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
(Tea Shop Productions LLC d/b/a The Foundation)

and Case 09-CB-249487

SAMUEL J. BUCALO, AN INDIVIDUAL

COUNSEL FOR THE GENERAL COUNSEL'S MEMORANDUM
IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Counsel for the General Counsel opposes the Motion for Summary Judgment filed by Truck Drivers, Chauffeurs, and Helpers, Local Union No. 100, Affiliated with the International Brotherhood of Teamsters (Respondent) on May 7, 2020. A Complaint and Notice of Hearing issued in this matter on March 5, 2020. Respondent filed an Answer on March 19, 2020. A hearing was originally scheduled for March 31, 2020, but on March 19, 2020, the matter was postponed indefinitely by the Judges' Division due to the Covid-19 pandemic. The rescheduled hearing date is September 9, 2020.

Initially, Respondent's motion should be dismissed pursuant to Board Rule 102.24(b). Rule 102.24(b) requires that motions for summary judgment be filed no later than 28 days prior to the scheduled hearing or, when no hearing is scheduled or when the hearing is scheduled less than 28 days after the date for filing an answer, the motion must be filed "promptly". Given that the Complaint in this matter issued March 5, 2020, a motion for summary judgment filed over 2 months later cannot be considered "prompt" under any reasonable definition of the word.

Respondent's motion for summary judgment also fails on its merits. As grounds for its request, Respondent states that there are no material disputes of fact in this matter and that it is entitled to judgment as a matter of law. This is false. The instant case must be viewed in a larger context of other violations committed by Respondent. Significantly, Administrative Law Judges Gollin and Amchan have both found that Respondent committed violations in the operation of the exact same hiring hall at issue in the present case. (Cases 09-CB-214166 and 09-CB-232458, respectively). These administrative law judge decisions issued on September 11, 2018 and October 24, 2019, respectively. Thus, Respondent was well aware that its conduct in operating the hiring hall at issue in this matter had been found unlawful more than once in very recent history and was likely to be under continuing scrutiny by the NLRB.

Additionally, although there are many criteria that Respondent could have chosen to rely upon in deciding how to refer drivers from its hiring hall for movie work, Respondent chose to make the driver's county of residence the single most important criterion. Thus, the Union's referral rules give highest priority to drivers residing in certain counties by placing them in one of its top three referral groups (placement within those three top groups is based upon the driver's years of experience and number of film productions worked). [1]/ Drivers living outside those counties were to be placed in three lower priority groups with a seventh group reserved for drivers receiving pension or retirement benefits.

It is not disputed that drivers residing in Montgomery County, Ohio were not to be placed in one of the top three groups. Despite this, and despite the fact that Aaron Robinson clearly indicated prominently on top of his "Movie Industry Driver's Application" that he resided in

[1]/ Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Pike, Scioto and Warren Counties in Ohio; Boone, Campbell and Kenton Counties in Kentucky; and Dearborn, Franklin, Ripley and Switzerland Counties in Indiana.

Montgomery County, Respondent still referred him ahead of other drivers who reside in counties that should have placed them in groups 1, 2 or 3 ahead of Robinson for referral priority. Respondent's failure to follow its own rules, particularly when viewed in conjunction with the egregiousness of the error in an environment where it knew its actions were under scrutiny by the NLRB, must lead to a conclusion that its actions amounted to at least gross negligence.

A union that operates a hiring hall must represent all individuals seeking to utilize that hall in a fair and impartial manner. The Board has held that "any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant … inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (b)(2)," absent a legitimate justification. *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549, 552 (2001), enfd. 325 F.3d 301 (D.C. Cir. 2003). The Board has held that "such departures encourage union membership by signaling the union's power to affect the livelihoods of all hiring hall users, and thus restrain and coerce applicants in the exercise of their Section 7 rights." *Plumbers Local 342*, supra at 550. After the General Counsel proves that a union has departed from established hiring hall procedures, a violation is established unless the union comes forward with rebuttal evidence that the departure was justified based on a valid union-security clause or is necessary to the effective performance of the union's representative function. *Plumbers Local 342* at 553 fn.10. A union's inadvertent mistake in operating a hiring hall arising from mere negligence does not violate Section 8(b)(1)(A) and (2). *Plumbers Local 342*, supra at 550. Gross negligence in the management of a hiring hall, however, does violate the Act. *IBEW Local 48 (Oregon-Columbia Chapter of NECA)*, 342 NLRB, 101, 108-109 (2004).

In the instant case, Respondent concedes that it improperly referred Robinson ahead of other drivers on its referral list. As such, it impliedly concedes that the General Counsel has established a violation unless the Union comes forward with rebuttal evidence establishing that the departure was justified based on a valid union-security clause, was necessary to the effective performance of the union's representative function or was an inadvertent mistake arising from mere negligence. Incredibly, Respondent asks the Board to conclude that it has satisfied its burden of proving that its actions constitute mere negligence solely based on self-serving, out of court affidavits from two of its agents, taken without opportunity for cross examination by counsel for the General Counsel. This can hardly be said to be the equivalent of hearing testimony. The equivalent argument for an employer in a case alleging discrimination for union activities would be for it to concede that the General Counsel satisfied its *Wright Line* burden and then the employer would submit management affidavits that the disputed actions were taken for non-discriminatory reasons. Clearly, this does not satisfy the standard for granting a motion for summary judgment. Genuine issues of fact remain for hearing as to whether Respondent's actions amount to mere negligence or gross negligence and Counsel for the General Counsel should be afforded the opportunity for cross examination and presentation of evidence challenging Respondent's defense.

Additionally, although Respondent makes much of the fact that Charging Party Samuel Bucalo is not among the individuals to whom a financial remedy is likely due, this is of no consequence. It is axiomatic that the individual filing a charge need not be a discriminatee to whom a remedy is due. The identities of the individuals who are due a remedy in this matter will be left to the compliance stage. Likewise, it is of no consequence that the Union changed its hiring hall procedures after the facts giving rise to the instant case. In contrast to the Union's

claim, this does not render the allegations of the complaint moot – although their identities have not been definitively ascertained, there are discriminatees who lost out on lucrative work due to the Union's mismanagement of its hiring hall as alleged in the Complaint for this matter.

Inasmuch as there are material issues of fact in this case, Respondent's motion for summary judgment should be denied.

Dated: May 15, 2020

Respectfully submitted,

/s/ Jonathan D Duffey

Jonathan D. Duffey
Counsel for the General Counsel
Region 9, National Labor Relations Board
3-111 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

CERTIFICATE OF SERVICE

May 15, 2020

The undersigned hereby certifies that the foregoing document, Counsel for the General Counsel's Memorandum in Opposition to Respondent's Motion for Summary Judgment, was served by electronic mail and regular mail to the following:

Julie C Ford, Attorney at Law
Doll, Jansen, Ford
Dayton, OH 45402-1156
Email: jford@djflawfirm. com

Samuel J. Bucalo
6158 Kingoak Drive
Cincinnati, OH 45248-4004
Email: sammo1245@aol.com

Mr. Dave Webster
Truck Drivers, Chauffeurs and Helpers
Local Union No. 100, affiliated with the
International Brotherhood of Teamsters
2100 Oak Rd
Cincinnati, OH 45241-2501

Tea Shop Productions LLC d/b/a
The Foundation
754 Old State Route 74
Cincinnati, OH 45245

Jonathan D. Duffey

Jonathan D. Duffey
Counsel for the General Counsel
Region 9, National Labor Relations Board
3-111 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271