

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

TRUCK DRIVERS, CHAUFFEURS AND  
HELPERS, LOCAL UNION NO. 100,  
AFFILIATED WITH THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS  
(Wicked Films, LLC)

and

Case 09-CB-214166

SAMUEL BUCALO, AN INDIVIDUAL

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING  
BRIEF TO RESPONDENT'S EXCEPTIONS TO THE  
DECISION AND RECOMMENDED ORDER OF  
ADMINISTRATIVE LAW JUDGE ANDREW S. GOLLIN**

**I. INTRODUCTION:**

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this answering brief to Respondent's Exceptions to the Decision of Administrative Law Judge Andrew S. Gollin, which issued on September 11, 2018. Judge Gollin correctly concluded that Respondent violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by failing and/or refusing to refer Charging Party Samuel Bucalo to employment with the Employer (Wicked Films, LLC.) From January 2, 2017 to March 18, 2017, and that it should make Bucalo whole for his lost earnings and benefits as a result of Respondent's failure to refer. (ALJD pp. 17-19)

The instant case is controlled by well-settled Board precedent for determining when a union violates the Act in operating a hiring hall, which Respondent concedes. Respondent's exceptions, most of which are based on its disagreement with Judge Gollin's credibility determinations, have no merit. Consequently, Judge Gollin's decision should be affirmed.

## II. FACTS <sup>1/</sup>

### A. Background:

Bucalo is a former employee of United Parcel Service (UPS) and originally became a member of Respondent in March 1979. He served two 3-year terms as Respondent's Secretary-Treasurer from January 1, 2011 through the end of 2016. (Jt. Ex.1) He retired from UPS in early 2011, after being elected Respondent's Secretary-Treasurer. In 2016, he unsuccessfully ran for president against Respondent's current president, David Webster. He has held no other union office since running in 2016. (Jt. Ex. 1.)

Respondent provides drivers on certain movie work in the Greater Cincinnati, Ohio area and, during the period in question, it maintained an agreement with the Employer embodied in Article V of the Area Standard Agreements, as well as a practice between the parties, requiring that Respondent be the exclusive source of referrals of employees for employment with the Employer. (Respondent's Answer, G.C. Ex. 1(e) at p. 5)

Respondent maintains two separate lists for referring drivers to film production work. The first is for individuals who it deems to be out-of-work drivers, who are referred for work first. The second is for individuals who it deems to be retired. They are referred to work after the out of work drivers. Bucalo was placed on the retiree list on June 9, 2017. Bucalo has challenged his placement on the retiree list and the use of the purported two-tier system. (Jt. Ex. 1; Tr. 69)

From May 18, 2017 through February 2, 2018, Bucalo filed 11 Board charges against Respondent related to its film and TV work hiring hall. (Jt. Ex. 1, 1A) In two of these cases (09-CB-199111 and 09-CB-204497), the Region found merit to the allegations that Respondent

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<sup>1</sup> References to the Administrative Law Judges Decision will be designated (ALJD p. \_\_\_\_); references to Respondent's exceptions and brief in support thereof will be designated as (R. Except. p. \_\_\_\_ ) and (R. Br. p. \_\_\_\_ ) respectively; references to the trial transcript will be designated as (Tr. \_\_\_\_); references to the General Counsel's exhibits are designated as (G.C. Ex. \_\_\_\_); and references to Respondent's exhibits and Joint exhibits are designated as (R. Ex. \_\_\_\_ ) and (J. Ex. \_\_\_\_), respectively.

operated its Film and TV referral list without using written objective criteria in referring applicants for employment; that it failed and refused to register Bucalo for employment on its Film and TV Referral list for arbitrary, discriminatory or invidious reasons; that it failed to keep adequate records of the Film and TV referral list; that it failed to provide access to the Film and TV referral list to Bucalo; and that it failed to provide a copy of the film and TV referral list to Bucalo. (Jt. Ex. 1) (Respondent entered into an informal Board Settlement Agreement with the Region to resolve these allegations. Bucalo declined to join the Settlement Agreement. (Jt. Ex. 1, 1B))

**B. Bucalo's Relationship with Respondent:**

Bucalo is 58 years old and receives a small pension, but he wants to work. (Tr. 101) Bucalo has not been employed full time since he left union office on December 30, 2016. (Tr. 57) The film work in question in this matter is extremely good work in terms of money. (Tr. 101) Transportation Captain Craig Metzger acknowledges that this work is very lucrative, but sporadic. An employee can make a whole lot of money in a short period of time. (Tr. 333) Working out of the film referral hall would enable Bucalo to become eligible to run for an elected position in Respondent in the future. A member must remain in good standing in order to be eligible to seek union office. (Tr. 508-510)

Bucalo describes himself as a union reformer. He has been “butting heads” with Respondent’s officers for many years and his opposition to the current local officers is well established in the record . Bucalo has been in an ongoing “struggle” with Respondent concerning Union operations since Bucalo first ran for union President in 2004. (Tr. 31)

David Webster has been the elected president of Respondent since January 2014. Webster and Bucalo ran on the same slate in 2013 – with Webster running for President, the principal

officer, and Bucalo running for Secretary/Treasurer, second in charge behind the President. (Tr. 31, 240-243) Webster and Bucalo initially had a good working relationship; however their relationship soured after they were in office together. (Tr. 128)

Bucalo has published his own unofficial "Teamsters Newsletter" since as early as 2003. (Tr. 34) When he ran against Webster in 2016, he also published and mailed campaign literature to every member of Local 100 in which he severely criticized many of the currently seated Union officers, including Webster. (Tr. at 35-36; G.C. Ex 3)

Bucalo also maintains Facebook pages on which he engaged in dissident activity. One such page is the "Teamsters News" on which he posts news articles, commentary and other information pertaining to Respondent. Only Bucalo can post on Teamsters News, but others can comment. Bucalo's other Facebook page is called the "Teamsters United" page, which his campaign slate used to promote its campaign. (Tr. 37-40; G.C. Ex. 4) The page has been accessible since the 2015 election (Id.)

Bucalo has filed a number of internal union charges, unfair labor practice charges and other sorts of claims against the Union (Tr. 246), including internal charges against a number of seated Union officers. (Tr. 53) He also filed charges against Respondent with the Department of Labor, the Occupational Safety and Health Administration and as a whistleblower under the Service Transportation Assistance Act. (Tr. 185; Resp. Exs. 5, 6, 7, 8, 9, 11, 13)

In response to some of the internal charges filed by Bucalo, the Union was required to publish a Notice in its newsletter stating that it would not violate the election rules again. (Election for delegate to the International Brotherhood of Teamsters Convention) (Tr. 190; G.C. Ex. 2 at 2)

Upon leaving office on December 31, 2016, Bucalo posted an open letter on “Teamsters United” wherein he made various accusations and criticisms against Webster and his activity during the election. (Tr. 58-60, 171; G.C. Ex. 4) Bucalo posted, “Mr. Webster and I ran together in 2013. I am ashamed for his dishonesty and for his selling out members. I believe his legacy will be that he fostered corruption and weak leadership at the Union Hall.” (G.C. Ex. 4, at .5) Webster responded, “all this comes from the man who has cost our local (members dues) more than any other man in the history of our great local because of the attorney fees we’ve had to spend on all of the frivolous charges he has brought forward.” (Tr. 61-62; G.C. Ex. 4, at. 22)

**C. Respondent’s Film Hiring Hall:**

Transportation Captain Craig Metzger has administered Respondent’s movie referral list for approximately the last 6 years. (Tr. 330) As transportation captain, Metzger coordinates with the producers of any film production companies that come to town; finds out how many drivers will be needed and with what kinds of skills; contacts drivers who are on the referral list to see who is available and interested in the jobs; coordinates the work and the schedule for drivers during production, and coordinates the logistics, including the logistics for the drivers who are not out of the hiring hall and come with the specialty trucks involved into the production. (Tr. 331-333; G.C. Ex 22, at 2) Until June 2018, there were no written referral rules for film work. (Tr. 334) Metzger continued the same informal practices that were in place under the prior Transportation Captain, Billy Baxter, and worked from the same basic list of individuals who wanted to be referred to the film work. (G.C. Ex. 22, ¶ 2) Metzger made lists for referral when he knew for sure that a movie was coming, generally right before production started. (Tr. 397)

Respondent has virtually no records concerning referrals for the film work.<sup>2/</sup> Through its hearing subpoena, General Counsel requested all records, including notes of contacts with employees concerning being referred to *Extremely Wicked*, including whether or not such work was accepted or rejected, the date(s) for any contact with any employee referrals and dates of each response it had no documents responsive to this request. (G.C. Ex 21, at. 3)

In the same subpoena General Counsel requested all documents that show the names and dates of employment for all employees referred to *Extremely Wicked*. Respondent produced a copy of a handwritten list that was allegedly prepared from Metzger's memory in March 2018<sup>3/</sup> (G.C. Ex. 21, p. 3; G.C. Ex. 2, at 15) and a second, updated list that was created from his memory on July 27, 2018, just prior to the hearing. (G.C. Ex. 1, p. 2; G.C. Ex. 21, at 14)

Metzger identified G.C. Ex. 21 as the list from which he made referrals. (G.C. Ex. 21, p. 12; Resp. Ex. 14; Tr. 336-337) But he could not recall when he developed the list, only that he developed the lists when he was requested to provide them. (Tr. 337-338) He has not removed people whom he believes to be retired. (Tr. 339-340) And has called at least one or two people who are not on the list for referrals. (Tr. 340) Metzger claimed that the list is in the order of who has experience but keeps qualifications in "his head." (Tr. 345) He has everyone's contact information stored in his phone, not on a paper list. (G.C. Ex 22, at ¶ 5)

Although he claims that he has maintained a separate list for retirees for as long as he can remember, Metzger admits that he did not have a written retiree list until June 9, 2017, the same date that Webster told him to add Bucalo to the list. (Tr. 353, 440; G.C. Ex. 21, at 14) Prior to June 9, 2017, Metzger purportedly just kept the list in his head. (Tr. 448)

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<sup>2/</sup> Respondent only produced one active employee list (G.C. Ex. 21, p. 12) and one retiree list. (G.C. Ex. 2, at 13)

<sup>3/</sup> Mike Lilly, who worked on the film, is not on that list.

There is conflicting evidence regarding why Respondent classified Bucalo as a retiree. In a statement provided during the investigation, Metzger states that Webster told him that Bucalo had retired from UPS before he was voted out of office. Since he was retired, Metzger put him on the retiree list. (G.C. Ex 22, at ¶ 9) However, when testifying at the hearing, Metzger testified that one of the ladies in the office at the Union hall informed Metzger that Bucalo was retired, so he placed Bucalo on the retiree list. (Tr. 354) Metzger also testified at the hearing that he could not recall if he spoke to Webster or anyone else about Bucalo's status as a retiree. He just could not recall. (Tr. 456) He also could not recall how or whether he learned the retiree status of the other individuals before placing them on the active list. (Tr. 468)

In any event, in June 2017, Metzger placed Bucalo on the retiree referral list. (G.C. Ex. 22) In October 2017, Bucalo was referred to work on the filming of *Donnybrook*.<sup>4/</sup> (Tr. 75) This was the first film work Bucalo performed after being put on the list. (Tr. 76)<sup>5/</sup> Bucalo worked on the *Donnybrook* film, in Cincinnati, from October 12, 2017 to November 22, 2017. He specifically worked for set director Leyna Haller on this film. (Tr. 78) He was her driver and worked with Haller on a daily basis. (Tr. 78, 201) They worked well together and Haller liked Bucalo's work. (Tr. 86, 203) At the end of filming, Haller concluded that she would want to work with – and would request - Bucalo if and when she returned to the Cincinnati area to work. (Tr. 204-205) She denies that Bucalo asked her to make such request – let alone pressured her in any way. (Tr. 218)<sup>6/</sup>

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<sup>4/</sup> The Union does not publish or post upcoming film work. Bucalo found out about work through the news. (Tr. 69-70, 73) To try to find out if there was any film work coming, Bucalo would text Metzger, generally around the first of the month. (Tr. 73, G.C. Ex. 5)

<sup>5/</sup> Respondent placed Bucalo on its list after he filed the Board charge in 09-CA-199111 alleging that Respondent has refused to refer him for work. (Jt. Ex. 1(b))

<sup>6/</sup> In fact, about half way through the production of *Extremely Wicked*, Haller got an e-mail from Metzger asking her if Bucalo had requested her to request him as her driver. She replied no. (Tr. 216)

After working on *Donnybrook*, Bucalo heard Rumors that there was another film coming to Cincinnati and, on January 2, 2018, he contacted Metzger about working on the film. (Tr. 95; G.C. Ex. 8) That same day he saw a Facebook posting by Haller wherein she stated that she was in Cincinnati, Ohio to work on a film. (Tr. 96)

In fact, by the time Bucalo texted Metzger, Haller had already requested to have Bucalo as her driver on the film. (Tr. 206; G.C. Ex.10) In December 2017, Haller was assigned to *Extremely Wicked* as lead set decorator. (Tr. 205) She requested Bucalo as her driver. (Tr. 206) Respondent sent Mike Lilly instead, who was 15 of 17 on Respondent's referral list. <sup>7/</sup> (G. C. Ex. 21, at. 12; Tr. 208)

On January 18, 2018, Bucalo again texted Metzger looking for work on *Extremely Wicked*. (G.C. Ex. 8.) Metzger responded "as of right now Mr. Bucolow [sic]. I do not need any more drivers. But if I need any more I will let you know sir." (G.C. Ex. 8, at. 4) Metzger stated that the film was, "just not needing anymore at this time. Never know. Things change in this business." (G.C. Ex. 8, at 3)

Two days later, on January 20, 2018 (after filming had started on *Extremely Wicked*), Metzger e-mailed Teamsters member Dan Matthews asking him if he was available for some driving work right away. (Tr. 315) Metzger explained to Matthews that Dave Webster had informed Metzger that Matthews might be interested in driving for him. (Tr. 315; G.C. Ex. 19) That e-mail was followed up with a phone call to Matthews from Metzger. Matthews declined the work because he was busy with a home remodeling project. <sup>8/</sup> (Tr. 315; G.C. Exs. 19-20)

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<sup>7/</sup> It is Haller's experience that if she requests a certain driver she would be given a reason that the driver was not assigned to her. (Tr. 237) In her experience in Cleveland, Ohio the reason that a certain driver is not available is usually because he is assigned to something else. (Tr. 236-237)

<sup>8/</sup> Other than this one instance on January 20, 2018, Matthews has never been called by Metzger for any movie work. (Tr. 317)

Matthews does not appear on any of Respondent's referral lists. (Tr. 312; G.C. Exs. 21 at 13-14; Resp. Exs. 14-15) In approximately October 2017, after learning about the movie referral list from Bucalo, Matthews contacted Webster and asked about being placed on the movie referral list. (Tr. 312-313; G.C. Ex 17) There is no record evidence showing that he was placed on any list, whether written or in Metzger's "head" at that time. For example, he was not contacted for the *Donnybrook* project in October 2017 on which everyone on the referral list worked. (Tr. 314) When asked why he called Matthews, who was not on Respondent's referral list, instead of moving to the retiree list, Metzger explained that he wanted to use Matthews "instead of a retired guy." (Tr. 480-481) He also admitted, and the record shows, that he contacted Matthews for work because Webster told him to. (Tr. 370; G.C. Exs. 19-20)

Contrary to Metzger's desire to use active employees instead of "retired guys," he subsequently referred a retiree to *Extremely Wicked*— his father, Ralph Metzger after the Employer requested another driver, Ralph Metzger worked for Haller. (Tr. 350) Although Haller did not recall exactly when the second truck (Ralph Metzger's) went into service, she recalled that it was about 2 to 3 weeks after shooting began and she was sure that his truck was in service on almost a daily basis for at least 4 weeks. <sup>9/</sup> (Tr. 499-501)

**D. Respondent's Referral Practices and Procedures:**

At the time that Respondent refused to refer Bucalo to *Extremely Wicked*, it had a policy, albeit unwritten, as well a past practice of referring employees on its referral list based on special considerations, i.e., out of the order in which they appeared on the list. This included honoring requests by name. (See, for example, Respondent's position statement from the investigation.

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<sup>9/</sup> The record does not corroborate Metzger's claim that Ralph Metzger was called in to cover a sick driver. Metzger's records show that it was Joe Hensley who replaced a sick driver (Rick Whaley who left the production for surgery). (G.C. Ex. 2; at 14) Hensley was not on the referral list. (Tr. 363; G.C. Ex. 21, at 12; Resp. 14) Webster referred Hensley to Metzger. (Tr. 365)

(G.C. Ex. 18)) Metzger testified that he is not aware of anything that would prohibit him from referring someone that had been requested for a project. (Tr. 454) Webster testified that there is nothing in the contract which would prohibit the Union from making a referral upon request. (Tr. 263-264) Finally, Respondent put hiring hall referral rules into effect on June 26, 2018, in which it states that such rules, “put in writing the informal procedures that have been in place for many years...” and were “developed from the existing practices...” (G.C. Ex 14, at. 1) Such rules include that, “an employer shall have the right to request a certain person or persons to be provided...” (G.C. Ex. 14, at. 4)

Prior to *Extremely Wicked*, Respondent had referred employees to movies based on special consideration. According to a statement provided from Metzger during the investigation into this matter, Dawn Frazier was added to the list in 2017, after the producers of *The Old Man and The Gun* asked specifically to hire women in addition to men. Metzger asked Webster if there were any out-of-work women drivers with a Class A CDL and Webster connected Metzger with Frazier. (G.C. Ex 22, ¶ 5) Although, on the stand, Metzger could not recall whether he called the union hall to see if there were any female drivers available, he admits that he would have accommodated the producers’ requests. (Tr. 358) Further, Metzger testified that Webster may have referred female drivers, but he could not recall. (Tr. 271) Although Frazier was added to the active employee referral list for *Old Man and a Gun*, she is on the list above Juliann Rudisell and Drew Perkins, who were referred to and worked on a movie that was filmed prior to *Old Man and a Gun - The Public*. (G.C. Ex. 2, p. 12; Resp. Ex. 14)

On *Strangers 2*, a very low-budget production that shot in Northern Kentucky from approximately the end of May until about July 8, 2017, Metzger determined to share the available work among employees on the list rather than simply referring the most senior on the

list. (Tr. 358-359, G.C. Ex 22, ¶ 14) The production required only a small number of truck and van drivers. Metzger assigned the drivers to work alternate days, allowing more employees to work fewer days, rather than follow the list. (Tr. 358-359)

In 2017, prior to *Donnybrook*, which began production in November 2017, everyone on the list and the retiree list with the exception of Bucalo had been referred for work. (Tr. 362)

### **III. ARGUMENT**

Respondent concedes that, in rendering his decision, Judge Gollin relied on well-established legal framework governing a union's duty of fair representation in its operation of a hiring hall. To wit, in examining whether a union operating an exclusive referral service has violated Sections 8(b)(1)(A) and (b)(2) of the Act by failing or refusing to refer an individual for employment, the Board applies both its duty of fair representation framework, i.e., asks whether the union acted arbitrarily, discriminatorily or in bad faith, see *Teamsters Local 631 (Vosburg Equipment)*, 340, NLRB 881, 883 (2003), as well as the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1968), *enfd.* 662 NLRB F.2d 889 (1<sup>st</sup> Cir. 1981), *cert. denied* 455 U.S. 989 (1982). *SSA Pacific Inc.*, 336 NLRB No. 51, slip op. 1 (2018) and cases cited therein. (ALJD p. 14) Under *Wright Line*, the General Counsel must establish: (1) the employee/union member engaged in protected activity; (2) the union had knowledge of that activity; and (3) the union had animus or hostility toward the protected activity at issue. 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 union to show that it would have taken the same action even in the absence of the protected activity. The 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 1844 at 1852 (2011). The record evidence fully supports Judge Gollin’s finding that Respondent’s conduct violated the Act under both the duty of fair representation and the *Wright Line* frameworks.

A. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THAT THE UNION HARBORED ANIMUS AGAINST BUCALO AND THAT A NEXUS EXISTED BETWEEN THAT ANIMUS AND ITS DECISION TO NOT REFER BUCALO TO “WICKED”.

(Exception Nos. 1, 2, 3, 8, 18, 19, 20)

1. The Administrative Law Judge Correctly Found That Respondent Harbored Animus Against Bucalo

Contrary to the overwhelming record evidence, Respondent argues that the General Counsel failed to establish that anyone at Respondent, including Metzger, actually had animus towards Bucalo for his protected activities. (R. Br. at 11.) Respondent goes on to argue that, in finding animus, Judge Gollin solely, and incorrectly, relied on Webster’s comments to Bucalo’s “open letter” on Facebook wherein Webster attacked Bucalo’s criticism of Respondent as “...com[ing] from the man who has cost our local (members dues) more than any other man in the history of our great local because of the attorney fees we’ve had to spend on all of the frivolous charges he has brought forward.” (Tr. 61-62; G.C. Ex. 4, at. 22) Without citing any authority for its proposition, Respondent simply states that Webster’s reply cannot be viewed as animus because it is a fact that Bucalo had cost Respondent a large amount of money in attorney fees. (R. Br. at 12) Additionally, it points out that such statement was remote in time to its alleged refusal to refer Bucalo. (R. Br. 13 ) The truth of a statement does not render it less probative of hostility. Moreover, even if Webster’s comments were construed as something less than direct hostility towards Bucalo’s activities, they prove that Webster was “keeping count” of his activities and viewed them as destructive to Respondent.

Not only was it appropriate for Judge Gollin to rely on Webster's statement – but the record is also replete with other facts pointing to animus attributable to both Webster and Metzger, on which Judge Gollin also appropriately relied. 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 action. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Brink's, Inc.*, 360 NLRB 1206, 1206 fn. 3 (2014). The reasons for such animus toward Bucalo are unquestionable – his dissident activities towards Respondent, including towards its current administration, are well-documented in the record. (Tr. at 31, 34, 35-36, 37-40, 51-55, 242, 246 G.C. Exs. 3 & 4)

<sup>10/</sup> Webster and other individuals who ran on a slate with Webster in 2015 acted in kind by filing internal union charges against Bucalo, some of which were listed in Respondent's newsletter. (Tr. at 51-55, GC Ex. 3 at p. 3) Most notably, prior to the being refused the referral at issue herein, Bucalo had filed multiple Board charges against Respondent wherein, in two, he successfully challenged Respondent's failure to register him on its film and television referral list, its failure to operate the list using written objective criteria and its failure to provide him access to the list. (Jt. Ex. 1, 1A) Indeed, despite the fact that he requested to be placed on the list in December 2016. (Tr. 110) Respondent did not place him on its film list until June 2017, which was after he filed the Board charge in 9-CB-199111 on May 18, 2017.

The record evidence fully supports Judge Gollin's finding that Respondent's animus towards Bucalo's activities was not only direct (as shown by Webster's statement) but could be inferred from "its repeated willingness to deviate from its 'established' practice, except for when the deviation would benefit Bucalo, as well as its disparate treatment [of him] in handling

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<sup>10/</sup> He also filed charges against Respondent with the Department of Labor, the Occupational Safety and Health Administration and as a whistleblower under the Service Transportation Assistance Act. (Tr. at 185, Resp. Exs. 5, 6, 7, 8, 9, 11, 13)

requests.” (ALJD p. 15) Contrary to Respondent’s claim that it was simply adhering to its purported two-tiered system for active employees and retirees when it refused to honor the Employer’s request for Bucalo, Judge Gollin’s finding that, in practice, Respondent did not strictly adhere to any of its claimed “established” procedures (ALJD p. 15, ll. 24-26) is well supported in the record. A review of the films to which Respondent referred employees in 2017 shows that it referred employees out of order based on special considerations – and even referred employees who were not on its lists. (See, e.g., Tr. 263-264, 271, 312-315, 350, 358-359, 370, 454, 480-481, 499-501 and G.C. Exs. 14 (pp. 1 & 4), 17, 18, 19, 20, 22 (paras. 5 & 14)) Indeed, on *Extremely Wicked*, Respondent (through Metzger) called an employee who was not on its list – Dan Matthews – a mere two days after telling Bucalo that there was no work available on the film. (Tr. 315, G.C. Exs. 8 (pp. 3&4) 19 and 20) There is also record evidence that Respondent had a policy of honoring requests for employees by name. (Tr. 263, 454; G.C. Exs. 14 (pp. 1 & 4) and 18) Yet, even when Respondent had the opportunity to honor both its two-tiered system of first referring active employees and its policy of honoring requests by finally sending Bucalo when the Employer needed a second set decorator in it instead chose to send Metzger’s father (Ralph Metzger). (Tr. 350; 499-501) Thus, Respondent’s reliance on its purported two-tiered system was demonstrably false and warranted not only the inference of animus on which Judge Gollin based his findings, *Camaco Lorain*, supra, but also warranted his finding that such reason basis for refusing to refer him was pretextual. *Teamsters “General” Local 200*, supra.

In its brief, Respondent goes to great lengths to attack Bucalo’s credibility and, furthermore, incorrectly argues that Judge Gollin relied on such incredible testimony to find animus – maintaining that “[Bucalo’s] own, self-serving testimony that Mr. Webster was biased against him constitutes no evidence of that at all.” (R. Br. 13-15) However, a review of Judge

Gollin's decision shows that nowhere in his analysis does he rely upon – or even specifically credit - such testimony by Bucalo to support his finding of animus. Thus, such purported crediting of Bucalo on these assertions over Webster and Metzger, even if undertaken by Judge Gollin, had no impact on his decision.

Indeed, much of Judge Gollin's key findings are based on his discrediting Webster and Metzger. (See generally, ALJD 11-14.) 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), enfd. 188 F.2d 362 (3d Cir. 1951). Here Respondent has not advanced any basis for overruling Judge Gollin's credibility determinations.<sup>11/</sup> Judge Gollin appropriately based such determinations on his observations of the witnesses' demeanors, their recollections and the overall record evidence. (ALJD 11) The record evidence fully provides support for Judge Gollin's determinations – not the least of which includes Respondent's failure to maintain – or produce at hearing – any records reflecting its operation of the hall or administration of its film referral list.<sup>12/</sup>

2. THE RECORD FULLY ESTABLISHES THAT A NEXUS EXISTED BETWEEN RESPONDENT'S ANIMUS AND ITS DECISION TO NOT REFER BUCALO TO "WICKED"

The cases cited by Respondent to support its position that General Counsel failed to show a nexus between Respondent's animus and the failure to refer Bucalo (R. Br. at 11) are distinguishable. In *Mid-Atlantic, Inc.*, 304 NLRB 853 (1991), the Board found that, notwithstanding strong evidence of animus towards the charging party, there was no nexus

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<sup>11</sup> Respondent excepts to the Judge's credibility findings, Exception 8. Decision, p. 11 lines 24-27.

<sup>12</sup> / Respondent's curious claim that the Judge had no basis for finding that certain names were or were not on a 2017 referral list because "that list was not introduced into evidence" (Resp. Br. p. 24) only reinforces the basis for Judge Gollin's determination.

between such animus and the way in which it made its referral because the evidence showed that the union had followed its established criteria when refusing to refer the charging party. In this case, unlike in *Mid-Atlantic*, supra, the evidence establishes that the Union repeatedly deviated from its “established” procedures, even on *Extremely Wicked* to the extent that they even existed, except when it came to Bucalo.

In the other case cited by the Respondent, *Brinks, Inc.*, 360 NLRB 1206 (2014), the Board found that the evidence of animus was “marginal” and that there was sufficient evidence to show that the Respondent would have terminated the charging party in the absence of protected activity. (*Id.* at 1220.) Here the evidence of animus against Bucalo is strong and Respondent failed to show that it would have refused to honor the Employer’s request for Bucalo in the absence of such animus.

Respondent also attacks the finding of nexus by claiming that Metzger was the sole person responsible for refusing to refer Bucalo and that the General Counsel failed to show that Metzger harbored animus towards Bucalo. As discussed in more detail above, Metzger’s own conduct in regularly deviating from the list while refusing to refer Bucalo was sufficient to create an inference of animus – notwithstanding any direct participation by Webster. Nevertheless, the record evidence shows that Metzger often looked to Webster or the “Union Hall” for input when making the movie referrals.

Furthermore, Judge Gollin discredited Webster’s claim that he was not involved in the operation of the film hall and the record evidence supports such conclusion. (ALJD 11 – 12) For example, Matthews contacted Webster to be placed on the movie referral list and Webster is the one who informed Metzger that Matthews might be interested in driving for him. (Tr. at 312-313, 315; GC Ex 17, 19.) Metzger testified that he called the “Union hall,” i.e. Webster, looking

for additional drivers for *Extremely Wicked*. (Tr. at 368) and that Webster mentioned Hensley. Metzger then contacted Hensley about replacing Whaley on *Extremely Wicked*. When Hensley stated he was interested and available, Metzger added Hensley's name to the out-of-work active referral list and referred him out. (Tr. 364-365; ALJD at 12) Webster acknowledged he "could have" provided Metzger with Sheryl Anderson's name to refer out to the project. (Tr. 271-272) (ALJD at 11) Metzger confirmed that Webster suggested that he refer out Anderson and Frazier to *Old Man & the Gun*, in response to the producers' request for female drivers. (Tr. 355; ALDJ at 12)

B. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THAT RESPONDENT'S STATED BASIS FOR REFUSING TO REFER BUCALO CONSTITUTED A PRETEXT FOR DISCRIMINATION AND WAS ALSO ARBITRARY (Exception Nos. 4, 5, 6, 7, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20)

Although the Respondent attempts to explain away the deviations from its purported referral procedures as "a variance from the practice of referring active employees first, by seniority and qualifications before moving to retirees," (R. Br. at 27) Metzger's testimony and the documents produced at the hearing established that Respondent regularly deviated from what it contends were its established, albeit unwritten, referral procedures.<sup>13/</sup> Initially, it is noteworthy that Respondent produced virtually no records to support its claims that it had much of a procedure for referring film work, calling into question any argument that referring Bucalo at the Employer's request would have constituted a real deviation. Through a hearing subpoena, General Counsel requested all records, including notes of contacts with employees concerning being referred to *Extremely Wicked*, including whether or not such work was accepted or rejected, the date(s) for

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<sup>13/</sup> Although the parties stipulated that the Union's unwritten practice is to refer from these two lists, first referring drivers, in order, from the out-of-work active list, and then referring drivers, in order, from the retiree list after the active list is exhausted (Jt. Ex. 1, par. 6) (ALDJ at 8), the record shows that Metzger regularly deviated from this practice.

any contact with any employee referrals and dates of each response. Respondent's response was that it has no documents responsive to this request. (G.C. Ex. 21 at p. 2) In the same request, General Counsel requested all documents that show the names and dates of employment for all employees referred to *Extremely Wicked*. Respondent produced a copy of a handwritten list that was prepared by Metzger from memory in March 2018 (and omitted the name of Driver Mike Lilly) (G.C. Ex. 21 at p. 2, G.C. Ex. 21 at 15) and a list that he updated around July 27, 2018, just prior to the hearing. (G.C. Ex. 21 at p. 2, G.C. Ex. 21 at 14) Regarding the only two referral lists that Respondent produced, which Metzger handwrote, Metzger could not recall when he developed the list or when he used the list. (Tr. at 337-338.) He had not removed people whom he believed to be retired. (Tr. at 339-340) And has called at least one or two people who are not on the list for referrals. (Tr. at 340) Metzger claimed the list is in the order of who has experience but that he remembers qualifications "in his head." (Tr. at 345.) He has everyone's contact information stored in his phone, not on a paper list. (G.C. Ex 22 at ¶ 5) Metzger also claims that he has maintained a separate list of retirees for as long as he can remember but that he did not have a written retiree list until June 9, 2017, the same date that Webster told him to put Sam Bucalo on the list. (Tr. at 353, 440, G.C. Ex. 21 at 14) Prior to June 9, 2017, Metzger purportedly just kept the list in his head. (Tr. at 448) These practices belie Respondent's claim that it deemed regular adherence to be important.

Respondent's failure to substantiate its procedures with documents aside, the record fully supports Judge Gollin's findings. In all of the productions for which any records were provided and testimony was taken, the record shows deviations from Respondent's purported referral policy. (Tr. 339-340, 358-359, 362-363 365; G.C. Exs. 21 (pp. 12 & 15) and 22 at ¶ 5; Resp. Ex. 14; Jt. Ex. 1, ¶ 6) (Tr. at 365) While Metzger may have used his lists as a reference point, the

evidence indicates that he followed a procedure that was loosely but not strictly based upon such lists. Out of the referrals that Metzger made to films between 2016 and up to and including *Extremely Wicked*” his deviations from the order of the list were the norm rather than the exception. The record shows that Metzger deviated from the list on 4 of the 5 productions since December 30, 2016. Thus, Judge Gollin was correct in finding it arbitrary for Respondent to consistently adhere to a different standard when it came to Bucalo. A Union must follow objective standards in the operation of an exclusive hiring hall. It is well established that a labor organization violates both Section 8(b)(1)(A) and (2) of the Act where it refuses to refer an individual to work under an exclusive referral system for discriminatory or arbitrary reasons. See, e.g., *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB 777, 780 (1984); *Plumbers Local 17 (FSM Mechanical)*, 224 NLRB 1262 (1976); *Electrical Workers IBEW Local 675 (S & M Electric)*, 223 NLRB 1499 (1976). Thus, unions in the operation of exclusive hiring halls must give due regard to the fair and equal treatment of referral applicants. Arbitrary or invidious treatment of such applicants will be presumed to encourage union membership in violation of the Act. See, *Carpenters Local 25 (Mocon Corp.)*, 270 NLRB 623 (1984), *enfd.* 769 F.2d 574 (9th Cir. 1985). See also, *Millwrights Local 2834 (Atlantic Maintenance)*, 268 NLRB 150 (1983). In considering whether an exclusive hiring hall is operated in an arbitrary manner, the absence of written rules, although not alone determinative, is evidence of the unfairness of the system. *Stage Employees IATSE Local 592 (Saratoga Arts)*, 266 NLRB 703 (1983). While Metzger claimed to have followed the order of the referral lists, the record did not bear out Metzger’s assertions that he strictly adhered to such a process. Thus, even in the absence of animus, his refusal to honor the Employer’s request for Bucalo was arbitrary, and therefore unlawful – particularly in light of record evidence showing that honoring such requests was consistent with its past practice and

policies.

**V. CONCLUSION:**

Based on the above and the record as a whole, Counsel for the General Counsel respectfully requests that the Board affirm the decision of the Administrative Law Judge and find that Respondent violated the Act as alleged in the complaint and issue an appropriate remedial order consistent with that recommended by the Administrative Law Judge.

Dated: October 23, 2018

Respectfully submitted,

*/s/ Kevin P. Luken*

Kevin P. Luken  
Counsel for the General Counsel  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

**CERTIFICATE OF SERVICE**

October 23, 2018

I hereby certify that I served the attached Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Decision and Recommended Order of Administrative Law Judge Andrew S. Gollin on all parties by e-mailing true copies thereof to the following at the addresses listed below:

Julie C. Ford, Attorney  
Doll, Jansen & Forde  
111 West First Street, Suite 1100  
Dayton, Ohio 45402-1156  
Email: [jford@djflawfirm.com](mailto:jford@djflawfirm.com)

Mr. Sam Bucalo  
6158 Kilgore Drive  
Cincinnati, Ohio 45248  
Email: [Sammo1245@aol.com](mailto:Sammo1245@aol.com)

*/s/ Kevin P. Luken*

Kevin P/ Luken  
Counsel for the General Counsel  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202