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Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters (Wicked Films, LLC) and Samuel J. Bucalo. Case 09–CB–214166

September 1, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On September 11, 2018, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions²

¹ The Respondent Union has excepted to some of the judge's credibility findings. 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). We have carefully examined the record and find no basis for reversing the findings.

We correct the judge's inadvertent, harmless error in referring to Dan Matthews as a construction driver. Matthews testified that he delivered engines and other parts for General Electric before being terminated by Ryder Logistics.

The judge analyzed the legality of the Respondent Union's conduct under both a duty-of-fair-representation standard and *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In affirming the judge's finding that the Respondent unlawfully failed to refer Samuel Bucalo to work as a set decoration driver on the Employer's motion picture under the duty-of-fair-representation framework, we find that the Union failed to satisfy its rebuttal "burden of establishing that its refusal to refer [Bucalo] was either 'pursuant to a valid hiring-hall provision' or 'necessary for [the] effective performance of its representational function.'" *Stage Employees IATSE Local 151 (SMG and the Freeman Cos. d/b/a Freeman Decorating Services, Inc.)*, 364 NLRB No. 89, slip op. at 2 (2016), enfd. 885 F.3d 1123 (8th Cir. 2018) (citing *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1170 (2006), enfd. 315 Fed.Appx. 318 (2d Cir. 2009)). We note in this regard that the Union failed to produce any hiring hall/referral service rule that prohibited it from honoring the Employer's request for Bucalo; the Union's own official conceded that nothing prohibited the Union from honoring an employer's request for referral of a named individual; the Union failed to demonstrate that it strictly adhered to a practice of referring nonretiree drivers in order of their placement on the active, nonretiree list ahead of registered retiree drivers such as Bucalo; and the Union failed to show that its failure to refer Bucalo was necessary for the effective performance of its representational function.

and to adopt the recommended Order as modified and set forth in full below.³

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 3, 4, 5, and 6 and renumber the remaining Conclusions of Law accordingly.

"3. By arbitrarily and discriminatorily failing or refusing to refer from its exclusive referral service Samuel J. Bucalo for a job with the Employer, the Respondent has violated Section 8(b)(1)(A) and (2) of the Act and has caused the Employer, which is signatory to a collective-bargaining agreement with the Respondent, to discriminate in violation of Section 8(a)(3) of the Act."

ORDER

The Respondent, Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Cincinnati, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing or refusing to refer individuals through its exclusive referral service for arbitrary or discriminatory reasons.

(b) Causing or attempting to cause any employer that is signatory to its collective-bargaining agreements to fail to employ individuals for arbitrary or discriminatory reasons.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Samuel J. Bucalo whole for any loss of earnings and other benefits suffered as a result of the unlawful failure to refer him. The backpay owed to Bucalo is \$23,283, plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law.

(b) Within 21 days from the date of this Order, file a report with the Regional Director for Region 9 allocating backpay to the appropriate calendar years. The Regional Director will then assume responsibility for transmission

We find it unnecessary to pass on the judge's finding that the same failure also violated the Act under the *Wright Line* framework.

² We shall amend the judge's Conclusions of Law to conform to our findings.

³ We shall modify the judge's recommended Order to conform to the amended conclusions of law and to the Board's standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

(c) Compensate Bucalo for the adverse tax consequences, if any, of receiving his backpay in one lump sum.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to refer Bucalo and, within 3 days thereafter, notify him in writing that this has been done and that the unlawful failure to refer him will not be used against him in any way.

(e) Post at its offices in Cincinnati, Ohio, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Union's authorized representative, shall be posted by the Union and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Union customarily communicates with employees and members by such means. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

Dated, Washington, D.C. September 1, 2020

John F. Ring, Chairman

Marvin E. Kaplan Member

⁴ If the Union's office is open to members and employees, the notices must be posted by the Respondent within 14 days after service by the Region. If the office involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the office reopens and a substantial complement of members and employees have returned to accessing the office for referrals. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its members by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to refer individuals through our exclusive referral service for arbitrary or discriminatory reasons.

WE WILL NOT cause or attempt to cause any employer that is signatory to our collective-bargaining agreements to fail to employ individuals for arbitrary or discriminatory reasons.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL pay to Samuel J. Bucalo backpay of \$23,283 for our failure or refusal to refer him for employment with Wicked Films, LLC, plus interest accrued to the date of payment, minus tax withholdings required by Federal and State law.

WE WILL compensate Bucalo for the adverse income tax consequences, if any, of receiving his backpay in one lump sum.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful failure to refer Bucalo, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful failure to refer him will not be used against him in any way.

TRUCK DRIVERS, CHAUFFEURS AND HELPERS
LOCAL UNION NO. 100, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

The Board's decision can be found at www.nlr.gov/case/09-CB-214166 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



DECISION

I. INTRODUCTION¹

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This consolidated complaint and compliance specification was tried on July 30–31, 2018, in Cincinnati, Ohio. The critical facts are largely undisputed. The Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters (Union) operates an exclusive referral service providing companies, like Wicked Films, LLC (Employer), with drivers for production work on motion pictures filmed in the Cincinnati and Northern Kentucky area. Samuel J. Bucalo (Bucalo) is a retired driver and union dissident who has politically challenged, been openly critical of, and filed internal and external charges against union officers and agents, including the current union president. In December 2017, the Employer requested Bucalo by name to be referred to work as a driver on *Extremely Wicked, Shockingly Evil and Vile*, a motion picture filmed in the Cincinnati area from January through March 2018. The Union refused the Employer's request.

The complaint alleges the Union failed or refused to refer Bucalo to this project because of his dissident union activity and for reasons other than a failure to tender periodic dues and initiation fees uniformly required for union membership, in violation of Sections 8(b)(1)(A) and (2) of the National Labor Relations Act (Act). The compliance specification alleges that Bucalo is entitled to \$23,283 in backpay for the 2 months he should have been referred out. The Union denies these allegations and contends it was following its established, albeit unwritten, practice of referring out-of-work active drivers ahead of retired drivers, and the only retired driver referred to this project was more senior than Bucalo.

For the reasons stated below, I conclude the Union breached its duty of fair representation when it discriminatorily failed or refused to refer Bucalo to work on this project, and that he is, therefore, entitled to the backpay amount alleged.

¹ Abbreviations in the decision are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibits; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Union's Exhibit. The parties agreed to several stipulated facts that are incorporated into the Joint Exhibits.

II. STATEMENT OF THE CASE

On February 2, 2018, Bucalo filed an unfair labor practice charge against the Union in the present case.² On April 30, 2018, the Regional Director for Region 9 of the National Labor Relations Board (Board), on behalf of the General Counsel, issued a consolidated complaint and compliance specification. On May 17, 2018, the Union filed its answer, denying the alleged violations and raising affirmative defenses.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. The Union, the General Counsel, and Bucalo filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following findings of fact, conclusions of law, and recommendations:

III. FINDINGS OF FACT³

A. Jurisdiction and Labor Organization Status

At all material times, the Employer has been a limited liability company with an office in Newport, Kentucky, and has been engaged in the production of a nationally distributed motion picture. In conducting its operations during the 12-month period ending April 1, 2018, the Employer performed services valued in excess of \$50,000 in states other than the Commonwealth of Kentucky. At all material times, the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

B. Unfair Labor Practices

1. Background

Bucalo became a member of the Union in March 1979, after he began working for United Parcel Service (UPS). In late 2010, Bucalo ran for and was elected Union Secretary-Treasurer. This was a full-time position, with a three-year term, beginning January 1, 2011. In early January 2011, after he was elected, Bucalo was forced to retire from UPS and thereafter began receiving pension benefits.

In 2010, when Bucalo was elected Secretary-Treasurer, he was on a slate of candidates with Butch Lewis, who ran for and was elected Union President. At some point during their terms, Bucalo and Lewis had a falling out. During the 2013 internal

² Bucalo filed other unfair labor practice charges against the Union in the months prior to filing the present charge, and some of those charges were pending disposition at the time this charge was filed.

³ Although I have included record citations to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited testimony or other evidence, or because it was otherwise incredible and unworthy of belief.

Union elections, Bucalo again ran for Secretary-Treasurer on a slate with David Webster, who ran against Lewis for Union President. Bucalo and Webster both won their respective elections. Bucalo was re-elected to a second three-year term as Secretary-Treasurer, beginning January 1, 2014. Webster was elected to a corresponding 3-year term.

About a year into their terms, Bucalo and Webster had a falling out. Bucalo also had issues with others within the Union. He filed internal and external charges against the Union and certain officers and agents. Some of those individuals filed charges against Bucalo. Although certain evidence was presented regarding these charges, the merits (or lack thereof) and eventual disposition of these charges are irrelevant to this proceeding.

In 2016, Bucalo was not selected to be a union delegate to go to the Teamsters national convention. Later that year, Bucalo ran against Webster to be union president. After a highly contentious campaign, Bucalo eventually lost to Webster. Following the election, Bucalo filed protests regarding the election campaign, and he filed internal union charges. Again, although certain evidence was presented regarding these protests and charges, their merits (or lack thereof) and their eventual dispositions are irrelevant to this proceeding.

After Bucalo left office at the end of December 2016, the Union deemed him to be a retired member and treated him as a retiree. Although Bucalo disputes his retiree status, the parties have stipulated that his status as a retired Union member is not at issue in this case.

In recent years, Bucalo has been a vocal opponent of several current and former Union officers and agents. He has publicly criticized how they have managed the Union's financial affairs, negotiated collective-bargaining agreements, handled certain grievances and unfair labor practice charges, and represented the membership as a whole. As stated, Bucalo was particularly critical of Union President Webster and his slate of candidates during the 2016 Union elections. Prior to, during, and after the elections, Bucalo published an unofficial newsletter and maintained a public Facebook account which he used to voice his views and openly condemn Webster and several other current Union officers. In at least one lengthy Facebook post made after he was voted out of office, Bucalo lauded his performance and criticized Webster and his administration. Webster saw and responded to the Facebook post by posting a "comment" rebuking Bucalo's claims and blaming him for causing the Union to waste more dues money "than any other member in the history of the local" on attorney fees to defend against Bucalo's "frivolous charges." (GC Exh. 4, p. 22.) Bucalo also filed internal and external charges against the Union and/or its officers, including with the Board, the Equal Employment Opportunity Commission, and the Department of Labor.

Bucalo's attacks did not go unanswered. Some of the individuals Bucalo criticized filed internal charges against him. A summary of those charges and their statuses were published in the official union newsletter prior to the 2016 elections. (GC Exh. 2.) According to Bucalo, publicizing the statuses of these charges against him was unprecedented.

On April 21, 2017, Bucalo sent the Union a letter requesting to be placed on, among others, the film and television referral

list. (R. Exh. 12.)⁴ On around June 9, 2017, the Union added Bucalo's name to that referral list as a retiree.⁵ (Tr. 450.) Thereafter, Bucalo notified the Union on a monthly basis that he was interested in being referred out.

2. Union's film and television referral system

The Union operates multiple referral systems, including referral systems for construction, pipeline, and film and television. Only the film and television referral system is at issue in this proceeding. The Union has a standard agreement that it enters into with each of the production companies (usually for each individual project) covering Union employees. Article V of this agreement, which is referred to as the Area Standard Agreement Low Budget Feature Basic Cable Pilot or Series (Area Standard Agreement), states that:

(a) The parties hereto recognize the condition in this industry requires frequent hiring of drivers on a daily non-continuing basis. For this purpose, the Union shall maintain, for the convenience of the producer and the employee, a referral service which shall in all respects comply with all applicable provisions of law.

(b) The producer agrees to request referrals for all drivers required for work covered by the agreement, from the [Union].

(GC Exh. 15.)

The Employer is signatory to an Area Standard Agreement with the Union. There is no dispute that as result of this Agreement, as well as a practice between the parties, the Union is the exclusive referral source of drivers for the Employer on covered television and film projects in the Cincinnati and Northern Kentucky area.

The film and television work in the Cincinnati and Northern Kentucky area is sporadic but lucrative. On average, there are about two or three films made per year. In 2017, there were five movies filmed: *The Public* (early 2017); *Old Man & the Gun* (Spring 2017); *Strangers II* (Spring 2017); *Donnybrook* (October through November 2017); and *Haunt* (October through November 2017). These projects typically last a few weeks but require long hours, and the individuals can earn a significant amount of money in a short period of time. Plus their fringe benefits and meal allowances are paid in cash and added to their paychecks.

The Union's "transportation captain" oversees the film and television referral service. This is an appointed position that reports to the union president. The transportation captain coordinates with the production companies to determine the number of drivers needed and any special skills required for the project; he/she contacts the drivers who are on the referral list(s) to see

⁴ There is a dispute over whether on his last day in office as the Union's secretary-treasurer (December 31, 2016), Bucalo told Webster that he wanted to be placed on the Union's referral lists, including the film and television referral list. However, resolution of this dispute is irrelevant to the allegations at issue.

⁵ Bucalo has been on the retiree referral list since June 2017. Although Bucalo has challenged his placement on the retiree list and the use of a two-tier system, the parties stipulated that the use of two referral lists, and Bucalo's placement on the retiree list, are not at issue in this case. (Jt. Exh. 1.)

who is available and interested; and he/she makes the referrals and arranges the work schedules for the drivers during production. The captain does not receive any compensation from the Union for holding the position, but he/she is assigned to work on each project. In 2014, Union President David Webster appointed Craig Metzger to be the Union's film and television transportation captain.

3. Bucalo's prior unfair labor practice charges regarding referral system

Between May 18, 2017 and February 2, 2018, Bucalo filed 11 unfair labor practice charges against the Union related to its referral services. Region 9 of the Board found merit to allegations in two of those charges (Cases 09-CB-199111 and 09-CB-204497), as well as the allegations in the present charge. According to the parties' stipulations, the specific allegations the Region found merit to in Cases 09-CB-199111 and 09-CB-204497 were that: (1) the Union operated a film and television referral list without using written objective criteria in referring applicants for employment; (2) the Union failed and refused to register Bucalo for employment on the Union's film and television referral list for arbitrary, discriminatory or invidious reasons; (3) the Union failed to keep adequate records of the film and television referral lists; (4) the Union failed to provide Bucalo with access to the film and television referral list; and (5) the Union failed to provide Bucalo with a copy of the film and television referral lists. (Jt. Exh. 1.) On June 15, 2018, the Union and the Regional Director for Region 9, on behalf of the General Counsel, entered into an informal settlement agreement to resolve these particular allegations. The settlement agreement contains a nonadmissions clause. Bucalo declined to join, and later appealed, the settlement agreement, and that appeal was pending as of the start of the hearing.⁶ As part of the settlement agreement, the Union agreed to "maintain records and rules of the operation of [its] referral system sufficient to establish that the referral system is being operated based on objective criteria and standards" and to post and make available written referral criteria for the referral service. (Jt. Exh. 1(b).) Thereafter, on June 26, 2018, the Union promulgated written referral procedures and rules for its film and television referral service. (GC Exh. 14.)

4. Referral lists and procedures

Prior to June 26, 2018, the Union had no written rules or procedures concerning the operation of its film and television referral service. The parties stipulated that at all material times relevant to this proceeding the Union's practice was to maintain two separate lists for referring drivers to film production work. The first list is for individuals who the Union considers to be out-of-work active drivers, and those individuals are referred out first. The second list is for the individuals the Union considers to be retired drivers based upon their receiving retirement benefits, and they are referred to work after the first list is ex-

⁶ There is no contention that this Settlement Agreement should be set aside, or that I make any findings or conclusions regarding the allegations addressed therein. As such, my findings and conclusions are limited to the allegations in the consolidated complaint and compliance specification in the present case.

hausted. (Jt. Exh. 1, par. 6.) According to Metzger, the reason out-of-work active drivers are given priority is that when they are not working they have no income, whereas retirees continue to receive some form of pension money. (Tr. 446-447.)⁷

In the record, there is one undated, handwritten out-of-work active referral list and one handwritten retiree referral list dated June 9, 2017.⁸ (GC Exh. 21, p. 12-13.) The out-of-work active list contains the following names (and their rank on the list): (1) Craig Metzger; (2) Craig Eastep; (3) Dennis Neubauer; (4) Brian Hinkle; (5) Scott McMullen; (6) Jeff Montgomery; (7) Bill Lloyd; (8) Wade Napier; (9) Mike Carpenter; (10) Brandon Leach; (11) Rick Whaley; (12) Sheryl Anderson; (13) Dawn Frazier; (14) Juliann Rudisell; (15) Mike Lilly, Sr.; (16) Tom Weinel; and (17) Drew Perkins. (GC Exh. 21, p. 12.) Metzger testified the rankings are based on his understanding of their experience working on films and television. (Tr. 344-345.) The list does not include any information about experience or qualifications. Metzger testified he keeps that information "in his head" or "on his phone." (Tr. 345; 446.)⁹

The retiree driver list contains the following names (and their rank on the list): (1) James Dometown; (2) Ralph Metzger; (3) Dave Ferguson; and (4) Sam Bucalo. This list states the first three individuals have car hauler experience. All four have a class "A" CDL. There is no other information about their experience or qualifications. (GC Exh. 21, p. 13.)

At the hearing, Metzger testified about the creation and maintenance of the out-of-work active list:

Q. Well, when did you develop this list?

A. We've just been using names that's on this probably the past three or four years.

Q. Have there been any additions to this in the last three to four years?

A. Yeah. Off and on, you know, people get—[sic] cause we have a slow spell or something like that and a lot of people get other jobs, and then I just—you know, they go to work somewhere else and I'll call them and they say they don't want to work no more. There's been a lot of different people that's not on this list that's worked movies probably in the past three or four years.

Q. When has this list been in effect?

A. I think this was the list I used—looks like the one I used on maybe on *Donnybrook*, maybe. I'm not sure.

⁷ A retired member referred out for work pays union dues while working, but then returns to retiree member status when their work on a project ends.

⁸ These two lists were produced in response to the General Counsel's subpoena duces tecum to the Union's Custodian of Record for "All referral lists for film work maintained by [the Union] during the period between December 1, 2017 and March 28, 2018." (GC Exh. 21.)

⁹ The General Counsel also subpoenaed categories of documents related to the referral of employees. Metzger testified that he kept most of the information regarding projects, referrals, and communications with individuals, including about qualifications or experience, on his cellular phone. However, in around March 2018, Metzger's cellular phone carrier informed him that his phone was "too full" so he went through and deleted messages. Metzger, therefore, was unable to produce the requested information. (Tr. 336.) As a result, the evidence about the referral service is based primarily on Metzger's testimony.

Q. Are there other lists?

A. No. I mean, this is basically—I just had, you know, on a piece of paper and I just kind of logged everybody's name down on it.

Q. So can you tell me when you developed this list?

A. I really don't know. Probably a few years ago, I would say. I've just been using the same people. You know, we've been using the same people. And the bottom two guys have retired, so I haven't called them.

Q. Mr.—is it [Weinel] and Mr. Perkins?

A. Yes. They both retired now from what I heard, so I haven't even called them.

Q. Well, when's the last time you added names to this list?

A. Let's see. Maybe—there might be one guy that's not on this list that's worked one movie and that's it.

Q. Who's that?

A. Joe Hensley, I think, is his name. He got laid off from a construction company, I think. I've only met him—you know, I didn't even—he called me or something like that back around Christmas or January, said he was looking for work, and I said if something comes up, I will let you know.

Q. Is he on the list?

A. No, so this must be an older list.

Q. Was he ever on the list?

A. Not until he called me and started working in January.

Q. And not to badger you, but is there a list somewhere with his name on it?

A. Yeah. I guess I—I guess there could be. I probably got—what it is, I probably just got his name down on my phone and I just called him if I need him.

Q. I guess when you're making referrals, is this the list you refer to?

A. Most of the time, yes.

Q. When you say "most of the time"—

A. I mean, yes.

...

Q. Okay. We'll say beginning in 2017.

A. Beginning of 2017? Yes, everybody on [sic] there except for the bottom two, I would say.

Q. When were they removed?

A. I think they retired last year. I'm not sure.

Q. Are there any people who contacted you that should be on the list that aren't on the list?

A. Let's see. Joe contacted me. Let's see. There was one of two people that I've called, and I can't remember their names right off, and they declined the work [sic] cause they was either doing something or they didn't want to do the hours, but they had family things going on and we was working weekends sometimes, and a lot of people don't like to work weekends.

(Tr. 338–340.)

At the hearing, Metzger was presented with and testified about the retiree list:

ADMINISTRATIVE LAW JUDGE: So at what point in time did you come up with two lists, a non-retiree or out of work?

THE WITNESS: I just always had it in my head and I never really—you know, I knew [sic] cause I only had two or three.

ADMINISTRATIVE LAW JUDGE: So from when you took over in 2014 moving forward, you had a list of out of work non-retirees?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE: And then a separate list of retirees?

THE WITNESS: And at the time, there was only two. It was Ralph and JD, James

Downtown.

ADMINISTRATIVE LAW JUDGE: Okay.

...

[Counsel for General Counsel] Let me ask you this question: And this is dated 6–9 of 17?

A. Yes.

Q. Is this the first time you ever wrote down the retiree list?

A. Probably. I would say yes because I never – 'cause there was only two of them on there.

...

Q. There was no written list of retired drivers prior to June 9th of 2017?

A. I would say no.

Q. And is that right about the same time that -- or it is the same day that Mr. Webster told you to put Mr. Bucalo on a list?

A. He just said Sam wanted to work, and I said the union hall said he was retired, so I just wrote his name on a retired list like everybody else.

Q. But the list didn't exist before then?

A. Well, no. I had –

ADMINISTRATIVE LAW JUDGE: The written list.

THE WITNESS: No. No.

[Counsel for General Counsel] The written list didn't exist until Mr. Bucalo—

...

THE WITNESS: I had it on my phone and just knew in my head.

Q. But the written list didn't exist, the retiree did not exist until Mr. Bucalo requested to be on the list; is that correct?

A. I would say it had nothing to do with Mr. Bucalo. It was just that there was only two people at the time, or two or three. Maybe three at the time that was even retired. I mean, I could remember who they was.

(Tr. 448–450.)

As previously stated, the parties stipulated the Union's unwritten practice is to refer from these two lists. According to the stipulation, the Union first refers drivers, in order, from the

out-of-work active list, and then refers drivers, in order, from the retiree list after the active list is exhausted. (Jt. Exh. 1, par. 6.) Metzger, however, has deviated from this practice.

Metzger has deviated from this practice to honor specific requests from producers. For example, if a producer needs a driver with mechanic skills, he will refer Bill Lloyd, who is a driver/mechanic, even if it means sending him out of order. (Tr. 472–473.) Another, specific example occurred on *Old Man & the Gun*, which was filmed in the Cincinnati area in spring 2017. The producers contacted Metzger and requested that he refer female drivers to work on that project. At the time, there were no female drivers on either list. Metzger contacted the Union hall to get names of out-of-work active female drivers. He received the names of Sheryl Anderson and Dawn Frazier. Metzger contacted them and, after they stated they were interested in working on films, Metzger added their names to the out-of-work active list and referred them to the project. (Tr. 356–358.)

Metzger also has deviated from this practice in order spread work around. On *Strangers II*, the producers originally requested about eight or nine drivers. Metzger referred himself and about eight other drivers. The producers later informed Metzger they only needed three or four drivers a day. Metzger talked with the drivers and, rather than just keep the three or four highest ranked/most senior drivers to work all the hours, the drivers agreed to rotate shifts, so they all could remain and work at least one or two days a week. (Tr. 358–359.)

Metzger also deviated from this practice to give opportunities to unlisted out-of-work active drivers. If he learns there are out-of-work active drivers who are not on the referral list, but who may be interested in working on film projects, he will contact them to determine if they are interested and available for work. If so, he will add them to the list and refer them ahead of those on the retiree referral list. (Tr. 474–475.) As stated this occurred on *Old Man & the Gun*, and, as discussed below, it occurred later on *Extremely Wicked*.

5. Bucalo referral to *Donnybrook* movie

In October and November 2017, there were two movies filmed in the Cincinnati and Northern Kentucky area at around the same time (*Donnybrook* and *Haunt*). These projects required Metzger to refer out all available drivers from both referral lists, including Bucalo. When Metzger texted Bucalo about working, he emphasized that Bucalo could not miss any work, because it would be too difficult to find a replacement to cover his shift. Bucalo accepted the assignment. (GC Exh. 6, p. 1.) This was Bucalo's first referral.

Metzger referred Bucalo to the *Donnybrook* movie to be the set decoration driver. Set decoration is responsible for the scenery, furniture, lighting, etc. on the set. The set dressers are responsible for moving and setting up these items, and the driver is responsible for transporting the items around. Bucalo was assigned to drive a 26-foot moving truck with a rear lift gate. Leyna Haller was the lead set dresser on the movie. She was responsible for coordinating the work of the set dressers. She also would tell Bucalo where to show up in the morning and give him the times and locations where he needed to be during the day. Bucalo interacted with Haller on a regular basis.

Bucalo worked from October 12 to November 22, 2017. During the project, Bucalo called in sick 1 day. Metzger was able to find a replacement to cover Bucalo's duties for the day. Bucalo returned the next workday, and no action was taken against Bucalo for calling in sick.

At the end of filming, Haller spoke with Bucalo and told him that she enjoyed working with him and she would love to work with him again. The two later became Facebook friends.

6. Bucalo not referred to *Extremely Wicked*, despite being requested

In December 2017, the Employer began pre-production for the movie *Extremely Wicked, Shockingly Evil and Vile*, which was going to be filmed in the Cincinnati and Northern Kentucky area, starting in January 2018. The Employer hired Leyna Haller to be the lead set dresser on the movie. On December 18, 2017, Haller was in a pre-production meeting with the movie's transportation coordinator, Tony Ruiz. Haller told Ruiz that she would love to work with Bucalo again. Ruiz wrote down Bucalo's name and said he would see what he could do, but there were no guarantees. (Tr. 207.) At some point before the holidays, Ruiz called Craig Metzger and told him that Haller wanted to know if Bucalo could be referred out to be the set decoration driver on *Extremely Wicked*. Metzger told Ruiz the Union had the active list and the retiree list, and that Bucalo was on the retiree list. That was the end of the discussion about Haller's request, and the two moved on to other matters. At some point—and the record is unclear when—Metzger spoke to Webster about Ruiz's request, and Metzger told Webster that he could not refer out Bucalo because he was on the retiree list. (Tr. 257.)¹⁰

Metzger decided to refer Mike Lilly, Sr., to be the set decoration driver for *Extremely Wicked*. On around December 29, 2017, Metzger informed Haller about the assignment. Haller did not say anything to Metzger about Bucalo or her earlier request that he be referred for the position. Lilly began work *Extremely Wicked* on around January 2, 2018.

In addition to Lilly, Metzger referred Rick Whaley, Brian Hinkle, Wade Napier, Dennis Neubauer, Jeff Montgomery, Bill Lloyd, Scott McMullen, Brandon Leach, Sheryl Anderson, Kim McCloud, and himself to work as drivers on *Extremely Wicked*.¹¹ They all began work on the project between January 10 and January 16, 2018.

At some point, Rick Whaley informed Metzger that he needed to have emergency surgery and could no longer work. Whaley stopped working on January 27. Metzger needed to find a replacement for Whaley. Rather than contact individuals off the retiree referral list, Metzger contacted the Union to see if there were any out-of-work active construction drivers interested in working on films. At some point, Union President Webster informed Metzger that Joe Hensley, an out-of-work active construction driver, was looking for work. Hensley had

¹⁰ Nothing requires or prohibits the Union from honoring an employer's request for a referral by name.

¹¹ McCloud's name does not appear on either of the referral lists introduced into evidence. There is no evidence as to whether she requested to have her name added to the list, or if she was referred out for this project without her name already being on the referral list.

previously contacted Metzger about getting referred out, but, at the time, there was no work available. Metzger called Hensley to see if he was available. Hensley was interested and available. At the time, Hensley was not on the out-of-work active (film and television) referral list, so Metzger added his name and referred him out to replace Whaley. (Tr. 364–365.)

At some point during the project, the Employer needed a second set decoration driver. There were no available drivers on the out-of-work active referral list. Again, rather than turn to the retiree referral list, Metzger contacted Dan Matthews, an out-of-work active construction driver. Matthews sent Union President Webster an email on December 21, 2017, asking to be added to the referral list. He did not specify which referral list. (GC Exh. 17.) At some point thereafter, Webster informed Metzger that Matthews was looking for work. On Saturday, January 20, 2018, Metzger sent Matthews a text message. (GC Exh. 19.) In the message, Metzger wrote that Webster had indicated that Matthews may be interested in being a film driver, and that he (Metzger) had a little work. Matthews texted back that he would call Metzger the following Monday. Metzger asked Matthews to call him immediately, if possible. (GC Exh. 19.) Matthews and Metzger spoke that day, and Matthews informed Metzger that he was not available at that time because he was remodeling his kitchen. (GC Exh. 20.) At the time, Matthews' name was not on the out-of-work active referral list. (Tr. 366–369.)

After Metzger exhausted the out-of-work active referral list, and was unable to find any other out-of-work active drivers, he began contacting, in order, the individuals on the retiree referral list. He contacted James Downtown, who was either not interested or unavailable. He then contacted Ralph Metzger, who is Craig Metzger's father, and Ralph Metzger accepted. It is unclear from the record how often and how many hours Ralph Metzger worked on the project.

7. Union's inquiries of Haller about requesting Bucalo

As stated, Bucalo filed the present charge on February 2, 2018. About halfway through the filming of *Extremely Wicked*—which would have been in early or mid-February 2018—Craig Metzger sent Leyna Haller an email. Haller no longer has the email, but she testified about what she recalled about its contents. Metzger asked her if Bucalo had asked her to request him to be her driver on *Extremely Wicked*. Haller replied that Bucalo had not. Metzger then replied, stating, something to effect, that Bucalo was retired and he would not be eligible. (Tr. 216–217.) Haller had no further communication with Metzger about Bucalo. At the hearing, Metzger was not questioned, and did not testify, about this communication with Haller.

In April 2018, after the filming for *Extremely Wicked* ended, Mike Lilly, Jr., the driver referred instead of Bucalo, contacted Haller and, according to Haller, “had the same conversation” she had with Metzger about requesting Bucalo. Lilly asked if Bucalo had told Haller to request him, and that Bucalo was retired. (Tr. 494–495.)

IV. CREDIBILITY

In assessing credibility, I have relied primarily on demeanor. I also have considered factors such as: the context of the wit-

ness's testimony, the quality of the witness's recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd. sub nom.*, 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, *supra* at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *revd. on other grounds* 340 U.S. 474 (1951).

Based on my observations and review of the record, I found the General Counsel's witnesses (Bucalo, Haller, and Matthews) to be more credible than the Union's witnesses (Webster, Metzger, and Lilly). General Counsel's witnesses appeared to be sincere and honest in their demeanors, and their recollections were clear, consistent, and reliable. In particular, I found Haller and Matthews, who were neutral witnesses subpoenaed to appear, to be reliable, straightforward and thoughtful. They answered questions fully and consistently on both direct and cross-examination, without any effort at providing responses more or less favorable to any particular side.

On the other hand, I found Webster and Metzger to be less sincere, candid, and forthright, or, at the very least, they had poor, incomplete, or inaccurate recollections of events and conversations. Their response was inconsistent and, at times, contradictory, particularly regarding the operation of the referral service.

For example, Webster testified multiple times he is not involved in the operation of the Union's television and film referral service, and that if he receives a call from someone seeking referral, he will tell them to contact Metzger. (Tr. 249, 250, 273–274, 282, 292.) Webster testified he would “always refer them to [Metzger] ‘cause [he] really didn't want anything to do with the movie industry.” (Tr. 249.) But later, when asked about the producers' request for female drivers on *Old Man & the Gun*, Webster acknowledged he “could have” provided Metzger with Sheryl Anderson's name to refer out to the project, but he could not recall. (Tr. 271–272.) Webster was asked if this was the first time Anderson had been added to the list and referred out, and Webster replied that he thought Anderson was already on the referral list. But, moments later, Webster again feigned ignorance and disinterest, stating, “I didn't know their status, I didn't know when they could drive, what they couldn't drive ‘cause I didn't really deal with it. I just gave them Craig's number.” (Tr. 29.)

Metzger was similarly evasive and inconsistent regarding Webster's involvement in the referral system. Initially, he testified as follows:

Q. Did Dave Webster ever tell you to put anybody on this list?

A. He referred some guys to call me. He's never actually said put these—directed me or made me or anything like that.

Q. Has Dave Webster ever called you and told you to put somebody on a film?

A. No. He—no. Never demanded it from nobody—for me to do that.

Q. Well, demand. Did he ever make some suggestions that you do that?

A. No.

(Tr. 352.)

Later, Metzger contradicted himself when he confirmed that Webster suggested he refer out Anderson and Frazier to *Old Man & the Gun*, in response to the producers' request for female drivers. Initially, Metzger could not recall if the producers requested female drivers. (Tr. 355.) But after he was confronted with his pre-hearing affidavit, he recalled the request was made. Metzger then testified that, after receiving the request, he (Metzger) contacted "the Union" to receive the names of available out-of-work female drivers. Metzger did not specifically testify that it was Webster who gave him Anderson and/or Frazier's names, but Anderson was one the names Webster testified he "could have" provided Metzger. Regardless, after receiving these names, Metzger added them to the out-of-work active referral list and sent them out to work on the film, in response to the producers' request. (Tr. 355–357.)

The same is true regarding Joe Hensley and Dan Matthews. Initially, Metzger could not recall if Webster referred Hensley to him. But after again being confronted with his pre-hearing affidavit, Metzger acknowledged when he contacted the Union for names of out-of-work active drivers, Webster mentioned Hensley. Metzger then contacted Hensley about replacing Whaley on the film. 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.)

As for Matthews, Metzger testified that Webster informed him about Matthews when he called the Union looking for out-of-work active drivers who were interested in working on movies. Webster told Metzger to contact Matthews. (Tr. 370–371.) Thereafter, Metzger contacted Matthews about the film, and his text mentioned that Webster had given him Matthews' name. Matthews—like Anderson, Frazier, and Hensley—was not on the out-of-work active referral list at the time Metzger contacted him about being referred out.

Additionally, Metzger and Webster had conflicting recollections about it they ever discussed the Employer's request to refer Bucalo to work on *Extremely Wicked*. Webster was asked if Metzger talked to him about the request, and Webster testified he did, but he could not remember when. (Tr. 283–284.) Webster testified that Metzger told him, "Dave, I can't do that." And Webster responded, "You are the boss. You run it." (Tr. 257.) In contrast, when Metzger was asked if he had any communication with Webster about the request, Metzger responded, "I really don't think I did, but I don't recall, to be honest. I can't remember right off." (Tr. 372.)

Metzger further undermined his credibility with his testimony about how and when he learned about Bucalo allegedly pressing Haller to request him to work on *Extremely Wicked*.

Metzger testified that Lilly first informed him about this "in January, something like that." (Tr. 374–375.) Lilly, on the other hand, testified Haller first allegedly acknowledged that Bucalo asked her to request him in April. Additionally, Metzger testified that he just happened to see Lilly one day, and Lilly told him about this. (Tr. 374–375.) Lilly, in contrast, testified he spoke with Haller about whether Bucalo pressed her to request him, because Metzger asked him to speak to her, and then to ask her if she would provide an affidavit to that effect. (Tr. 494–495.)

Lilly also did not impress me as a reliable and trustworthy witness. He testified that when he spoke to Haller after filming ended she told him that Bucalo *had* pressed her to request him to work on *Extremely Wicked*. I do not credit this testimony. To begin with, it conflicts with Haller's testimony—which I have credited. Furthermore, Haller already told Metzger that Bucalo did not ask her to request him when Metzger emailed her about Bucalo several months earlier. I find it inherently improbable that Haller would give the transportation captain one response, and then give Lilly—driver that she did not request and, frankly, did not want—a contradictory response. Moreover, Lilly directly benefited from the Union not referring Bucalo to this project.

I do, however, credit Lilly's testimony that Metzger asked him (Lilly) to speak to Haller about her conversations with Bucalo, and to ask her if she would be willing to provide an affidavit. I find Metzger's request suggests the Union was seeking to find, or quite possibly create, a reason to invalidate Haller's request for Bucalo to be referred out to this particular job.

V. ANALYSIS

The complaint alleges that the Union, which admittedly operates an exclusive referral service, violated Sections 8(b)(1)(A) and (2) of the Act when it failed or refused to refer Bucalo out to work for the Employer because of his dissident union activity and for reasons other than the failure to tender periodic dues and initiation fees uniformly required for Union membership. The Union denies the alleged violations and contends that it acted consistently with its established, albeit unwritten, practice of referring out all available and interested out-of-work active drivers before referring out retired drivers, and that the only retired driver subsequently referred out for this project was higher on that referral list than Bucalo.

Section 8(b)(1)(A) of the Act provides that it is an unfair labor practice for a labor organization or its agents to restrain or coerce employees "in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The rights guaranteed in Section 7 include, in pertinent part, the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Among the rights guaranteed by Section 7 of the Act is the general "privilege to protest and to question the wisdom of their bargaining representative and to persuade others or

take such steps as they deem necessary to align their union with their position” and such so-called dissident activities. See *East Texas Motor Freight*, 262 NLRB 868 (1982); *Teamsters Local 745 (Transcon Lines)*, 240 NLRB 537 (1979); *Roadway Express*, 108 NLRB 874, 875 at fn. 3 (1954). See also *Transcon Lines*, 235 NLRB 1163, 1165 (1978) (dissident union literature protected); *Singer Co.*, 220 NLRB 1179, 1180 (1975) (distribution of dissident publications which “sought to spur the union to more effective representation” protected.); and *Samsonite Corp.*, 206 NLRB 343, 346 (1973) (literature which supported an opposition candidate for union office and solicited members to become more active found protected).

Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization to “cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of [the Act] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.” Causing or attempting to cause an employer to discriminate does not necessarily require an overt demand by the union to discriminate. Rather, the discrimination in some cases may take the form of the union’s mere failure to refer the employee for work, without any direction to the employer. *Electrical Workers Local 675 (S & M Electric Co.)*, 223 NLRB 1499 (1976), enfd. mem. 556 F.2d 574 (4th Cir. 1977).

The Act prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair. *Miranda Fuel*, 140 NLRB 181, 185 (1962), enfd. denied 326 F.2d 172 (2d Cir. 1963). This duty of fair representation requires a union to represent the interests of all bargaining-unit members, and to do so “without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). In interpreting the duty of fair representation, however, the Board recognizes that unions must enjoy an amount of discretion in serving their represented employees. *Teamsters, Chauffeurs, Warehousemen & Helpers Local 631 (Vosburg Equipment, Inc.)*, 340 NLRB 881, 881 (2003). As the Supreme Court has stated, “[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.” *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

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).¹² When a union prevents a

worker from being hired through the referral service, it is presumed to encourage union membership and the burden shifts to the union to justify its actions. *Lucas v. NLRB*, 333 F.3d 927, 932 (9th Cir. 2003). This presumption can be rebutted by showing the union acted in accordance to a valid security clause or its action was necessary to the effective performance of its function of representing its constituency. *Id.*; See also *Stage Employees IATSE Local 150 (Mann Theatres)*, 268 NLRB 1292, 1295 (1984); *Operative Plasterers & Cement Masons, Local 299 (Wyoming Contractors Assn.)*, 257 NLRB 1386, 1395 (1981)).

In determining whether a union operating an exclusive referral service has violated Sections 8(b)(1)(A) and (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). *SSA Pacific Inc.*, 366 NLRB No. 51, slip op. 1 (2018); *Teamsters “General” Local 200*, 357 NLRB 1844 (2011), affd. 723 F.3d 778 (7th Cir. 2013).

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 action. *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 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.*

The General Counsel has met his burden under both theories. The Union breached its duty of fair representation when it actively prevented Bucalo from working on *Extremely Wicked* by denying the Employer’s request to refer him, without a legiti-

¹² A union operating an exclusive referral service is required to refrain from the arbitrary application of rules. The Board has found arbitrary conduct and a breach of the duty of fair representation where a union fails to establish and apply objective standards in operating its exclusive referral service. See *Ironworkers Local 505 (Snelson-Anvil)*,

275 NLRB 1113, 1113–1114 (1985), enfd. 794 F.2d 1474 (9th Cir. 1986); and *Teamsters Local 25*, 358 NLRB 54, 66–67 (2012). Counsel of General Counsel acknowledged there are no allegations the Union operated its exclusive referral service without regard to established objective criteria. (Tr. 23). Consequently, I need not make findings or conclusions as to whether the Union violated the Act by such conduct.

mate reason for doing so. The Union defends that it was simply following its “established” practice of first referring, in order, from its out-of-work active list and then, in order, from its retiree list. Assuming this was the Union’s established practice, Metzger regularly deviated from this practice, both before and after the Employer requested Bucalo. With *Old Man & the Gun*, the Union deviated when it referred two female drivers who were not, at the time of the request, on either referral list. Metzger added their names after they expressed interest, and then he referred them out. He took these steps in order to accommodate the producers’ request. With *Strangers II*, the Union deviated when it did not strictly refer or assign, in order, from the list. After learning that the producers needed fewer drivers than originally were requested and sent, the Union kept all the originally referred drivers and had them rotate shifts, rather than have the highest-ranked/most senior drivers remain and work full-time. Finally, with *Extremely Wicked*, the Union deviated both when it did not turn to the retiree list after exhausting the out-of-work active list, and when it contacted two *unlisted* out-of-work active *construction* drivers (Hensley and Matthews) and offered them the work.¹³

The Union also discriminatorily failed or refused to refer Bucalo to work on *Extremely Wicked* because of his dissident union activity and for reasons other than the failure to tender periodic dues and initiation fees uniformly required for membership. The Union was well aware of Bucalo’s dissident activity, which, as previously stated, is protected under Section 7 of the Act. Webster expressed hostility toward that activity when he “commented” on Bucalo’s Facebook post criticizing Webster and his administration. Additionally, the Union’s repeated willingness to deviate from its “established” practice, except for when the deviation would benefit Bucalo, as well as its disparate treatment in handling requests, is ample evidence from which to infer animus or discriminatory motivation. And it is precisely because of these deviations and disparate treatment that I find the Union’s claimed defense that it was simply acting in accordance with its established practice when it did not honor the Employer’s request to refer Bucalo is pretext for its discriminatorily motive.¹⁴ Based on this finding of pretext, I find

¹³ On *Extremely Wicked*, the Union ignored and adhered to its established practice, both to Bucalo’s detriment. It initially ignored when it referred Hensley and offered to refer Matthews, and it adhered when it assigned Ralph Metzger to be the second set decoration driver based on his seniority.

¹⁴ The Union attempts to distinguish the Employer’s request for Bucalo from these other requests by arguing it was not a valid request, because he “pressed” Haller to request him. As stated, this is based on Lilly’s testimony regarding his conversation with Haller in April 2018, which I do not credit. And even if I did credit Lilly, Metzger could not have known about Bucalo’s alleged pressing of Haller at the time he denied the Employer’s request to refer Bucalo, which occurred months earlier, in late December 2017.

At the hearing, the Union suggested that there was no animus or hostility toward Bucalo because it referred Bucalo to work on *Donnybrook*, and later to a film that began production following the conclusion of the hearing. I reject this argument. With *Donnybrook*, there was another movie being filmed (*Haunt*), and the Union had exhausted all of the individuals on both lists before referring Bucalo. In other words, the Union had no one else to send to fill the number of drivers needed. The

the Union cannot establish it would have taken the same action against Bucalo in the absence of his protected activities.

Based on the foregoing, I conclude the Union violated Sections 8(b)(1)(A) and (2) of the Act when it, in the operation of its exclusive referral service, breached its duty of fair representation when it discriminatorily failed or refused to refer Bucalo out to work for the Employer on *Extremely Wicked*.¹⁵

VI. COMPLIANCE SPECIFICATION

As indicated above, the General Counsel consolidated the complaint in this case with a compliance specification. The compliance specification alleges that but for the Union’s unfair labor practice it would have dispatched Bucalo for employment with the Employer, and that it is reasonable to assume that Bucalo would have worked the same days and number of hours worked by employee Michael Lilly, Sr., whom the Union dispatched to the Employer in Bucalo’s place, and would have received the pay and benefits that the Employer paid to Lilly. As such, the backpay period for Bucalo begins on Monday, January 2, 2018, the date Lilly began work for the Employer, and ends on March 2, 2018, the last day Lilly worked for the Employer. Bucalo had zero interim earnings and expenses. The General Counsel contends that the backpay owed to Bucalo as a result of the Union’s unfair labor practices is \$23,283, which includes the wages, meal allowances, and fringe benefit payments Lilly received during the backpay period, all of which were treated as wages, with daily compounded interest accruing on the entire amount to the date of payment, minus tax withholdings required by Federal and State law.

In its answer to the compliance specification, the Union denies that Lilly was dispatched to the Employer in Bucalo’s place. It argues that Lilly was properly dispatched in accordance with the normal processes and seniority order and, therefore, denies that Bucalo is entitled to be paid the sums earned

same appears to be true regarding the film that began production following the hearing. Therefore, the Union’s decision to refer Bucalo to these two movies—when it had no one else to refer—does not negate that it acted with a discriminatory motive when it refused the Employer’s request to refer him to *Extremely Wicked*.

¹⁵ The Board has held that regardless of whether there is a specific discriminatory intent, 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 Sections 8(b)(1)(A) and (b)(2), absent demonstration of a legitimate justification. *Cell-Crete Corp.*, 288 NLRB 262, 264 (1988). See also *Operating Engineers Local 150*, 352 NLRB 360, 360 (2008); *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549, 552 (2001), *enfd.* 325 F.3d 301 (D.C. Cir. 2003). The Board’s reasoning is 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. As stated, there are no allegations that the Union failed to maintain established procedures based on objective criteria for the operation of its exclusive referral service. There also are no allegations that the Union departed from its established procedures. That, of course, presumes the Union had established procedures. Therefore, it is unnecessary for me to reach whether the Union also violated Secs. 8(b)(1)(A) and (2) by departing from an established practice, which resulted in Bucalo being denied employment.

by Lilly. However, the Union admits that Lilly is the relevant comparator under the theory presented, that the applicable dates are approximately early January through early March 2018, and that the pay received by Lilly during that period was \$23,283. The Union contends it lacks sufficient information to dispute that Bucalo had no interim earnings during this period of time. In its post-hearing brief, the Union stated no positions and made no arguments regarding any of the allegations in the compliance specification.

Compliance proceedings restore the status quo ante by restoring circumstances that would have existed had there been no unfair labor practices. *Hubert Distributors, Inc.*, 344 NLRB 339, 341 (2005). The finding of an unfair labor practice is presumptive proof that some backpay is owed. *Beverly California Corp.*, 329 NLRB 977, 978 (1999). The General Counsel's burden in backpay cases is to show the amount of gross backpay due the discriminatee. *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993). Once the General Counsel has introduced the gross backpay due, the burden shifts to the respondent to establish affirmative defenses that would eliminate or otherwise reduce its backpay liability. *Avery Heights*, 349 NLRB 829, 838 (2007); *Centra, Inc.*, 314 NLRB 814, 815–820 (1994).

Based upon these admissions, I find, as alleged, that the backpay owed to Bucalo is properly calculated, using Lilly as the relevant comparable, to be \$23,283, minus tax withholdings required by Federal and State law. The adverse tax consequences, if any, for which Bucalo is entitled to be compensated will be the difference between the 2018 taxes and the taxes calculated for the year in which the payment is eventually made.

Thus, the Union shall pay Bucalo \$23,283, plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law, plus the amount of any adverse tax consequences.

CONCLUSIONS OF LAW

1. Wicked Films, LLC (Employer) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union breached its duty of fair representation when it discriminatorily failed or refused to refer Samuel J. Bucalo to employment with the Employer because of his dissident union activity or for reasons other than failure to tender periodic dues and initiation fees uniformly required for membership in the Union.

4. The Union discriminatorily failed or refused to refer Samuel J. Bucalo to employment with the Employer because of his dissident union activity or for reasons other than failure to tender periodic dues and initiation fees uniformly required for membership in the Union.

5. The Union caused or attempted to cause the Employer

that is signatory to a collective-bargaining agreement with it to discriminatorily fail to employ Bucalo because of his dissident union activity or for reasons other than failure to tender periodic dues and initiation fees uniformly required for membership in the Union.

6. By engaging in the unlawful conduct set forth above, the Union has engaged in an unfair labor practices affecting commerce within the meaning of Sections 8(b)(1)(A) and (2) of the Act.

7. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Union shall pay to Bucalo net backpay of \$23,283, plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law, plus the amount of any adverse tax consequences.

REMEDY

Having found that the Union has violated Sections 8(b)(1)(A) and 8(b)(2) of the Act, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Union, having unlawfully failed or refused to refer Bucalo to employment with the Employer from January 2 to March 2, 2018, must make him whole for his lost earnings and other benefits in the amount of \$23,283. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, supra. The amounts owed are computed above in this decision and interest and tax liability shall continue to accrue until the date of payment.¹⁶

In addition, the Union shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file a report allocating backpay with the Regional Director for Region 9. The Union will be required to allocate backpay to the appropriate calendar years only. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Union shall also compensate Bucalo for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

The Union also shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Union's facility or wherever the notices to members are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Union customarily communicates with

¹⁶ The compliance specification does not allege that Bucalo had any reimbursable search for work expenses; therefore, none are included in the proposed remedial order.

its members by such means. In the event that, during the pendency of these proceedings, the Union has gone out of business or closed the facility involved in these proceedings, the Union shall duplicate and mail, at its own expense, a copy of the notice to all current and former members of the Union and all current and former employees employed by the Employer at any time since December 27, 2017. When the notice is issued to the Union, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters (Union), Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to refer individuals through its exclusive referral system because of their dissident union activity or for reasons other than failure to tender periodic dues and initiation fees uniformly required for membership.

(b) Causing or attempting to cause an employer that is signatory to a collective-bargaining agreement to discriminatorily fail to employ an individuals because of his/her dissident union activity or for reasons other than failure to tender periodic dues and initiation fees uniformly required for membership in the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, make Samuel J. Bucalo whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. The backpay owed to Bucalo is \$23,283, plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law.

(b) Within 14 days, remove from its files any reference to the discrimination against Bucalo., and, within 3 days thereafter, notify him in writing that this has been done and that the discrimination will not be used against him in any way, including in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.

(c) Within 21 days of the Board's order, file a report allocating backpay to the appropriate calendar years with the Regional Director for Region 9. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Compensate Bucalo for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(e) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Union's authorized representative, shall be posted by the Union and maintained for 60 consecutive days in conspicuous places including all places where notices to employees/members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Union customarily communicates with its employees/members by such means. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Union has gone out of business or closed the facility involved in these proceedings, the Union shall duplicate and mail, at its own expense, a copy of the notice to all current and former members of the Union and current and former employees employed by the Employer at any time since December 27, 2017.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

Dated, Washington, D.C., September 11, 2018.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law has ordered us to post an obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose a representative to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to refer individuals through our exclusive referral system because of their dissident union activity or for reasons other than failure to tender periodic dues and initiation fees uniformly required for union membership.

WE WILL NOT cause or attempt to cause an employer that is

¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in each of the notices referenced herein reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

signatory to a collective-bargaining agreement to discriminatorily fail to employ an individual because of his/her dissident union activity or for reasons other than failure to tender periodic dues and initiation fees uniformly required for union membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL pay to Samuel J. Bucalo backpay of \$23,283 for failing or refusing to refer him for employment with Wicked Films, LLC, plus interest computed and compounded daily, accrued to the date of payment, minus tax withholdings required by Federal and State law, plus the amount of any adverse tax consequences.

WE WILL file with the Regional Director for Region 9, within 21 days of the date the Board Order, a report allocating the backpay award to the appropriate calendar year(s).

TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL
UNION NO. 100, AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

The Administrative Law Judge's decision can be found at www.nlr.gov/case/09-CA-214166 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

