International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 720, AFL–CIO, CLC (Production Support Services, Inc.) *and* Michael Young. Case 28–CB–6555

August 22, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On December 26, 2007, Administrative Law Judge John J. McCarrick issued the attached decision.[1] Charging Party Michael Young, appearing pro se, filed exceptions and a supporting brief and the Union filed an answering brief.

The National Labor Relations Board[2] 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[3] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] By Board Orders dated May 21 and June 24, 2008, respectively, Cases 28–CB–6336 (Steven Lucas) and 28–CB–6582 (Michael Serwe) were severed from this proceeding and remanded to the Regional Director for Region 28 of the National Labor Relations Board for further appropriate action in light of the parties' non-Board settlement agreements. Thus, this decision concerns only Case 28–CB–6555.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] The Charging Party argues that a union operating a hiring hall and referral system cannot under any circumstance suspend a referent for failing to pay a union fine and, therefore, the Union violated Sec. 8(b)(1)(A) and (2) of the Act by maintaining rules providing that failure to pay a Union fine will result in an employee's suspension from the referral system until the fine is paid. We do not pass on the Charging Party's argument because it exceeds the scope of the General Counsel's theory of the case as alleged in the complaint and proffered at the hearing. *Kimtruss Corp.*, 305 NLRB 710, 711 (1991) (the charging party cannot enlarge upon or change the General Counsel's theory of the case). Accordingly, in the absence of exceptions that pertain to the issues raised in the complaint, as pleaded and litigated, we find it unnecessary to pass on the judge's analysis of the work rules, as maintained.

Joel Schochet, Esq., for the General Counsel.
Michael Urban, Esq. (Laquer, Urban, Clifford & Hodge, LLP), of Las Vegas, Nevada, for the Respondent.
Michael Serwe, for the Charging Party, Pro Se.
Michael Young, for the Charging Party, Pro Se.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on August 14 and 15, 2007. The original charge, Case 28–CB–6555, was filed March 1, 2007, and the order further consolidating cases, second consolidated complaint and notice of hearing (the complaint) issued by the Regional Director for Region 28 issued on June 28, 2007. The complaint alleges that Respondent International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 720, AFL–CIO, CLC (Respondent) violated Section 8(b)(1)(A) and (2) of the Act by: (1) assessing nonmembers who use Respondent's hiring hall and referral system, fees that are disproportionate to the cost necessary to maintain and operate its hiring hall and referral system and exceed the nonmembers' pro rata share of the cost of operating and maintaining Respondent's hiring hall and referral system; (2) causing employer AVW–Telav, Inc. (AVW) to discriminate against employees who are nonmembers of Respondent by denying employees the right to employment by assessing nonmembers disproportionate fees for utilizing its hiring hall and referral system; (3) refusing to provide Charging Party Steven Lucas (Lucas) information detailing apportionment of Respondent's costs associated with the assessment of nonmembers' fees relating to the maintenance and operation of its hiring hall and referral system; (4) establishing and maintaining work rules that provide for fines of employees who use Respondent's hiring hall and referral system; and (5) fining employee Michael Serwe (Serwe) and refusing to refer Serwe to employment with employers using Respondent's referral system because he had been charged with violating Respondent's work rules and had not paid the fine levied upon him for violating the work rules. Respondent filed a timely answer to the complaint denying any wrongdoing.

Upon the entire record herein, including the briefs from the General Counsel, Respondent, and the Charging Parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

AVW, is a Texas corporation, with an office and place of business in Las Vegas, Nevada, and engaged in the business of audio-visual presentations at shows and conventions during the 12-month period ending April 5, 2007, provided services valued in excess of $50,000 to customers located in States other than the State of Nevada.

Production Support Services, Inc. (PSS), a Nevada corporation, with an office and place of business in Las Vegas, Nevada, and engaged in the business of audio-visual presentations at shows and conventions during the 12-month period ending March 1, 2007, purchased and received at PSS' facility in Las Vegas, Nevada, goods valued in excess of $50,000 directly from points located outside the State of Nevada.

Based upon the above, AVW and PSS are and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admitted in its answer and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Hiring Hall Fees Charged to Nonmember Referents

1. The facts

It is undisputed that pursuant to a succession of collective-bargaining agreements Respondent has operated an exclusive, nondiscriminatory hiring hall and referral system in the Las Vegas, Nevada area that is the exclusive source of referral of employees to who perform stagehand, hair, makeup, and wardrobe work to signatory employers including employers AVW and PSS.[1]

From about April 2005 to the present, Respondent has had 4900 persons registered for referral. Of the 4900 employees registered, 1700 are members of Respondent. The record did not disclose how many of the 4900 persons registered for referral worked and paid referral fees in 2005 and 2006, however, in 2006 there were 60,000 referrals made from the hiring hall.

Respondent operates the hiring hall from its wholly owned building at 300 Valley View Drive, in Las Vegas, Nevada. Respondent's office also includes a training facility operated by the Training Trust and a Credit Union. Respondent's paid officers and employees consists of President Harold (Hal) Ritzer, Business Representative Jeff Colman, three business agents, two organizers, president's assistant, Gary Elias, secretary-treasurer Deidre Prestridge, Office Manager Lisa Lafever, Jacky Ward, craft division v representative, Dispatch Supervisor Brenda Neuhauser, seven dispatch employees, and other clerical staff.

Ritzer's duties include overseeing all of Respondent's officers and employees, contract negotiations, organizing campaigns, reviewing grievances, chairing various committees, including the executive board, chairing membership meetings, and attending political fundraisers and functions

Assistant to the president, Elias, works on various projects including organizing, assisting with the office staff, building maintenance, and maintaining hiring hall records.

The business representative engages in contract negotiations, organizing campaigns, administration of the referral system, and grievance processing.

The business agents' duties include organizing campaigns, collective-bargaining agreement administration, and handling grievances

The dispatch supervisor and seven dispatch employees handle all referrals from the hiring hall and all discrepancies in paychecks for referred employees.

The secretary-treasurer, Prestrige, handles all new membership applications, health and welfare issues, contract negotiations, political activities, and Respondent's fiscal issues. She files reports with the International Union, prepares minutes of Respondent's executive board and membership meetings, supervises the office staff, process and distribute payroll checks of employees referred from the hiring hall, processes membership cards and cards of traveling union members, and correspondence. Prestridge spends 15 percent of her time on political activities, including campaigning for political candidates.

For about 2 years, while Respondent was under trusteeship it charged both union member and nonunion referents 3 percent of their gross wages as a referral fee. Since about January 1, 2005, when the trusteeship ended, Respondent has charged both union member and nonmembers 3.5 percent of their gross wages as a referral fee. Ritzer admitted that when the referral fee was raised to 3.5 percent in 2005 no calculation was performed to determine the cost of operating the hiring hall. In addition to the referral fees, union members pay a $500 initiation fee and quarterly fees of $50 to the International Union.

Glenn Goodenough (Goodenough), Respondent's accountant, prepared accounting reports for Respondent for 2005 and 2006.[2] These reports were based on Respondent's 2005 and 2006 LM-2 forms[3] prepared by Goodenough and submitted to the United States Department of Labor together with Goodenough's interviews with Respondent's officers to ascertain those expenses that were chargeable as expenses of the hiring hall. Goodenough's report for 2005 reflects that Respondent had income from hiring hall referral fees of $1,944,367 and income unrelated to the hiring hall of $423,679. Expenses chargeable to the operation of the hiring hall were $1,798,250. Nonchargeable expenses excluded from the operation of the hiring hall amounted to $429,706. Goodenough's report for 2006 shows Respondent had income from referral fees of $2,345,764 and income unrelated to referral fees of $617,305. Expenses chargeable to the hiring hall were $2,212,401. Nonchargeable expenses excluded from the operation of the hiring hall were $503,036.

2. The analysis

In the second consolidated complaint (the complaint) paragraphs 5(c) through (e), (h) through (j), and (m) through (q) it is alleged that Respondent has restrained and coerced employees in the exercise of the rights guaranteed under Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act by assessing referral fees to nonmembers that are disproportionate to their pro rata share of the costs of maintaining and operating Respondent's hiring hall and referral system.

[1] See GC Exh. 1(v), Respondent's answer admitting that it is a party to collective-bargaining agreements requiring that Respondent be the exclusive source for referrals for employment with the employers.

[2] R. Exhs. 34 and 65.

[3] GC Exhs. 17–18; R. Exhs. 6–7.

Counsel for the General Counsel (CGC) contends that the evidence establishes that Respondent's 3.5-percent referral fee charged to nonmember referents does not represent their pro rata share of the costs of maintaining and operating its hiring hall and referral system and thus Respondent has violated both Section 8(b)(1)(A) and (2) of the Act.

Respondent contends that the 3.5-percent referral fee for nonmember referents represents their fair share of the costs of the operation of the hiring hall and referral system and absent evidence of discriminatory operation of the hiring hall and referral system there is no violation of the Act in charging the 3.5-percent fee to nonmembers.

A union may charge nonunion members a fee to use an exclusive hiring hall unless the fee is excessive or based on an improper allocation of hiring hall expenses. *J. J. Hagerty, Inc.,* 153 NLRB 1375 (1965). In *Hagerty,* where the Board had found blanket discrimination in the operation of the hiring hall, allowable expenses associated with the operation of the hiring hall included office expenses, rent, salaries, utilities, publications, and payroll taxes. Expenses excluded from the operation of the hiring hall were union meetings, dinners, conventions, contributions, and International union assessments. The Board accepted the administrative law judge's formula for calculating the costs of operating the hiring hall and allocating the pro rata share of each person eligible to use the hiring hall. In determining which expenses were excluded from the operation of the hiring hall the judge disallowed items properly chargeable to the union as an institution rather than as a bargaining agent. To arrive at referents' pro rata share of costs, the judge divided the allowable expenses of operating the hiring hall by the total number of employees eligible to use it in arriving at a pro rata share. This amount was subtracted from the fees actually paid by the referents in calculating the amount of refund due. The trial examiner ordered, and the Board adopted his finding, that $3.50 be refunded to each registrant based on his finding that the fees charged were excessive and did not represent the actual costs to referents of operating the hiring hall.

However, in *Stage Employees IATSE Local 640 (Associated Independent Theater Co.),* 185 NLRB 552, 558 (1970), a case involving no discrimination in the operation of the hiring hall, the Board rejected the administrative law judge's conclusion that the hiring hall fees were in excess of the value of the hiring hall services provided. In *Stage Employees IATSE Local 640*, all referents paid referral fees of 2 percent of gross wages from jobs obtained through referrals. In 1967, the union collected $35,000 in referral fees paid by members and nonmembers and spent $29,000 in operating the hiring hall. In 1968, the union collected $29,000 in referral fees from both members and nonmembers and spent $26,000 in operating the hiring hall. In evaluating the referral fees collected against the costs of operating the hiring hall the Board said:

> After careful consideration of the issue, we are disposed to dismiss the allegation relating to assessment of referral fees. In our view, the breakdown of income and expenses in the record does not demonstrate that the assessments were not, in terms of the test laid down by the Second Circuit, "reasonably related to the services provided by the union," or that the assessments were "in excess of the value of the hiring hall services." In 1967, using the Union accountant's concededly less-than-rigorous figures, the Union spent at least $29,500 for hiring hall and related collective bargaining (and $12,000 for "institutional expenses"). In that year, the Union collected $35,000 from hiring hall assessments of members and nonmembers, $28,500 of which was from members and $6,500 from nonmembers. The Union, in other words, on the less-than-precise figures before us, spent at least five-sixths of its hiring hall assessments for the Costs of the hall. Furthermore, if it had to return the other one-sixth of the assessments ($5,500), it would have to reimburse nonmembers for only somewhat more than one-fifth of that amount ($1,100), since assessments were collected from nonmembers and members at a ratio of $6,500/ $28,500. The only other figures available related to just the first 9 months of 1968, showing total costs allocable to the hiring hall of $26,000 and total assessments received of about $29,000. In *Local 138,* supra, there was a finding of a substantial amount of discrimination and a clear showing that, over a 5-year period, the Union consistently collected $3.50 per month more (out of $10) than it needed for running the hiring hall. In the present case, we make no finding of substantial discrimination, and it may well be that, over a more representative period of years, the assessments and their proper allocations would be equalized. In the circumstances of this case, we are of the opinion that the evidence does not support a finding that the assessment system was violative of the Act, and we shall dismiss the relevant complaint allegations.

A fee paid by nonmember referents equal to that paid by union members was not found excessive where there was no showing made by the General Counsel of the cost of operating the union's hiring hall or the pro rata share of each registrant. *Operating Engineers Local 825 (Homan),* 137 NLRB 1043, 1044 (1962). In *Morrison-Knudsen Co.,* 291 NLRB 250 (1988), cited with approval by the Board in *Communications Workers Local 22 (Pittsburgh Press),* 304 NLRB 868 (1991), the Board found that the General Counsel had made a prima facie showing the referral fees were discriminatory by proving that nonmembers' fees were higher than union members dues.

Counsel for General Counsel contends that the rule of *Hagerty*, supra, has been superceded by *Communications Workers v. Beck*, 487 U.S. 735 (1988), and its progeny, including *California Knife & Saw Works*, 320 NLRB 224 (1995). In *Beck*, the Court dealt with the 8(a)(3) proviso permitting union-security clauses requiring union membership. The Court held that "financial core" membership in a union requires payment of fees necessary for collective bargaining and representation obligations and a union may not require payment from unwilling members of sums for a union's political and fraternal activities.

In *California Saw & Knife Works*, supra, the Board, in applying *Beck*, held that *Beck* was grounded in a union's 8(b)(1)(A) duty of fair representation and applies where union dues are mandatory. The Board set forth certain "*Beck* rights" and held that before a union seeks to obligate an employee to pay fees and union dues under a union-security clause, the employee must be informed that they have the right to object to paying

for union activities not relevant to the union's duties as bargaining representative, that they be given sufficient information to intelligently decide to object, including the percent of reduction in dues, the basis for the calculation, and the right to challenge that figure, and that they be apprised of internal union procedures to object.

In *Teamsters Local 443 (Connecticut Limousine Service),* 324 NLRB 633 (1997), the Board found that providing an employee with the union's LM-2 financial reports satisfied the *Beck* requirement for providing information to challenge the union's calculation of reduced fees.

While CGC argues that the *Beck* line of cases applies to hiring hall fees, no case has been cited by any party reflecting the application of *Beck* to the hiring hall. Indeed, *Beck* is limited to cases dealing with the interpretation of the union-security proviso to Section 8(a)(3) and the union's duty of fair representation. Moreover, in cases[4] dealing with hiring hall fees subsequent to *Beck*, the Board has continued to adhere to the *Homan* and *J. J. Hagerty*, supra, line of cases in assessing the union's obligations under Section 8(b)(1)(A) of the Act.

In this case, according to the accountant's 2005 and 2006 reports summarizing[5] Respondent's audited income and expenses, Respondent collected fees from both union member and nonmember referents of $1,944,367 in 2005 and $2,345,764 in 2006. Chargeable expenses for 2005 were reported to include payroll and benefits, accounting, automobile, bank fees, building maintenance, computer maintenance, contracted services, delegate expense, delivery expenses, dues and subscriptions, education, entertainment, insurance, legal fees, miscellaneous, office expenses, copier expenses, organizing expenses, payroll taxes, postage, property taxes, sales tax, telephone, trustee expenses, utilities, depreciation, per capita taxes of $1200, and contributions of $1,798,250. Goodenough's report explained that $6696 was excluded from payroll for lobbying activity and time devoted to the Respondent's newsletter sent to members only. Advertising expenses of $26,323 were eliminated as not related to the hiring hall. Half of the delegate expense of $9731 was eliminated as only half the union convention was unrelated to the hiring hall. Office expenses of $10,350 were eliminated as a cost of providing rental space for union member meetings. Postage expenses of $4768 were excluded as cost of mailing the members newsletter. Virtually all of the union members' per capita taxes were excluded. Total chargeable expenses for 2005 amounted to $1,798,250. Under the *Hagerty* formula, I would additionally disallow legal fees, contributions, entertainment, and delegate expenses[6] in the sum of $114,797 as no showing was made that these expenses are directly related to costs of operating the hiring hall as opposed the costs of the Union as an institution. The adjusted expenses for 2005 are $1,683,453. Fees paid from hiring hall referents in excess of costs chargeable to the operation of the hiring hall in 2005 amounted to $260,914 or 13 percent of all fees paid.

Chargeable expenses for 2006 were reported as payroll and benefits, accounting, advertising, automobile, bank fees, building maintenance, computer maintenance, contracted services, delegate expense, dues and subscriptions, education, entertainment, insurance, legal fees, miscellaneous, referent drug test fees, office expenses, copier expenses, organizing expenses, payroll taxes, postage, property taxes, sales tax, settlement payments to NLRB, telephone, trustee expenses, utilities, depreciation, per capita taxes, PAC disbursements, and contributions. Total chargeable expenses for 2006 amounted to $2,212,401. Under the *Hagerty* formula, I would additionally disallow delegate expenses, entertainment, legal fees, settlement payments to NLRB, PAC disbursements, and contributions in the sum of $231,682 as no showing was made that these expenses are directly related to costs of operating the hiring hall as opposed the costs of the Union as an institution. The adjusted expenses for 2006 are $1,980,719. Fees paid from hiring hall referents in excess of costs chargeable to the operation of the hiring hall in 2006 amounted to $365,044 or 15 percent of all fees paid.

In assessing how much nonunion member referents may have been overcharged, I am guided only by the estimate that of 4900 referents on the referral list in 2005 and 2006, 3200 or 65 percent were nonunion members.[7] Thus, for 2005, 65 percent of the $260,914 paid in excess referral fees is $169,594 or 8.7 percent of all referral fees charged and for 2006, 65 percent of $365,045 paid in excess referral fees is $237,272 or 10 percent of all referral fees charged. Each nonunion referent would be entitled to a refund of $52 each for excess dues paid in 2005 and $74.14 each for excess dues paid in 2006.

In *Stage Employees IATSE Local 640 (Associated Independent Theater Co.),* 185 NLRB 552, 558 (1970), the Board found no violation of the Act in the assessment of hiring hall fees where, like here, was no evidence of discriminatory operation of the hiring hall, and where 20 percent of the fees in excess of chargeable expenses were attributable to nonunion member referents.

As in *Stage Employees IATSE Local 640*, over a longer period of time the allowable expenses and referral fees of Respondent's hiring hall may be equalized and given the fact that only $126 is owed to each nonunion member referent, I find that Respondent's assessment system does not violate Section 8(b)(1)(A) of the Act.

B. The Request for Information Regarding Referral Fees

1. The facts

Union member Steven Lucas sent Respondent a letter[8] dated June 7, 2005, requesting that Respondent provide the basis for charging 3.5-percent referral fee to registrants. After requesting withdrawal from Respondent, Lucas sent the Respondent a

[4] M*orrison-Knudsen Co.,* 291 NLRB 250 (1988), cited with approval by the Board in *Communications Workers Local 22 (Pittsburgh Press),* 304 NLRB 868 (1991).

[5] R. Exhs. 34 and 65.

[6] Ritzer testified that he had fruitful discussions with other union representatives at the Union's conferences about hiring hall issues. I find no evidence that these discussions comprised more than a minimal portion of the union conventions.

[7] There is no evidence as to how many member or nonmember referents were dispatched or of how much in fees were paid by member and nonmember referents respectively.

[8] GC Exh. 9.

second letter[9] dated September 26, 2005, requesting Respondent substantiate how the 3.5-percent referral fee is related to the cost of operating the hiring hall. By letter[10] dated December 1, 2005, Ritzer advised Lucas that all costs of Respondent were related to operation of the hiring hall. On December 15, 2005,[11] Lucas requested Respondent provide financial statements supporting the 3.5-percent fee charged to nonmembers. Finally on May 31, 2006, Respondent furnished Lucas with the Union's LM-2 form for 2005.[12] Respondent has not provided Lucas any other information concerning its basis for charging nonmember referents a fee of 3.5 percent.

2. The analysis

It appears that CGC contends that Respondent violated its duty of fair representation to Lucas under Section 8(b)(1)(A) of the Act because it did not provide a cost breakdown of costs directly related to operation of the hiring hall. It is undisputed that Respondent was under a trusteeship until January 2005 and it would have been difficult for Respondent's new officers to provide financial information in 2005. CGC concedes that not until 2006, with the completion of the 2005 LM-2 forms, could Respondent provide the financial information Lucas requested. CGC argues that Respondent's LM-2 forms provided to Lucas on May 31, 2006, were insufficient for him to make an intelligent objection to the amount of referral fees paid by nonmember users of the hiring hall since there was no breakdown of expenses for operation of the hiring hall and expenses related to the operation of Respondent as an institution.

Under Section 8(b)(1)(A) of the Act a union, as operator of an exclusive hiring hall, owes users of the exclusive hiring hall a duty of fair representation by not operating the hiring hall in a manner that is arbitrary or unfair. *Radio Electronics Officers Union,* 306 NLRB 43 fn. 2 (1992), enf. granted in part and denied in part 16 F.3d. 1280 (D.C. Cir. 1994) Concomitant with that obligation of fair representation is the requirement that the union provide users of an exclusive hiring hall with information sufficient to intelligently challenge the hiring hall fee structure. Cf. *California Saw & Knife*, supra. Certainly Ritzer's December 1, 2005 letter was insufficient to provide Lucas with sufficient information to make an intelligent decision whether to object to the hiring hall fee structure. However, when Respondent provided Lucas with the 2005 LM-2 reports on May 31, 2006, as soon as the reports where prepared, Lucas had sufficient information, even under the *Beck* and *California Saw & Knife* rules to make an informed decision to challenge the hiring hall fees. *Teamsters Local 443 (Connecticut Limousine Service),* 324 NLRB 633 (1997). I find Respondent did not violate Section 8(b)(1)(A) of the Act by failing to provide sufficient information to Lucas.

[9] GC Exh. 11.
[10] GC Exh. 13.
[11] GC Exh. 14.
[12] GC Exh. 15.

C. Work Rules Violations

1. The facts

Michael Serwe has been a member of Respondent since 2004 and has utilized Respondent's referral system. In December 2006, Respondent dispatched Serwe to a job pursuant to request of AVW-Telav. Serwe worked for about 10 days for AVW. On the last day of work about 20–30 minutes after he finished his work but while he remained at AVW's worksite waiting to speak with a union steward, Serwe had a conversation with an AVW employee named Victor. Serwe told Victor that he looked forward to working with him again. Victor replied, "The next time you work for me are you going to take a phone call while you're on my job?" Serwe said, "I'm not your nigger. I'm paid labor and the only reason I take a call, and I very seldom do on a job, is if it's somebody calling me to see if I'm available for work. However, I always do my amount of work on a job. You can ask anybody that I work with and they will tell you that."

After making this statement, Serwe saw Michael Jeffrey, an African-American AVW supervisor behind him. Serwe told Jeffrey, "You know I'm not prejudiced." Jeffrey replied he heard what he heard.

In late December 2006, Serwe called Respondent to see if there was work for him. He was told that he was suspended. On January 5, 2007, Respondent sent Serwe a letter advising that:[13]

> In accordance with Article VIII of Work Rules and Procedures for Referents,[14] which we have included for your reference, you are in violation of Article VIII, Section 1B(iv): Verbal assault against or threatening harm to any referent, Union employee, Job Steward, Union official, or Employer representative while at work, or in connection with work. This includes threatening or abusive language to the employees at the Union office.

The letter added that Serwe was being fined $1000 and would be suspended from the dispatch list until he paid the fine. Serwe was further advised that the fine and suspension would be held in abeyance if he appealed the fine.

Serwe appealed the fine and suspension. On February 21, 2007, Respondent denied the appeal[15] and advised that if Serwe failed to pay the fine within 35 days he would be removed from the referral system until the fine was paid. On April 5, 2007, Serwe learned that he had been suspended from the referral system effective April 2, 2007. Serwe remained suspended until July 16, 2007, when he entered into an agreement to make installment payments on the fine.

Respondent's work rules and procedures for referents provides in pertinent part at article VII, section 2:

[13] GC Exh. 3.
[14] GC Exh. 4.
[15] GC Exh. 6.

> Failure to pay the fine in the allowed period of time as per Article VIII, Section 3, will result in automatic suspension from the Local 720 referral system until such fine is paid in full. In case of appeal, no penalty shall be imposed until the appeal procedure has been completed.

2. The analysis

CGC contends that Respondent violated Section 8(b)(1)(A) and (2) of the Act by refusing to refer Serwe because he failed to pay a union fine and for maintaining a rule in its 2006 work rules providing that failure to pay a fine will result in Respondent's refusal to refer.[16]

Respondent argues that Serwe was properly suspended for work rules violations, citing *Boilermakers Local 40 (Envirotech Corp.),* 266 NLRB 432 (1983).

Radio Electronics Officers Union, supra, held that when a union prevents an employee from being hired it compels an inference that its action is to encourage union membership and may be overcome only by showing that it is acting pursuant to a valid union security clause or by showing its action is necessary to performing its representative function. *Stagehands Referral Service,* 347 NLRB 1167, 1169 (2006).

The Board has held that the inference is overcome where a union refused to refer an individual who was not qualified to perform the job; *Plasterers Local 299 (Wyoming Contractors Assn.),* 257 NLRB 1386 (1981), where a union suspended an applicant for violating work referral rules; *Boilermakers Local 40,* supra; where the union refused to refer an applicant for his long history of misconduct and where the majority of employers using the hiring hall for referents requested the employee not be referred; *Stage Employees IATSE Local 150 (Mann Theaters),* 268 NLRB 1292 (1984), where the union refused to refer an employee who had caused a wildcat strike; *Longshoremen Local 341 (West Gulf Maritime Assn.),* 254 NLRB 334 (1981); and where the union refused to refer an employee with a 15-year history of misconduct toward fellow employees, employers using the hiring hall and employers' clients; *Stage Employees IATSE Local 720 (AVW Audio Visual),* 332 NLRB 1 (2000), revd. 333 F.3d 927 (9th Cir. (2003). In each of the above cases the Board found that the union's action taken was necessary to performing its representative function.

The Board has found the union did not overcome the inference where it removed an employee for non payment of a fine and non payment of dues without proper notice; *Radio Electronics Officers Union,* supra; and where an employee was removed from the referral list without adequate showing that he had performance problems; *Stagehands Referral Service,* supra.

In this case, Serwe was removed from Respondent's referral system after failing to pay a fine pursuant to work rule article VIII, section 1B(iv) for use of a racial epithet on a jobsite. There is no dispute that Respondent has prevented Serwe from being hired. Likewise, it is undisputed that the action taken against Serwe was not pursuant to a valid union-security clause. Thus, Respondent can overcome the inference that its action was to encourage or discourage union membership by showing that it took the action because it was necessary to performing its representative function.

Unlike the employees in *Stage Employees IATSE Local 150 (Mann Theaters),* 268 NLRB 1292 (1984); *Stage Employees IATSE Local 720 (AVW Audio Visual),* 332 NLRB 1 (2000), here, Serwe had no long history of misconduct or poor performance. Serwe's misconduct was limited to one employer. Since there is no evidence that other employers have refused to accept Serwe as a referent, his isolated conduct would not preclude his referral to other employers. Likewise, there is no evidence that Serwe is not unqualified to perform jobs to which he may be referred and he did not attempt to undermine the referral system like the referents in *Plasterers Local 299 (Wyoming Contractors Assn.),* 257 NLRB 1386 (1981), or *Boilermakers Local 40,* supra. Finally, Serwe's conduct was not so eggregious as to affect the entire bargaining unit like the employee in *Longshoremen Local 341 (West Gulf Maritime Assn.),* 254 NLRB 334 (1981). I conclude that Respondent has not overcome the inference that it took the action against Serwe in order to encourage or discourage union membership in violation of Section 8(b)(1)(A) and (2) of the Act in suspending Serwe from the referral system for failure to pay a fine.

The mandatory language of Respondent's work rule article VIII, section 1B(iv) is subject to the same test set forth above. The rule prevents an employee from being hired and raises the inference that the rule encourages or discourages union membership that can be overcome only by showing that the rule is necessary to the Union's performance of its representative function. Nonpayment of a fine, per se, has nothing to do with the union's representative function. It is the reason for imposing the fine that must be scrutinized. As the cases above have demonstrated there may be legitimate and unlawful reasons for imposing fines that result in removal from a referral system. These cases must be scrutinized on a case-by-case basis.

In *Radio Electronics Officers Union,* 306 NLRB 43 fn. 2 (1992), the union was found to have violated the Act for suspending an employee from its referral system for nonpayment of dues where the employee was not given adequate notice of his delinquency before removal. Likewise, the Board found that the rule requiring removal from the referral list for nonpayment of dues was unlawful as it required removal prior to notice to the delinquent referent.

Here, after Serwe's appeal was denied he was given notice that he had 35 days to pay the fine or face suspension from the referral system. In this case, adequate notice is provided in Respondent's work rules before an employee may be suspended for nonpayment of a fine. I find there is nothing in the work rule itself that violates the Act but that in cases where an individual is suspended for nonpayment of a fine, the Respondent's rationale for imposing the fine must be examined under the *Radio Electronics Officers Union* test. I find that Respondent's work rules and procedures for referents, article VII, section 2 does not violate Section 8(b)(1)(A) and (2) of the Act.

[16] This is the only remaining portion of Charging Party Michael Young's charge that has been alleged as a violation of the Act in the instant complaint.

CONCLUSIONS OF LAW

1. AVW and PSS have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(b)(1)(A) and (2) of the Act since April 2, 2007, by refusing to allow Michael Serwe to register for referral from its exclusive hiring hall because of his failure to pay a fine levied against him by the Union.

4. Respondent did not otherwise violate Section 8(b)(1)(A) or (2) of the Act and the remaining portions of the complaint are dismissed.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to allow Serwe to register for referral, I shall recommend it be ordered to list Serwe on its referral register and, on request from him, list him on any appropriate referral register that he requests to be listed on. I further recommend that Respondent be ordered to make Serwe whole for any loss of wages and benefits he may have suffered as a result of the Respondent's refusing to allow him to register on its referral list on and after April 2, 2007.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, International Alliance of Theatrical & Stage Employees & Moving Picture Technicians, Artists, and Allied Crafts of the United States, its Territories and Canada, Local 720, AFL–CIO, CLC, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to refer Michael Serwe for employment for arbitrary, invidious, or capricious reasons.

(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) Make Michael Serwe whole, with interest, for any loss of wages and other benefits he may have suffered by reason of the Respondent Union's discriminatory failure to refer him to employment after April 2, 2007.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its union hall or facility, copies of the attached notice marked "Appendix"[18] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by an authorized representative of the Respondent Union, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

(d) Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(e) 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 Union has taken to comply.

IT IS FURTHER ORDERED that the second consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO 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

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

[18] 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."

WE WILL NOT refuse to refer Michael Serwe for employment for arbitrary, invidious or capricious reasons.

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

WE WILL make Michael Serwe whole, with interest, for any loss of wages and other benefits he may have suffered by reason of our discriminatory failure to refer him to employment after April 2, 2007.

INTERNATIONAL ALLIANCE OF THEATRICAL & STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS, AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 720, AFL–CIO, CLC