the election. Mr. Webster responded to this diatribe, which ran to 10 pages of screen shots, with a brief, three-paragraph response that pointed out that Mr. Bucalo had cost the Local Union large amounts in attorney’s fees to defend against a number of what he termed frivolous charges and that invited the members to review the Union’s financial statements. Ex. GC 4 at 2-11, 22; Tr. 57-62, 171-72 (Bucalo).

Mr. Webster’s characterization of Mr. Bucalo as having filed frivolous charges is essentially accurate and therefore cannot reasonably be considered to be retaliatory. There was evidence at the trial about just a few of his internal Union charges, ULP cases, and charges filed

with other agencies such as the EEOC or OSHA. Other than portions of two of his charges relating to the film work, which the Union agreed to settle without admitting fault, each one of those charges was either dismissed or withdrawn. In one case, the General Executive Board (GEB) of the IBT – the last step of the Teamsters’ internal charge procedure short of an appeal to the full Convention held every five years – concluded there was no basis for certain of Mr. Bucalo’s charges and that they were designed purely to retaliate against his political opponents.⁵

Furthermore, this Facebook exchange – which occurred on December 31, 2016 and January 1, 2017, a full year before the incidents at issue in this case – simply does not evidence any significant animosity toward Mr. Bucalo on the part of Mr. Webster, much less constitute evidence of retaliation against him a year later. In addition, Mr. Webster testified calmly and credibly that Mr. Bucalo’s general contentiousness and filing of various internal, NLRB, and other charges did not create any animosity on his part; he “just got used to him” and put his charges “on the pile.” Tr. 240-46. This contrasted with Mr. Bucalo’s conclusory testimony that Mr. Webster – along with the last two preceding Local 100 Presidents and Vice Presidents (two of whom also had been his running mates but with whom Mr. Bucalo had fallen out) and a majority of its other officers – “absolutely” had animus against him.

The ALJ did not directly address this testimony or the contradictions therein, other than to say generally that the witnesses for the General Counsel including Mr. Bucalo were on the whole more credible than those for the Respondent, including Mr. Webster. (At most, he cited

⁵ Specifically, the GEB concluded there was “no legitimate reason for Bucalo to have filed charges in May 2015, essentially based on the discredited procedural objections had made in 2014. . . . Nor should the objections . . . be the subject of another set of charges in 2016.” Ex. R-9 at 4. The GEB held that Mr. Bucalo had filed internal charges only “to discredit his opponents with the sweeping and overstated charges of civil and criminal misconduct.” *Id.* The IBT’s decision, while careful to acknowledge the rights of Union members to criticize fellow members or political opponents and to use the internal charge procedures, warned Mr. Bucalo that any “future abuse” of the process “to retaliate against members of a hearing panel based upon his disagreement with a decision, or to discharge members from serving on panels by putting their membership in jeopardy, will not be tolerated.” It stated it would consider removing him from Union membership entirely if any future such misuse of the process occurred. *Id.* at 5.

some alleged inconsistencies in the testimony of Mr. Webster and the Transportation Captain and some vagueness by the Union President on details – understandable, since the Union President testified he had very little involvement with the small amount of work relating to the film industry in Cincinnati). The ALJ also utterly ignored the many statements made by Mr. Bucalo under oath – in sworn ULP charges, in affidavits provided to Region 9 investigators or at the trial – that were demonstrably not factual or outright false.⁶

For example, Mr. Bucalo asserted that the Local Union retaliated against him and threatened to discipline him because he called off sick during the filming of “Donnybrook.” However, he admitted he was not removed from that project or even reassigned from the set dec work. In support of this claim, he relied on a letter to him from Local 100’s current Secretary-Treasurer that addressed Mr. Bucalo’s ongoing arguments about his retiree status and his allegation that he was being discriminated and retaliated against. That letter stated only: “I understand that, far from discriminating against you, the transportation captain was lenient with you and did not remove you from the job, even though you called off without a valid excuse after being told that calling off was not acceptable on the film jobs.” Tr. 118-22, 185-86 (Bucalo); Exs. R-1 & R-11. This comment hardly constitutes a “threat” – and the February 9, 2018 letter was sent some three months after “Donnybrook” was finished and about six weeks after the decision not to refer him to “Wicked,” so obviously it played no part in the decision regarding “Wicked.”

Mr. Bucalo asserted in multiple ULP charge forms – which require a declaration of truthfulness, on penalty of prosecution – that President Webster kept a single list for both

⁶ These undeniably false, or substantially exaggerated, statements by Mr. Bucalo were set forth in detail in the Respondent’s Post Trial Brief (at page 17, note 10). However, they were not acknowledged in the ALJ’s Decision – which was issued just four business days after the filing of the briefs – suggesting that the ALJ did not review or consider the arguments from the briefs.

construction and film work, which was incorrect; Mr. Webster maintains a list of construction drivers, with their specific qualifications for the specialized equipment that construction involves, while Mr. Metzger is responsible for the pool of film drivers. Furthermore, Mr. Bucalo stated repeatedly that Mr. Webster was responsible for making specific assignments to film industry jobs. However, he was forced to acknowledge on cross-examination that he based this only on his perception of how the prior Union president might have handled this, that he did not actually know who did those assignments, and that he never saw Mr. Webster doing so. (And, of course, the other witnesses testified from direct personal knowledge that Mr. Metzger was fully responsible for this task.) Mr. Bucalo also testified that Mr. Webster “must have” put Mr. Metzger in the Transportation Captain job because they were friends. He admitted he had no information about Mr. Metzger’s background and experience, and the evidence showed Mr. Webster and Mr. Metzger were not even acquainted before the Union President appointed Mr. Metzger as Transportation Captain – which he did based on his apparent qualifications and his demonstrated ability to do the work. Similarly, Mr. Bucalo asserted Mr. Webster was “calling friends and family” for film industry work. However, he admitted he had never seen him make *any* assignments, he did not know who was working and no one on the list was a family member or particular friend of Mr. Webster. (At most, he mentioned that the Transportation Captain’s father, a retiree, did some occasional work and that another driver, Brandon Leach, happens to be the stepson of another Union officer. None of these involve Mr. Webster.)

In another example of Mr. Bucalo giving a sworn statement that was completely unsupported and inaccurate, he referred to Mike Lilly in an affidavit as a “retired driver,” to support a claim that Mr. Metzger did refer a retiree first over active drivers. However, he admitted he had no idea whether Mr. Lilly was retired but claimed on cross-examination that Mr.

Lilly must be retired because he is at least age 70. To the contrary, Mr. Lilly testified he is only age 66 and has never retired or taken any pension benefits.

In a matter that was only tangentially relevant to the issues in this case – the many internal Union charges involving Mr. Bucalo as a charged or charging party – Mr. Bucalo minimized the results and the outcome of certain charges against him and stated falsely that the charges filed against him “were dismissed.” In fact, the GEB – in the last step of a lengthy charge and appeal process, short of an appeal to the membership at a full Convention – ruled against him at least three times. The IBT in one case ordered Mr. Bucalo to repay Union funds he had spent for unauthorized travel and further suspended him from office with pay for two weeks, Ex. R-6. In another case, the IBT sanctioned both him and Mr. Webster for not ensuring that proper filings were made with the State of Ohio for the Union’s political action committee. Ex. R-7. Finally, as noted above, the GEB upheld charges against Mr. Bucalo and strongly admonished him for his “abuse” of the charge-filing process; he tried to rationalize his inaccurate testimony that these charges were “dismissed” by arguing that the GEB did not impose the charging parties’ requested penalty of expelling Mr. Bucalo from Union membership. Ex. R-9. See Tr. 53-55, 117-18, 150-53, 166-68, 176-79 (Bucalo), 246-52, 281-82 (Webster), 352, 400-01, 408-09 (Metzger), 485-86 (Lilly).

Notwithstanding the ALJ’s conclusory comments about the witnesses’ “demeanor” at the trial, this objective evidence showed that Mr. Bucalo was not credible, and his own, self-serving testimony that Mr. Webster was biased against him constitutes no evidence of that at all. The evidence showed a pattern of Mr. Bucalo experiencing conflict with others and then citing “corruption,” “retaliation,” “political vindictiveness,” or other improper motives on the part of those with whom he disagreed. Tr. 40-43, 128, 142-52, 154-61 (Bucalo); Exs. R-2, R-3 & R-4;

Ex. R-8 at 2-3. Indeed, he even asserted *that the staff and the Regional Director of Region 9 of the NLRB were not impartial and were retaliating against him* for his (largely unsuccessful) appeals of the Regional Director's dismissals of a number of his ULP charges. Tr. 179-81 (Bucalo). The common denominator in each situation is Mr. Bucalo himself; he filed charges and published accusations and insults against nearly every other officer and representative of Local 100 over a period of years, but he and the General Counsel provided no evidence that the current President responded in kind or had any similar malice.

2. *The evidence did not show any animus at all toward Mr. Bucalo by the only decision-maker involved in this case, so there is no nexus between any alleged animus and the action regarding the referral to "Wicked."*

Most significantly, it was clear from the hearing testimony that the only person involved in the decision not to refer Mr. Bucalo to work on *Wicked* after a representative of the film company asked about the possibility of using him simply had no negative history with Mr. Bucalo nor even any knowledge of his past charge-filing and other actions. The claimed animus on the part of Mr. Webster, even if such could be found to exist, cannot be imputed to Mr. Metzger as the Transportation Captain – and he is the person whose actions are in dispute.

Mr. Bucalo admitted he had not met or had any contact with Mr. Metzger before June 2017, much less any conflict or other negative interaction with him, and that they first met in person a week or two into the filming of "Donnybrook" when Mr. Metzger started work (after Mr. Bucalo did). The Transportation Captain said he knew Mr. Bucalo from attending Union membership meetings but agreed they had had no real interaction and certainly no disputes. Mr. Metzger had never been a political opponent of Mr. Bucalo, or a political supporter of Mr. Webster or any of Mr. Bucalo's opponents; to the contrary, he testified that he stayed well out of internal politics at Local 100. None of Mr. Bucalo's prior internal union charges or ULPs

involved Mr. Metzger, who was unaware of this activity by Mr. Bucalo at the time in question. Tr. 70-71, 90, 116-17, 174 (Bucalo), 330, 383-84, 407-08 (Metzger).

After Mr. Bucalo's name was put on the film referral list in June 2017 – immediately after Mr. Metzger first learned that he wanted to be added – Mr. Bucalo regularly contacted the Transportation Captain to inquire about the availability of work and to dispute his characterization as a retiree. In each of their communications, Mr. Metzger was courteous in his responses, telling Mr. Bucalo he would be called in order to any available jobs in the same manner as all others and making clear that the Union administration, not he, had made the determination that Mr. Bucalo was a retiree and should be placed in the retiree group. Nothing in their text communications indicated any kind of hostility toward Mr. Bucalo on the part of Mr. Metzger. Tr. 72-76, 113-14, 172-74 (Bucalo); 409-410 (Metzger); Exs. GC 6, 7 and 8.

Indeed, just a few months earlier, in October 2017, Mr. Metzger had referred Mr. Bucalo for a lengthy and lucrative job on the film “Donnybrook.” The ALJ suggested that this action is not relevant to the issue of animus, because there were two movies filming in the greater Cincinnati area at the time, and the Captain needed all available drivers and thus had no choice. Decision at 16, n. 5. However, Mr. Metzger not only referred Mr. Bucalo for a job but also assigned him to the relatively easy work of driving a straight truck, rather than a tractor-trailer, and to a position supporting the set decoration department, a job that involves a longer work period than other driving jobs because the set dec work begins before filming starts. Mr. Metzger also took no action against Mr. Bucalo for calling off work, even though he had been warned before starting work that this was not done in the film industry, or for failing to report his absence to either the Transportation Captain or the Transportation Coordinator. Mr. Bucalo's absence could have created a potentially large problem had a back-up driver not fortuitously

been available. This specific assignment and the leniency shown for the late and improper call-off demonstrate that Mr. Metzger bore Mr. Bucalo no ill will.

Most significantly, Mr. Metzger testified that he alone made the decision not to accede to the film company's informal and somewhat deferential request to assign Mr. Bucalo if possible. When Mr. Ruiz, the Transportation Coordinator, passed on Ms. Haller's request for Mr. Bucalo, Mr. Metzger responded on the spot based on his own experience and judgment. He determined it would be inappropriate and unacceptable to refer the most junior driver on the retiree list before more senior retirees *and* before all of the drivers on the active/out-of-work list (which Mr. Bucalo admits would be the outcome he sought). Mr. Metzger did not consult with Mr. Webster or anyone else in making this decision but responded to Mr. Ruiz immediately, in that same short phone conversation; he testified that it was "*my call.*" Tr. 123-26 (Bucalo), 371 (Metzger) (emphasis added).

While Mr. Bucalo and even the ALJ might disagree with this determination about the proper response to the request, there is simply no evidence that Mr. Metzger reached the conclusion that he did because of any hostility toward Mr. Bucalo, whether because of his political or charge-filing activities or any other reason. Simply put, there was no proof of a connection between any alleged animus on the part of an amorphously defined "Union" and the specific, immediate decision made by Mr. Metzger.

It is clear that, even where animus exists between a union member and the union, the General Counsel still must establish a "nexus between that animus and the failure to refer" that member to a job. Brand Mid-Atlantic, Inc., supra. In that case, a union member had a "longstanding feud" with the union's business representative and had brought internal union charges against him. Id. at 854. The member subsequently requested but was not referred to

employment through the union's non-exclusive hiring hall. Later, the worker and the business agent engaged in an argument at a membership meeting, where the union representative referred to the member as a "troublemaker" who "would never work again in this Local." Id. at 855. The Board found that, although the General Counsel had "established a strong animus" toward the Charging Party by the union representative, it failed to prove "any nexus between that animus and the failure to refer," while the union had "successfully met its burden of showing that its failure to refer [the employee] ... was nondiscriminatory." Id. The Board credited the union agent's testimony that "in selecting men for work, he considered three factors in making his decision: who had been unemployed the longest, whether the individual had the skills necessary to perform the job, and whether the individual could get to that job," and found that, given these criteria, there was no "evidence that [the Charging Party] was entitled to referral ahead" of the four individuals whom the union referred. Id. In this case, there was no such "strong animus" shown, nor indeed any animus proved on the part of Mr. Metzger.

The ALJ cited only alleged "conflicting recollections" between Mr. Metzger and Mr. Webster about whether "they had ever discussed the Employer's request to refer Bucalo to work on *Extremely Wicked*." Decision at 12 (underlining added). There may have been some confusion about exactly when the two first discussed this matter, perhaps arising from the phrasing of the questions,⁷ but there simply was no dispute that they did not consult or discuss the request beforehand or at the time the request to use Mr. Bucalo if possible was communicated and Mr. Metzger declined it. Tr. 257 (Webster), 372, 444-45 (Metzger). Obviously, the two did speak about it at some point, both because it was highly unusual – Mr.

⁷ In fact, when asked a specific and direct question by the ALJ about the timing of any discussions with Mr. Webster, Mr. Metzger testified very clearly, "Oh, I mean, we've talked since then, but at the time, I never said a word to anybody about it." Tr. 444-45 (Metzger).

Metzger testified he had never known a film company to ask for a driver by name – and because Mr. Bucalo later filed the present charges. However, the fact that they could not remember precisely when they *ever* discussed the situation does not establish that any discussions between them led to Mr. Metzger’s decision, and the evidence was directly to the contrary. Because the General Counsel did not show that the sole individual involved in the decision at issue in this case bore any sort of animus toward Mr. Bucalo, and could prove no nexus to the action, the allegation that the decision not to refer him for the work on “Wicked” was discriminatory or in bad faith must be rejected and the ALJ’s recommended decision on this point overruled.

B. The evidence did not support the finding that the Union’s stated, legitimate basis for its actions was a pretext for discrimination.

Mr. Metzger testified consistently that he declined the film company’s highly informal and conditional request for Mr. Bucalo (phrased as a preference for him by the set decoration coordinator, who had no authority or responsibility for hiring drivers, for him to drive for her department “if possible”) solely because, in his view, the longstanding practices required that he go by experience and qualifications, starting with the active list before turning to the retiree list. The ALJ’s conclusion that this explanation was somehow pretextual for discrimination against Mr. Bucalo is unsupported by the evidence.

The ALJ correctly outlined the law relating to the duty of fair representation in the operation of an exclusive hiring hall and the burden-shifting that may occur in the analysis of a claimed violation, as follows:

When the union operates an exclusive referral service – which the Union admits it does here – it breaches its duty of fair representation when it acts in an arbitrary, discriminatory, or bad faith manner. *Teamsters Local 631 (Vosburg Equipment)*, 340 NLRB 881, 883 (2003). ...

In determining whether a union operating an exclusive referral service has violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by failing or refusing to refer an individual out for employment, the Board applies both the duty-of-fair-representation framework, above, as well as the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1968), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). [Additional citations omitted.] . . .

Under the *Wright Line* analytical framework, the General Counsel must establish: (1) the employee/union member engaged in protected activity; (2) the employer/union has knowledge of that activity; and (3) the employer/union had animus or hostility toward the protected activity at issue. Among the factors supporting an inference of animus are: suspiciousness of timing, departure from past practice, disparate treatment, shifting or inconsistent reasons, and false or pretextual reasons given to explain adverse actions. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Brink's, Inc.*, 360 NLRB 1206, 1206 fn. 3 (2014).

Once the General Counsel establishes that the employee/union member's protected activity was a motivating factor in the decision, the burden of persuasion shifts to the employer/union to show that it would have taken the same action even in the absence of the protected activity. The employer/union cannot simply present a legitimate reason for its action, but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Teamsters "General" Local Union No. 200*, 357 NLRB at 1852. When an employer/union's stated motives are found to be false, the circumstances may warrant an inference that the true motive is one that the employer/union desires to conceal. *Id.* In short, a finding of pretext defeats any attempt by the employer/union to show that it would have not referred the discriminatee absent his protected activities. *Id.*

Decision at 14-15.

However, this analysis was incorrectly applied to the facts adduced at trial. The evidence did not show that the Union's stated reason for its action – that the Transportation Captain was following what he understood to be the appropriate procedure in referring retirees such as Mr. Bucalo last – was false, much less that it was a pretext for any improper or invidious motives.

1. *There were no improper "deviations" from the Union's standard practice of referring out-of-work drivers over retirees.*

The ALJ's recommended Decision cited as a basis for a finding of pretext instances of alleged "deviations" from the Union's established, albeit informal, referral procedures. However, all of the situations mentioned in the Decision are consistent with the practice of referring out-of-work drivers before retirees or are otherwise justifiable under the specific circumstances.

First, the ALJ noted that Mr. Metzger sometimes refers driver Bill Lloyd, who also is a qualified mechanic, out of seniority order when a producer requires someone with mechanic skills. Decision at 8. This is not evidence of a "deviation;" the procedure is, as Mr. Metzger testified, to refer drivers based on their experience *and* qualifications. It should be obvious that a referral system can only function if the Union provides employees who meet the necessary qualifications, whether for drivers who are capable of operating tractor-trailers or specialized car-haul trucks or for those with mechanic skills.

Furthermore, Mr. Metzger testified without contradiction that retirees always have been referred last, after any non-retired, out-of-work drivers, and driver Mike Lilly corroborated this. Tr. 354, 394-95, 445-48 (Metzger), 492-95 (Lilly). The Board does not require that such hiring-hall policies and criteria be in writing, only that they be objective. See, e.g., Stage Employees Local 412, 308 N.L.R.B. 1084, n.4 (1992); IATSE Local 592, 266 N.L.R.B. 703, n.2 (1980). The placement of retirees in a secondary, essentially supplemental group meets that standard, and the evidence showed no actual deviations from that process.

There was some limited testimony about the Union's referral of women drivers in response to a request from the producers of "The Old Man and the Gun" for a more diverse workforce. Neither Mr. Webster nor Mr. Metzger remembered the exact details of how two unemployed female drivers were identified,⁸ although there was testimony that at least one of

⁸ The ALJ's Decision implied that their vague recollections about these details were somehow suspicious or even "feigned." Decision at 11-12. However, the lack of detailed recall about what apparently was a minor matter that had

them, Cheryl Anderson, previously had done some film industry driving in addition to driving in construction. Tr. 270-73 (Webster), 355-58 (Metzger). However, even if these two drivers were added to the list at the time, there was no evidence whatsoever that they were referred ahead of anyone who was already on either the active or retiree list. (Indeed, the retirees who worked on that film only did so because they had car-haul experience required to transport the vintage vehicles used as picture cars in that film. Tr. 405-07 (Metzger).) The mere addition of two women drivers to the pool, without evidence that they displaced any more senior drivers or otherwise were referred out of order, does not show a “deviation” from the process.

The ALJ’s Decision also cites the offers of work on “Wicked” to out-of-work drivers Joe Hensley and Dan Matthews, even though their names purportedly were not on “the list,” and suggests it was therefore improper to have offered them work over Mr. Bucalo, whose name was on a list from 2017. To the contrary, it was not established that their names were *not* on a written list used in January 2017, as that list was not introduced into evidence. Furthermore, the evidence that these two drivers were offered work on “Wicked” before Mr. Bucalo in fact supports the Union’s position that the pool of out-of-work drivers were given priority over retirees, regardless of whether their names were on a written list.

The fact that Mr. Matthews and Mr. Hensley may not have been on any specific, written list that was introduced into evidence does not indicate that they were not properly part of the pool for referrals. First, the actual, written list that Mr. Metzger used in January 2018 was not available and was not introduced into evidence at the trial. The General Counsel had subpoenaed from Mr. Metzger and Local 100, among other things, the referral lists used for “Wicked.” The Union produced the lists that were prepared in June 2017, when Mr. Bucalo was added to the

never been made an issue during Mr. Bucalo’s case until the trial, more than a year after the filming of “The Old Man and the Gun” in the spring of 2017, is hardly surprising and does not indicate dissembling.

retiree list, Ex. GC 21 at 12, 13, and lists of those who *actually* worked on “Wicked,” prepared when the filming had concluded.

Mr. Metzger identified the first list, Ex. GC 21 at 12, as one that he thought had still been in use in the fall of 2017 for the film “Donnybrook.” The Transportation Captain testified that this list was no longer up to date, as two of the drivers had retired and a few names had been added, including Mr. Hensley. However, the list Mr. Metzger used to make the specific referrals to “Wicked” was lost sometime between the January referrals and the late-July trial. Tr. 336-341 (Metzger). Mr. Metzger testified that he believed Mr. Hensley’s name *was* added to the list, after he had requested to be put on the list in December or January. Tr. 336-41 (Metzger).

The lists attached to the Union’s subpoena response also included one that Mr. Metzger prepared, after the fact, of individuals he could recall having worked on “Wicked” and another that he had later updated to include the approximate dates that different drivers worked and to add a couple of names he had inadvertently omitted from the original list. Ex. GC 21 at 14, 15; Tr. 345-50, 428-32 (Metzger). Neither of these versions was, or purported to be, a list that was used for contacting employees or making the referrals in the first place.

Regarding Mr. Matthews, there were no specific questions at trial about whether his name was put on a written list and therefore no direct evidence on that point. Obviously, he was not on the final list of individuals who worked on “Wicked,” Exs. GC 21 at 14-15, because he declined the proffered work due to his involvement in a home remodeling project. However, like all of the other drivers who were on either the active or retiree lists in 2018, he was sent a package from the Union with the newly prepared, written rules and procedures for the film work, suggesting that he was in fact on the list, even though he had not actually done any movie driving. Tr. 317 (Matthews), 427-28 (Metzger).

Mr. Hensley was a laid-off driver in the construction industry. Mr. Metzger testified that Mr. Hensley contacted him and asked to be placed in the group for film work around Christmas of 2017 or early January 2018; the Transportation Captain believed he put his name on the written list he was using at the time but could not recall positively. Mr. Hensley did work on “Wicked” starting in late January; Mr. Metzger initially referred him when the production company needed a van driver for a day or two, then he was assigned to replace another driver who went out for knee surgery. Tr. 338-40, 348-49, 365 (Metzger).

Mr. Matthews in late 2017 and early 2018 was unemployed after having been terminated by his prior employer.⁹ He had learned about the film referral list from Mr. Bucalo in the fall and contacted Mr. Webster, who provided his contact information to Mr. Metzger. The Transportation Captain contacted him in mid-January 2018, and offered him work on “Wicked” – presumably, the extra work that eventually was performed by the senior Mr. Metzger, given the timing of the offer on January 20 – but Mr. Matthews declined because he was engaged in a home improvement project. Tr. 312-18, 325 (Matthews); Exs. GC 19 & 20; see also Tr. 367-70 (Metzger). Mr. Matthews was not a retiree but an unemployed driver in need of work, and he was properly contacted about potential film work before either Mr. Bucalo or any of the more experienced and senior drivers on the retiree list. The situation with Mr. Matthews establishes that Mr. Metzger followed a consistent practice of referring out-of-work drivers before retirees.

⁹ Contrary to the reference in the ALJ’s Decision, Mr. Matthews was not an “an out-of-work active construction driver,” Decision at 10, but had recently been terminated from Ryder Logistics, where he delivered aircraft engines and other parts for General Electric. Tr. 312, 320 (Matthews). The Decision also stated that Mr. Matthews had sent the Union President an e-mail in late December 2017 “asking to be added to the referral list. He did not specify which referral list.” Decision at 10. Again, this is incorrect; Mr. Matthews’s e-mail stated: “Please add my name to the movie list as an unemployed teamster.” Ex. GC 17. There was no question of what group Mr. Matthews would be placed in; he is not of retirement age, he referred to himself as “unemployed,” and Mr. Webster was well aware he was discharged, not retired, since the Union at the time was processing a grievance disputing his termination. Tr. 319-21 (Matthews).

Finally, the ALJ cited as a purported “deviation” from the standard practice the agreement among the drivers to share the work and rotate days during a small, low-budget film called “Strangers II.” Decision at 8. That film required only a few drivers on most days; rather than have the top senior drivers get all of the work, with the others having no income but unemployment, Mr. Metzger and the drivers agreed that the seven to nine regular (non-retired) drivers who were available for work at the time would share the work, although on some days they all were needed and worked. Tr. 358-59, 361 (Metzger). This was admittedly unusual, but Mr. Metzger did use the existing pool of drivers, and he presumably would not have implemented this sharing arrangement had any of the top few drivers on the list objected. More significantly for purposes of this case, no one was involuntarily displaced by a driver with less seniority *or* by a retiree.

None of these situations involved a variance from the practice of referring active employees first, by seniority and qualifications before moving to retirees if needed. Therefore, they do not establish that the practice was inconsistent or that the Union Transportation Captain’s stated reliance was false or pretextual.

2. *The Union has not offered shifting, inconsistent or false explanations for its actions.*

The Union’s explanation of the basis for not referring Mr. Bucalo when the film company representative asked if that might be possible did not shift over time, as the ALJ’s Decision suggests. In addition, the Respondent is not arguing here, and did not assert at trial, that the request to use Mr. Bucalo was denied because he himself had asked for it.

The ALJ’s Decision states: “The Union attempts to distinguish the Employer’s request for Bucalo from these other requests [for mechanics or women drivers] by arguing it was not a valid request, because he ‘pressed’ Haller to request him.” Decision at 16, n. 14. However, the

Respondent is making no such argument. At most, this was mentioned in correspondence to the Region early in the process, due to a misunderstanding between Mr. Metzger and the Union's counsel. In an informal statement to this effect, in a February 26, 2018, e-mail to a Region 9 investigator, Ex. GC 18, counsel mistakenly stated that the Transportation Captain believed at the time he spoke to Mr. Ruiz, and denied the request about possibly using Mr. Bucalo, that Mr. Bucalo himself had asked for this referral. In fact, Mr. Metzger testified that he did not know about this one way or the other until much later, and the possibility that Mr. Bucalo had sought the set dec lead's intercession on his behalf simply was not in his mind when he spoke to Mr. Ruiz.¹⁰ He testified that the Union attorney's email was incorrect, and counsel took responsibility for this error both at trial and in the post-trial brief.¹¹ Tr. 420-23 (Metzger); Respondent's Post-Trial Brief at 24 n.12.

The evidence is uncontroverted that Mr. Metzger determined – immediately upon being asked about the possibility of using Mr. Bucalo, out of seniority order and ahead of all other regular and retired drivers – that it would be incorrect to send Mr. Bucalo first, since he was on the retirees list and since the Union used a system of referring based on seniority and

¹⁰ The Union did attempt later to find out how it came about that Ms. Haller had asked Mr. Ruiz about requesting Mr. Bucalo, including by asking her by e-mail and in person, since there had never been any such request in the past and since Mr. Bucalo had by then filed the present ULP charge. The ALJ's Decision seems to imply that these queries, on a legitimate question of concern to the Transportation Captain and the Union, were somehow improper; they were not. Decision at 10-11.

Mr. Lilly testified that Ms. Haller told him Mr. Bucalo had asked her to request him by name, although she denied having said that and testified that she made the request of her own volition. Although the ALJ determined that Ms. Haller's testimony on this point was more credible, because she had no interest in the case – in fact, neither did Mr. Lilly, particularly (even if it is found that Mr. Bucalo should have been referred instead of him, Mr. Lilly already has performed the work and been paid and will lose nothing) – the actual fact of what Ms. Haller told him is immaterial. Mr. Lilly's evidence is relevant only to show that by the end of February, when the Union's counsel communicated with the investigator, Mr. Metzger *believed* Mr. Bucalo himself had pressed for this based on what Mr. Lilly had told him. Counsel therefore communicated this to the Regional office, misunderstanding the time frames involved. Mr. Metzger testified unequivocally that he did not know this at the time of Mr. Ruiz's initial request, in late December, and it therefore was not a basis for his action in that phone call when he declined to refer Mr. Bucalo.

¹¹ The ALJ's decision indicated that the Union was still making this argument, even though it explained the miscommunication at the trial and again in its brief, when it very specifically disavowed any such position. Again, this indicates the ALJ did not even read the Respondent's post-trial brief.

qualifications. He testified to this consistently, in his affidavit and at the trial, and this is what was communicated to the set dec lead on “Wicked,” Ms. Haller. Tr. 216-17, 237 (Haller).

3. *There were no other indicia of animus or pretext.*

The other indicia of animus or pretext are suspiciousness of timing and disparate treatment. Decision at 15, *citing* Camaco Lorain Mfg. Plant, 356 NLRB 1182, 1185 (2011), and Brink's, Inc., 360 NLRB 1206, 1206 fn. 3 (2014). Neither of these is present in this case.

There were no specific actions in close proximity in time to the December 2018 decision by Mr. Metzger on “Wicked” that might have been the trigger for any claimed retaliation – indeed, the only purported evidence of animus on the part of the Union President, Mr. Webster, was his response to a Facebook post a full year earlier – and there had been no conduct by Mr. Bucalo that was any different from his normal pattern (as he had filed 10 separate ULP charges over the course of 2017 relating to the film work alone) that might arguably have prompted some action against him.

There also was no evidence of disparate treatment. Mr. Bucalo and the General Counsel did not provide any evidence of any other retiree being referred ahead of non-retired, out-of-work drivers, Mr. Bucalo’s assertion that driver Mike Lilly was retired having been proved to be incorrect. Nor was there any other similarly situated person who was not referred after a request by name from a film company; it was undisputed that this had never occurred, at least in the six years Mr. Metzger had been working in the industry in Cincinnati. Therefore, there is no one to whom Mr. Bucalo might be compared who was treated differently and no disparate treatment.

The evidence does not support the conclusions of the ALJ that the Union acted arbitrarily or out of animus toward Mr. Bucalo, and it met its burden of showing persuasively that the

Transportation Captain's decision not to refer him for work on "Wicked" was based on a legitimate, non-discriminatory, and non-pretextual reason.

IV. CONCLUSION

The record as a whole does not support the conclusion that the Union violated its duty of fair representation to Mr. Bucalo. Therefore, based on the evidence, legal standards, and reasons set forth here, the Respondent Teamsters Local 100 respectfully requests that its Exceptions be granted, the ALJ's Decision reversed and the Complaint dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Support of Exceptions to the Recommended Decision and Order of the Administrative Law Judge was filed electronically with the National Labor Relations Board, and was served by electronic mail on NLRB Region 9 Regional Director Garey E. Lindsay (garey.lindsay@nlrb.gov), Counsel for the General Counsel Kevin Luken (kevin.luken@nlrb.gov) and Charging Party Samuel J. Bucalo (sammo1245@aol.com), on this 8th day of October, 2018.

Julie C. Ford