

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-71452

STEVEN LUCAS

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW
OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Steven Lucas, an individual, to review an order of the National Labor Relations Board ("the Board") dismissing a complaint against the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Local 720, AFL-CIO

("the Union"). The Board's Decision and Order issued on September 12, 2000, and is reported at 332 NLRB No. 3 (ER 215- 224).¹

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) ("the Act"), which empowers the Board "to prevent any person from engaging in any unfair labor practice" This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), as the complaint alleged that the unfair labor practices were committed in Las Vegas, Nevada. The Board's order is a final order under Section 10(e) of the Act (29 U.S.C. § 160(e)). Lucas' petition for review was filed on November 6, 2000, and was timely, as the Act places no time limitation on such filings.

STATEMENT OF THE ISSUE

Whether the Board had a rational basis for dismissing the complaint alleging that the Union violated Section 8(b)(1)(A) and (2) of the Act by refusing to readmit Steven Lucas to its exclusive hiring hall for job referral.

1 "ER" refers to the Excerpts of Record volume, which includes the decisions of the Board and the administrative law judge, and excerpts from the transcript of testimony before the administrative law judge. "Tr" refers to portions of the transcript of testimony before the administrative law judge which were not included in the Excerpts of Record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

Based on charges filed by Steven Lucas ("Lucas"), the Board's General Counsel issued an unfair labor practice complaint against the Union on April 28, 1995, alleging that the Union violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)) by barring Lucas from its hiring hall and thus denying him work referrals through the hiring hall. (ER 5, 8-13.) A hearing was held before an administrative law judge, and on February 29, 1996, the judge issued a decision finding that the Union violated the Act as alleged. The Union filed exceptions, and on September 12, 2000, the Board issued its decision reversing the administrative law judge, and dismissing the complaint in its entirety. (ER 215-218.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Union operates an exclusive hiring hall for theatrical and stage workers in the Las Vegas, Nevada, area. (ER 215; ER 112, Tr 56-57.) Under the collective-bargaining agreement between the Union and various industry employers, a signatory employer may submit a written request to the Union for a particular employee to be referred from the hiring hall and the Union must grant that request, provided that the requested employee is eligible and unemployed.

Signatory employers also have a contractual right of first refusal for a specified percentage of referred employees. (ER 48-49.)

Lucas is an audio-visual technician. From 1981 to 1992, he was a member of the Union. In 1992, he took an honorable withdrawal from union membership but continued using and being referred from the Union's hiring hall. (ER 218-219; ER 140, Tr 132-133.) On May 16, 1994, Lucas filed a charge with the Board alleging, in relevant part, that the Union had violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by refusing to dispatch nonunion members to jobs and, specifically, by refusing to dispatch Lucas. (ER 215; ER 89.) On May 19, 1994, the Union's executive board voted to expel Lucas from the hiring hall because of Lucas' misconduct towards fellow employees, employers, and clients over a 15-year period. (ER 215; ER 187-188.)

On June 30, 1994, the Board's Acting Regional Director sent Lucas a letter explaining that a complaint would not issue on Lucas' charge. The letter explained that the Board's investigation of the charge had revealed that the Union had not refused to refer non-members for work. In addition, the investigation revealed that the Union had decided that "it [would] no longer permit [Lucas] to be dispatched because of complaints from Union agents, other registrants, and employers regarding [his] behavior at the Union hall or while employed by signatory employers." (ER 90-91.) The letter further stated that there was "no evidence"

that the Union's decision was based on Lucas' lack of membership in the Union, "or for any reason other than the complaints received by the Union regarding [his] behavior at the Union hall and while employed." (ER 215; ER 90-91.)

Lucas did not appeal the Acting Regional Director's decision to dismiss his May 1994 charge. (ER 219.) *See* Section 102.19 of the Board's Rules and Regulations (29 C.F.R. § 102.19) (If the Regional Director declines to issue a complaint, the "person making the charge may obtain a review of such action by filing an appeal with the General Counsel in Washington, D.C. . . .").

In early 1995, Lucas went to the hiring hall and attempted to register for referral. He was not allowed to do so. In response to his belief that his "emotional and mental stability were questioned at the time" (ER 220; ER 142), Lucas retained the services of a psychologist, Dr. Lynn Larson, to subject him to a series of psychological tests. (ER 215; ER 142-143.) The results were summarized in a March 3, 1995, letter from Dr. Larson to Union President Dennis Kist. In the letter, Larson listed the tests that had been administered to Lucas, and concluded that "[n]one of the test results revealed signs of psychopathology. . . . There should be no reason, from a psychological standpoint, that Mr. Lucas should not be considered fit and able to be employed at this time." (ER 219-220; ER 64.) Lucas attached Dr. Larson's letter to another he sent to Kist in which he wrote, "I've made several attempts to sign in for work referral on this Union's out of work list

but haven't been dispatch [sic] since May of 1994. Please insure [sic] I am signed in, for I am available to work" (ER 215; ER 63, 144.)

Around the same time Lucas contacted AVW Audio Visual, Inc. ("AVW"), a signatory to the collective-bargaining agreement with the Union. Lucas asked whether AVW would be requesting him to work in an upcoming convention in Las Vegas. An AVW representative indicated that Lucas would be requested specifically. Subsequently, on March 22, AVW included Lucas on a list of employees it was requesting the Union to refer. (ER 215; ER 67, 148-149.) Later, when Lucas contacted the hiring hall, he was informed by a dispatcher that he was ineligible for referral. Lucas was not referred by the Union to AVW's Las Vegas job, or to any other job. (ER 215; ER 96, 151-152.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Truesdale and Members Liebman and Hurtgen), in disagreement with the administrative law judge, found that the Union did not violate Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)) by refusing to readmit Lucas to the hiring hall. (ER 215-218.) Accordingly, the Board dismissed the complaint in its entirety.

SUMMARY OF ARGUMENT

Lucas, as the charging party disputing the Board's dismissal of the complaint, bears the heavy burden of showing that the Board's action was

irrational, and that the Board should have found a violation of the Act. Lucas has failed to meet that burden. Because, as the Board explained (ER 216), the General Counsel neither challenged nor litigated "whether the [Union] had adequate justification in May 1994 to remove Lucas from its hiring hall referral system," the only issue before the Board was whether the Union's refusal to readmit him was arbitrary. The Board reasonably concluded that it was not, based on Lucas' long history of misconduct, and the Union's need to continue successfully operating the hiring hall for both members and non-members alike. Lucas has failed to rebut this finding with any evidence that he had been treated in a disparate manner, or that changed circumstances compel a contrary conclusion. Accordingly, Lucas' petition for review should be denied.

ARGUMENT

THE BOARD HAD A RATIONAL BASIS FOR DISMISSING THE COMPLAINT ALLEGING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) AND (2) OF THE ACT BY REFUSING TO READMIT LUCAS TO THE EXCLUSIVE REFERRAL HALL FOR JOB REFERRAL

A. Applicable Principles and Standard of Review

Under Section 10(c) of the Act (29 U.S.C. § 160(c)), the Board's General Counsel carries the burden of establishing an unfair labor practice by a preponderance of the evidence. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983). Where, as here, the Board finds that the General Counsel

has failed to establish a violation of the Act, the Board's determination must be upheld unless it has no rational basis. *Chamber of Commerce v. NLRB*, 574 F.2d 457, 463 (9th Cir.) *cert. denied*, 439 U.S. 981 (1978). *Accord District 65, Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1164 (D.C. Cir. 1978) (citation omitted); *Louisiana Dock Co., Inc. v. NLRB*, 909 F.2d 281, 286 (7th Cir. 1990).

Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act]" (29 U.S.C. § 157).² Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)) makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of" Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)).³ These statutory principles apply to "exclusive hiring hall arrangements, under which workers can obtain jobs only through union referrals." *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988) ("*Boilermakers Local No. 374*"). *Accord Breininger*

² Section 7 protects the right of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

³ Section 8(a)(3) of the Act provides, in relevant part, "[i]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization"

v. Sheet Metal Workers Local No. 6, 493 U.S. 67, 87-88 & n.11 (1989)

("Breininger").

Because of the potential for coercion, a union operating a hiring hall owes a duty to the users "not to conduct itself in an arbitrary, invidious, or discriminatory manner when representing those who seek to be referred out for employment by it." *Teamsters Local 519*, 276 NLRB 898, 908 (1985). *Accord NLRB v. International Ass'n of Bridge, Etc.*, 600 F.2d 770, 777 (9th Cir. 1979); *Breininger*, 493 U.S. at 87-88 & n.11 (union operating exclusive hiring hall owes members a fiduciary duty "to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct") (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)). A union that breaches this "duty of fair representation" unjustifiably restrains employees in the exercise of their Section 7 rights and thereby violates Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)). *Miranda Fuel Co. Inc.*, 140 NLRB 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); *NLRB v. Wismer & Backer, Contracting Engineers*, 603 F.2d 1383, 1388 (9th Cir. 1979)

A union breaches the "duty of fair representation" only when its conduct toward a member of the bargaining unit is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) ("*Vaca*"). *Accord Airline Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67, 77 (1991) ("*O'Neill*") (holding that tripartite

standard announced in *Vaca* applies to all union conduct including its operation of a hiring hall). A union's actions are arbitrary only if its "behavior is so far outside a 'wide range of reasonableness,' . . . as to be irrational." *O'Neill*, 499 U.S. at 67 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). *Accord Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45-46 (1998) (to be classified as "arbitrary," a union's conduct must be "without a rational basis or explanation").

Where the union's breach causes an employer to discriminate against an employee in violation of Section 8(a)(3), the union thereby violates Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)). *Vaca*, 386 U.S. at 186. *See Plumbers & Pipe Fitters Local No. 32 v. NLRB*, 50 F.3d 29, 31-32 (D.C. Cir.) ("*Plumbers & Pipe Fitters Local No. 32*"), *cert. denied*, 516 U.S. 974 (1995). If a union wields arbitrarily the power to employ applicants that it has in a hiring hall, its conduct will be found to inherently encourage union membership because such a demonstration of union power gives "notice [to applicants] that its favor must be curried." *NLRB v. International Ass'n of Bridge Workers, Local 433*, 600 F.2d 770, 777 (9th Cir. 1979). Thus, no specific intent to discriminate on the basis of union membership need be shown where encouraging union membership is the foreseeable result of the union's conduct. *Id. Accord Teamsters Local 35 v. NLRB*, 365 U.S. 667, 674-75 (1961); *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8, 10 (D.C. Cir. 1985).

It is well settled that where a union in the operation of a hiring hall prevents an employee from being hired, the Board presumes that the action effectively encourages membership and will find such action violative of the Act unless the union demonstrates that it was not improperly motivated or arbitrary, or that its action was necessary to the effective performance of its representational function.

See NLRB v. Wisner and Becker, Contracting Engineers, 603 F.2d 1383, 1388 (9th Cir. 1979); *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), *enforcement denied on other grounds*, 496 F.2d 1308 (6th Cir. 1974),

B. The Board Had A Rational Basis For Concluding
That The Union Did Not Violate The Act When
It Refused to Readmit Lucas to the Hiring Hall

In the instant case, as the Board explained (ER 216-217), the General Counsel, in effect, conceded that the Union acted lawfully in May 1994 when it permanently expelled Lucas from its hiring hall for years of misconduct. Nevertheless, the General Counsel alleged that the Union violated Section 8(b)(1)(A) and (2) of the Act when, 10 months later in March 1995, it refused to readmit Lucas to the hiring hall and refer him to available jobs. As shown below, the Board had a rational basis for concluding that the General Counsel had failed to prove either that the Union acted arbitrarily in refusing to readmit Lucas, or that the Union's action was not necessary to the effective performance of its representative function.

Before the Board, the General Counsel relied solely on Lucas' psychologist's March 1995 letter, and argued that it alone compelled the Union to readmit Lucas. However, as the Board observed (ER 216-217), that letter must be viewed in the context of Lucas' prior hiring hall behavior. Thus, it is central to the analysis of this case that in May 1994--only 10 months before Lucas' March 1995 request to be referred--Lucas was lawfully expelled from the hiring hall because he had engaged in 15 years of misconduct towards employers, clients, and other employees.

The Board was reasonably warranted in concluding that Dr. Larson's finding-- "[t]here should be no reason, from a psychological stand point, that Mr. Lucas should not be considered fit and able to be employed at this time"--could not have obliged the Union to readmit Lucas to the hiring hall. As the Board noted (ER 217), even assuming the relevance of Dr. Larson's conclusion about Lucas' state of mind in March 1995, the Union did not act arbitrarily in concluding that the letter failed to sufficiently counter Lucas' prior 15-year history of misconduct for which he had been expelled. Indeed, Dr. Larson's letter did not assume any relationship between Lucas' 15-year history of misconduct and his mental health, and therefore, as the Board observed (ER 217), the letter did not address whether any significant changes had occurred between May 1994, when Lucas was expelled for disruptive conduct, and March 1995, when he sought

readmission to the hiring hall. Dr. Larson's letter also failed to address whether any potential existed for Lucas' prior misconduct to reoccur.

It is true, as the Board observed (ER 217) and Lucas argues (Br 30, 35), that in denying Lucas readmission to the hiring hall, the Union "did not act pursuant to an explicit, written policy governing readmission . . . of persons permanently expelled." However, as the Board further explained (ER 217), the Supreme Court in *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 677 (1961), clearly forbade the Board from imposing such rules on a union hiring hall: "If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it." *Id.* at 677. Thus, as the Board noted here (ER 217), the Union was under no "legal requirement" to "maintain rules or a process governing readmission [to the hiring hall] for those who have been expelled." *See Busch v. Givens*, 627 F.2d 978 (9th Cir. 1980) ("Absent bad faith or other compelling circumstances" a court should not dictate to a union "how the union should conduct its affairs."). *See also Plumbers Local 32 (Alaska Pipeline)*, 312 NLRB 1137, 1138 (1993) ("The absence of written standards is not itself violative of the Act"), *enforced* 50 F.3d 29 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995).

In the circumstances, therefore, the Board rationally found that the General Counsel did not prove that the Union acted arbitrarily in refusing to readmit Lucas to the hiring hall.

In addition to the fact that the Union's refusal to readmit Lucas to the hiring hall was not shown by the General Counsel to be arbitrary, the Board was warranted in finding (ER 217) that the Union carried its burden of demonstrating that its actions were necessary to its representational function. Thus, as the Board noted (ER 218), the effective operation of the Union's hiring hall is based on its "reputation for referring competent and well-behaved employees." Naturally, this reputation would be tarnished if the Union were to refer disruptive employees. As the Board concluded (ER 217), when Lucas sought referral in March 1995, the Union "used reasonable judgment, considering Lucas' 15-year history of misconduct, in concluding that the effective operation of its hiring hall--with respect to both registrants and employers--required it to deny Lucas readmission to the hall." In that light, the Board was warranted in sustaining the Union's determination that it could no longer refer Lucas for fear "that signatory employers would resist the continued use of the hiring hall." (E 217.). Lucas fails to demonstrate that the Board's conclusion in this regard lacked any rational basis.

Similarly, the Board rationally concluded (ER 217-218) that the fact that Lucas was able to secure a request from AVW for him to be referred to work on its

Las Vegas worksite, did not create an obligation on the part of the Union to readmit Lucas to the hall. Under the contract, signatory employers have a right to request employees from the hall. However, as an expelled employee, Lucas was not eligible for referral at the time that AVW requested him.

Moreover, even if Lucas were otherwise eligible for referral to AVW, the Union's refusal to refer him was necessary to the proper functioning of the hiring hall. The request from AVW would not, by itself, represent any indication that Lucas would no longer engage in misconduct if readmitted to the hiring hall; all it represented was that one employer had been sufficiently satisfied with Lucas' past performance to rehire him.

As the Board noted (ER 217), AVW is just a single employer, and though it uses the Union's hiring hall, it is not the only employer to do so. If Lucas were readmitted to the hall, he would not be limited to referrals to AVW jobs; he would be eligible to receive referrals to other employers as well. While AVW might not have been displeased with Lucas' past job performance, it was not unreasonable for the Union to be concerned that other employers--especially those who had endured his on-the-job misconduct in the past--would object to having to employ Lucas again. Further, it was not unreasonable for the Union to refuse to give Lucas an opportunity to engage in misconduct with AVW on the Las Vegas jobsite. Accordingly, the Board reasonably concluded (ER 218) that "the AVW

request does not undermine the [Union's] reasonable judgment that the situation had not changed sufficiently in the 10 months since Lucas' lawful expulsion from the hiring hall so as to compel his immediate reinstatement to the hiring hall."

Finally, the Board rationally found (ER 218) that other employees represented by the Union would understand that by expelling Lucas, the Union was not acting to encourage union membership. A refusal by employers to use the hiring hall because of the possibility of having Lucas referred to them would lead to fewer work opportunities for all the employees on the referral lists. In light of Lucas' misconduct--not only to employers, but also to fellow employees--other employees would be expected to understand that, as the Board found (ER 218), "the continued exclusion of Lucas from the referral list was in their interests . . . and not an exercise of raw power designed to intimidate them into closer adherence to the [Union]."

In sum, the Board's decision here was clearly rational and well within its precedents. *See, for example, Stage Employees IATSE Local 150 (Mann Theatres)*, 268 NLRB 1292, 1295 (1984) (refusal to refer employee who had history of misconduct did not violate the Act where "further referral [of the employee] would jeopardize [the union's] position as the exclusive supply of the employer's employees"). *See also International Longshoremen's Ass'n, Local 341 (West Gulf Maritime Ass'n)*, 254 NLRB 334, 337 (1981) (union's expulsion of

employee from hiring hall "necessary for the effective performance of the [u]nion's function of representing its constituency" where employee engaged in unauthorized strikes).

C. Lucas' Additional Arguments Are Without Merit

There is no merit to Lucas' claim (Br 17-21) that the Board judged the Union's action under a too permissive standard of care. The Supreme Court has repeatedly held that a union's actions in the representation of employees is to be judged according to whether those actions were arbitrary, and has repeatedly noted that arbitrary conduct is that which is irrational. As this Court observed in *Banks v. Bethlehem Steel Corp.*, 870 F.2d 1438, 1441 (9th Cir. 1989), "[w]hile recognizing the importance of a union's duty of fair representation, the Supreme Court . . . has acknowledged that unions must be given broad discretion to act in what they believe is their members' best interests." Moreover, this Court applies the same standard to a union's operation of a hiring hall. See *NLRB v. International Ass'n of Bridge, Etc.*, 600 F.2d 770, 776-777 (9th Cir. 1979); *NLRB v. Wismer & Becker Contracting Engineers*, 603 F.2d 1383, 1388 (9th Cir. 1979).

Thus, contrary to Lucas' claim (Br 19-21 and n.5), in concluding that the General Counsel failed to prove a breach of the duty of fair representation, the Board properly equated arbitrary conduct with conduct "having no rational basis." (ER 217.) In other words, as *O'Neill* teaches, unless the Union's refusal to readmit

and refer Lucas was "so far outside a 'wide range of reasonableness' . . . as to be irrational," the Union neither breached that duty nor failed to establish that its conduct was necessary to the effective performance of the hiring hall. *Airline Pilots v. O'Neill*, 499 U.S. 65, 67 (1989). In sum, if the union's action is within the reasonableness range, as here, then it cannot be found irrational and arbitrary.

Lucas' reliance (Br 21) on *Jacoby v. NLRB*, 233 F.3d 611 (D.C. Cir. 2000), is also misplaced. There, the court, disagreeing with the Board, held that a union's mere negligence in the operation of a hiring hall constituted a breach of the duty of fair representation. Whatever may be the merits of that holding, it does not implicate the instant case because, here, it is undisputed that the Union's actions were volitional and not merely negligent. As the Board made clear in the decision underlying *Jacoby*, its holding on the negligence issue was a "narrow" one and it expressly left intact that a union's volitional acts in denying referral from a hiring hall remained subject to the inference that they encourage membership and presumptively violate the Act. *Steamfitters Local Union No. 342 (Contra Costa Electric)*, 329 NLRB No. 65, 162 LRRM 1156, 1159, 1160 (1999). Again, that presumption was expressly applied here.

The short answer to Lucas' contention (Br 21-24) that no record evidence established that Lucas had engaged in years of misconduct warranting his expulsion from the hiring hall in May 1994, is that the General Counsel conceded

the legitimacy of Lucas' expulsion. As the Board observed (ER 216), the General Counsel did not challenge or seek "to litigate, whether [the Union] had adequate justification in May 1994 to remove Lucas from its hiring hall referral system."

Importantly, that concession was key to the General Counsel's argument, with which the Board agreed (ER 215), that Lucas' March 1995 charge was not time-barred under Section 10(b) of the Act (29 U.S.C. § 160(b)) as merely a challenge to the May 1994 expulsion, which had occurred more than six months prior to March 1995.⁴ That is, under well-settled law, the March 1995 charge would have been time-barred under Section 10(b) of the Act had the Board sustained the Union's contention that it was the equivalent of the dismissed May 1994 charge filed by Lucas. *See Machinists Local 1424 v. NLRB*, 362 U.S. 411, 417-419 (1960).

As the Board explained (ER 216), the instant complaint is not time-barred because it challenges a separate event--the refusal to readmit Lucas--that occurred within six months of the March 1995 charge. Because the General Counsel conceded the lawfulness of Lucas' expulsion and convinced the Board that the March 1995 charge was timely, Lucas cannot now seek to litigate the expulsion.

⁴ Section 10(b) provides in relevant part, "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board"

See, generally NLRB v. Marin Operating, Inc., 822 F.2d 890, 894 (9th Cir. 1987)

("When events occurring within the six-month period violate the Act only if certain earlier events constitute an unfair labor practice, then evidence of earlier events would not merely be proof relating to recent events, but would also be proof of a time-barred unfair labor practice. Such evidence is inadmissible.")

Moreover, the General Counsel sought, by Motion in Limine, to bar from the proceedings any information he had gathered during the investigation of Lucas' May 1994 charge, and that supported his dismissal of that charge. As the administrative law judge stated (ER 219 n.3), that information "[was] not admitted in support of any substantive issue in this case."

Finally, Lucas takes issue (Br 33-34) with the Board's conclusion (ER 215 n.2) that it would not draw an adverse inference from the Union's failure to fully comply with a subpoena duces tecum. Contrary to Lucas (Br 34), the Board did not find that the Union had fully complied with the subpoena. Rather, the Board concluded that some documents which had been requested may not have actually existed--such as records of any other employees being expelled and readmitted--or were rendered moot by the stipulations of the parties--such as the stipulation that an employer had requested Lucas and that he had not been referred. Under these circumstances, it was reasonable for the Board to refuse to draw an adverse inference on these matters. This Court should defer to the Board's resolution of

this matter. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB*, 459 F.2d 1329, 1339 (D.C. Cir. 1972) (court review of a factfinder's application of the adverse inference rule is limited to abuse of discretion). *Accord Ready Mix Concrete Co. v. NLRB*, 81 F.3d 1546, 1552 (10th Cir. 1996).⁵

⁵ Lucas' contention (Br 36-37) that the Board should order reimbursement for his expenses in retaining Dr. Larson is without merit. This contention was not raised before the Board and therefore, the Court is without jurisdiction to entertain it under Section 10(e) of the Act (29 U.S.C. § 160(e).) *See Woelke and Romero Framing v. NLRB*, 456 U.S. 645, 666-667 (1982). *Compare NLRB v. IBEW Local 952*, 758 F.2d 436, 439-440 (9th Cir. 1985).

CONCLUSION

For the foregoing reasons, the Board respectfully submits that judgment should be entered denying the petition for review.

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March 2001

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NATIONAL LABOR RELATIONS BOARD,	:	
	:	
Respondent.	:	

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the Board's brief in the captioned case was this day served by first class mail on the following counsel at the address listed below:

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Dated at Washington, D.C.
this 22nd day of March, 2001