Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters (Beta Productions LLC) *and* Samuel J. Bucalo. Case 09–CB–232458

October 21, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On October 24, 2019, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and Respondent each filed exceptions and a supporting 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, and conclusions only to the extent consistent with this Decision and Order.[1]

I. INTRODUCTION

This case involves the hiring hall rules the Respondent Union promulgated in June 2018 after entering into a settlement agreement that resolved two unfair labor practice charges filed against it by union dissident Samuel Bucalo.[2] That agreement required the Union, among other things, to refer individuals in accordance with written, objective standards. In a nutshell, the rules the Union adopted provide as follows.

First, resident active (i.e., non-retiree) drivers are given priority over nonresident active drivers.

Second, all active drivers—regardless of their residence—are given priority over retirees, i.e., individuals who currently receive a pension or Social Security retirement benefits. Thus, the rules place retired drivers such as Bucalo in the lowest priority group, below active drivers who reside both within and outside the Union's territorial jurisdiction. Applying *Wright Line*,[3] the judge found the preference for all active drivers over retired drivers was motivated by animus towards Bucalo's dissident union activities and therefore unlawful.

Third, resident active drivers are given priority over other resident active drivers depending upon their experience performing "Teamster work" in the "Teamsters Movie Industry" (and the same is true with respect to the nonresident active drivers). The judge found that this provision was also unlawful.

The Respondent excepts, claiming that the complaint should be dismissed in its entirety. The General Counsel also excepts, contending, among other things, that the preference for active drivers is unlawfully arbitrary even absent evidence of unlawful motivation. As explained below, we reverse the judge's *Wright Line* finding, and we find no merit in the General Counsel's exception. We agree, however, that granting priority to drivers based on experience performing "Teamster work" in the "Teamsters Movie Industry" is unlawful.

II. ANALYSIS

A. The Preference for Active Drivers Over Retirees

We disagree with the judge's finding that the Respondent's decision to place retirees in the lowest priority group for referral to film work was unlawful under the *Wright Line* analytical framework.[4] *Wright Line* requires proof of unlawful motivation. Although the Respondent knew of Bucalo's dissident union activity prior to promulgating the referral rules, we find that the General Counsel failed to carry his burden of showing that the Union structured its referral preferences the way it did because of opposition to Bucalo's dissident union activity.

The judge cited three reasons in support of his finding the referral preferences unlawfully motivated. First, the judge observed that Bucalo's "name came up in the Union's discussions during the drafting of the referral policy for reasons not adequately explained." But, as the judge noted elsewhere, Transportation Captain Metzger mentioned Bucalo's name in the context of discussing his desire for rules to address *absenteeism*. The record indicates that Metzger truthfully stated that Bucalo had missed work recently, but that fortunately, he (Metzger) had been able to find someone to cover for Bucalo. In addition, the record in *Wicked Films*, of which the judge took administrative notice by agreement of the parties, shows that before referring Bucalo to work on a different movie, Metzger had told him that drivers were not allowed to miss work, and that Bucalo missed work on that job. In these

[1] We shall modify the judge's recommended Order to conform to our findings and 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.

[2] We recently found, in connection with another unfair labor practice charge filed by Bucalo, that the Respondent Union violated Sec. 8(b)(2) and 8(b)(1)(A) by failing to refer Bucalo to a job in early 2018. See *Truck Drivers, Chauffeurs & Helpers Union Local No. 100 (Wicked Films, LLC)*, 370 NLRB No. 15 (2020) (*Wicked Films*).

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[4] Chairman Ring agrees that the Union treated retirees lawfully under its referral rules, but he expresses no view as to whether Sec. 8(b)(2) allegations should be analyzed under *Wright Line*.

circumstances, the mere fact that Bucalo's name "came up" in discussions of absenteeism does not support a finding that the Union's treatment of retirees for referral purposes was unlawfully motivated.

Second, the judge noted that the Union was obligated to promulgate referral rules as a result of unfair labor practice charges filed by Bucalo. However, the judge points to no evidence that any Union official was angry or resentful about having to promulgate written referral rules. And the settlement agreement that required the Union to do so contained a nonadmissions clause and thus does not constitute evidence of animus. See *Metal Assemblies, Inc.*, 156 NLRB 194, 194 fn. 1, 200 fn. 16 (1965). Neither do the allegations in Bucalo's settled charges. See *Diamond Electric Mfg. Corp.*, 346 NLRB 857, 859 (2006) (rejecting claim that presettlement allegations constituted evidence of animus where the allegations were encompassed by an informal settlement agreement containing a nonadmissions clause); accord *BPH & Co., Inc. v. NLRB*, 333 F.3d 213, 222 (D.C. Cir. 2003) (Where parties enter into an informal settlement agreement containing a nonadmissions clause, the charged party "has not agreed to remedy *unfair labor practices*. Rather, [it] has agreed to take certain actions to secure a dismissal of the pending unfair labor practice charges—nothing more and nothing less.") (emphasis in original). Accordingly, we find that the second factor relied on by the judge does not support a finding of unlawful motivation.

Third, the referral rules went through three drafts, and the judge found that the Union did not adequately explain the change in the treatment of retirees from draft to draft. The initial draft placed retirees in the lowest priority group. After a handful of experienced drivers with whom the Union was consulting opined that resident retirees should be afforded preference over nonresident (but not resident) active drivers, a union attorney circulated a second draft incorporating that suggestion. Subsequently, however, the Union's executive board decided that it was not appropriate to put retirees ahead of nonresidents who were trying make a living, and the Union's attorney revised the second draft accordingly.

We disagree with the judge's finding that the changes from draft to draft were inadequately explained. The experienced drivers suggested a change, and the Union's attorney revised the initial draft to incorporate their suggestion. There is no evidence that the Union's seven-member executive board instructed the attorney to do so, and there is no evidence that the Union delegated final decision-making authority over the referral rules to this handful of experienced drivers. It strikes us as entirely reasonable, therefore, that the Union's executive board decided to review the recommendation of the experienced drivers. Moreover, no version of the rules treated resident retirees (such as Bucalo) on par with resident active drivers. And the testimony of Union President Webster, who was at the April 25 executive board meeting, and Union Attorney Ford, who participated in part of the meeting via conference call, shows that the executive board concluded that active drivers, whether resident or nonresident, deserve priority over retirees because the latter receive a pension or Social Security retirement benefit. Accordingly, we find that the third reason relied on by the judge is also insufficient to warrant a finding of unlawful motivation.

In finding that the General Counsel did not prove that the Respondent's placement of retirees in the lowest preference category was unlawfully motivated, we have also considered whether the record in *Wicked Films*, supra, supports a finding of unlawful motivation here. We conclude that it does not. Preliminarily, we note in this regard that Judge Gollin, who presided over that case, did not find any evidence that Union President Webster or Transportation Captain Metzger made any unlawful threats to retaliate against Bucalo.

We recognize that in addition to finding that the Union's failure to refer Bucalo was unlawful under the duty-of-fair-representation framework, Judge Gollin found that the same failure was also unlawful under *Wright Line*.[5] In this regard, Judge Gollin inferred unlawful motivation from (a) President Webster's comment regarding Bucalo's Facebook post criticizing Webster and his administration, (b) the Union's deviations from its alleged practice of referring active drivers in order of their placement on the active list ahead of registered retiree drivers, and (c) the Union's disparate handling of employer requests. Judge Amchan adopted Judge Gollin's findings.

We find this evidence insufficient to support a finding of unlawful motivation here. First, Webster's Facebook comment contained no threat of reprisal or force or promise of benefit.[6] Accordingly, it was protected by Section

[5] In *Wicked Films*, we found it unnecessary to pass on the judge's finding that the Union's failure to refer Bucalo was unlawful under *Wright Line*. 370 NLRB No. 15, slip op. at 1 fn. 1.

[6] After unsuccessfully running for union president, Bucalo posted an open letter on Facebook, which stated, "I am ashamed [of Webster] for his dishonesty and for his selling-out the membership. I believe his legacy will be that he fostered corruption and weak leadership at the Union hall." Bucalo blamed his loss on poor voter turnout, and he asserted that there was a spoiler slate whose organizer "was paid-off by Webster and UPS" to ensure victory "by Webster and his evil minions."

On January 1, 2017, Webster posted the following response:

> All this coming from the man who has cost our local union (members' dues) more than any man in the history of our great local because of the attorney fees we've had to spend on all the frivolous charges he has brought forward. I suppose after these latest protests and charges are

8(c)[7] and cannot constitute evidence of an unfair labor practice.[8] In any event, Webster wrote the comment nearly a year and a half before the Respondent promulgated the rules in question. Second, none of the deviations cited by the judge involved retirees being referred to jobs ahead of active drivers who could perform the work in question. As for the Union's alleged disparate handling of employer requests, Judge Gollin did not cite any instance in which the Union had honored a name request for a retiree when there was an available active driver capable of performing the work, as there was when the employer in *Wicked Films* requested Bucalo to work as a set decoration driver.[9] Judge Gollin also relied on the Union's honoring another employer's request for female drivers, but the record showed that the Union honored the request by referring *active* female drivers. Moreover, while Judge Gollin found that the referred female drivers were not registered at the time of the employer request, there is no evidence that any of the retired drivers who had expressed interest in being referred for film work were female drivers, so the Union could not have satisfied that employer's request for female drivers by referring one of those retired drivers.

In sum, we find that the record in this case, whether considered in isolation or together with the record in *Wicked Films*, falls short of establishing that the Respondent Union placed retirees last because of Bucalo's dissident union activity. Accordingly, we reverse the judge's *Wright Line* finding.[10]

B. The Respondent Union's Classification of Employees According to Experience in the "Teamsters Movie Industry" and the Number of Productions on Which They Have Been Performing "Teamster Work"

Where, as in this case, a union operates an exclusive hiring hall, "it must refer applicants . . . without regard to union affiliation." *NLRB v. IBEW, Local Union 112*, 827 F.2d 530, 532 (9th Cir. 1987). It is also unlawful, outside the construction industry, for a union to grant referral preferences based on prior employment with union-signatory employers. *Newspaper & Mail Deliverers (New York Post)*, 361 NLRB 245, 245, 248 (2014), enfd. 644 Fed. Appx. 16 (2d Cir. 2016). "Such discrimination violates the Act because it favors those who are union members and/or are or have been employed by union-signatory employers, and disfavors individuals who have exercised their Section 7 right to refrain from union activity." Id. at 248.[11]

We find that the Union's hiring hall rules may reasonably be read as granting such preferences. Thus, for example, the rules provide that in order to be placed in the

dismissed he will blame it on Russian interference. We invite, welcome, any member to come to the union hall and inspect our financial records. Perhaps it's time for Mr. Bucalo to start writing for the "National Enquirer"! Wishing everyone a most happy, healthy and prosperous New Year.

[7] Sec. 8(c) of the Act provides that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit." See, e.g., *Children's Center for Behavioral Development*, 347 NLRB 35, 35–36 (2006) (employer's public criticism of union for causing it to incur legal expenses protected by Sec. 8(c)).

[8] See *United Site Services of California, Inc.*, 369 NLRB No. 137, slip op. at 14 fn. 68 (2020).

[9] The record in *Wicked Films* established that the individual referred to work as a set decoration driver was qualified to perform the work.

[10] The General Counsel excepts to the judge's failure to find the Union's preference for active drivers over retirees who receive a pension or Social Security retirement benefit unlawfully arbitrary. We find no merit in this exception. Union actions are arbitrary only if the union's conduct is "so far outside a 'wide range of reasonableness' as to be irrational." *Air Line Pilots Assn., Intern. v. O'Neill*, 499 U.S. 65, 67 (1991) (citation omitted); see *Roadway Express, Inc.*, 355 NLRB 197, 202 fn. 22 (2010), enfd. mem. per curiam 427 Fed. Appx. 838 (11th Cir. 2011). Under the terms of a settlement agreement, the Union was required to formulate written, objective referral standards. In doing so, it had to accord some registrants priority over others, and there was nothing irrational in its decision to accord priority to those who depend on referrals to earn a living over those who draw a pension or receive Social Security. Indeed, the General Counsel concedes that as an abstract matter, giving priority to active drivers over retirees is "laudable" as a matter of policy. The General Counsel nevertheless argues that the Union's conduct was arbitrary, but his arguments cannot withstand scrutiny under the applicable "wide range of reasonableness" standard.

We note that the General Counsel does not invoke the *Ohio Contractors* rebuttable presumption under the duty-of-fair-representation framework, which provides that "[w]hen a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power." *Local 18, Operating Engineers (Ohio Contractors Assn.)*, 204 NLRB 681, 681 (1973), enf. denied on other grounds 555 F.2d 552 (6th Cir. 1977). We agree that the presumption does not apply here. The preference for active drivers over retirees would not presumptively encourage membership—i.e., it would not encourage employees to be "good" members and refrain from dissident union activity—because union dissidents enjoy the preference so long as they do not retire, and drivers who retire and receive a pension or Social Security are no longer entitled to the preference even if they were "good" union members before retiring. Cf. *NLRB v. New York Typographical Union No. 6*, 632 F.2d 171, 182 (2d Cir. 1980) (preference accorded to Category A employees over all other employees did not violate Sec. 8(b)(2) and (1)(A) because there was no rational basis for inferring that the preference would have the effect of encouraging union membership or restraining employees in the exercise of their Sec. 7 rights).

[11] The Board has held that Sec. 8(f)(4) of the Act immunizes agreements in the construction industry under which referral preference is given to applicants represented by the union at places of prior employment. See *Bechtel Power Corp.*, 229 NLRB 613, 613 (1977), vacated 597 F.2d 1331 (10th Cir. 1979); *Interstate Electric Co.*, 227 NLRB 1996, 1996–1999 (1977). However, driving work in the motion picture industry is not construction-industry work, and the Union does not invoke Sec. 8(f)(4).

second-highest priority group for referrals (Group II), the applicant must, among other things, "have two (2) or more years of experience in the *Teamsters Movie Industry* . . . and . . . been *employed performing Teamster work* in the Movie Industry on at least three productions in the past two (2) years in the geographical jurisdiction of the Union" (emphasis added).

The Respondent Union contends that no violation may be found because the language in question was not intended to grant any such preferences but was merely intended to give priority to employees with experience performing the *driving work* that Teamsters-represented employees typically perform in the motion picture industry. That may well be, but we agree with the judge that "such a distinction would not necessarily be apparent to a lay person reading the referral rules" because the rules do not afford preference to employees based on their *driving* experience.[12] The Union also points out that the referral rules provide that the Union shall not discriminate based on membership or nonmembership in the Union. However, this language does not give any assurance that the Union will not discriminate on the basis of experience with Teamsters-signatory employers. "[A]t best," as the judge noted, the rules "create an ambiguity which must be resolved against the Union."

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) Operating an exclusive hiring hall pursuant to a referral procedure and rules that describe the requisite work experience as "Teamster work" or experience in the "Teamsters Movie Industry."

(b) 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) Revise its referral procedure and rules to delete the description of the requisite work experience as "Teamster work" or experience in the "Teamsters Movie Industry."

(b) Post at its offices in Cincinnati, Ohio, copies of the attached notice marked "Appendix."[13] 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.

(c) Sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by Beta Productions, if willing, at all places or in the same manner as notices to employees are customarily posted.

(d) 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 Respondent has taken to comply.

Dated, Washington, D.C. October 21, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[12] See *Operating Engineers Local 132 (National Engineering Contracting Co.)*, 266 NLRB 977, 980–981 (1983) (rejecting argument that provision granting referral preference to "parent body members who are physically handicapped or fifty (50) years of age or older" was lawful because the reference to "parent body members" was merely intended to denote employees who possess 3 years' experience, and stating that the argument "is not meritorious because the clause does not provide that operators with 3 or more years' experience who are physically handicapped or 50 years or older will have preference . . . ; it provides that parent body members meeting such criteria will be accorded the preference").

[13] If the Union's office is open to members and employees, the notice must be posted by the Respondent and delivered to the Regional Director for posting by the Employer, if it wishes, 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 and delivered 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."

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 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 operate our exclusive hiring hall pursuant to referral procedures and rules that describe the requisite work experience as "Teamster work" or experience in the "Teamsters Movie Industry."

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL revise our Movie Industry Referral Procedure and Rules to delete the description of the requisite work experience in the referral groups as "Teamster work" or experience in the "Teamsters Movie Industry."

TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION 100, A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS (BETA PRODUCTIONS LLC)

The Board's decision can be found at www.nlrb.gov/case/09-CB-232458 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.

Naima R. Clarke, Esq., for the General Counsel.
John R. Doll and *Julie C. Ford, Esqs. (Doll, Jensen, and Ford, Dayton, Ohio)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, ADMINISTRATIVE LAW JUDGE. This case was tried on August 26 and 27, 2019, in Cincinnati, Ohio. Samuel J. Bucalo filed the charge giving rise to this case on December 10, 2018. The General Counsel issued the complaint on June 13, 2019.

The General Counsel alleges that Respondent violated Section 8(b)(1)(A) of the Act by promulgating on June 26, 2018, and since maintaining an illegal hiring hall referral system for the motion picture industry. According to the General Counsel this system is illegal in classifying all "retirees," that is job applicants who are receiving a pension, other retirement benefits and/or social security benefits in the lowest of seven referral categories. Thus, these employees are referred to jobs in the movie industry only after those applicants in the first six categories. The General Counsel alleges that the classification of retirees in the lowest preference group was motivated by a desire to discriminate against the Charging Party, Samuel Bucalo, in retaliation for his dissident activities. The General Counsel further alleges that Respondent violated Section 8(b)(1)(A) and 8(b)(2) by refusing to register the Charging Party Bucalo in the second highest group for referral due to his union dissident activity.

The General Counsel also alleges that the hiring hall rules are illegal on their face because they classify employees according to work in the "Teamster Movie Industry" and the number of productions on which they have been performing "Teamsters work," complaint paragraphs 6(a)(iii) and 8.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Beta Productions is a limited liability company engaged in the production of nationally distributed motion pictures. Beta has an office in Cincinnati, Ohio. The Respondent Union, Teamsters Local 100, is a labor organization within the meaning of the Act. The Union and Beta Productions are parties to an agreement requiring that the Union be the exclusive source of referrals for vehicle driving work for Beta and other film production companies in the Cincinnati/Northern Kentucky Area (G.C. Exh. 20).

II. ALLEGED UNFAIR LABOR PRACTICES

In July 2018, the same parties litigated case 09–CB–214166. On September 11, 2018, Administrative Law Judge Andrew Gollin rendered a decision in that case which is currently pending before the Board. I have adopted all of Judge Gollin's relevant factual findings in the current case.

Judge Gollin found that Respondent violated Section 8(b)(1)(A) and 8(b)(2) in failing or refusing to refer Samuel Bucalo for work with as a driver for the film *Extremely Wicked* with a different production company in early 2018. The principal issue in the instant case is different, i.e., whether the referral rules

[1] Tr. 385, line 7 should read 2017 rather than 2014.

promulgated by the Union in June 2018 (G.C. Exh. 6) violate the Act and whether Respondent violated the Act by placing Samuel Bucalo and possibly other retirees in the least desirable referral category.

Charging Party Samuel Bucalo's History with the Union

Samuel Bucalo became a member of the Union in March 1979, after he began working for United Parcel Service ("UPS"). By 2010, Bucalo was earning about $60,000 a year at 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, at a salary of between $92,000-$97,000 a year. Upon election to the Union position, Bucalo did not, as do many, or possibly all other union officers, take a leave of absence from their employer. UPS employees represented by the Teamsters are allowed by contract to return to work for UPS when their union position ends without a loss of seniority or other benefits.

Bucalo, however, attempted to continue working 1 day a week instead of seeking a leave of absence. UPS would not agree to this, so Bucalo retired because he understood that UPS would terminate him.[2] Thus, in early January 2011, after he was elected, Bucalo retired from UPS and thereafter began receiving pension benefits. At the time Bucalo was 51 years old. Bucalo receives a pension from UPS of $2323 a month from which taxes and health insurance premiums are deducted. I infer that this amount is based on his age and/or length of service with UPS. Although, the record is not clear on this point, I infer that Bucalo received this pension in addition to his $92,000–97,000 yearly salary as secretary-treasurer of the Union from 2011–2016.

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 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 three-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. 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 lost to Webster. Following the election, Bucalo filed protests regarding the election campaign, and he filed internal Union charges. Again, 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. Bucalo disputes his retiree status. He filed an unfair labor practice charge against the Union asserting that the Union is violating the Act by classifying him as a retiree. The Region declined to issue a complaint based on this charge.

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. Bucalo was particularly critical of Union President Webster and his slate of candidates during the 2016 Union election. Prior to, during, and after the election, 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." 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 election. 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. On around June 9, 2017, the Union added Bucalo's name to that referral list as a retiree. Thereafter, Bucalo notified the Union on a monthly basis that he was interested in being referred out.

The Union's Film and Television Referral System

The Union operates multiple referral systems, including referral systems for construction, pipeline work, 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 unit 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

[2] Bucalo's explanation of what happened with UPS is at Tr. 213–226. It appears that rather than take a leave of absence, Bucalo planned to work 1 day a week and then repeatedly notify UPS 48 hours in advance that he would be off work for union business. He conceded that, "I think it was something unique that I was trying" (Tr. 218).

applicable provisions of law.

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

The film and television work in the Cincinnati and Northern Kentucky area is sporadic but lucrative. Very few films were made in this area between 2000 and 2014. Since 2014, there have been many more films produced in the area than previously. 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). Since 2017, Teamster drivers worked on films such as *Extremely Wicked* (January–March 2018), *London Calling* (June 2018), *Point Blank* (August 2018) and *Dry Run* (January 2019). The Union referred Bucalo to work on *Donnybrook, Point Blank and Dry Run*. 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. Their fringe benefits and meal allowances are paid in cash and are 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 who is available and interested in working on a film. He/she also 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 and Local 100 pays his or her union dues. In 2014, Union President Webster appointed Craig Metzger to be the Union's film and television transportation captain. If more than one film is being produced at the same time, there will be more than one transportation captain.

Bucalo's Prior Unfair Labor Practice Charges Regarding the 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 and the one litigated before Judge Gollin. According to the parties' stipulations in Judge Gollin's case, 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 lists; and (5) the Union failed to provide Bucalo with a copy of the film and television referral lists. 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 non-admissions clause. Bucalo declined to join, and later appealed the Settlement Agreement. His appeal was sustained in part but was denied insofar as it is relevant to this proceeding on November 7, 2018.

As part of the settlement agreement, the Union agreed to "operate our exclusive hiring hall for Film and TV work by using written, objective criteria and standards when making referrals" and to "maintain records and rules of the operation of our 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. Thereafter, on June 26, 2018, the Union promulgated the written referral procedures and rules for its film and television referral service which are the subject of the instant proceeding. (G.C. Exh. 6).

The Union Promulgates Movie Industry Referral Procedure and Rules

Shortly after its settlement with the Region, the Union began drafting referral rules for the movie industry. The principal individuals involved in the drafting were Union President Webster, Transportation Captain Metzger and the Union's outside legal counsel, Julie Ford. Other union members were consulted in the process. At a meeting on December 14, 2017, Metzger specifically brought Bucalo's name up. Metzger stated that Bucalo had called off of work on one occasion without explanation. Bucalo testified in this proceeding that he was sick. Metzger testified he brought this up as a reason that absenteeism and tardiness had to be addressed in the rules (Exh. R–8).

The initial draft rules sent by Ford to Webster and Metzger around February 1, 2018, placed job applicants in six categories (R. Exh. 9). Those who were receiving retirement benefits from any source or social security benefits were placed in the lowest category (G.C. Exh. 3). This placement scheme would have a greater impact on Charging Party Bucalo than most other retirees because most union retirees are not interested in regular employment (Tr. 110–111).

A later draft sent by Ford in about March 2018, placed retirees residing in the greater Cincinnati Tri-State Area (parts of Ohio, Indiana, and Kentucky) in Group III of VI (R. Exhs. 11 and 12; G.C. Exh. 4). This gave such retirees a preferred status for film industry referrals relative to applicants in Groups IV and V and VI. Those Groups are for applicants not residing in the Greater Cincinnati area. According to Ford, this change was based on comments made by three experienced drivers at a meeting occurring between December 2017, and April 2018.

The final version of the rules put retirees living in the Tri-State Area in a new Group VII, the lowest and least desirable category (G.C. Exh. 6).[3] Thus, retirees have lower priority than non-retirees from outside the Greater Cincinnati area. Ford testified that this change was made pursuant to comments made by an

[3] The Rules do not mention retirees living outside the of the Greater Cincinnati area. This appears to be inadvertent.

unidentified executive board member or members at an executive board meeting on April 25, 2018. Union counsel Ford participated in the April 25, 2018 meeting by speaker phone and then only for part of the meeting.

According to Ford, the participants in the April 25 meeting took the position that individuals living, for example, in the Cleveland or Columbus area, who were not receiving a pension should have preference over retirees living in the Greater Cincinnati area (Tr. 437–439). Ford testified that this unnamed individual or individuals, also opined that putting retirees in the lowest referral category was consistent with the Union's referral policy for the film industry at least since 2014.[4] All members of the executive board were on the slate of officers headed by David Webster in 2016 who ran against Bucalo. There is no evidence of what other deliberations by the executive board led to the reversion back to the original concept.

All drafts contained language proving that each applicant be placed in the highest priority group for which he or she qualified. The final rules were approved by the Executive Board and implemented on June 26, 2018 (G.C. Exh. 2). The Union required each interested recipient of the new rules to submit an application and a resume. Sarah McFarland, the Local's administrative assistant, placed the applicants in the various groups. She placed Bucalo in group 7.

The introductory language to Local 100's referral procedure and rules state in pertinent part:

> 1. The Union shall refer applicants for employment and apply these procedures and rules without discrimination against such applicants by reason of membership or nonmembership in the Union, and such referral shall not be affected in any way by rules, regulations, bylaws, constitutional provisions or any other aspect or obligation of Union membership policies or requirements.

The final seven groups are as follows:

> Group I
>
> All applicants for employment who have four (4) or more years of experience in the Movie Industry, who are residents of the geographical area constituting the normal Movie Industry labor market in the Greater Cincinnati /Tri -State area and who have been employed performing Teamster work in the Movie Industry on at least six productions in the past four (4) years in the geographical jurisdiction of the Union. The Tri -State area shall be defined to include: 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.
>
> Group II
>
> All applicants for employment, who have two (2) or more years of experience in the Teamsters Movie Industry, are residents of the geographical area constituting the normal Movie Industry labor market in the greater Cincinnati /Tri -State area and who have been employed performing Teamster work in the Movie Industry on at least three productions in the past two (2) years in the geographical jurisdiction of the Union.
>
> Group III
>
> All applicants for employment who have not worked in the Teamster Movie Industry trade, who are residents of the geographical area constituting the normal Movie Industry labor market in the greater Cincinnati /Tri -State area and who have a valid Class A CDL?
>
> Group IV
>
> All applicants for employment who have four (4) or more years of experience in the Teamsters Movie Industry trade, who have been employed performing Teamster work in the Movie Industry on at least six productions in the past four (4) years, who have a valid Class A CDL and who are not residents of the geographical area constituting the normal Movie Industry labor market in the greater Cincinnati /Tri -State area.
>
> Group V
>
> All applicants for employment who have worked in the Teamster Movie Industry trade for more than one (1) year, who have a valid Class A CDL and who are not residents of the geographical area constituting the normal Movie Industry labor market in the greater Cincinnati /Tri -State area.
>
> Group VI
>
> All applicants for employment who have not worked in the Teamster Movie Industry trade, who are not residents of the geographical area constituting the normal Movie Industry labor market in the greater Cincinnati /Tri -State area and who have a valid Class A CDL?
>
> Group VII
>
> All applicants for employment, whether or not they have worked in the Teamster Movie Industry, who are residents of the geographical area constituting the normal Movie Industry labor market in the greater Cincinnati /Tri -State area, who have a valid Class A CDL and who are receiving pension or retirement benefits from any source or Social Security retirement benefits.

ANALYSIS

Respondent Violated the Act in Placing Retirees in the Lowest Preference Category for Referral for Film Work

Respondent Union owes a duty of fair representation to its members. A union's duty of fair representation applies to all union activity. A union may not treat a unit employee in a manner that is arbitrary, discriminatory or in bad faith, *Vaca v. Sipes,* 386 U.S. 171 (1967); *Steelworkers v. Rawson,* 495 U.S. 362 (1990); *Air Line Pilots Assn. v. O'Neil,* 499 U.S. 65 (1991). A union, such as Respondent, which operates an exclusive hiring hall violates Section 8(b)(1)(A) and possibly 8(b)(2) if it discriminates against employees for dissident union activities, such as running against the incumbent officers, *Development Consultants,* 300

[4] Respondent has not established that it had an established past practice of referring retirees to film industry jobs only after exhausting efforts to find other drivers. The only example given, from 2000, occurred under very different circumstances.

NLRB 479 (1990), *Chauffeurs Union Local 923, Teamsters (Yellow Cab Co.),* 172 NLRB 2137 (1968), *Laborers Local 158 (Contractors of Pennsylvania)* 280 NLRB 1100 (1986).[5]

When a union interferes with an employee's employment status for reasons other than failure to pay dues, initiation fees, or other uniformly required fees, a rebuttable presumption arises that the interference is intended to encourage union membership in violation of Section 8(b)(1)(A) of the Act. Once the General Counsel establishes union interference with a member's employment status, the union bears the burden of establishing the such interference was made pursuant to a valid hiring-hall provision, or that its conduct was necessary for effective performance of its representational function, *IATSE Local 151 (SMG and the Freeman Cos., d/b/a Freeman Decorating Services),* 364 NLRB No. 89, slip opinion at p. 2 (2016).

Putting aside the Union's animus towards Bucalo, a policy placing retirees in the lowest referral category would not be illegal. The Union has a valid reason for giving preference to drivers who have no income over those receiving a pension or social security benefits.

However, this case involves the issue of motivation., i.e., whether Local 100's decision to do this was the product of its animus towards Bucalo for his dissident union activities. As in cases against an employer-respondent under Section 8(a)(3) and (1), to establish a violation of Section 8(b)(1)(A) and (b)(2) the General Counsel must make an initial showing that Local 100 either put retirees in the lowest category or placed Bucalo into that category due to his dissent union activity, *SSA Pacific Inc.,* 366 NLRB No.51 (slip op. at 1) (2018); *Teamsters Union No. 200,* 357 NLRB 1844, 1852 (2011) affd. 723 F. 3d 778 (7th Cir. 2013). The General Counsel has satisfied his initial burden by establishing that Bucalo engaged in dissident union activity, that the Union knew of that activity, had animus towards that activity and that Bucalo suffered an adverse action [being placed in the lowest referral group].

Once that showing is made, the Union must show that would not put retirees and/or Bucalo in the lowest referral category in the absence of an unlawful motive, *CNN America, Inc.,* 361 NLRB 439, 458–459 (2014) (enfd. in relevant part, 865 F.3d 740 (D.C. Cir. 2017) and cases cited therein. The appropriate test for such discrimination generally is set forth in *Wright Line,* 251 NLRB 1083 (1980) enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.,* 462 U.S. 393 (1983).

Respondent does not meet its burden by simply showing that it had a legitimate reason for its action, it must persuasively show that it would have taken the same action in the absence of the protected conduct. This is the decisive principle in this case. Local 100 clearly has a legitimate reason for placing retirees in the lowest referral category. However, it has not shown that absent its animus towards Bucalo, that it would have structured its referral preferences as it did.

Respondent has not met its burden in this case. The record is replete with evidence from which I infer animus towards Bucalo's dissident activities. His name came up in the Union's discussions during the drafting of the referral policy for reasons not adequately explained. Moreover, the Union was obligated to go through the rules promulgation process as the result of a ULP charge filed by Bucalo. The Union has not adequately explained the change in the drafts

which in its last form placed retirees, including Bucalo in the lowest category.[6] For example, no witness who was present at the April 25 meeting testified to the deliberations resulting in the change from the second draft to the third with regard to retirees.

Bucalo clearly falls within the plain meaning of the applicants described in Group II, being a local resident, with 2 years' experience in the film industry, who has worked on at least three films within the 2 years prior to June 2018. It is irrelevant that other retirees, who have not engaged in dissident activity are also disadvantaged by being placed in Group 7. Being in receipt of a full pension, this classification is not be as important to these individuals as it is to Bucalo. Moreover, if they are comfortable with their pension income, they are free to decline film work when called by the transportation captain.

In sum, I find that Respondent has not met in burden of rebutting the General Counsel's initial showing of discrimination. It has not established that Bucalo and other retirees were placed in Group 7 for non-discriminatory reasons.

Respondent's Referral Rules Violate Section 8(b)(1)(A) of the Act in Classifying Employees According to Experience in the "Teamster Movie Industry" and the Number of Productions on Which They Have Been Performing "Teamsters Work."

While the introductory language of Respondent's referral rules assure that the Union will not discriminate on the basis of union membership, the expressed requirement of experience in "Teamster work" and reference to the "Teamsters Movie Industry" at best create an ambiguity which must be resolved against the Union. Respondent explained that its intent was to distinguish between driving work on movie sets as opposed to work not done by Teamster represented employees. Nevertheless, such a distinction would not necessarily be apparent to a lay person reading the referral rules.

Respondent Did Not Violate Section 8(b)(2) of the Act

The is no evidence that Respondent caused or attempted to cause an employer to discriminate against any employee. There is, for example, no evidence that Charging Party Bucalo suffered any loss of employment opportunities by virtue of being classified in Group VII. However, if in compliance it turns out that he did suffer such a loss due to the manner in which he was classified, Respondent will be required to make him whole for such losses.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the

[5] If the hiring hall is not an exclusive hiring hall, such discrimination only violates Sec. 8(b)(1)(A), but not 8(b)(2).

[6] I see no basis for taking into account the fact that Bucalo put himself into the position of having to live off an inadequate pension due to his "unique" machinations when he was elected to union office in 2010. Had he done what every other union official did, he could have gone back to work for UPS in 2016.

policies of the Act,

In the event it is established that Samuel Bucalo is entitled to backpay, it 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,* 356 NLRB 6 (2010). Respondent shall compensate him for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings, computed as described above.

Respondent shall file a report with the Regional Director for Region 9 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Samuel Bucalo for the adverse tax consequences, if any, of receiving one or more lumpsum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey,* 363 NLRB 1324 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Truck Drivers, Chauffeurs and Helpers Local Union No. 100, Cincinnati, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Operating an exclusive hiring hall while using a referral procedure and rules which place retired employees in a distinct category which results in their being referred for work in the film industry only after non-retirees are referred.

(b) Operating an exclusive hiring hall pursuant to a referral procedure and rules which describes the requisite work experience as "Teamster work" or experience in the "Teamster Movie Industry" as opposed to a description of the work to be performed that does not ambiguously suggest a preference for membership in Local 100.

(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) Revise its hiring hall procedure and rules to delete any provision that places retirees in a category that results in their being referred to work only after non-retirees are referred.

(b) Revise its referral procedure and rules to describe the work covered by the rules in such a manner as to unambiguously convey the proposition that membership or non-membership in the Union, past or present, will not be a factor in the referral of employees for work in the film industry.

(c) Make Samuel Bucalo whole for any loss of earnings and other benefits suffered as a result of being referred for film industry work pursuant to a policy that resulted in his being referred only after all non-retired job applicants.

(d) Within 14 days after service by the Region, post at its hiring hall in Cincinnati, Ohio copies of the attached notice marked "Appendix"[8] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to unit 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 Respondent customarily communicates with unit members by such means. Reasonable steps shall be taken by the Respondent 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 Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all individuals who were unit members at any time since June 26, 2018.

(e) Sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by Beta Productions, if willing, at all places or in the same manner as notices to employees are customarily posted.

(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 Respondent has taken to comply.

Dated, Washington, D.C. October 24, 2019

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 discriminate against retired employees vis-à-vis non-retired employees in referring applicants for work in the film industry.

WE WILL NOT operate our exclusive hiring hall pursuant to procedures and rules which ambiguously suggest that an applicant must be a member of Local 100 in order to be referred for work

[7] 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.

[8] 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."

in the film industry.

WE WILL revise our Movie Industry Referral Procedure and Rules to eliminate any potential for discrimination in referral opportunities for job applicants who are receiving a pension or retirement benefits from any source or Social Security retirement benefits.

WE WILL revise our Movie Industry Referral Procedure and Rules to describe the work to be performed without any reference to "Teamster Work," or experience in the "Teamster Movie Industry."

WE WILL make Samuel Bucalo whole for any loss of earnings and other benefits which may have resulted from his being placed in the lowest priority group for referrals in the film industry, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Bucalo for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION 100, A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS (BETA PRODUCTIONS LLC)

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CB-232458 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.