Nos. 07-2126-ag (L) & 07-3103-ag (XAP)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL ALLIANCE OF THEATRICAL & STAGE EMPLOYEES AND MOTION PICTURE TECHNICIANS OF THE UNITED STATES AND CANADA, LOCAL 84, AFL-CIO, STAGEHANDS REFERRAL SERVICE, LLC

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

Headings **Pages**

Headings-Cont'd **Page(s)**

Headings-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases--Cont'd **Page(s)**

Cases--Cont'd **Page(s)**

TABLE OF AUTHORITIES

Statutes

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Regulations

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of International Alliance of Theatrical & Stage Employees and Motion Picture Technicians of the United States and Canada, Local 84, AFL-CIO ("the Union") and Stagehands Referral

Service, LLC ("SRS") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Decision and Order of the Board that issued on August 31, 2006, and is reported at 347 NLRB No. 101. (SA 1-24.)[1] The Union and SRS filed their petition for review on May 16, 2007. The Board filed its cross-application for enforcement on July 20, 2007. All filings were timely; the Act imposes no time limit on such filings.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction over this case under the same section of the Act, because the unfair labor practices occurred in Connecticut.

[1] "SA" refers to the special appendix filed by the Union and SRS; the special appendix includes the Board's Decision and Order and its Order Denying the Union's and SRS's Motion for Reconsideration of the Board's Decision and Order. "A" refers to the joint appendix filed by the Union and SRS. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

The Union supplies stagehands to various employers through an exclusive hiring hall arrangement. It supplies stagehands to one employer, the Mohegan Sun Casino, through SRS, a Union-controlled and operated entity. The Union has an exclusive hiring hall arrangement with SRS, which itself is a statutory employer. The Board reasonably found that the Union unlawfully failed to refer veteran stagehand Stephen Foti for jobs with various employers, and that SRS unlawfully discriminated against him. The specific issues before the Court are:

1. Whether substantial evidence supports the Board's finding that the Union violated Section 8(b)(1)(A) and (2) of the Act by refusing to refer Foti for employment with several employers, including SRS, for arbitrary, invidious, or capricious reasons unrelated to any objective standards for referrals.

2. Whether substantial evidence supports the Board's finding that SRS violated Section 8(a)(3) and (1) of the Act by maintaining with the Union a hiring hall system under which Foti was denied referrals for arbitrary, invidious, or capricious reasons.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by Stephen Foti, the Board's General Counsel issued a complaint alleging that the Union violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by failing to refer Foti to various

employers, and violated Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)) by attempting to cause or causing employers to violate Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)). The complaint also alleged that SRS, a statutory employer controlled and operated by the Union, violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discrimination in hiring in order to encourage membership in the Union. Following a hearing, an administrative law judge issued a decision recommending that the complaint be dismissed. (SA 12-24.) The General Counsel filed exceptions. (SA 1.)

On review, the Board reversed the judge's decision. The Board found that the evidence established that the Union refused to refer Foti for jobs for arbitrary, invidious, or capricious reasons unrelated to any objective standards of referral in violation of Section 8(b)(1)(A) and (2) of the Act. The Board also found that SRS violated Section 8(a)(3) and (1) of the Act by maintaining with the Union an exclusive hiring hall system under which he was denied referrals for arbitrary, invidious, or capricious reasons. (SA 1-12.)

On October 25, 2006, the Union and SRS filed a motion for reconsideration of the Board's Decision and Order. The Board issued an order denying the motion on April 17, 2007. (SA 25-33.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Union Supplies Stagehands to Various Employers Through Its Exclusive Hiring Hall; the Union Makes Job Referrals From a List That Favors Union Members; No Written Rules Govern the Operation of the Hiring Hall

The Union represents stagehands. It has collective-bargaining agreements or arrangements with the Horace Bushnell Theatre, the Meadows Music Theatre, and the Hartford Civic Center that require that the Union serve as the exclusive source of stagehands for those employers. (SA 2 & n.2, 13; A 47, 51, 388-90) The Union supplies stagehands directly to those employers through its exclusive hiring hall. (SA 2 & n.2, 13; A 47, 51, 388-90.)

The Union's business manager, Charles Buckland, runs the hiring hall, and is responsible for making decisions about referrals. (SA 3; A 214-15, 384-85.) Buckland refers stagehands to employers from a three-part list of names that he maintains. One part lists union members by seniority; another part contains an alphabetical list of individuals who are not members of the Union (also known as "extras"). (SA 3; A 186, 385, 417-19.) The remaining section contains the name of wardrobe employees, who are not at issue here. (SA 3; A 419.) Each week, as he makes referrals in response to requests from employers, Buckland starts at the top of the list of Union members, regardless of how far down the list he had to go

the previous week. (SA 3; A 385, 388, 421-23.) He refers nonmembers only if union members are unavailable. (SA 3; A 133, 421-23.) There are no written rules governing the operation of the hiring hall. (SA 3; A 213, 385, 417, 423, 426-27.)

B. The Union Establishes SRS To Refer Stagehands to the Mohegan Sun Casino

One of the largest employers in the geographical area in which the Union operates is the Native American-owned Mohegan Sun Casino and Hotel ("the Casino"). (SA 2 & n.2, 12; A 53.) The Casino is willing to employ union members, but is apparently unwilling to sign a collective-bargaining agreement with the Union or receive stagehands directly from it. (SA 2 & n.2, 12; A 53, 424-25.)

In light of the Casino's policy, the Union established SRS to serve solely as a pass-through vehicle for referring stagehands to the Casino. (SA 2 & n.2, 8; A 130, 424-25, 457-60.) The Union and SRS, which is an admitted statutory employer, maintain an exclusive hiring hall arrangement. SRS turns only to the Union for referrals, and does not refer stagehands to venues other than the Casino. (SA 2 & n.2, 12; A 52-53, 204, 425, 457-60.) SRS invoices the Casino for the employees' services, and SRS issues paychecks to the referred individuals. (SA 2 & n.2, 12-13; A 425.) SRS is located in the Union's office, and Union Business Manager Buckland and Union President Charles Morris are its only officers. (SA 2 & n.2, 12; A 53, 182-83, 204, 424-25, 442, 457-60.) In referring individuals

from SRS to the Casino, Buckland uses the same list of union members and nonmembers that he uses to refer stagehands from the Union's hiring hall directly to other employers. (SA 2 & n.2, 12; A 52-53, 214, 421, 424-25.)

C. Veteran Stagehand Robert Foti Moves To Connecticut, Receives Steady Referrals from the Union, and Works Without Incident

Robert Foti had worked as a stagehand for over 15 years when he moved to Connecticut in 2001. (SA 2, 13; A 43, 49-50.) He possessed a wide range of stagehand skills, including some that other stagehands do not have. (SA 2, 13; A 43-50, 56, 76, 115.) Soon after moving, Foti, who was not a union member, contacted the Union about obtaining job referrals. (SA 2, 13; A 49-51.) Within a few months, the Union began referring him from its exclusive hiring hall to the employers it served in Connecticut. (SA 2, 13; A 47, 50-54.)

The Union and SRS would consistently call Foti for referrals. (SA 2; A 54, 67-68, 441.) Foti did not have to initiate calls because Business Manager Buckland (along with Buckland's predecessor as business manger, Mike Sullivan) viewed him as a "yes man"—someone who was regularly willing to take jobs. (SA 2; A 54, 60, 67-68, 73, 441.)

Foti worked without incident on hundreds of jobs for the employers to whom he was referred. (SA 3, 32; A 73-76.) He received compliments about his

work from the SRS leadperson, and one venue extended Foti's employment from 1 day to 30 days based on his good work. (SA 3, 32; A 73-75.)

No employer ever complained to the Union or SRS about Foti's work. (SA 3, 32; A 73, 118.) Unlike other stagehands, he was never the subject of safety or incident reports. (SA 4; A 73, 118.) Unlike other stagehands, he was never reprimanded or disciplined. (SA 4; A 73, 118, 169-73, 180, 184, 296-99, 302-04, 375, 472-73.) Although Foti was late to work on occasion, many other stagehands were late far more often than he was, and some, unlike him, were disciplined. (SA 4, 16 n.3, 28-29; A 56-57, 147, 180, 285-92, 461-71, 474.) At no time did the Union or SRS ever tell Foti it was concerned about his punctuality or any other aspect of his job performance. (SA 4, 30-32; A 73, 118.)

D. Foti Applies for Union Membership; at a General Membership Meeting at Which Applicants Are Discussed, One Member Expresses His Opinion that Foti Is Lazy and Often Late; Union Officers Do Not Ask Foti About His Allegedly Poor Performance

As noted above, under the hiring hall arrangement, union members get the first opportunity for taking referrals from the hiring hall. (SA 3; A 133.) The Union's rules allow individuals to apply for membership after they have performed bargaining unit work for 18 months. (SA 13; A 188-89, 191.) In April 2004, Foti applied for membership. (SA 13; A 59-60.) To become a member, an applicant has to pay fees, pass a background check, obtain approval from the Union's

executive board, and, finally, garner the approval of the Union's general membership via a favorable vote. (SA 13; A 60-61, 188-89.)

Foti paid the required fees and passed the background check. (SA 13; A 60-61.) Following those steps, the Union's executive board—which included President Morris and Business Manager Buckland—interviewed Foti (and nine other applicants) in April. (SA 3, 13; A 60-61.) The executive board approved all of the applicants. (SA 13; A 60-61, 63, 196-97.) The executive board members did not raise any concerns about Foti's job performance. (A 63, 216-17.)

After the executive board had voted, the Union held a general membership meeting at which Buckland and Morris were present. (SA 13; A 149, 197, 390.) At the meeting, members were invited to discuss the applicants' qualifications in anticipation of voting on them at the next general membership meeting, to take place the following month. (SA 4, 13; A 63, 93, 196.) The applicants were not present during this discussion. (SA 3-4, 13; A 193, 196.) Union member Jason Philbin expressed his opinion that Foti was "lazy" and "often late." (SA 3, 13; A 159.) Philbin had been brought up before the executive board for disciplinary action regarding his tardiness. (SA 4, 13; A 159, 169.)

None of the executive board members spoke to Foti or anyone else about the allegations raised during the April general membership meeting. (A 217-18.) Union President Morris, who later could not recall what the complaints about Foti

at the April meeting were, did not think that anything alleged at the meeting would result in Foti's being denied membership. (A 198-99, 217-18.) Business Manager Buckland viewed the complaints about Foti that were voiced at the April meeting as unremarkable and similar to gripes he had heard about other stagehands. (SA 30 & n. 6; A 392.)

E. The Union's General Membership Votes To Approve All of the Applicants Except Foti; Without Investigating the Allegations Against Foti, Buckland Tells Foti that Due to the Membership Vote, He Would No Longer Receive Referrals from the Union or SRS

At a May 24 general membership meeting, attended by about 45 members, the membership voted to approve all of the applicants except Foti. (SA 4, 13; A 63, 193, 200-01, 444.) This was the first time that the Union had ever voted down an applicant. (SA 4, 13; A 200.) After the vote, Union President Morris entered the room in which the applicants were waiting to hear the results. (SA 4, 14; A 63-64.) He announced that nine of the applicants had been accepted, but that one had not. (SA 14; A 64-65.) Morris asked all of the applicants except Foti to leave. (SA 4; A 65-67.) Foti realized that his application had been rejected. As Morris was escorting Foti away, Foti told him that it was the most embarrassing thing he had ever experienced. (SA 4, 14, 21; A 65.) At no time did Foti ever tell Morris—or anyone else—that he would no longer accept referrals from the Union or SRS.

(SA 4, 21; A 65-67.) Morris did not say anything to Foti about Foti's job performance; neither did Buckland. (A 66, 72-73.)

The three-week referral on which Foti had been working expired on May 29. (SA 4; A 67, 72.) Because Foti had not heard from Buckland regarding further referrals, he called Buckland on May 31 in order to obtain more work. (SA 4; A 67, 72-73.) Buckland denied Foti's request. (SA 4; A 72-73.) He referred to the vote against Foti, and told Foti that the Union would not refer him to jobs because his application for membership had been denied. (SA 4; A 72, 76-78.) Buckland also told Foti that SRS would not refer him for jobs at the Casino. (SA 4; A 76-77, 81.) The Union did not call Foti between the date of this conversation and November. (SA 4; A 76-77, 81.) The Union and SRS did not investigate why union members had rejected Foti. (SA 7, 31; A 397-98.)

Six months later, in November, the Union received notice of an unemployment compensation claim that Foti had filed against SRS. Morris was upset about this because the claim was potentially an expensive one. He then asked Foti—who had been told that he could no longer receive referrals (SA 4; A 72, 73, 77)—why he had not been calling in. (SA 4; A 79, 217.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Liebman and Schaumber) found 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 refusing to refer Foti for arbitrary, invidious, or capricious reasons unrelated to any objective standards for referral. (SA 1-11.) The Board also found that SRS violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by maintaining with the Union an exclusive hiring hall system under which applicants for employment were denied referrals for arbitrary, invidious, or capricious reasons. In this regard, the Board found that SRS had actual notice of the Union's discriminatory treatment of Foti, and was therefore, under settled Board law, jointly and severally liable with the Union for Foti's remedy.[2] (SA 8, 11.)

The Board's order requires the Union to cease and desist from refusing to refer Foti for arbitrary, invidious, or capricious reasons, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act (29 U.S.C. § 157). (SA 11.) Affirmatively, the Board's order requires the Union to, jointly and severally with

[2] As noted above, the Union and SRS filed a motion for reconsideration of the Board's Decision and Order. The motion asserted, as grounds for reconsideration, that the Board's decision ignored the administrative law judge's credibility findings; ignored evidence concerning Foti's work performance; and misconstrued the record evidence. (SA 25-26; A 31.) The Board found that the claims were without merit, and denied the motion. (SA 25-33.)

SRS, make Foti whole for any loss of wages and benefits; to make available to the Board any records necessary for determining backpay; and to post a remedial notice. (SA 11.)

As for SRS, the Board's order requires it to cease and desist from maintaining with the Union an exclusive hiring hall system under which applicants for employment were denied referrals for arbitrary, invidious, or capricious reasons and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. (SA 11.) Affirmatively, the Board's order requires SRS to, jointly and severally with the Union, make Foti whole for any loss of earnings and benefits; to make available to the Board any records necessary for determining backpay; and to post a remedial notice. (SA 11.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Union's refusal to refer stagehand Stephen Foti after denying his application for membership was arbitrary, invidious, and unrelated to any objective standards for referral, and therefore unlawful.

Notwithstanding Foti's unblemished record, Union Business Manager Buckland simply assumed after the membership vote rejecting Foti that there was merit to a complaint raised about Foti at the meeting where his application was discussed. In abruptly terminating Foti's referrals in the aftermath of the vote,

Union officers Buckland and Morris did not so much as pause to investigate the allegations against Foti or to ask Foti about them.

The Board reasonably found that the Union's asserted reason for failing to refer Foti—that he was a deficient worker whose removal was necessary to the Union's effective performance of its representational function—was unpersuasive. First, as just noted, at the time, Buckland and Morris did not actually know anything about Foti's alleged deficiencies, but instead, they blindly accepted the membership's vote.

Moreover, the Union's and SRS's claim that they were compelled to stop referring Foti after the vote was, as the Board explained, undermined by evidence showing that he was treated in a markedly disparate manner vis-a-vis other stagehands. There was no objective explanation for why Foti was denied referrals while no one else was.

The Union's and SRS's challenges to the Board's finding are without merit. To begin, the Union and SRS wrongly claim that the Board inappropriately shifted the burden of proof from its General Counsel to the Union and SRS by applying the analytical framework of *Operating Engineers Local 18 (Ohio Contractors Assn.),* 204 NLRB 681, 681 (1973), *enforcement denied on other grounds*, 496 F.2d 1308 (6th Cir. 1974). The Union and SRS failed to file any cross-exceptions with the Board, in which they could have raised such an argument; nor did they

mention it in their motion for reconsideration. Thus, Section 10(e) of the Act (29 U.S.C. § 160(e)) creates a jurisdictional bar to consideration of this untimely argument. In any event, the Board appropriately applied settled principles relating to exclusive hiring halls, and the cases relied on by the Company are inapposite.

In order to bolster their allegations about Foti's job performance, the Union and SRS rely on the testimony of witnesses at the *unfair labor practice hearing*, such as testimony about Foti's work ethic and two alleged safety issues. This is after-the-fact evidence, unknown to the Union's decision-makers when they stopped referring Foti; by definition, it cannot provide an explanation for their action against Foti. The Union's and SRS's attempt to downplay testimonial and documentary evidence that shows that Foti was treated disparately from stagehands with job performance deficiencies similar to those he was alleged to have is also unavailing.

Finally, the Union and SRS get nowhere in arguing that the Board ignored the judge's credibility findings. The Board acknowledged the judge's difficulty in reconciling Union members' testimony about why they voted against Foti with Foti's testimony about his work abilities. But the Board did nothing more here than exercise its undisputed prerogative to examine the evidence and draw reasonable inferences. The Union's and SRS's argument ignores the fact that *they* rely on explicitly discredited testimony in order to buttress their contentions.

Substantial evidence also supports the Board's finding that SRS violated Section 8(a)(3) and (1) by maintaining with the Union an exclusive hiring hall system under which applicants for employment were denied referrals for employment for arbitrary, invidious, or capricious reasons. The Board reasonably found that SRS was liable because, under settled Board law—the application of which the Union and SRS failed to challenge before the Board—an employer is jointly and severally liable for a union's discriminatory operation of a hiring hall if it knows or can be reasonably charged with notice of a union's discrimination. As the Board explained, there is no question that SRS, which is run by Buckland and Morris, had actual notice of the Union's discriminatory treatment of Foti.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) AND (2) OF THE ACT BY FAILING TO REFER STEPHEN FOTI FOR EMPLOYMENT FOR ARBITRARY, INVIDIOUS, OR CAPRICIOUS REAONS

A. Applicable Principles and Standard of Review

Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) makes it an unfair labor practice for a labor organization to "restrain or coerce employees" in the exercise of their rights guaranteed by Section 7 of the Act (29 U.S.C. § 157), including the right to refrain from union activity.[3] Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)) makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of" Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)). Section 8(a)(3), in turn, makes it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[4] The policy

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[3] Section 7 of the Act (29 U.S.C. §157) guarantees employees the right to self-organization, to form, join, or assist labor organizations, or to refrain from such activities.

[4] The only exception to these general principles is that lawful union security clauses in collective-bargaining agreements may require payment of uniformly required union dues and fees as a condition of employment. *See* Section 8(a)(3) of the Act. This exception is not relevant to the present case.

behind these provisions is to ensure that employees' jobs are insulated from their organizational rights.[5]

These statutory principles apply to "exclusive hiring hall arrangements, under which workers can obtain jobs only through union referrals."[6] The operation of an exclusive hiring hall is not a per se violation of the Act, but it is "subject to scrutiny[,]" because it presents a union with an opportunity to engage in discrimination by giving preference to some individuals over others.[7] Accordingly, an exclusive hiring hall "must represent all users in a fair and impartial manner."[8] Because of the potential coerciveness involved with hiring halls—that is, the union's tremendous authority over hiring and the workers' dependence on that authority—the Board has long held that a Union violates Section 8(b)(1)(A) of the Act when it administers or fails to refer an individual from an exclusive hiring hall for arbitrary, invidious, or capricious reasons.[9] When

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[5] *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954). *Accord NLRB v. Bakery Workers Local 50*, 339 F.2d 324 (2d Cir. 1964); *Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988).

[6] *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988).

[7] *Kudla v. NLRB*, 821 F.2d 95, 99 (2d Cir. 1987).

[8] *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 907 (1985), *enforced*, 843 F.2d 1292 (6th Cir. 1988).

[9] *Stage Employees IATSE Local 646 (Parker Playhouse)*, 270 NLRB 1425 (1984).

a union causes or attempts to cause 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.[10]

Additionally, when a union interferes with an employee's employment status for reasons other than the failure to pay dues, initiation fees, or other fees uniformly required, "it has demonstrated its . . . power to affect his livelihood in so dramatic a way" that the Board infers that the effect of the Union's action is to encourage union membership.[11] This inference—or presumption as it is also called—may be overcome "in instances in which the facts show that the union action was necessary to the effective performance of its function of representing its constituency."[12]

See also Boilermakers Local 374 v. NLRB, 852 F.2d 1353, 1358 (D.C. Cir. 1988) ("by wielding its power arbitrarily, the Union gives notice that its favor must be curried, thereby encouraging union membership and unquestioned adherence to its policies.").

[10] *See, e.g., Carpenters Union Local No. 25 v. NLRB*, 769 F.2d 574, 580-81 (9th Cir. 1985); *Stage Employees IATSE Local 646 (Parker Playhouse)*, 270 NLRB 1425 (1984).

[11] *Operating Engineers Local 18 (Ohio Contractors Assn.),* 204 NLRB 681, 681 (1973), *enforcement denied on other grounds*, 496 F.2d 1308 (6th Cir. 1974).

[12] *Id.; accord Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8, 10, 14 (D.C. Cir. 1985); *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985), *enforced*, 843 F.2d 1292 (6th Cir. 1988).

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole, even if a reviewing court might have reached a different conclusion had the matter been before it de novo.[13] Indeed, "whether a hiring hall practice is discriminatory and violative of the Act is a determination that Congress has entrusted in the first instance to the Board, and is entitled to considerable deference."[14] The Board's reasonable inferences are entitled to substantial deference;[15] the Board's application of the law to the facts is entitled to deference as well.[16] Finally, the Board "is free to draw its own conclusions from the record developed before the [administrative law judge]."[17]

B. After Rejecting Foti's Bid for Membership in the Union, the Union and SRS Unlawfully Refused to Refer Him for Jobs for Arbitrary and Invidious Reasons

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[13] Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). *Accord NLRB v. G&T Terminal Packaging Co*., 246 F.3d 103, 114 (2d Cir. 2001); *NLRB v. Thalbo Corp*., 171 F.3d 102, 112 (2d Cir. 1999);

[14] *Kudla v. NLRB*, 821 F.2d at 99 (citations omitted).

[15] *Universal Camera Corp. v. NLRB*, 340 U.S. at 487-88.

[16] *See, e.g., Electrical Contractors, Inc. v. NLRB*, 245 F.3d 109, 116 (2d Cir. 2001); *Sheridan Manor Nursing Home, Inc. v. NLRB*, 225 F.3d 248, 253 (2d Cir. 2000).

[17] *Kudla v. NLRB*, 821 F.2d at 98.

Substantial evidence supports the Board's finding (SA 6-8) that following the vote denying union membership to stagehand Foti, the Union refused to refer him to jobs for arbitrary and invidious reasons unrelated to any objective standards for referral.

As shown above, when a union operates an exclusive hiring hall (as it undisputedly does here), and interferes with an employee's employment status for arbitrary, invidious, or capricious reasons, it has demonstrated its power so dramatically that the Board infers that the effect of the conduct is to encourage union membership.[18] Here, it is undisputed that the Union abruptly and explicitly stopped referring Foti after his bid for membership was rejected. Indeed, the Union and SRS concede (Br 26) the temporal connection between the events. As the Board stated, the central issue is "whether the Union's failure to refer Foti was justified by his poor work, as the Union argues, or was unjustified because it was based on . . . arbitrary reasons." (SA 2.)

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[18] *Operating Engineers Local 18 (Ohio Contractors Assn.),* 204 NLRB 681, 681 (1973), *enforcement denied on other grounds*, 496 F.2d 1308 (6th Cir. 1974) *("Operating Engineers Local 18").* As shown below, although the Union and SRS now express qualms (Br 34-38) about the framework of analysis the Board applied to this issue—that is set forth in *Operating Engineers Local 18*—their challenge is untimely. The Union and SRS never challenged the judge's or Board's reliance on that framework, either by filing cross-exceptions to the administrative law judge's decision or by including such an argument in their motion for reconsideration of the Board's Decision and Order.

Foti was a veteran stagehand who possessed a wide range of skills. Prior to his unsuccessful efforts to be admitted to the Union, he had received hundreds of referrals to various employers. (SA 2-3; A 47, 50-54.) Foti was in demand because Business Manager Buckland viewed him as a "yes man"—someone who would routinely accept referrals. No employer ever complained about Foti's work, and Foti worked on his assignments without incident. Thus, he was never disciplined or reprimanded, and was never the subject of any incident or safety report. (SA 2-4, 7; A 73, 76, 118, 173.) In short, the Union and SRS never raised any concerns with Foti about his job performance. (SA 2-4, 7; A 73, 76, 118, 173.)

After Foti tried unsuccessfully to become a member of the Union, there was a dramatic—and arbitrary—change in the Union's view of his suitability for referral, with Buckland telling Foti that he would not refer him for jobs, explaining only that it was because Foti's application had been denied. (SA 4; A 72, 77.) Not surprisingly, the Union no longer attributes its decision to Foti's non-member status, but has proferred no plausible and non-arbitrary explanation for its actions. The only intervening development related to Foti's qualification for continued referral was Union member Jason Philbin's statement at the April meeting that Foti was "lazy" and "often late." (SA 4; A 159, 249, 254.) At the time, however, Buckland viewed these allegations against Foti as unremarkable, and he did not think that Foti would be rejected by the membership. (A 392.) Morris, who was

also at the meeting, could not subsequently recall what the allegations were, and did not think that the allegations would prevent Foti from becoming a member. (SA 4; A 199, 217-18.) Neither Buckland nor Morris spoke to Foti about any of the allegations before the May 24 vote rejecting his application, nor did they even claim to have had any actual knowledge of Foti's alleged deficiencies at that time. (SA 7, 31; A 216-18.)

More critically, as the Board reasonably found (SA 4, 7-8, 31), neither Buckland nor Morris had obtained any additional knowledge or talked to Foti about the allegations when, a week after the vote, Buckland told Foti that the Union would not refer him; notwithstanding that no employer had ever complained about Foti's work, and Foti had never been disciplined or reprimanded, Buckland and Morris did not so much as pause to look into the matter before they ended his referrals. (SA 2, 4-7, 31; A 63, 73, 76, 118.) Rather, as the administrative law judge and the Board found (SA 21, 32), they merely assumed on the basis of the vote that Foti's work was deficient. (A 200, 225, 396-99.) In the circumstances, the Board reasonably found (SA 30-32) that the Union's decision to terminate Foti's livelihood based solely on assumptions about his performance that it could have investigated, but chose not to, was arbitrary and invidious.

As the Board explained (SA 2-4, 7-8, 27), the Union's and SRS's claim that it had to stop referring Foti because of his poor work was further undermined by

record evidence establishing that Foti was treated disparately vis a vis other stagehands. Unlike Foti, stagehands with shortcomings similar to—or worse than—the ones he was alleged to have did not find themselves cut off from referrals or denied membership in the Union. (SA 4-7; A 169-73, 180, 184, 245-47, 296-99, 302-04, 375, 461-74, 494-98.)

As shown above, at the April general membership meeting, a Union member opined that Foti was "often late" to work and was "lazy." (SA 3; A 159, 162, 249, 254.) Although Foti may have occasionally been late to jobs (lateness reports from two venues including over 100 entries for a wide variety of stagehands show that he was late a total of three times), other stagehands were late far more often. (SA 4, 28-29 & n.3; A 285-93, 336, 461-71, 474, 494-98.) Time and again, stagehands showed up late, but none of them suffered the ultimate consequences that Foti did. (SA 4, 28-29; A 61-71, 474, 494-98.) The Union's lateness reports show, for example, that Chris Valenti was late multiple times. (A 288, 462, 464-65, 471, 474) Valenti's application for membership was not rejected, however, and he did not stop getting referrals. (SA 7; A 245.) In fact, Jason Philbin, the very union member who spoke against Foti in April, was late to work many times, and he was even disciplined by the executive board as a result. (SA 4, 7, 29 & n.3; A 465.) He did not even show up at all for one job, but the Union kept referring him. (SA 4, 7, 29 & n.3; A 169-73, 184, 465.) Another union member, Gene Graves, was

also disciplined for being late, but the Union and SRS did not stop his referrals. (A 184.) Moreover, Union member Al Lopez, was, unlike Foti, the subject of an incident report, but he continued to get referrals. (SA 4, 29; A 302-04, 374-75, 472-73.) None suffered the ultimate economic consequence that Foti suffered.

With respect to the Union's assertion that Foti was "lazy" (Br 8), the Board found that the ranks of stagehands included many individuals who did not, in the words of one witness, routinely "step up to the plate." (SA 7, 29-30 & n.4; A 244-45.) Union and SRS witnesses Stella Cerullo (A 244-48, 256), Michael Philbin (A 310-11), and Robert Tabara (A 148) testified that numerous stagehands did not consistently carry their weight on jobs or display a go-getter attitude. But, unlike Foti, they were not denied union membership or referrals. (SA 7, 29-30.) There was, in short, no evidence that the Union ever changed its referral criteria for anyone other than Foti. (SA 29-30.)

Finally, the Board reasonably found that, although there was testimony during the unfair labor practice hearing about two alleged safety issues relating to Foti—and criticism about Foti's work ethic—the Union and SRS "did not introduce incident reports or otherwise demonstrate knowledge of these issues at the time they ceased" referring him. (SA 7; A 146, 264, 308, 330, 332, 347, 350-51, 370-71.) If the events happened the way the witnesses' said they did, the Union's and SRS's failure to introduce such reports was inexplicable, because Buckland

testified that the one thing he insists on is that safety reports be filed. (SA 28-29; A 399.) The Board reasonably found that Buckland and Morris did not have any knowledge of actual safety (or other) problems. (SA 7; A 146, 264, 308, 330, 332, 347, 350-51.) Again, they just made assumptions based on vague allegations about Foti, and leapt to the conclusion that Foti was a deficient worker without so much as looking into the claims against him. (SA 4, 7, 30-31.)

In sum, the Board reasonably found that the Union and SRS unlawfully failed to refer Foti. The Union's and SRS's asserted reason for failing to refer Foti was, as the Board explained, based on speculation, and not on objective considerations. Moreover, it is fatally undermined by the record evidence, which shows that Foti was treated differently than his peers for no objective reason.[19] (SA 1-11, 28-30.)

C. The Union's and SRS's Contentions Are Without Merit

The Union's and SRS's challenges to the Board's finding that Foti was denied referrals for arbitrary and invidious reasons are without merit. As a preliminary matter, although they now express doubts (Br 34-38) about the framework of analysis the Board applied to this case, those doubts are untimely. The Union and SRS had multiple opportunities to bring their concerns to the

[19] *Cf. Carpenters Local 1102 (Detroit Edison Co.)*, 322 NLRB 198, 203 (1996), enforced 166 F.3d 1214 (6th Cir. 1998) (Table) (union's argument that it had to stop referring an employee was undermined by its disparate treatment of him vis-a-vis another employee).

Board's attention, but they failed to do so, either in cross-exceptions to the administrative law judge's decision in their favor (which they did not file at all) or their motion for reconsideration of the Board's decision. The Court is therefore jurisdictionally barred from considering this new argument—which, in any event, is without merit— on review.

The Union's and SRS's other contentions essentially amount to an after-the-fact attempt to bolster their asserted rationale for failing to refer Foti. They do this by quoting at length the unfair labor practice hearing testimony of witnesses who admitted that they first revealed their alleged concerns about Foti only days in advance of the hearing. The Union's and SRS's final stabs at unsettling the Board's findings consist of an unpersuasive challenge to the Board's reliance on certain documentary evidence and testimony showing disparate treatment, and a meritless argument that the Board ignored the judge's credibility findings.

1. The Union's and SRS's claim that the Board improperly shifted the burden of proof onto them by relying on *Operating Engineers Local 18* is untimely, and the Court is therefore jurisdictionally barred from considering it; in any event, the claim is wrong

Before this Court, the Union and SRS (Br 4 & n.2 34-38) assert, for the first time, that the Board "erred in putting the burden of proof" on them by applying the

settled principle of *Operating Engineers Local 18*[20] to this case. As shown above, in *Operating Engineers Local 18*, the Board held that, when a union interferes with an employee's employment status for reasons other than failure to pay dues or fees uniformly required, "it has demonstrated its . . . power to affect [the employee's] livelihood in so dramatic a way" that the Board infers that the effect of the Union's action is to encourage union membership.[21] This inference—or presumption as it is also called—may be overcome "in instances in which the facts show that the union action was necessary to the effective performance of its function of representing its constituency."[22] As we show, judicial consideration of the Union's and SRS's contention that the Board erred in applying this settled principle to the instant case is precluded by Section 10(e) of the Act (29 U.S.C. § 160(e)), which provides, in relevant part, that "no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances not present here.

Section 10(e) embodies the well-established principle that the need for "orderly procedure and good administration," requires that "courts should not

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[20] 204 NLRB 681, 681 (1973), *enforcement denied on other grounds*, 496 F.2d 1308 (6th Cir. 1974).

[21] *Id.*

[22] *Id.*

topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice."[23] In short, as this Court has recognized, courts "have no power to entertain [a] line of argument" that a party to a Board proceeding failed to raise before the Board.[24]

In ruling for the Union and SRS here, the administrative law judge *explicitly applied* the framework of analysis, contained in *Operating Engineers Local 18*, that the Union and SRS now express extended misgivings about. (SA 20.) Although the Board's rules permit a prevailing party to file cross-exceptions to aspects of the judge's decision with which they do not agree,[25] the Union and SRS failed to do so. The fact that the judge recommended dismissing the complaint is not a valid reason for failing to file exceptions, because the principle that courts have no power to entertain a line of argument that a party did not raise before the

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[23] *United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 37 (1952). *Accord NLRB v. GAIU Local 13 B Graphic Arts Int'l Union*, 682 F.2d 304, 311-12 (2d Cir. 1982).

[24] *NLRB v. DeBartelo*, 241 F.3d 207, 211 n.6 (2d. Cir. 2001)

[25] *See* Section 102.46(a), (g) of the Board's Rules and Regulations (29 C.F.R. § 102.46(a), (g)).

Board fully applies to such scenarios. It was incumbent on the Union and SRS to bring this matter to the Board's attention.[26]

Further, in reversing the judge, the Board applied the very same framework of analysis that the judge did, so the Union and SRS had yet another opportunity to take issue with it. Although they did file a motion for reconsideration of the Board's Decision and Order, they did not assert as one of their grounds for reconsideration that the Board had erred in applying the framework of analysis described in *Operating Engineers Local 18*. Instead, they only took issue with the Board's factual findings.[27] (SA 26; A 31.)

The Union and SRS have pointed to no extraordinary circumstances that would excuse their failure to take either of the two bites of the apple of which they could have availed themselves. Accordingly, under settled precedent, this Court lacks jurisdiction to consider the untimely argument of the Union and SRS that the

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[26] *NLRB v. DeBartelo*, 241 F.3d at 211 n.6 (citing *NLRB v. GAIU Local 13 B Graphic Arts Int'l Union*, 682 F.2d 304, 311-12 (2d Cir. 1982)).
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[27] Specifically, they only argued that the Board's Decision and Order contradicted the judge's credibility findings; ignored evidence concerning Foti's work performance; and misconstrued record evidence. (SA 26; A 31.) *See* Section 102.48(d)(1) of the Board's Rules and Regulations (29 C.F.R. § 102.48(d)(1)) (a motion for reconsideration must state with "particularity" the material error claimed).

Board impermissibly shifted the burden of proof onto them.[28] "To hold otherwise would be to set the Board up for one ambush after another" without giving it a chance to address a matter in the first instance.[29]

In any event, the Union's and SRS's contention that the Board impermissibly shifted the burden of proof onto them is meritless. It was the General Counsel's burden to establish the unfair labor practice violations by a preponderance of the evidence. Part of the General Counsel's burden of proof was to establish the existence of an exclusive hiring hall arrangement, which he undeniably did. (SA 2 & n.2) It was also his burden to establish that the Union and SRS stopped referring Foti, as he undeniably did as well. This failure-to-refer obviously affected Foti's employment status, as he was unable to earn a living through the union-operated hiring hall. Moreover, the Union and SRS overlook the fact that the Board expressly found (SA 7, 10) that the Union's conduct constituted *arbitrary and invidious* action.[30] Accordingly, as shown under

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[28] *See, e.g., Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *NLRB v. DeBartelo*, 241 F.3d at 211 n.6 (failure to file objections or motion for reconsideration regarding assertion acts as waiver); *NLRB v. Ferguson Electric Co., Inc*., 242 F.3d 426, 435 (2d Cir. 2001) (same).

[29] *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497-98 (D.C. Cir. 1996).

[30] *See, e.g., Stage Employees IATSE Local 646 (Parker Playhouse)*, 270 NLRB 1425 (1984).

Operating Engineers Local 18, the application of which was uncontested below, the General Counsel established the elements necessary to require the Union to rebut the presumption against it.

For essentially the same reasons, judicial consideration of the Union's and SRS's discussion (Br 35-37) of the Board's failure to apply *Wright Line, Div. of Wright Line*[31] principles is also foreclosed by Section 10(e). As just shown, the Union and SRS did not challenge the legal framework applied by the Board, much less propose an alternative framework such as it now urges, through cross-exceptions or in their motion for reconsideration. Nor, in any event, are those principles applicable here. *Holo-Krome Co. v. NLRB*,[32] on which the Union and SRS heavily rely (Br 23, 35-37), involved a totally distinct area of law—that is, a Section 8(a)(3) discharge allegation against an employer—and had nothing to do with hiring hall discrimination. In any event, central to the Board's rejection of the Union's defenses was its affirmative finding (SA 4, 7, 29) that the Union and SRS treated Foti in a disparate manner from stagehands who were members of the

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[31] 251 NLRB 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

[32] 954 F.2d 108 (2d Cir. 1992).

Union, a finding that plainly speaks to the question of motive.[33] At bottom, the Union was hardly deprived of an opportunity to advance a defense here—it was simply unable to come up with a convincing one that could show that its action against Foti "was necessary to the effective performance of representing its constituency."[34]

Finally, the Union and SRS do not advance their argument by relying on *NLRB v. New York Typographical Union No. 6,*[35] for the proposition that the Board failed to make a necessary finding that the Union's and SRS's conduct encouraged union membership. In that case, the Court addressed the question of whether a provision of a hiring hall's standards discriminated against nonmembers. The issue was not a failure-to-refer for arbitrary and capricious reasons. In the circumstances here, there was ample basis for the Board to infer, based on its settled law, that the entirely arbitrary treatment of Foti encouraged union membership. As shown above, under the *Operating Engineers Local 18* framework applied by the Board without objection below, the fact that the Union has interfered with Foti's employment for reasons other than a failure to pay dues

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[33] *See NLRB v. Future Ambulette, Inc*., 903 F.2d 140, 143 (2d Cir. 1990); *NLRB v. J. Coty Messenger Service, Inc*., 763 F.2d 92, 98 (2d. Cir. 1985).

[34] *Operating Engineers Local 18*, 204 NLRB at 681.

[35] *NLRB v. New York Typographical Union No. 6*, 632 F.2d 171 (2d Cir. 1980).

was by itself sufficient to give rise to the inference that the effect of its action was to encourage union membership.

Even without that presumption, moreover, the facts here would inevitably lead to the same conclusion. As the Union and SRS concede (Br 26), there is a temporal connection between the vote and the end of Foti's referrals, and the vote against Foti undeniably set in motion the very process which led to the disparate treatment against him—Foti was denied referrals even though union members with worse records than his were not. Moreover, Buckland conceded that, had the membership approved Foti's application, he would have continued to receive referrals. (A 409.) The Union's arbitrary actions, in circumstances intertwined with its denial of membership to Foti, plainly conveyed to employees that they should do everything within their power to "curr[y]" favor with the Union, thereby encouraging union membership.[36]

In sum, the Union's and SRS's challenge to the Board's analytical framework in this case is patently untimely. They had two opportunities to raise this issue, but neglected to do so. The belated contention should fail for that reason. Moreover, it should fail because the Union and SRS are wrong in suggesting that the Board erred in applying settled principles to this case.

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[36] *See Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988) (citation omitted).

We now turn to the remaining contentions, which essentially amount to an effort to unsettle the Board's reasonable findings that the failure to refer Foti was unjustified.

2. The Union and SRS rely on irrelevant after-the-fact testimony about matters of which they had no knowledge at the relevant time

The Union and SRS point to, and quote at great length from (Br 9-14), portions of their witnesses' hearing testimony about Foti's alleged work deficiencies. According to the Union and SRS, this testimony suggests that they were justified in refusing to refer Foti because he was a "dangerous" or unsafe employee. The contention is meritless because it is built around allegations of which Buckland and Morris undisputedly were unaware, and therefore could have no pertinence to the issue here—their contemporaneous rationale for failing to refer Foti.

As shown above, the Board found (SA 7, 30-31) that Buckland and Morris had no knowledge of any safety-related (or any other) issues involving Foti prior to the vote and even afterwards. At most, they simply assumed that the vote against Foti indicated that some of his co-workers felt uncomfortable working alongside

him, but the two of them had no actual knowledge of any such problems. (SA 30-31.) Nothing in the employee testimony on which the Union and SRS rely undermines those critical findings; to the contrary, the witnesses who testified about supposed safety issues involving Foti admitted that they never shared these concerns with Buckland or Morris, and that they first revealed this information only days or weeks before the hearing. (SA 31; A 264, 308, 350-51, 363.) Finally, contrary to the Union's and SRS's claim, Foti rebutted the accusations. He testified that he was never told that he had any safety (or any other) problems. (A 104, 118.)

In a somewhat related vein, the Union and SRS lace their brief (Br 8, 13, 32) with references to some stagehands who seemed to dislike Foti for personal reasons, and therefore "ridicule[d]" him. They point to testimony that a union member angrily and physically confronted Foti for no apparent reason (Br 8), and that another union member taunted him by calling him by a disparaging nickname (Br 8-9). None of this name-calling (Br 8, 13, 32) advances the Union's and SRS's cause, however. Some union members may not have liked Foti, but this certainly does not constitute a legitimate reason for ending his referrals, much less demonstrate that Buckland and Morris had specific knowledge—and not just assumptions—on which to base their decision.

In sum, the Union's and SRS's reliance on the after-the-fact testimony of their witnesses to portray Foti as a poor employee is fundamentally flawed because the relevant issue is what the Union and SRS knew at the time they stopped his referrals, not what was revealed for the first time a year later.

3. The Union's and SRS's attempt to undercut evidence relied on by the Board in finding disparate treatment is unavailing

As shown above, the Union's and SRS's claim that it had to stop referring Foti was based on his allegedly being lazy and frequently late to assignments. As the Board found (SA 4, 7, 28-30), this explanation was undermined by documentary and testimonial evidence, including the Union's own records. (SA 4, 7, 28-30.) Although the Union and SRS now try to undercut that evidence, their effort falls short.

In finding that Foti was treated disparately, the Board pointed to two lateness reports prepared by SRS and the Union. (SA 4, 7; A 461-71, 474.) The lateness report from SRS shows that Foti was only late on one occasion, and for a valid

excuse. (A 463.) Others, however, were late for more often. Some were disciplined, yet, unlike Foti, continued to get referrals.[37] (SA 4, 7; A 461-71.)

The Union and SRS try to undercut this evidence by arguing, first, that it was haphazardly prepared guesswork, and, second, that Buckland was not even aware of it until after he decided to stop referring Foti. As to the first point, the document speaks for itself, and it was prepared by a union leadman, Michael Philbin, in the course of his duties. Indeed, Philbin testified that it was based on his best recollection. (SA 4, 28-29; A 291-92.)

The second argument is based on pure speculation. Buckland obviously was aware of at least one member's tardiness record, because he was a member of the executive board, which had disciplined that union member for being late. (A 169.) In any event, to say that Buckland was not aware of this document—and that the Union's record keeping was hopelessly disorganized—would amount to a concession that Buckland stopped referring Foti without investigating any of the allegations against him, and utterly failed to measure him against any objective standards for referral.

As to the Union's and SRS's claim that Foti was not referred because he was "lazy" (Br 10), the Board found (SA 7, 29-30 & n.4) that several witnesses testified

[37] Indeed, Jason Philbin was simply a "no show" for one assignment. He was disciplined, but unlike Foti (who was never a "no show") kept getting referrals. (SA 29.) As the Board stated, this demonstrated disparate treatment. (SA 29.)

that the stagehand ranks included numerous individuals who did not carry their weight and did not step up to the plate on a routine basis. (A 148, 244-48, 256, 310-11.) Unlike Foti, they were not denied referrals. (SA 7, 29-30 & n.4.) The Union and SRS are simply wrong in saying that Stella Cerullo was the only witness who testified about this matter. The Board used her testimony as one example—it did not stand alone. Michael Philbin and Robert Tabara echoed her testimony. (SA 29 & n. 4; A 148, 244-48, 256, 310-11.)

4. The Union's and SRS's argument that the Board's decision cannot be reconciled with the administrative law judge's credibility findings is also without merit

The Union and SRS argue (Br 40-41) that the administrative law judge's credibility resolutions mean "that it must be taken as true that Foti was a deficient worker," and that the Union's and SRS's "newfound knowledge" (Br 40) of those deficiencies was the "real reason" (Br 40) Foti's referrals ended. Their argument is without merit.

To begin, the Union's and SRS's assertion (Br 40-41) that the Board disregarded sworn testimony is simply wrong. They fail to recognize that the Board's decision acknowledged union members' testimony about why they voted against Foti, and noted the judge's difficulty in "reconcil[ing] Foti's testimony about his work abilities with the union members' testimony." (SA 27.) In fact, the

only two witnesses who the judge *directly* discredited in whole or in part were union witnesses Jason Philbin and Charles Morris. Moreover, the Union's and SRS's take on the judge's credibility resolutions is inaccurate. The judge did not find, as the Union and SRS argue (Br 39-40), that Business Manager Buckland and President Morris actually knew about Foti's deficiencies at any point. The judge's finding (SA 21), as the Board noted (SA 30), was that Morris merely *assumed* that Foti's job performance was lacking to such an extent that they had to stop referring him to employers. Further, there is no evidence that the Union and SRS had any actual knowledge of Foti's alleged deficiencies at any time.

In raising their challenge, the Union and SRS overlook that it has been settled for over half a century that the Board has the ultimate power and responsibility of determining the facts as revealed by the preponderance of the evidence after conducting a *de novo* review of the record.[38] As the Board found (SA 4, 7, 25-33), the record contained ample, uncontradicted evidence undermining the Union's and SRS's claim that it had to stop referring him because of his job performance. This evidence consists of the Union's own records, as well as the uncontradicted testimony of *its own* witnesses. The Board thus acted entirely appropriately in drawing its own inferences from this evidence.

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[38] *Standard Dry Wall Products*, 91 NRLB 544, 545 (1950), *enforced* 188 F.2d 362 (3d Cir. 1951); *see also Kudla v. NLRB*, 821 F.2d 95, 98 (2d Cir. 1987).

The Board was, therefore, entirely justified in inferring, based on settled law, that the Union's and SRS's denial of referrals to Foti was arbitrary and unjustified. As the Board pointed out (SA 31-32), it was not saying in its decision that Foti was an "exemplary" employee—the central matter was that the Union and SRS treated him disparately vis-a-vis other stagehands who used the hiring hall, and the Union's and SRS's reasons were based on unfounded speculation, rather than readily-available facts.

As a final matter, it is the Union and SRS who actually ignore aspects of the judge's credibility findings. Thus, in their brief (Br 9), the Union and SRS refer to Morris's explicitly discredited testimony that Foti told him that he was too embarrassed to work alongside union members. (SA 4, 21.) The Union and SRS overlook the fact that the judge credited Foti's testimony that he never said this, and discredited Morris's claim that he did. (SA 4.) The judge, at bottom, credited Foti's testimony that he merely said that the vote was the most embarrassing thing that had ever happened to him. (SA 4, 21.)

In sum, the Union and SRS have provided no grounds for disturbing the Board's finding that they arbitrarily failed to refer Foti. As the Board reasonably found, their asserted reason for refusing to refer Foti was based on assumptions and speculation, and was undermined by the record evidence, which showed him to be a victim of disparate treatment.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT SRS VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY MAINTAINING WITH THE UNION AN EXCLUSIVE HIRING HALL SYSTEM UNDER WHICH FOTI WAS DENIED REFERRALS FOR ARBITRARY, INVIDIOUS, OR CAPRICIOUS REASONS

A. Applicable Principles and Standard of Review

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to "discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[39] Under settled Board law, employers will be jointly and severally liable for a union's discriminatory operation of a hiring hall if they know or can reasonably be charged with notice of a union's discrimination.[40]

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole, even if a reviewing court might have reached a different conclusion had the matter been before it de novo.[41] The Board's reasonable inferences are also entitled to substantial deference.[42]

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[39] A violation of Section 8(a)(3) of the Act results in a derivative violation of Section 8(a)(1) of the Act, which provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of [their] rights." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 697 n.4 (1983).

[40] *Wolf Trap Foundation*, 289 NLRB 760, 760 (1988).

[41] Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). *Accord NLRB v. Thalbo Corp*., 171 F.3d 102, 112 (2d Cir. 1999).

B. The Board Reasonably Found that SRS Had Actual Notice of the Union's Discriminatory Treatment of Foti, and Is Jointly and Severally Liable with the Union for His Remedy

Substantial evidence supports the Board's finding that SRS violated Section 8(a)(3) and (1) of the Act by maintaining with the Union a hiring hall system under which Foti was denied referrals for arbitrary, invidious, or capricious reasons. It is undisputed that SRS is an employer under the Act, and that it has an exclusive hiring hall arrangement with the Union. (SA 2 & n.2, 8.) As shown above, the Union established SRS in order to provide stagehands to the Casino, which apparently would not accept referrals directly from the Union. (SA 2 & n.2, 8.) The sole purpose of SRS was to function as a "pass through" mechanism, and its only officers were union agents Buckland and Morris. (SA 2 & n.2.) In making referrals to SRS, Buckland used the same list of union members and nonmembers that he uses to make referrals to other employers. (SA 2 & n.2.)

Foti received numerous referrals from SRS. However, following the vote, Buckland told him the Union and SRS would no longer refer him. Foti's referrals from SRS thus effectively ended in May. (SA 3.) The Board reasonably found (SA 8) that "there is no question that" SRS had actual notice of the union's discriminatory treatment of Foti, because its only officers also operated the union's

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[42] *See, e.g., Universal Camera Corp.*, 340 U.S. at 487-88.

hiring hall, and had notice of the hiring hall's discriminatory treatment of Foti. (SA 8.) Thus, as the Board explained, under the principle of *Wolf Trap Foundation,* SRS violated Section 8(a)(3) and (1), and is jointly and severally liable with the Union for Foti's remedy. (SA 8, 11.)

There is no merit to the Union's and SRS's apparent claim (Br 21) that the Board somehow changed the theory under which SRS was allegedly liable. The Union and SRS did not raise this claim before the Board, so they are barred from doing so before the Court.[43] In any event, the Board did no such thing—the 8(a)(3) allegation has remained the same at all times. The Board simply applied the settled principle of *Wolf Trap Foundation* to the allegation. That is, when a union fails to refer an individual from a hiring hall for an unlawful reason an employer is also liable under Section 8(a)(3) and (1), if the employer knew, or can reasonably be charged with knowing, about the union's discrimination. Notably, the Union and SRS do not challenge the Board's application of *Wolf Trap Foundation*. Indeed, the Union and SRS do not directly challenge this finding. Their only claim (Br 23) is that, "if the Union's conduct turns out not to be illegal, SRS's conduct therefore automatically becomes legal as well." As shown above,

[43] *See, e.g., Int'l Ladies Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (failure to raise argument before the Board regarding alleged change to theory of liability precluded judicial consideration of that argument).

however, there is no merit to their contentions that the Board erred in finding that the Union's conduct toward Foti was unlawful under the Act.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Union's and SRS's petition for review, and enforcing the Board's order in full.

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National Labor Relations Board
March 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL ALLIANCE OF THEATRICAL & STAGE EMPLOYEES AND MOTION PICTURE TECHNICIANS OF THE UNITED STATES AND CANADA, LOCAL 84, AFL-CIO, STAGEHANDS REFERRAL SERVICE, LLC	)	
Petitioners/Cross-Respondents	)	
v.	)	Nos. 07-2126-ag(L) & 07-3103-ag(Xap)
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

COMBINED CERTIFICATES

As required under the Federal Rules of Appellate Procedure, combined with Local Rules 25, 28, and 32, Board counsel makes the following certifications:

COMPLIANCE WITH TYPE-VOLUME REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its brief contains 10,472 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the pdf file containing a copy of the Board's brief that was sent by e-mail to the Court is identical to the hard copy of the Board's brief filed with the Court and served on petitioners/cross-respondents, and were scanned for viruses using Symantec AntiVirus, program version 10.0.2.2000 (3/2/08 rev. 1), and according to that program, are free of viruses.

_____

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Dated at Washington DC
this 3rd day of March 2008

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by U.S. Priority Mail the required number of copies of the Board's brief in the above-captioned case, and has served two copies of that brief by U.S. Priority Mail, and by e-mail, upon the following counsel at the address listed below:

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