

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

and

Case 09-CB-232458

SAMUEL BUCALO, AN INDIVIDUAL

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN SUPPORT OF ITS LIMITED EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Counsel for the General Counsel takes limited exceptions to Administrative Law Judge Arthur J. Amchan's October 24, 2019 decision in the above-captioned case. In support of such exceptions, Counsel for the General Counsel hereby submits the following:

Exception 1: The Judge erred in finding that Respondent "has a valid reason for giving preference to drivers who have no income over those receiving a pension or social security benefits" (ALJD p. 8, ll.39-41) and "clearly has a legitimate reason for placing retirees in the lowest referral category." (ALJD p. 9, ll.19-20)

Although Board law supports that Judge's statement that placing retirees in the lowest referral category is not, per se, unlawful, it does not support his finding that Respondent herein had a legitimate reason for placing retirees in the lowest referral category or that it had a valid reason for giving preference to drivers who have no income over retirees. Regardless of any discriminatory motive, unions operating a hiring hall must operate the hiring hall in a manner free from any arbitrary or invidious considerations. *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898 (1985); Also see, *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690, 699-700 (1976). Respondent had no rational basis for permanently placing retirees last in priority or for

even relying on a retiree classification at all when it implemented its written rules. As a starting point, none of the sample rules on which Respondent relied in drafting its rules relied on any retiree classification in making referrals and Respondent could not point to any halls that follow this practice. (Tr. 34, 380, 383-384, 49-51; GC Exh. 10; R Exh. 7) Thus, there is not even an industry practice of such stratification based on retiree status. Moreover, Respondent had no such prior practice. Finally, Respondent's other claimed bases for the policy – to maintain a stable work pool and to give people without an income a preference – while superficially appealing, revealed themselves to be no more than post hoc justifications for the policy.

As the Judge correctly found, Respondent failed to show that it had an established past practice of referring retirees to film industry jobs only after exhausting efforts to find other drivers. (ALJD p. 6, fn. 4) The Judge's finding is fully supported in the record. In this regard, the record evidence shows that, prior to implementing the hiring rules at issue herein, Respondent did not have an established method for compiling its referral list or ascertaining the retiree status of individuals who sought to be placed on the referral list. (Tr. 23-24, 44-47, 101-102, 123-127, 186-189, 267-269, 271-272, 293, 305-306, 311-312). Its transportation captains would just refer from whatever list that the union president gave them, or what was in their head, without inquiring into anyone's retiree status (Tr. 123-125, 267-269, 271-272, 293, 311-312) The only record example of Respondent giving lower priority to retirees (that didn't involve Bucalo) occurred in 2000 and, as the Judge correctly pointed out, involved "very different circumstances." (ALJD p. 6, fn. 4; R. Exh. 6; Tr. 374-375) Those circumstances – Central States' pension rules restricting pensioners' ability to work on Teamster-represented jobs – no longer exist. (Tr. 103-104, 125-127, 374-375).

In a similar vein, the record established no correlation between permanently placing retirees in the lowest priority group and Respondent's claimed objective of creating a stable pool of individuals who are capable and available to do the work. (Tr. 449) Indeed, Respondent's transportation captain admitted that placing eligible retirees in a higher group would not hinder his ability to maintain an available list of drivers. (Tr. 191) The only plausible basis that Respondent proffered in support of permanently placing retirees in the last priority group - to give people who are trying to make a living and support their families a preference over people who are collecting a pension or social security (Tr. 43, 449) – while laudable, appears post hoc, at best, given the overwhelming evidence showing that the policy otherwise had no basis in objectivity.

Against the above backdrop, one could only conclude that Respondent's use of a retiree classification was arbitrary. Thus, the Judge erred in finding that Respondent had a valid or legitimate reason for placing retirees in the lowest referral category.

Exception 2: The Judge Erred in finding that Respondent did not violate Section 8(b)(2) of the Act (ALJD p. 10, ll. 17-21):

Contrary to his findings that Respondent discriminatorily placed Charging Party Samuel Bucalo and other retirees in the lowest priority group on its hiring list, the Group VII "retiree" group, the Judge found that Respondent did not violate Section 8(b)(2) because there was "no evidence that Charging Party Bucalo suffered any loss of employment opportunities by virtue of being classified in Group VII." (ALJD p. 10, ll.17-19). Notwithstanding whether Bucalo or other Group VII members actually loss work, which is still being determined, Respondent's conduct, as found by the Judge, meets the textbook definition of "attempting to cause discrimination" and, thus, still violates Section 8(b)(2). Indeed, the Judge contemplates the possibility that an 8(b)(2) violation might ultimately be found by ordering a make-whole remedy

if compliance establishes that Bucalo actually loss work; however, such finding of a violation may not be relegated to the compliance stage and is more appropriately determined during the proceeding on the merits.

Exceptions 3, 4 and 5: The Judge’s recommended remedies do not fully conform to his findings and conclusion, as supported in the record, that Respondent discriminated against all retirees on its hiring hall list.

Based on the Judge’s finding that Respondent violated the Act by placing all retirees, including Bucalo, in the lowest preference category for referral for film work (ALJD pgs. 8-10), it is appropriate that the Board’s remedies include the entire class of retirees. Even though Bucalo may have been Respondent’s target, the Judge correctly found, and the record supports, that absent its animus toward Bucalo, Respondent would not have structured its referral preferences as it did. (ALJD p. 9, ll.20-22) Respondent failed to “establish that Bucalo *and the other retirees* were placed in Group 7 for non-discriminatory reasons.” (ALJD p. 11, ll. 3-4 (emphasis added)) Consequently, any remedy should include an explicit order that Respondent update its referral lists to place retirees in the highest group for which they qualify under Respondent’s hiring rules, without reference to their retiree status. (Exception 3) Such remedy is needed to reverse the discriminatory placement of retirees into Group VII. Similarly, based on the breadth of the Judge’s finding of discrimination – that it was against *all* retirees - the Judge’s recommended affirmative action 2(c) (ALJD p. 11, ll. 32-34), should not be limited to Bucalo and should be amended to include all group VII members as follows: *Make Samuel Bucalo, and all other Group VII members, whole for any loss of earnings as a result of being referred for film industry work pursuant to a policy that resulted in their being referred only after all non-retired job applicants.* (Exception 4. Proposed amendments in italics) The recommended Notice should also read that Respondent will make Samuel Bucalo, and other members in Group VII,

whole. (Exception 4) ^{1/} Finally, the recommended Order and Notice should more explicitly require Respondent to revise its Movie Industry Referral Procedure and Rules to eliminate the Group VII “retiree” classification and to not base referral opportunities for job applicants on whether individual are receiving a pension or retirement benefits from any source or Social Security Retirement Benefits.

Dated this 21st day of November 2019.

Respectfully submitted,
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^{1/} Counsel for the General Counsel does not seek, as recommended by the Judge, that any monetary make whole award be labeled as wages or “backpay” for Social Security Administration (SSA) purposes. (See Appendix to ALJD, recommended Notice to Members). Although such remedies are determined based on what affected individuals would have earned in wages, Respondent is not the employer and is not in a position to report the make-whole remedy to SSA as wages or “backpay.”

CERTIFICATE OF SERVICE

November 21, 2019

I hereby certify that I served the attached Counsel for the General Counsel's Limited Exceptions to the Administrative Law Judge's Decision and Brief in Support of its Limited Exceptions to the Administrative Law Judge's Decision on the following parties by electronic mail:

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