

**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	:	CASE NO. 9-CB-249487
TEAMSTERS (Tea Shop Productions LLC	:	
d/b/a The Foundation),	:	
	:	
Respondent,	:	
	:	Administrative Law Judge
and	:	Melissa M. Olivero
	:	
SAMUEL J. BUCALO, AN INDIVIDUAL,	:	
	:	
Charging Party.	:	

**RESPONDENT’S BRIEF TO THE
ADMINISTRATIVE LAW JUDGE**

INTRODUCTION

This case came before Administrative Law Judge Melissa M. Olivero on September 21, 2020, via Zoom, upon the General Counsel’s Complaint against Respondent Teamsters Local Union No. 100, an affiliate of the International Brotherhood of Teamsters (“Respondent,” “Local 100” or “the Union”) (referred to in the case caption as Truck Drivers, Chauffeurs and Helpers Local Union No. 100). The Complaint was based on an unfair labor practice charged filed by the Charging Party, Samuel J. Bucalo, alleging that the Union had committed a variety of violations of the Act with regard to referrals for drivers to work on a film production in September 2019, including “the favored referral of a junior driver.” GC Ex. 1(a). The Complaint, addressing a portion of the charge, alleges that the Union “referred employees in Group V to employment with the Employer ahead of employees in Groups I, II and III,” contrary to the provisions of the policy

requiring referrals to be made through the lists in descending order of priority. Complaint ¶ 5(c). The Complaint further alleges that this conduct restrained and coerced employees in the exercise of their rights under Section 7 of the Act and caused the Employer to discriminate against employees in violation of the Act.

The Respondent respectfully submits that the evidence does not establish any deliberate or even reckless or grossly negligent administration of the referral policy, specifically in the compilation of the referral lists by group. Rather, the Union's uncontroverted evidence was that a small number of employees who live in a nearby city were mis-placed on the list for local drivers, due to an innocent error by an office clerical employee. Such a mistake is insufficient to constitute a violation of the Act. Therefore, Local 100 urges that the Complaint be dismissed in its entirety.

STATEMENT OF FACTS

Teamsters Local 100 is a large local union in Cincinnati, Ohio with approximately 4600-4700 members, working under contracts with some 60 different employers; United Parcel Service (UPS) employs the largest group of its members, approximately 2000. Tr. 110 (McFarland). The Union as one small part of its services provides employers who are producing film and television projects (collectively, the "movie industry") in greater Cincinnati with referrals for drivers. The movie industry in the area is highly sporadic and unreliable. As movie industry driver and Transportation Captain Craig Metzger¹ attested, there might be as many as five productions in one

¹ Mr. Metzger began working as a movie industry driver after being laid off by a large freight company in early 2011; he was appointed the Captain for Local 100 in about 2013. On behalf of the Union, he made the referrals for drivers to work on film and television productions – when Local 100 operated an exclusive hiring hall, including at the time in question in this case – by calling the drivers in order based on their experience and the other factors in the policy by working down the lists in order. As the Transportation Captain working on a film, in his role as an employee of the production company, he: works with the heads of other departments (electrical, props, sound, camera, etc.) to determine each day's transportation needs; assigns and notifies drivers of their start times and other details; picks up materials and equipment; parks trailers and vans; prepares the vehicles needed each day; and generally coordinates the work of the drivers. Although the standard collective bargaining agreement provides that the Captain will work before other drivers, Mr. Metzger often waives this; the driver assigned to work with the set decoration crew begins

year, or there might be none. Even before COVID-19 restrictions were imposed in mid-March 2020, there was only one, small production in Cincinnati after October 2019. Some films involve only a short period of work; the one film shot in Cincinnati in early 2020 filmed for only about five days. Tr. 65-66 (Metzger). The number of drivers on the Local's referral lists was 35 in January 2019 and 40 in July of that year, representing less than one percent of the Union's total membership. R. Ex. 2; GC Ex. 5.

Before 2018, Local 100 had operated its referral system informally, making referrals based on experience but without a written policy or significant documentation. In late May 2018, the Union issued a written policy that formalized and added to its existing, informal procedures for referrals for work in the film and television industry. GC Exs. 2 & 3. This policy categorized the drivers into seven different groups or sub-lists, based on their experience in the industry and their number of jobs in film or television productions in recent years, as well as their status as local residents or not and whether they were receiving pension or other retirement benefits. The groups were as follows:

Group I: Drivers residing in the Tri-State area² with at least four years of experience and six productions in the last four years in the geographic jurisdiction of Local 100

Group II: Drivers residing in the Tri-State area with at least two years of experience and three productions in the last two years in the geographic jurisdiction of Local 100

Group III: Drivers without the requisite experience residing in the Tri-State area

Group IV: Drivers not residing in the Tri-State area with at least four years of experience and six productions in the last four years in the geographic jurisdiction of Local 100

first, as early as six weeks before filming starts, and the Captain begins about two weeks before shooting. Tr. 34-35, 64-69 (Metzger).

² The policy defines this as Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Pike, Scioto and Warren Counties in Ohio; Boone, Campbell and Kenton Counties in Kentucky; and Dearborn, Franklin, Ohio, Ripley and Switzerland Counties in Indiana. GC Ex. 2 at 2. As Mr. Metzger explained, Cincinnati is located in the Southwest corner of the State of Ohio, adjacent to both Kentucky and Indiana, thus the reference to the "Tri-State" area. Tr. 76-77 (Metzger).

Group V: Drivers with at least one year of experience not residing in the Tri-State area

Group VI: Drivers without the requisite experience and not residing in the Tri-State area

Group VII: Drivers who are receiving a pension or other retirement benefits

The written policy was disseminated in June 2018 to all individuals who had worked or expressed interest in the movie industry; they were asked to return a resume and a completed application form in order to be placed on the list for referrals. GC Exs. 3 & 4. The Union's then-President, Dave Webster, assigned the task of using the resumes and applications to compile the referral lists to Administrative Assistant Sarah McFarland, who has worked as an office clerical employee at Local 100 for 33 years.

Ms. McFarland testified that the administrative and clerical work relating to the movie industry was a very small part of her many duties at Local 100. The Union's only other clerical employee work mainly involves billing and receiving dues for all but one employer³ and coordinating the referral of grievances under certain contracts to the joint labor-management panel system; she also performs some basic office functions such as answering phones and making copies. Ms. McFarland is responsible for essentially all other administrative and clerical work at the Union, for the eight full-time officers and business agents. Her duties include typing all collective bargaining agreements and correspondence, maintaining the Union's grievance records and other files, assisting members with questions about insurance or pension issues, handling all incoming mail, managing accounts payable and payroll functions and doing the routine office work

³ Ms. McFarland testified that she is responsible for the dues administration for employees at one company, which the hearing transcript refers to as "Local C." Counsel for the Respondent represents to the ALJ that there is no such entity within Teamsters Local 100; counsel's notes show that Ms. McFarland referred to the employer as First Student.

of answering phones, making copies and the like. She testified that she has little downtime in her work days, which generally are “pretty busy.” Tr. 109-13 (McFarland).

Ms. McFarland did not have any role in writing or even typing the 2018 referral policy; her first involvement was to prepare the packages and mail the new policy and associated forms to the drivers in June 2018. As directed by the President, she compiled and ordered the drivers’ resumes as they came in to the Union’s offices beginning in the fall of 2018 and into early 2019. She prepared the first set of lists, R. Ex. 2, in January 2019. Tr. 113-16 (McFarland).

In the present charge, Mr. Bucalo alleged that one driver was mis-placed on the list and improperly referred; after receiving the charge, the Union realized that Aaron Robinson was mistakenly listed in Group III, which comprises local-resident drivers without the experience to qualify them for Group I or II. He lives in Dayton, Ohio, in Montgomery County, which is outside the counties defined as the applicable geographical area. Because of his residence and the fact that he did not have one year of experience in the industry, Mr. Robinson should have been listed in Group VI; therefore, he was incorrectly referred ahead of any drivers who were properly placed in Group III or Group IV. Ms. McFarland learned about the error regarding Mr. Robinson’s placement when she was informed of the charge, which was filed on October 4, 2019; Mr. Metzger learned that Mr. Robinson lived in Dayton, and therefore was not properly included in the list for “local” drivers, sometime during the filming of “Wrong Turn.”⁴ Tr. 75-76 (Metzger), 120-21 (McFarland); GC Exs. 1(a), 5, 6, 10.

⁴ Mr. Bucalo suggested in his questions to Mr. Metzger on cross-examination that the 937 area codes in the three drivers’ phone numbers would have indicated that they live in Dayton, as that is the area code for that city. However, as Mr. Metzger testified, these days an area code for a mobile phone does not necessarily mean anything about where the person actually lives. In addition, at least one other driver who was not identified as living outside the local area as defined by the policy, Doug Callahan, also has a 937 area code. Tr. 62-63, 79 (Metzger); GC Ex. 5 at 3.

Ms. McFarland and Mr. Metzger testified that they learned for the first time at the trial that two other individuals listed in Group III, Teaven Curtiss and Billee Duty, also lived in Montgomery County and similarly should have been listed in Group VI. Mr. Metzger did call to offer work on “Wrong Turn” to Mr. Curtiss, who declined it, before calling Mr. Robinson; he did not call Billee Duty because he had enough drivers and did not get to that place on the lists. Tr. 76 (Metzger), 120 (McFarland). Therefore, no other driver was displaced or not referred due to these two drivers’ mis-placement on the lists.

Ms. McFarland’s testimony shows that the mis-placement of the three Dayton-resident drivers was an inadvertent error made by a busy office employee with many duties, of which compiling the movie industry referral lists is only a very small part. She testified that she simply “made a mistake” when placing Mr. Robinson and the other two drivers in Group III when she first compiled the groups and typed the lists in January 2019, either not realizing or overlooking the fact that their Dayton addresses were not within the definition of the local area under the policy. Ms. McFarland was aware that some drivers working under Local 100 contracts do go as far north as Dayton and other parts of Montgomery County, which is closer to Cincinnati than many of the outlying counties in the tri-state area of Ohio, Kentucky and Indiana that *are* considered local under the policy. Indeed, as Mr. Metzger testified, the Teamster local in Dayton does not have a movie division, and Local 100 movie industry drivers have worked in Montgomery County on productions including “Miles Ahead” and “The Old Man and the Gun.”⁵ Tr. 76, 79 (Metzger), 118-20 (McFarland).

Ms. McFarland testified that she does not know Mr. Robinson or the other two drivers who live in the Dayton area – or, indeed, most of the movie industry drivers – and had no reason to

⁵ The transcript incorrectly referred to this film as “Old Man’s Gun,” but counsel represents to the ALJ that the correct title is “The Old Man and the Gun.”

favor them or disfavor other applicants by putting these three in a higher group. Tr. 117-18, 120-21 (McFarland) (Notably, counsel for the General Counsel stipulated at trial that the General Counsel is not proceeding on a theory that the Union's actions in this case involved animus toward Mr. Bucalo as the Charging Party. Tr. 88-89 (colloquy of counsel).

Mr. Metzger as the Transportation Captain used the lists Ms. McFarland prepared and emailed to him, which were updated occasionally through July 2019, believing they were accurate and the placements were correct. He used those lists to make referrals for movie industry projects through August 2019, when the Union determined to discontinue the exclusive referral system. He did not have access to the resumes or applications to determine if all the drivers were properly grouped, and the lists he received from Ms. McFarland included only the names and phone numbers for the drivers in each group, with no other information. Mr. Metzger used the lists, GC Ex. 5, to make referrals in August 2019 for the film "Wrong Turn" that was to be shot in the Cincinnati area in September and October 2019; it was a medium-sized production that used only 12 drivers including the Captain. He offered Aaron Robinson⁶ work based on his placement in Group III in those lists. Mr. Metzger previously had called Teaven Curtiss, who also was incorrectly in Group III, but he declined the work; Billee Duty was not called. Tr. 57-59, 72-75, 80 (Metzger); GC Ex. 16.

"Wrong Turn" was the last film production for which Local 100 provided exclusive hiring hall services. On August 28, 2019 – before filming on that project began on September 9 but after the referral process was well underway – the Union's Executive Board adopted a new movie industry policy that provides for non-exclusive referrals and for "producer's choice" in hiring, with no role for the Transportation Captain or any other Local 100 representative in the determination

⁶ Mr. Metzger did not know Mr. Robinson before he had first called him to offer work on a one-week project earlier in the summer of 2019 and did not know where he lived.

of who will work on what film or movie project. Instead, the Union provides information about all qualified drivers on an equal basis directly to each production company to make the hiring decisions itself. Ms. McFarland compiles applications and resumes for all qualified driver applicants and sends them electronically to any production company planning to film in the area, assembling them in alphabetical order and making no distinctions or groupings based on experience, local residence, retiree status or any other factor. The employer may select the drivers it wishes to hire from those who have been referred through Local 100 and also may hire outside applicants from any other source. The Union through Ms. McFarland has followed this process for two planned movie productions since the effective date of the policy. Tr. 90-92 (Metzger), 121-23 (McFarland), R. Ex. 5. Therefore, the clerical errors in the Dayton drivers' placement on the lists became moot even before the present charge was filed, and a similar mistake cannot be repeated in the future since the applicants are no longer classified into groups for purposes of referral.

III. LEGAL ANALYSIS AND ARGUMENT

A. The Legal Standards for Exclusive Hiring Halls

Local 100 acknowledges that it had an obligation to operate its exclusive hiring hall for movie industry work in a fair, non-discriminatory and non-arbitrary manner and in accordance with its established procedures. However, the law also provides that inadvertent errors in the operation of a referral system do not constitute a breach of the duty of fair representation or a violation of Section 8(b) of the Act.

Although the Complaint in this matter does not specifically allege that Local 100 breached its duty of fair representation to Mr. Bucalo or any other applicant for movie industry jobs, the case law in that area obviously is relevant here. "A union's duty of fair representation applies to the operation of an exclusive hiring hall. While operating a hiring hall, a union cannot act in an

unreasonable, arbitrary, discriminatory, or bad faith manner.” IATSE Local 99, 2017 WL 6604848 (N.L.R.B. Div. of Judges), *citing* Teamsters Local 631 (Vosburg Equip.), 340 N.L.R.B. 881, 883 (2003). A union violates its duty of fair representation when it operates an exclusive hiring hall in a manner that is arbitrary or unfair. Stage Employees Local 720 (4VW Audio Visual), 332 NLRB 1 (2000). The Board has acknowledged the Supreme Court’s guidance under “the Vaca v. Sipes standard, that the duty of fair representation is breached only by conduct that is ‘arbitrary, discriminatory, or in bad faith’” and that this standard “is not breached by conduct that constitutes ‘mere negligence.’” Plumbers Local 342 (Contra Costa Elec., Inc.) (“Contra Costa I”), 329 NLRB. 688, 689 (1999), *citing* Vaca v. Sipes, 386 U.S. 171 (1967). The Board in Contra Costa I further noted that the Vaca standard “applies to all union conduct, [including] to the operation of hiring halls.” Id., *citing* Air Line Pilots Ass’n v. O’Neill, 499 U.S. 65 (1991).⁷

The Board has held that “any departure from the established procedures for an exclusive hiring hall that results in denial of employment to an applicant violates the duty of fair representation and Section 8(b)(1)(A) and (2), unless the union can demonstrate that the departure was pursuant to a valid union-security clause or was necessary to the union’s effective performance of its representative function. . . . [S]uch 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 (Contra Costa Elec., Inc.) (“Contra Costa II”), 336 NLRB. 549, 550 (2001). Crucially, however, the Board also has “recognized that *inadvertent errors* in operating a hiring hall *do not* signal the union’s power over referrals and thus

⁷ In O’Neill, the Supreme Court held that the rule it had formulated in Vaca v. Sipes, 386 U.S. 171, 190 (1967), “that a union breaches its duty of fair representation if its actions are either ‘arbitrary, discriminatory, or in bad faith,’ . . . applies to all union activity” 499 U.S. at 76. In addition, the Court held that “a union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness’ . . . as to be irrational.” Id. (*quoting* Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)).

do not encourage union membership or restrain and coerce applicants in violation of either the duty of fair representation or Section 8(b)(1)(A) and (2).” Id. (emphasis added)

In Contra Costa I, the Board concluded that “‘mere negligence’ in the operation of an exclusive hiring hall does not give rise to a claim for breach of the duty of fair representation, even by an applicant who loses an employment opportunity as a result of the union’s mistake.” 329 NLRB at 689. The Board noted prior decisions of the Board and the Supreme Court establishing that a union’s obligation under the duty of fair representation is “increased” in the context of an exclusive hiring hall but reasoned that this is because the union has taken on additional responsibilities in that realm – *not* because a stricter standard applies. Id. at 689-90. Contra Costa I involved a single error in the hiring hall process, in which a union representative mistakenly believed he had called the charging party/applicant for work on a specific project but had not done so. The Board concluded that “honest, inadvertent mistakes, such as the Union’s in this case, do not, without more, constitute a breach of the duty.” Id. at 691.

As the Board explained, the cases in which it has found a union liable for a breach of the duty in the context of a failure to make a hiring hall referral have involved

deliberate, volitional departure from established procedure or rules or failure to apply objective standards for referrals. The Board has reasoned that in such cases, the unspoken message to all hiring hall users is that, despite what the rules say, the union – which controls their access to employment – can do as it pleases in awarding referrals, and that union considerations may therefore very well affect the ability of individuals to obtain favorable consideration in referrals. On that basis, the Board has concluded that such actions “encourage membership” in the Union within the meaning of the Act. *While this reasoning makes sense when applied to the volitional actions of union officials, it is unpersuasive when applied to simple mistakes.*

Id. (emphasis added). In defining what constitutes “arbitrary” conduct within the hiring hall context, the Board in a supplemental decision in Contra Costa I after an appeal to and remand from the D.C. Circuit noted the following:

The descriptive terms used to describe breaches of the duty – “arbitrary,” “invidious,” “discriminatory,” “hostile,” “unreasonable,” “capricious,” “irrelevant or unfair considerations,” without “honesty of purpose” – indicate deliberate conduct that is intended to harm or disadvantage hiring hall applicants. They all imply that the union is either using its power to control referrals against the interests of individual applicants or classes of applicants, or that it may do so at any time, at its discretion.

There is nothing in those descriptions, however, to suggest that a union must operate an exclusive hiring hall mistake-free. An inadvertent failure to dispatch a hiring hall applicant in the proper order by definition is not deliberate and can hardly be described as “arbitrary,” “invidious,” “hostile,” or any of the other adjectives repeatedly used to characterize unfair representation. It carries no suggestion that the union has any thought or intention of acting to an applicant’s disadvantage. It may signal an error in judgment, but not favoritism or hostility.

Moreover, in operating hiring halls, unions perform a valuable service for employers as well as employees. If we were to find that unions have a duty to perform that service free of all errors, we might well discourage unions from undertaking that worthwhile role. As a matter of sound public policy, then, we are unwilling to infer that the duty of fair representation admits of no mistakes in the hiring hall context.

Contra Costa II, 336 NLRB at 552. Specifically, the Board stated in that case that it was affirming “that *inadvertent mistakes in the operation of an exclusive hiring hall arising from mere negligence do not violate the union’s duty of fair representation*. We also reaffirm that such mistakes *do not violate Section 8(b)(1)(A) and (2)*.” Id. at 550 (emphasis added).

The Court of Appeals for the D.C. Circuit upheld this analysis and conclusion on review of Contra Costa II in Jacoby v. NLRB, 325 F.3d 301 (D.C. Cir. 2003). The court agreed that the case law applying a heightened duty in hiring-hall cases “does not compel a finding that a single act of simple negligence results in a breach of the DFR.” Rather, the court concluded: “The Union in this case made a simple mistake, erring in good faith. The Board was well within the bounds of the law and sound judgment in concluding that a single error in the hiring hall setting did not breach the DFR.” Id. at 310.

In a case decided shortly after Contra Costa II, the Board found that a union did not violate the duty of fair representation when 1) one of its agents responded to an emergency call for workers early the following morning, which came in after hours and at a time when he needed to leave the office for an important appointment, by referring individuals who happened to be in the office rather than attempting to call the next person on the list, or 2) when the union agent mistakenly believed one worker had wished not to be referred to a particular job but to wait for another anticipated project. Plumbers Local 91 (Brock & Blevins), 336 NLRB 541 (2001). The Board concluded that the former situation, involving “cutting corners” in an exigent situation, was either excusable as an inadvertent mistake or, if a departure from the rules, was one that was “not ‘so far outside a wide range of reasonableness as to be irrational.’” Id. at 544, *quoting O’Neill*, 499 U.S. at 67. The latter situation was the result of simply “a good faith, albeit mistaken, belief” about the applicant’s desire to wait for a different job rather than be referred to the one in question, which similarly did not rise to a breach of the duty. Id.

In another case involving various alleged defects in a union’s operation of hiring halls in different industries, the Board affirmed an ALJ’s conclusion that two instances of variance from a local union’s referral procedures – when a business agent had “simply made a mistake” by unknowingly using the wrong referral list and when the union accepted an employer’s request to refer an individual by name, ahead of others who should have been referred first, not knowing that the employee improperly had solicited the by-name referral – were not intentional violations of the hiring hall rules and did not constitute violations of the duty of fair representation. Vosburg Equip., 340 NLRB at 885.

By contrast, the cases in which the Board has found a violation of the duty of fair representation in deviations from hiring hall procedures have involved conduct which either was

intentional or which encompassed such widespread errors that it amounted to gross negligence. For example, in Southwest Regional Council of Carpenters (Perry Olsen Drywall), 358 NLRB 1 (2012), the Board adopted an ALJ's conclusion that a union had discriminatorily refused to allow an applicant to register on its hiring list because he had questioned whether it had been operating properly under the state's "right-to-work" law.

In a case involving mis-categorization of workers on a referral list, the Board concluded that as many as 200 improper referrals were made in a period of two years because the local union had permitted applicants to register in the highest group by signing the referral book themselves, using an "honor system" in which no union representative checked to determine if the workers in fact were qualified for that list. The Board concluded that this conduct, in which the union entirely failed to enforce its contractual procedures and rules, constituted gross negligence, which it defined as "conduct indicating disregard for established procedures." These actions amounted to "reckless disregard for established procedures in employees' interests, and thus constitute gross negligence under Contra Costa I or II." IBEW Local 48 (Oregon-Columbia Chapter of NECA), 324 NLRB 101, 108-09 (2004). The Board in Contra Costa I similarly had noted in a footnote, "if 'mistakes' are routinely made, or they typically disfavor nonmembers, dissidents or some other identifiable group, they may well not be found to be mistakes at all but, instead, arbitrary, discriminatory, or bad faith conduct in breach of the duty of fair representation." 329 NLRB. at 691 n.24.

B. Analysis and Argument

As the case law makes clear, variances from prescribed hiring-hall procedures that do not involve some demonstrable bad faith or animus, and inadvertent mistakes that do not rise to the level of gross negligence, do not violate the union's duty of fair representation or sections 8(b)(1)(A) and (2) of the Act. The present case involves no favoritism or discriminatory animus

and no “reckless disregard for established procedures.” Furthermore, the error in the referral process was not shown to have the effect of “restraining and coercing employees in the exercise of their rights guaranteed in Section 7,” as alleged. Complaint ¶ 6. To the contrary, the uncontroverted evidence shows only an inadvertent mis-placement of three applicants on the wrong list due to an error in the staff member’s understanding of what area was considered local, resulting in the out-of-order referral of a single driver. It is essentially the same situation described by the D.C. Circuit in affirming the Board’s ruling in Contra Costa II: “The Union in this case made a simple mistake, erring in good faith.” Jacoby v. NLRB, 325 F.3d at 310. The court there agreed with the Board that an “inadvertent error in operating a hiring hall” is insufficient to create liability in the union. Contra Costa II, 336 NLRB at 550. In this case, the “single act of simple negligence” in the hiring hall setting, Jacoby, 325 F.3d at 310, does not constitute either a breach of the duty of fair representation or coercive activity.

The staff member responsible for preparing the movie industry lists is a longtime Local 100 administrative employee with a large number of duties; her responsibilities relating to the administration of the movie industry referrals including preparation of the lists represent only a very small part of her work for a large and busy local union. Her testimony showed that the mis-placement of three Dayton-area residents in the wrong group in the referral lists was nothing more than a simple mistake; furthermore, the Transportation Captain testified that he used the lists in good faith without knowing of the error. Neither of them had any personal connection to Mr. Robinson and did not even know him at the time he was put in the wrong group, so there was no favoritism toward him, nor was there any intent to disfavor any other applicant.

Clearly, then, there was no deliberate intention to subvert the process to advantage or disadvantage any individual or to coercively encourage union membership in violation of Section 8(b)(1)(A). As the Board has held, the law does not require that “a union must operate an exclusive hiring hall mistake-free.” Contra Costa II, 336 NLRB at 552. In this case, the single instance of a clerical error cannot be seen to be anything other than simple negligence that does not rise to the level of a breach of the duty of fair representation and or violate Section 8(b) in any way.

Counsel for the General Counsel asserted at the hearing that Local 100 should have been particularly careful not to make any mistakes at all because it knew that its movie industry referral system was under “repeated scrutiny” by Region 9. Presumably, this refers to the two prior cases involving Mr. Bucalo that had gone to trial, one of which was decided by the Board and one of which was awaiting a ruling on exceptions to an ALJ decision at the time of the trial in this case. (Notably, the Board has since ruled on the exceptions and rejected the most significant of the ALJ’s recommendations, sustaining the ALJ’s decision only as to a relatively minor, technical violation in the Union’s 2018 policy as discussed further below. Truck Drivers, Chauffeurs & Helpers Local Union No. 100, 370 NLRB No. 36 (Oct. 21, 2020).) This argument should be given no credence.

First, there is no basis for this position in the case law. A union is obliged to operate a hiring hall fairly and in accordance with its rules, but there is no authority for an assertion that the existence of prior ULP charges, even those that are essentially unrelated or that eventually are found to be non-meritorious, somehow creates a heightened standard of care.

Second, a review of the timeline of those cases together with the facts of the present charge makes clear that, when Ms. McFarland was compiling the first set of driver lists in late 2018 and into January 2019, there had been only a single, ALJ decision on the first of Mr. Bucalo’s relevant

prior charges; the second charge had only just been filed, with no complaint issued yet.⁸ This hardly constitutes “repeated scrutiny” of all of the Union’s activities relating to the movie industry referral process. The mere fact that these two charges were pending when Ms. McFarland compiled the lists, in late 2018 and finished in January 2019 was not necessarily indicative to Local 100 that it was somehow subject to increased oversight from the Region. To the contrary, the filing of the charges simply showed that Mr. Bucalo himself was scrutinizing the Union’s actions, which is not at all the same thing. As noted in both of the ALJ decisions in the prior cases, he previously had filed 11 separate ULP charges relating to Local 100’s movie industry referral system just in a period of less than 10 months, from May 18, 2017, to February 2, 2018. (The Administrative Law Judge may take administrative notice of the many other charges he filed after February 2018; two, including the one involving the policy provisions filed in December 2018 and the present one, filed in October 2019, were reflected in the record in this case.)

In addition, the two prior cases that went to the Board did not involve the administrative tasks of a clerical employee in implementing the routine functioning of the film referral policy and the compilation of the driver lists but related to very different issues. The first case, decided by the Board in September 2020, arose in December 2017, long before the written policy was developed.

⁸ The timeline, based on the facts set forth in the two Board decisions, is as follows:

Feb. 2, 2018	Mr. Bucalo files charge no. 09-CB-214166 (over the request for him for “Wicked”).
April 30, 2018	Complaint issues in case no. 09-CB-214166.
May 30, 2018	Local 100 adopts a written policy for movie industry referrals.
June 2018	Local 100 sends new policy and applications to drivers and applicants.
July 30-31, 2018	Trial is held on charge no. 09-CB-214166.
August 2018	Ms. McFarland begins to receive driver applications for categorization into lists; applications received into early 2019.
Sept. 11, 2018	ALJ Gollin issues recommended decision in case no. 09-CB-214166.
Dec. 10, 2018	Mr. Bucalo files the charge in case no. 09-CB-232458 (over provisions of policy).
January 2019	Ms. McFarland completes the first set of driver referral lists, with drivers in Groups 1-VII.
June 13, 2019	Complaint issues in case no. 09-CB-232458.
Oct. 24, 2019	ALJ Amchan issues recommended decision in case no. 09-CB-232458.
Sept. 1, 2020	Board issues decision in case no. 09-CB-214166.
Oct. 21, 2020	Board issues decision in case no. 09-CB-232458.

It involved an isolated situation, when the production company’s transportation department coordinator told Mr. Metzger that another department head had asked if Mr. Bucalo could be assigned to her crew for an upcoming film referred to as “Wicked.” Such a request had never been made before, and Mr. Metzger made an on-the-spot reply that the Union could not refer Mr. Bucalo, a retiree, until the pool of non-retired employees had been exhausted through the experienced-based referral system.⁹

The second case, decided by the Board just days ago, focused on specific provisions of the 2018 written policy, with the primary dispute being the placement of retired drivers in a separate category, to be referred last after all non-retired drivers had been offered the work. The complaint in that case also alleged that the policy’s references to “Teamster movie industry” work were ambiguous and could cause applicants to believe the Union would favor those who had worked under Teamster contracts over those who had non-union movie driving experience.¹⁰

Neither of these charges had anything to do with the compilation of the lists based on the drivers’ resumes, nor did they involve actions that were within Ms. McFarland’s purview as a clerical employee. Therefore, nothing in those cases – even if the second one had not just been filed a month before she finalized the first list – would suggest that the administrative details of the list preparation would be subject to heightened scrutiny.

⁹ The Board in its September 1, 2020, decision upheld without detailed review or analysis the ALJ’s conclusions that the Union had, in the absence of written procedures and with evidence that it had gone outside the normal processes for other purposes such as to provide women drivers on request, improperly refused to honor the employer’s request and that the refusal was based in part on animus toward Mr. Bucalo.

¹⁰ In its October 21, 2020, decision, the Board disagreed with the ALJ’s conclusion that the provision of the policy that put retirees in a separate, and last, category for referrals was unlawful; it held that it was not unreasonable to favor drivers who relied on movie work for income over those who had at least some income from retirements benefits. The Board also found there was no evidence that the decision to do so was made out of animus against Mr. Bucalo. The Board did conclude that the language in the policy referring to “Teamster work” and “the Teamster movie industry,” although it could be read simply to mean driving work as opposed to electrician, gaffer or other work on a film set, also could be read to mean that the policy favored drivers who had worked under a Teamster contract and thus favored workers based on Union membership. Therefore, it concluded that only this portion of the policy was improper.

Obviously, mistakes in the administration of a hiring hall are regrettable, and the Union acknowledges that this mistake resulted in a single driver being offered work that properly should have been offered first to a different individual.¹¹ However, Ms. McFarland's error in thinking that Montgomery County was included with the 18 other counties in three states that composed the local area was understandable, given its proximity to Cincinnati and the fact that the drivers working under Local 100 movie industry contracts have done work there. There is no basis for the suggestion that Ms. McFarland and the Union somehow were on notice of a need to be hyper-vigilant to guard against any mistakes due to the existence of Mr. Bucalo's other charges, such that a heightened standard of care would apply.

The General Counsel at trial also took pains to point out that it was Ms. McFarland who categorized the applicants and compiled the lists, even though the policy states this will be done by the Transportation Captain, and that neither he nor the Union's President and Business Agent "double-checked" her work. First, there is no reason that a union officer cannot delegate tasks to a different person than specified in a policy. In this case, Ms. McFarland is a very experienced administrative employee, who also has access to a computer, scanner and other necessary office equipment.¹² Mr. Metzger's background is as a truck driver in the freight and film industries; he has performed minimal administrative and paper work as the Transportation Captain, but that job mainly involves coordinating logistics for the driving work involved in the actual film production. In addition, the drivers' applications and resumes were returned to the Union hall, not to Mr.

¹¹ Mr. Bucalo pointed out on cross-examination that Ms. McFarland was not disciplined for the error in placement of the Dayton drivers, which was discovered as to Mr. Robinson some nine months after she prepared the first set of lists. There might be many reasons why Local 100 as an employer might choose not to discipline an office employee with an extremely long tenure for a simple mistake, but its decision not to do so cannot somehow be read as ratification of the mistake and is irrelevant.

¹² The ALJ may recall that, when Mr. Metzger testified at the Zoom hearing in this case, he appeared with the name "Sarah McFarland" on the screen because he was using her personal computer; he mainly accesses e-mail on his phone. Tr. 29 (statement of counsel), 128 (McFarland).

Metzger's home some 50 miles away. Finally, as the resumes began to come in, Mr. Metzger – who is not paid by the Local Union, only by a production company when he is actually working – was working on a film and not available, even if he had the capability to do the word processing and organizing required to maintain the documents and prepare the lists. For all of these reasons, the decision of the Local President to assign this task to Ms. McFarland was quite reasonable under all of the circumstances.

Ms. McFarland did acknowledge that no one reviewed the lists to check her work. However, she also stated that she is routinely assigned a good deal of administrative work relating to contract administration and that the officers and business agents normally do not double-check what she has done. Tr. 108, 128-29 (McFarland). Ms. McFarland is quite experienced and, based on her testimony and demeanor at the hearing, obviously intelligent and competent. In addition to compiling the film industry lists – which the Union acknowledges are important, as a driver referred for such work could be well paid – she also is responsible for typing collective bargaining agreements and handling payroll, accounts payable and dues administration for one large employer. Many of Ms. McFarland's duties thus involve important matters, where mistakes could be costly. However, there was no evidence she had a history of making errors, much less significant ones, that would lead the Local Union's officers to feel a need to look over her shoulder or review all of her work in detail; it was not unreasonable for the Local's President to delegate to her the work of compiling the lists or to trust her to do the work without close supervision.

The General Counsel's suggestion that some special duty was imposed because the jobs at issue might be "well paid" – although there is no record evidence that they are better paid than, say, jobs in the construction industry – also is misplaced. As the Board has held, "mere negligence does not violate the duty of fair representation even if an applicant loses an employment

opportunity as a result of the Union’s mistake.” Vosburg Equip., 340 NLRB at 884 (*citing Contra Costa I*). Nearly any error in administration of a hiring hall might involve some economic loss to an applicant, but the Board nonetheless holds that the process is not required to be completely error-free. Furthermore, as noted, the Board has rejected the principle that a union should be held to a higher standard of care in the hiring-hall context than in other areas of its representation of members. To the contrary, it has interpreted potentially ambiguous language in a Supreme Court decision on this point¹³ to mean that, “when a union operates an exclusive hiring hall, its duty of fair representation expands into additional areas, *not* that the union is subject to a higher standard of conduct.” Contra Costa II, 336 NLRB at 549 n.2 (emphasis added), *citing Contra Costa I*, 329 NLRB at 689-90.

Again, the evidence shows only that the mistaken placement of the Dayton drivers was a simple clerical error by a busy administrative employee. It was clear that the Administrative Assistant either overlooked or forgot that Montgomery County was not one of the 18 counties listed; if she failed to double-check the details of the policy to review the list of counties, that would amount to mere negligence at most. However, there is no evidence to support the General Counsel’s assertion that her actions were the result of recklessness or gross negligence. As the Board made clear in Contra Costa II, the law does not require that “a union must operate an exclusive hiring hall mistake-free.” 336 NLRB at 552. Nothing in the record here establishes anything beyond a simple mistake, or mere negligence. Therefore, there was no “violation of either the duty of fair representation or Section 8(b)(1)(A) and (2).” Contra Costa II, 336 NLRB at 550.

¹³ In Breininger v. Sheet Metal Workers International Association Local Union No. 6, 493 U.S. 67, 89 (1989), the Court noted that the duty of fair representation applies to union-operated hiring halls, stating, “if a union does wield additional power in a hiring hall by assuming the employer’s role, its responsibility to exercise that power fairly *increases* rather than *decreases*.” (emphasis in original).

IV. CONCLUSION

Based on the exhibits and testimony offered at the trial and the applicable legal standards, the Respondent, Teamsters Local Union No. 100, respectfully submits that the General Counsel has failed to prove any violation of the Act by the Union. Therefore, the Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief to the Administrative Law Judge was filed electronically with the Division of Judges of the National Labor Relations Board, and was served by electronic mail on Counsel for the General Counsel, Jonathan Duffey, Esq. (jonathan.duffey@nlrb.gov), and on Charging Party Samuel J. Bucalo (sammo1245@aol.com), on this 26th day of October, 2020.

Julie C. Ford