

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

IN THE MATTER OF	:	
	:	
TRUCK DRIVERS, CHAUFFEURS AND	:	
HELPERS LOCAL UNION NO. 100,	:	
AFFILIATED WITH THE	:	CASE NO. 09-CB-249487
INTERNATIONAL BROTHERHOOD OF	:	
TEAMSTERS (Beta Productions, LLC),	:	
	:	
Respondent,	:	<u>RESPONDENT’S REPLY TO</u>
	:	<u>GENERAL COUNSEL’S</u>
and	:	<u>OPPOSITION TO ITS MOTION</u>
	:	<u>FOR SUMMARY JUDGMENT</u>
SAMUEL J. BUCALO, AN INDIVIDUAL,	:	
	:	
Charging Party.	:	

Counsel for the General Counsel objects to the Respondent’s Motion for Summary Judgment on both procedural grounds and the merits. However, neither argument is persuasive.

The Timeliness Issue

First, the General Counsel urges that the motion was not filed “promptly,” a term not defined in the regulations. However, the motion with the lengthy supporting materials was sent as soon as reasonably could be accomplished, and there is no prejudice to any party due to the date of the filing.

The complaint in this matter was issued on March 5, 2019, and received by the Respondent on March 6 (and by its counsel not until March 9). It was accompanied by a notice of a trial date on March 31, just 25 days after Local 100 received it; this did not allow the normal period of 28 days before a trial date to submit a motion under Section 102.24(b) of the Board’s Rules and Regulations. Due to the time that would be involved in preparing a fully supported motion, the

Respondent instead simply filed an answer. However, shortly after the Complaint was issued the trial date was cancelled and postponed indefinitely due to the COVID-19 pandemic.

Thereafter, counsel for the Respondent began the work necessary to prepare a motion for summary judgment, including obtaining a number of documents and affidavits from the only two individuals who have direct knowledge of the mis-placement of one driver on the lists and his resulting referral out of order. That process was complicated and slowed by the impacts of the current public health situation, as Local 100 has reduced the in-office presence of its clerical employees and thus their access to documents and materials and as counsel for the Respondent was unable to meet with the two witnesses in person.

The Respondent submitted its motion for summary judgment, with the two sworn affidavits and a number of exhibits, as soon as practicable, on May 7, 2019. The General Counsel's memorandum in opposition indicates that the new trial date is September 9, 2019¹; the motion thus was submitted more than four months before the rescheduled trial date. This would seem to be quite reasonably "prompt" and, in any case, there can be no prejudice to the General Counsel or the Charging Party from the filing at this point in the proceedings.

The Merits of the Charge

Although the current charge relates solely to the inadvertent mis-placement of a single driver on the movie industry referral lists, the General Counsel asserts that it "must be viewed in light of other violations" allegedly committed by Local 100 in the administration of its referral system. In fact, the other two charges in which ALJs have issued recommended decisions finding violations – neither of which has yet been ruled on by the Board, after the Respondent filed

¹ The Respondent was not informed of this planned new trial date until receiving the General Counsel's response; the formal order setting a September 9 date was issued on May 18, 2019, after the response was filed.

exceptions – are entirely unrelated to the present case and do not indicate any sort of pattern of misconduct or even of mistakes.²

The first case cited, number 09-CB-214166, arose in December 2017 after a production company representative inquired about hiring the Charging Party, Mr. Bucalo, for a production that was to start in January 2018.³ At that time, Local 100 did not have a written referral policy but was applying the existing but informal practice of referring drivers by experience and qualifications, while referring retired drivers last. The Transportation Captain, without speaking to any Union officers and not having dealt before with a by-name request, immediately replied that the Union used a list-based system and that he could not refer Mr. Bucalo out of order, and the employer accepted that answer. Nonetheless, the ALJ found the captain's action was discriminatory. The written rules that were adopted in mid-2018 specifically addressed matters relating to employer requests for drivers outside of the normal referral order.

The second charge, case number 09-CB-232458, was filed in December 2018, and challenged provisions of the May 2018 written policy, specifically the Union's interpretation of arguably inconsistent provisions to mean that retirees, including but not limited to Mr. Bucalo, would remain in Group VII, rather than moving up to Groups I, II or III based on their years in the industry and number of film or television productions. The ALJ concluded that the Union had a reasonable and legitimate basis for the placement of retirees in a separate group but that it did not show it would have taken the same action if not for the alleged animus toward Mr. Bucalo.

Neither of the two prior cases involved a mistaken placement on the lists. Furthermore, there is no authority to support the General Counsel's assertion that Local 100 should be held to

² It is also difficult to square the General Counsel's assertion that the other two cases involving Mr. Bucalo are relevant to the current case while at the same time arguing that it is "of no consequence" that he was not affected by the misplacement of one driver on the lists and thus is not a discriminatee in the present case.

³ The facts that are summarized here can be obtained in more detail in the respective ALJ decisions.

some higher standard and required to run its referral system absolutely error-free because it “knew its actions were under scrutiny by the NLRB.” The General Counsel suggests the Union’s knowledge of Mr. Bucalo’s other charges, combined with the alleged “egregiousness of the error,” indicates gross negligence. The Union regrets the mistake, but it cannot agree that the misplacement of a single driver, in an admitted clerical error made by an administrative assistant, is “egregious” or rises to the level of actionable, gross negligence.

Finally, the General Counsel urges that the Respondent should not be found to have satisfied its burden of proof because its motion for summary judgment is based on “self-serving, out of court affidavits from two of its agents.” The summary judgment process under the Federal Rules of Civil Procedure and otherwise typically is conducted through the submission of documentary evidence and out-of-court but nonetheless sworn affidavits. In this case, the most significant evidence about the misplacement at issue is the testimony of a 31-year clerical staff employee of Local 100, who stated that she has a large number of duties, of which administering the movie industry list is only a small part, and that she simply made a mistake in either not realizing or overlooking that one driver’s nearby home county was out of the definition of “local” in the policy. The General Counsel provides no information to counter the sworn testimony in that affidavit, other than to assert that it should be afforded the opportunity for cross-examination to try to challenge that testimony.

Ms. McFarland’s affidavit testimony credibly explained the circumstances and showed that she – a longtime staff member and not an elected union representative with any political interests – made an honest mistake in the compilation of the list. She had no reason to favor the driver in question, whom she did not and does not know, and the error did not affect Mr. Bucalo so it could not have been the product of any animus toward him. The evidence is uncontroverted, and

