

Writers Guild of America, West, Inc. and Universal Network Television, LLC. and NBC Studios, Inc. Cases 31–CB–12062 and 31–CB–12063

July 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On February 13, 2007, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

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

Anne J. White, Esq., for the General Counsel.

Anthony R. Segall, Esq., of Pasadena, California, and *Countess C. Williams, Esq.*, of Los Angeles, California, for the Respondent.

Peter J. Hurtgen, Esq., of Irvine, California, *Andrew Herzig, Esq.*, of New York, New York, and *Sheldon Kasdan, Esq.*, of Los Angeles, California, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Los Angeles, California, on December 11–13, 2006. Universal Network Television, LLC. (Universal), in Case 31–CB–12062, and NBC Studios, Inc. (NBC), in Case 31–CB–12063 (hereafter referred to collectively as the Charging Parties or the Employers), filed respective unfair labor practice charges against the Writers Guild of America, West, Inc. (the Writers Guild, the Union, or the Respondent) on August 15, 2006.¹ Copies of those charges were served on the Respondent by regular mail on August 16, 2006.² Based on those charges, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a com-

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² NBC Universal is the parent company of both Universal and NBC.

³ The Respondent's answer denies knowledge of the filing and service of the charges. However, the formal papers received in evidence establish that the charges were properly filed and served on the Respondent on the dates alleged in the complaint. (GC Exhs. 1(a)–(d).)

plaint dated October 26, 2006.³ The complaint alleges that the Respondent violated Section 8(b)(1)(B) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsels for the General Counsel, the Charging Parties, and the Respondent, and my observation of the demeanor of the witnesses, I now make the following.⁴

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Universal, with an office and primary place of business located in Universal City, California, has been engaged in the business of producing television programs. Also, I find that during the 12-month period ending October 26, 2006, Universal purchased and received goods, supplies, and materials in the State of California valued in excess of \$50,000, directly from sources located outside the State of California; and that during the same period of time, in conducting its business operations, Universal received gross revenues in excess of \$50,000.

Accordingly, I conclude that Universal is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Further, the complaint alleges, the answer admits, and I find that NBC, with an office and primary place of business located in Universal City, California, has been engaged in the business of producing television programs. Also, I find that during the 12-month period ending October 26, 2006, NBC purchased and received goods, supplies, and materials in the State of California valued in excess of \$50,000, directly from sources located outside the State of California; and that during the same period of time, in conducting its business operations, NBC received gross revenues in excess of \$50,000.

Accordingly, I conclude that NBC is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

³ All dates are in 2006, unless otherwise indicated.

⁴ The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Dispute*

For the most part, the facts in this case are not in dispute. The Employers are parties to collective-bargaining agreements with the Union covering the writers of network television programs. While NBC and Universal are parties to separate agreements with the Union, all parties stipulated at the hearing that the two agreements are almost identical, with only minor differences unrelated to the issues in this matter, and both agreements are referred to throughout this decision collectively as the MBA.⁵ The MBA encompasses the minimum terms and conditions of employment for the writers. However, the writers have the opportunity to negotiate better terms and conditions than provided for in the MBA directly with the Employers.

The Employers produce network television programs, a number of which were scheduled for the 2006–2007 fall television season. Among those shows were two mentioned in the complaint, “The Office” and “Crossing Jordan.” On each of the network shows there is typically an individual employed as a “show runner.” The show runner is in many instances the creator of the show, and generally is an executive producer who functions as the show’s chief writer with principal responsibility for the creative direction of the series. While each program may have more than one executive producer, there is usually only one show runner. All parties seem to agree that the show runner is a television program’s head creative executive, with the ultimate responsibility for the overall look and content of the show. As the name implies, the show runner “runs” the show.

In the television industry, there is a custom of employing certain individuals on a show to perform not only writing services, but also other nonwriting functions, such as producer functions. The MBA defines the term “writer,” and sets forth a number of other duties that are not covered by the contract, and that when performed by a nonwriter does not convert the individual to writer status. (GC Exh. 2, art. I.C.1.a at 17.) An individual performing covered and noncovered services is referred to in the MBA as a “writer employed in additional capacities,” and, as a result of carrying multiple titles, has customarily been referred to in the industry as a “hyphenate.” Examples of such hyphenates would be writer-producer, writer-director, writer-executive producer, writer-show runner, or writer-executive producer-show runner. It is significant to note that under the hyphenate status, while the writing portion of the hyphenate’s duties are covered by the MBA, the other functions that he/she performs are not covered.

The dispute before me is principally a legal issue, that being whether the show runners are representatives of the Employers for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act; and whether the Union threatened the show runners with discipline for acting in their capacity as representatives of the Employers.

⁵ MBA is an acronym for minimum basic agreement.

B. *The Facts*

During the negotiations in 2001 for a new contract, the parties to the MBA added a provision known as the “side letter of literary material written for programs made for the internet” (internet side letter). (GC Exhs. 3–4.) The internet side letter was carried forward without change in the current agreement, the effective dates of which are November 1, 2004, through October 31, 2007. (GC Exh. 2.) The Employers and the Union disagree over the effect of the internet side letter as it applies to the writing of “webisodes.” This disagreement underlies the alleged violation of the Act at issue in this case as the General Counsel alleges that in an effort to support its position, the Respondent is unlawfully pressuring the show runners to apply its interpretation of the internet side letter.⁶

Webisodes can take a number of different forms, but are essentially short vignette style original programs created for and exhibited on the internet for the purpose of advertising an existing television series. Each webisode typically lasts between 2 and 5 minutes and is intended for distribution exclusively over the internet. Users access the webisodes through their computers.

The internet side letter authorizes an employer that is party to the MBA, at the employer’s option, to execute a “letter of adherence” to cover writing work on internet material, in this case webisodes. (GC Exhs. 3–4.) According to the internet side letter, the letter of adherence is binding on the employer executing the document and the Union, and the employer will be required to abide by the pension, health, and union-security provisions of the MBA. The internet side letter also states that, “No other terms of the [MBA] shall apply to the employment of such writer . . . unless agreed in writing between the [Union] and the writer, on the one hand, and the [employer], on the other hand.” While the internet side letter does not contain a specific form to be used for the letter of adherence, the Union drafted and posted on its website a form letter of adherence for use by employers in connection with the internet side letter. Further, the Union posted instructions regarding how to fill out the letter of adherence, and stated the benefits of using it. (GC Exhs. 5, 12.) Subsequently, the Employers printed and used a copy of the form letter of adherence from the Union’s website.

There is a fundamental difference in the way the Employers and the Union interpret the internet side letter. It is the position of the Employers that under the internet side letter, an employer signatory to the MBA, at its option, can decide whether to treat writing services for the internet as covered or not covered by the contract. If electing to treat the services as covered, the employer’s only obligation would be to contribute to the multi-employer pension and health funds and to apply the union security provisions. Further, compensation and any other terms and conditions of employment that would apply to the writer’s services would be subject to direct discussions between the employer and the writer, without any involvement by the Union. The contributions to the pension and health funds would be a

⁶ The actual dispute between the Employers and the Union as to the application of the internet side letter has been referred to the contractual arbitration procedure and was scheduled for arbitration in late January 2007.

percentage (as set forth in the MBA) of the compensation paid to the writer for his/her services on the internet material. All the employer would need to do in order to trigger the application of the internet side letter was to execute a letter of adherence.

The Union disagrees with the Employers' position, arguing that the internet side letter merely provides a "framework" for employing writers to write the internet material. According to the Union, the internet side letter does not relieve the parties of the obligation to negotiate additional terms and conditions of employment, including the compensation upon which the pension and health contributions are to be based.

In the spring of 2006, the Employers' show runner hyphenate for the program "The Office," Greg Daniels, with the assistance of several senior level writer-producers, created and prepared a series of webisodes. Initially, the Employers took the position that these webisodes were "promotional" vehicles, which the MBA did not cover, and, therefore, this work was performed outside of any agreement with the Union and without any direct additional compensation.⁷ However, it soon became apparent to Daniels that the preparation and writing of webisodes required too much time and attention not to reward the work with additional direct compensation. Thereafter, the Employers took the position that they would, under their option, treat such work as covered by the internet side letter.

In preparation for its 2006–2007 fall television season, most of NBC's prime time scripted programs were to have some type of internet material associated with them. For "The Office," Daniels decided that the writing demands of the webisodes required the hiring of a new writer devoted to this work. After consultation with a number of the Employers' managers, Daniels chose Jason Kessler to write the webisodes, under his direction. Kessler was a former writer's assistant on Daniels' staff, and was not a member of the Union. A decision was then made for NBC to avail itself of the internet side letter so that Kessler could be provided with employee benefits. The plan was for NBC to execute a letter of adherence for submission to the Union, and to negotiate with Kessler and/or his agent directly on a rate of compensation.

It was apparently through Daniels' subsequent contact with the Union that the Employers learned that the Union held the position that the internet side letter was only a "framework" and did not adequately cover the writing of webisodes. Further, the Employers were informed that the Union expected that in order for its members to perform such work, a full contract for terms and conditions of employment, including salary and residuals, would need to be negotiated with the Union. Daniels is a member of the Union, as apparently are most of the Employers' show runners including the other two show runners named in the complaint, Tim Kring and Robert Rovner.

On May 25, 2006, Keith Gorham, senior vice president of labor relations, Sheldon Kasdan, senior labor relations counsel, and Steven Berkowitz, vice president of labor relations, all on behalf of the Employers, met for lunch with David Young, the

newly appointed executive director of the Union.⁸ Gorham acted as the principal spokesman for the Employers. Gorham and Berkowitz testified at the hearing and characterized their meeting with Young as an opportunity to introduce themselves to the new union director. In addition to the social pleasantries, the topic of webisodes was discussed.

According to Gorham, Young indicated that the Union was not happy with the compensation that had been paid thus far in respect to writing services on webisodes. Gorham stated the Employers' initial position that as the webisodes were "promotional," the work was not covered by the MBA, and mentioned the possibility of having the show runners "overseeing" the writing work, which could be performed by nonunion writers. Gorham testified that Young stated the Union disagreed with the contention that the webisodes were promotional, and he would not approve any plan to have the work performed by nonunion writers. Gorham characterized the discussion as "very brief" with nothing else being discussed on the subject.

Young's testimony regarding this May luncheon meeting was similar to that of Gorham. He testified there was a brief discussion about webisodes with Gorham taking the position that the webisodes were promotional, and, therefore, not covered by the collective-bargaining agreement. Gorham allegedly stated that since the MBA did not apply, the Employers were not required to use union members for the writing work. Young responded by saying that if the Employers did intend to use union members to do the work, the Union would expect the work would be covered by a collective-bargaining agreement.⁹ Young specifically denied saying anything about instructing writers or union members not to perform their employment services.

There is a significant variance in the testimony of Berkowitz when compared to that of Gorham and Young. Berkowitz testified that the May meeting was requested so that management could introduce itself to Young and discuss the concept of webisodes. He indicated, in conformity with the other two witnesses, that the Employers' position was that the webisodes were promotional, and yet the Employers still had the option of using the internet side letter. However, Berkowitz adds an important element not mentioned by either Young or Gorham. According to Berkowitz, Young responded by saying that "[he] had the ability to order [his] members not to work on webisodes and this would include [the] producers . . . absent an agreement by the [Union]." Berkowitz contends that Gorham "vehemently denied" this assertion that the Union had any "jurisdiction over the producing services."

All three witnesses were reasonably credible. However, there is no way to reconcile the testimony of Berkowitz with that of Gorham and Young. Gorham was the Employers' chief spokesperson, and surely had Young made any such statement at the May meeting regarding ordered the "producers" not to

⁷ The Employers have continued to "reserve" the alternate position that since the webisodes are "promotional" in nature, writing such material does not come within the jurisdiction of the MBA.

⁸ Young had previously been the acting executive director of the Union and the testimony is somewhat conflicting as to precisely when he assumed the permanent position.

⁹ I assume that in this discussion the references to "union members" were really intended to be references to "members of the bargaining unit."

work on the webisodes, Gorham, clearly an intelligent, articulate witness, would have so testified. He did not, and Young specifically denied making any such comment. Accordingly, I must conclude that Berkowitz, also an intelligent, articulate witness, was simply mistaken in his recollection of what he alleges Young said at the May meeting.¹⁰

Having been unable to obtain an agreement with the Union, Berkowitz and Daniels discussed how Daniels might proceed to have webisodes for "The Office" written. Ultimately, the Employers decided to exercise their option under the internet side letter of the MBA. By letter dated June 29, Berkowitz informed Young of the Employers' intention to hire Jason Kessler under the terms of the internet side letter to write the webisodes for "The Office." This letter specifically noted the Employers' intention to apply the MBA only so far as making contributions for pension and health funds and applying the union security provisions.¹¹ Berkowitz was careful to reserve the Employers' alternate position that the webisodes were promotional and not covered by the MBA in any respect. He included a completed and executed copy of the letter of adherence, the form of which had been removed and copied from the Union's website. The rate of compensation on the letter of adherence was left blank, the intention apparently being to arrange compensation directly with Kessler and/or his agent. The letter ended with Berkowitz asking Young to execute the document and return it to him. (GC Exh. 6.) However, to date the Union has not done so.

On July 17, Young sent a letter to Keith Gorham stating the Union's position that writing services performed on webisodes were covered by the MBA, but would require negotiating with the Union over all terms and conditions of employment, including salary compensation. In closing, the letter stated that "the [Union] will instruct its members not to perform such non-union work, under the authority of the [Union's] Working Rules." (GC Exh. 8.)

The Union hosted a dinner for the Employers' show runners on July 26 at a local Los Angeles restaurant, Pinot Bistro. In attendance were approximately a dozen show runner hyphenates, as well as a number of union officials. David Young spoke at the dinner, explaining the Union's position on writing services performed for webisodes. Two of the show runners in attendance were Greg Daniels and Tim Kring. Kring was the show runner hyphenate for the program "Heroes" and executive producer hyphenate for the program "Crossing Jordan." Both men are members of the Union. From their testimony, it appears to me that they were plainly conflicted about their dual loyalty to the Employers, which were broadcasting their shows, and to the Union, which was their bargaining representative.

Daniels was asked on direct examination at the hearing whether Young said anything to the show runners at the dinner about whether they should work on the webisodes. He responded that his "impression" was that they "were not sup-

posed to work on the webisodes," and that the Union would give them the "go ahead to do so" when the dispute was resolved. Daniels acknowledged a distinction between writing and producing and testified that Young did not make that specific distinction in his remarks. However, Daniels testified, "I think [Young] was just talking about writing." In response to counsel for the General Counsel's follow-up question as to whether he interpreted what Young was saying as to not write on the webisodes, Daniels responded "Yeah." Later Daniels repeated, "I interpreted that to mean don't write webisodes, yes."

Counsel for the General Counsel was persistent in questioning Daniels as to whether Young had mentioned anything about the show runners not assigning other writers to perform work on the webisodes. While Daniels initially indicated that Young was saying as much, when directly asked by the undersigned whether Young had used such words, he testified, "No, [Young] never. [Young] never had a prescriptive comment, I don't think." Daniels went on to state that it was his "understanding of the way unions work" that if he did not follow the Union's direction that there could be "fines" levied or he could be "kicked out of the Union." However, he clearly testified that repercussions for not supporting the Union were "never explicitly said." According to Daniels, he left the dinner meeting with the impression that the Union wanted the show runners to wait until it had an agreement with the Employers before working on the webisodes.

Kring's recollection of the dinner meeting at Pinot Bistro was similar to that of Daniels. He recalled Young stating the Union's position on writing services performed for webisodes. That position was that until the question of compensation and residuals could be clarified through a collective-bargaining agreement, the Union wanted services to be withheld. However, when asked to specify what Young said, Kring admitted that he was not able to "recall[] specifics." According to Kring, Young asked the show runner hyphenates to take a "united front against having to do this work." When asked by counsel for the General Counsel what work Young was talking about, Kring testified, "Meaning, to write the content for these various digital extensions." Persisting, counsel asked Kring if he had any "sense" of whether he should or should not be assigning the writing of the webisodes to any of the writers. Kring responded that his sense was that he should not be assigning this work to other union members on his staff. Further, he testified that Young asked the show runners to take a "hard line" on the webisodes, and it was his "interpretation" that they were being asked to stop doing any work on the webisodes.

In my opinion, both Kring and Daniels testified in a rather vague, imprecise way when reciting the alleged statements of Young at the July 26 dinner meeting. In part this may have been the result of the passage of time. However, in large measure I believe it to have been caused by their feelings of divided loyalty. Clearly, both men were dedicated to the success of their respective programs, which were dependent largely upon the efforts of the Employers to promote them by various means, including the use of webisodes. Conflicting with those feelings were the loyalty they owed the Union, of which they were members. Their future financial success would depend in part

¹⁰ It should be noted that the complaint does not specifically allege any statements made by Young at the May meeting to constitute a violation of the Act.

¹¹ Daniels previously informed Berkowitz that Kessler had indicated a willingness to join the Union.

on the Union's efforts to obtain the maximum benefits for them through the collective-bargaining process, such salary compensation and residuals.¹² While I found the testimony of Kring and Daniels to be less than precise, I do not believe they were intentionally attempting to be misleading. In that sense their testimony was credible, although unfortunately somewhat less than probative.

Young testified only briefly on direct examination by counsel for the Union. His testimony was limited to the subject of various meetings between management and union representatives. He specifically did not testify on direct about the July 26 dinner meeting at Pinot Bistro. Thereafter, when counsel for the General Counsel during cross-examination attempted to elicit testimony from Young about that dinner meeting, I sustained objections raised by counsel for the Union as the subject matter was outside the scope of direct examination. However, as I noted to counsel, while the testimony of Kring and Daniels concerning the Pinot Bistro meeting was un rebutted, that did not concomitantly establish that their testimony was probative. A further discussion of their testimony will await the analysis section of this decision.

Following the Pinot Bistro meeting, Kring sent an e-mail to various management representatives dated July 28 in which he indicated that he was "in full support" of the Union's position on writing services for the webisodes. While he said that he was "thrilled" to be a part of NBC's efforts at digital extensions, that as a "loyal member[] of the [Union] . . . an agreement needs to be reached before any web related content . . . is released." Further, he indicated that his sentiments were shared by "everyone on the writing staff."¹³ (GC Exh. 9.) Several days later, July 31, all four writer hyphenates on the show "Crossing Jordan" including Kring sent an e-mail message to various management representatives repeating essentially what Kring had said in his earlier electronic mail message. (GC Exh. 13.)

One of the "signers" of the July 31 e-mail was Robert Rovner. Rovner was the executive producer-show runner-writer of "Crossing Jordan." While Rovner did not attend the Pinot Bistro dinner meeting, he did attend a different dinner in July at the Beverly Hilton, also hosted by the Union. He estimated the number of people in attendance at this meeting as 100, some of whom were show runners and union officials. Rovner did not testify about what Young or other union officials had to say at this meeting. However, in response to a question from counsel for the Union, he did say that at no point has the Union threatened him, and his decision not to write webisodes is not based on any threats.

As the time passed, the Employers' management executives became increasingly concerned with their inability to get webisodes for the network's various programs written and produced. Specifically for "The Office," a decision was made to hire a

¹² In the television broadcast industry, "residuals" may be very significant financially, as the reuse/rebroadcast of programs can potentially reward a program's writers for many years after the original work was produced.

¹³ This e-mail was sent by Kring in his capacity as the show runner for "Heroes," another NBC program.

writer separate from the show's writing staff and have Daniels supervise this writer's work without having to personally perform any MBA covered writing functions. Vernon Sanders, the vice president of comedy programming for the Employers, testified that Daniels refused to supervise the work of this writer because of pressure from the Union. According to Sanders, he informed Daniels that Daniels was only expected to perform supervisory/producer duties, such as give notes and make suggestions to the writer. Nevertheless, Daniels allegedly declined to do so because of his relationship with the Union. However, Daniels testified that he never refused to perform nonwriting duties in connection with the webisodes. According to Daniels, what Sanders asked him to do in assisting an outside writer would have required him to utilize his writing skills. This he was not willing to do until the Union reached an agreement with management regarding the terms and conditions of employment for webisode writing services.

In an effort to make some progress on the webisode issue, another meeting between the parties was held on July 31. In attendance on behalf of the Union were Young, Patrick Verone, president of the Union, and Grace Reiner, assistant executive director. Gorham, Kasdan, and Berkowitz again represented the Employers. Gorham and Young served as spokespersons for their respective parties. According to Gorham, Young stated that the provisions of the internet side letter did not apply, as it was only intended to cover original, made for internet programming that was not related to existing television programming. It was the Union's position that a "full agreement" covering all terms and conditions of employment was needed for webisode material, which was made for the internet in connection with existing programming. Gorham restated the Employers' contention that while they would reserve their position that webisodes were promotional and not covered by the MBA, in any event, they insisted that the internet side letter provided the producer with the option of having the work covered by the MBA, to the limited extent set forth in the side letter.

Once again, Berkowitz' version of the meeting was at variance with that of Gorham and Young. Berkowitz testified that the Employers' representatives articulated the position that the Union could not lawfully order its show runners not to perform nonwriting duties. He alleges that Young responded by saying that the Union would refuse to allow hyphenates, even in their capacity as producers, to perform any work on webisodes. Gorham makes no mention of any such alleged threat by the union representatives, and Young, in his testimony, specifically denies ever saying that the Union would instruct the show runners not to perform "producer services" as opposed to writing services.

I am of the view that Berkowitz is mistaken in his recitation of Young's alleged threat during the July 31 meeting. My conclusion is based on the same rationale as given earlier in connection with the May 25 meeting. It is simply illogical that had such a threat been made that Gorham, the Employers' chief spokesman, would not have so testified. As he did not, and as Young categorically denies the statement attributed to him, I must conclude that where all three witnesses appear reasonably

credible, that the greatest probability rests with Berkowitz being mistaken as to his recollection.¹⁴

The July 31 meeting ended with no agreement. Thereafter, by cover letter dated August 2, and sent to the Employers' show runners, Young asked the show runners to read and distribute an attached letter about the webisode issue to their writing staffs, and indicated that the show runners' support was important in ensuring that their staffs understood "both the spirit and letter" of the attached document. (GC Exh. 19.) The attached letter from Young was also dated August 2, and in that document Young set forth the Union's position that writing services for webisodes required the negotiation of a full agreement, including specifically appropriate compensation and residuals. In particular, Young mentioned that "writing or re-writing/polishing services" as performed by "writer-producers, story editors and other writers in similar positions" required a negotiated agreement between the Employers and the Union as to appropriate compensation. Young informed the readers that the Union had advised the Employers' managers that it would continue to "instruct [its] writers not to perform any of these services until the [Employers] negotiate[] an appropriate agreement with the [Union]." (GC Exh. 17.)

In light of the show runner hyphenates and the writers' continued refusal to work on webisodes for any of the Employers' programs, the Employers requested another meeting with the Union. On August 10 the parties met, with the same representatives present as at the last meeting, with the exception of Patrick Verrone. Gorham proposed the retroactive application of any agreement reached between the parties in upcoming MBA negotiations to any work on webisodes performed under a letter of adherence. This proposal was rejected by the Union.

Further, Gorham complained that the Employers' show runners were refusing to perform not only writing functions, but any services in connection with the "digital extensions," including the supervision of nonunion writers.¹⁵ Gorham testified that he informed the Union that while the Employers felt that the Union was pressuring the show runners to withhold these services and that this conduct was unlawful, the Employers would refrain from taking legal action if the Union would send a letter specifying that the show runners would not be disciplined for "producing the work of nonunion writers." According to Gorham, the Union simply ignored his suggestion. However, in his testimony, Young denies any request by Gorham at any meeting to have the Union issue a letter specifying that the show runners would not be disciplined for performing work on the webisodes in their producer capacities. To the extent that Gorham and Young disagree as to what was said, I credit Gorham. It is logical that Gorham would have made such a suggestion in an effort to have the work on the webisodes resumed. Gorham, who I have found to be credible, appears to me to be an executive who is very careful in his pres-

entation and choice of words, and I believe that having made the proposal to the Union in an effort to resolve the dispute, he is unlikely to have forgotten it. In any event, the Union's silence in response to Gorham's suggestion will be discussed further in the analysis section of this decision.

Once again, the parties had failed to resolve their dispute over writing and producing the webisodes. Subsequently, both the Union and the Employers filed respective grievances under the terms of the MBA. The Employers' grievance alleges that the Union's instructions to its members not to perform services on webisodes and its refusal to execute the letter of adherence violated various provisions of the MBA, including the internet side letter and the no-strike clause. (R. Exh. 1.) The Union filed a counterclaim alleging among other matters that the Employers were in violation of the MBA and internet side letter by refusing to bargain over additional terms and conditions of employment (beyond those covered in the side letter), and by instructing hyphenates to perform writing services on webisodes for no additional compensation. (R. Exh. 2.) As noted earlier, these grievances were scheduled for a hearing before an arbitrator in late January 2007.

On August 11, the Union sent another letter to show runner hyphenates and other writers. This letter summarized the position of the parties as expressed at the meeting the previous day. The letter added that the Union would continue to assert the position that an agreement must be reached on writing services for webisodes that included fees for residuals. Young closed the letter by asking the reader to remain patient as the Union continued to press its demands. (GC Exh. 18.)¹⁶

At least one show runner interpreted the August 2 and 11 correspondence from the Union as instructing him not to perform any more "writing services" on webisodes. Robert Rovner, the show runner for "Crossing Jordan," testified that following receipt of the Union's letters, he stopped writing and assigning others to write webisodes. However, interestingly, he did not cease such writing until after he received the latter communication from the Union dated August 11.

By this time virtually all work on writing and producing webisodes for any of the programs on the Employers' network had ceased. There then followed a series of correspondence between Rick Olshansky, executive vice president of business affairs for the Employers, and the personal attorneys representing Daniels and Kring. Olshansky sent a letter dated August 17 to Sam Fischer, attorney for show runner Daniels. In the opening paragraph of the letter, Olshansky claimed that Daniels had advised the Employers' managers that he was "unwilling or unable to cooperate in the production of [webisodes] despite the [Employers'] right to assign him such work" under the terms of his personal services agreement, due to the Union's "threat to discipline him should he perform such services before the [Union] has negotiated . . . additional terms and conditions" regard-

¹⁴ It should be noted that the complaint does not specifically allege any statements by Young at the July meeting with management to constitute a violation of the Act.

¹⁵ The term "digital extensions" refers in general to all "platforms" over which internet programming can be broadcast, such as hand-held devices (like cell phones) and computers.

¹⁶ The parties stipulated at the hearing that the Union's intent was to send the two August 2 letters (GC Exhs. 17, 19) and the August 11 letter (GC Exh. 18) to all the show runners employed on programs appearing on the NBC network as of those dates.

ing webisode work. (GC Exh. 10.)¹⁷ On the same date, Olshansky sent Kring's attorney, Jeanne Newman, a virtually identical letter. (GC Exh. 20.)

The attorneys for Daniels and Kring responded to Olshansky by separate letters dated August 17. In his letter, Daniels' attorney acknowledged that Daniels was "not prepared to render services in connection with the [webisodes]" for the reasons "eloquently stated in the first paragraph of [Olshansky's] letter." Further, he said that Daniels had been advised by the Union that the performances of those services would violate the MBA. (GC Exh. 10.) Kring's attorney responded similarly, stating that "Kring is unable to render writing services for the [webisodes] pursuant to the instructions of the [Union]." She added that Kring's services to the Employers were subject to the MBA, as specified in Kring's personal services agreement. Therefore, Kring was not in breach of that personal services agreement. (GC Exh. 21.)¹⁸

C. Legal Analysis and Conclusions

1. The duties of show runners

Section 8(b)(1)(B) of the Act prohibits unions from restraining or coercing employers in the selection of their representatives for the purposes of collective bargaining or the adjustment of grievances. The unlawful conduct may be applied directly against the employer to force it to select or replace an 8(b)(1)(B) representative or indirectly against the employer's 8(b)(1)(B) representative in order to adversely affect how the representative performs the enumerated functions of collective bargaining or grievance adjustment. The Board has determined that contract interpretation is so closely interrelated with collective bargaining that it is considered an 8(b)(1)(B) activity. *Elevator Constructors Local 10 (Thyssen General Elevator Co.)*, 333 NLRB 701 (2002); *Elevator Constructors Local 1 (National Elevator Industry)*, 339 NLRB 977, 983 (2003); *Teamsters Local 507 (Klein News)*, 306 NLRB 118, 120, 121 (1992). The Supreme Court has also indicated that contract interpretation comes within the limits of 8(b)(1)(B) activities, as it is a "closely related activity." *NLRB v. Electrical Workers Local 340 (Royal Electric)*, 481 U.S. 573, 586 (1987).

From the evidence adduced at the hearing, there is no serious doubt that show runners are supervisors as defined in Section 2(11) of the Act. For the three show runners who testified, Daniels, Kring, and Rovner, the record is replete with examples of their exercise of supervisory authority. Even counsel for the Union, in his posthearing brief, does not appear to seriously question the supervisory status of the show runners.

¹⁷ The term "personal service agreement" as used in the industry for show runner hyphenates refers to an agreement for the show runner's compensation and credits above and beyond the minimum provided for writing services in the MBA, as well as compensation and credits for duties not considered writing services under the MBA. Apparently virtually all show runners have such agreements with the respective studios for which they are employed.

¹⁸ While these letters from attorneys representing Daniels and Kring were admitted into evidence, their probative value is quite limited. In my opinion, they constitute hearsay so far as any statements purportedly made by agents of the Union regarding these matters.

The show runners "run" their respective shows, hence the name. There is usually only one show runner in charge of a particular program. In many instances, the show runner is the creator of the show, and generally is an executive producer who functions as the show's chief writer with principal responsibility for the creative direction of the series. As the television program's head creative executive, he/she has the ultimate responsibility for the overall look and content of the show.

From the testimony of Daniels, Kring, Rovner, and other witnesses, it appears that all show runners share many of the same duties and responsibilities. Typically, they hire all the writers and directors for the show, and they determine whether to retain those writers and directors by picking up an employee's "option" when an employment contract expires, which is the functional equivalent of having the authority to fire. The show runners are also instrumental in deciding which actors to hire for the cast. One of the principal duties of the show runner is to assign the writing work to the individual staff writers. This assignment of writing duties is made by the show runner utilizing his/her own discretion and independent judgment in evaluating the needs of a particular program episode and the artistic skills of the individual members of the writing staff.

The exercise of any of the above duties by the show runners is adequate alone to constitute indicia of supervisory authority. It is well established that the possession of even one of the powers enumerated in Section 2(11) of the Act is sufficient to establish supervisory status. *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948), cert. denied 355 U.S. 908 (1949). As I have said, there is no serious dispute on this issue, and, accordingly, I conclude that Daniels, Kring, Rovner, and other show runners similarly situated are supervisors as defined in the Act.

However, the question still remains as to whether Daniels, Kring, Rovner, and other show runners were the Employers' 8(b)(1)(B) representatives. Simply exercising some supervisory authority is not sufficient to find that an individual is a collective-bargaining representative or grievance adjuster. The Supreme Court has held that in order to establish a violation of Section 8(b)(1)(B), it must be shown that the individual involved had the actual authority to engage in grievance adjustment or collective bargaining activities on behalf of the employer. *NLRB v. Electrical Workers Local 340 (Royal Electric)*, supra. Prior to the *Electrical Workers Local 340* case, the Board had taken the position that Section 8(b)(1)(B) should be broadly construed to cover any 2(11) supervisor, because in the future such a supervisor could become engaged in collective bargaining or grievance adjustment. This theory was referred to as the "reservoir doctrine," as it created a pool or reservoir of potential authority to cover any 2(11) supervisor. In the *Electrical Workers Local 340* case, the Court made it clear that Section 8(b)(1)(B) prohibits union discipline of only supervisors who actually perform 8(b)(1)(B) duties.

I believe that it is clear that Daniels, Kring, Rovner, and other show runners do, in fact, actually perform 8(b)(1)(B) duties. The three show runners who testified each indicated responsibilities for adjusting grievances/complaints that arose during the course of production. Daniels testified that he has had to resolve staff complaints such as a writer consistently

coming to work late, a writer-director taking too long in the editing room, and writer-producers giving members of the cast too many notes. According to Daniels, he is the “ultimate arbiter of what goes in the show.” Kring testified that he acts as a “parent, mediator, and arbitrator of various conflicts that go on.” He indicated that as problems develop he talks with the involved staff and tries to reach some accommodation on the issue. According to Kring, problem solving is an important part of his show runner duties. Rovner also testified that one of his responsibilities is to mediate problems on the set. He gave the example of having to resolve the problem of an actor who felt he was working too much, and of a director concerned about the ethnicity of one of the actors cast for a particular role.

While the grievances/complaints resolved by the show runners were oral and “informal” in the sense that they were not steps in a grievance and arbitration procedure, they certainly had the capacity to become “formal” if they were not resolved at an early stage. The television broadcast industry is heavily unionized, with not only the writers, but the work of the directors, actors, and technical crews covered by collective-bargaining agreements. Certainly a failure by the show runner to resolve disputes with the members of any of these bargaining units might lead to the filing of a formal grievance under the terms of the applicable contract. In *Sheet Metal Workers Local 68 (DeMoss Co.)*, 298 NLRB 1000, 1003 (1990), the Board concluded that adjusting grievances at a low level, before they become formalized in the grievance arbitration procedure, conforms to the grievance adjustment requirements in Section 8(b)(1)(B). According to the Board, one of the purposes of that section of the Act is to protect the employer’s interest in having an individual of its own choosing to represent it in dealings with the union that represents its employees. *Id.*

In conjunction with their responsibility to resolve grievances, the show runners were required to interpret the various collective-bargaining agreements on behalf of the Employers. In fact, in many instances the adjustment of grievances involves an understanding of the contractual rights of other employees. For example, Daniels’ resolution of the dispute over excessive time spent in the editing room by a writer-director could have had potential ramifications under the Directors Guild of America collective-bargaining agreement.

It is significant to note that a dispute over the exercise of contract interpretation is at the very heart of this proceeding. The Employers and the Union have a dispute over the scope and meaning of the internet side letter. Under the Employers’ interpretation, the writing of webisodes is covered by the MBA, although only to a very limited degree, and the show runners are required to designate writers for that project. However, under the Union’s interpretation, the internet side letter does not apply, requiring the negotiation of a full new agreement, until which time any assignment by the show runners of writers to prepare webisodes would be made without the writers having the benefit of a collective-bargaining agreement.

The duties and responsibilities of the Employers’ show runners far exceed those which the Board has often found sufficient to establish that an individual is an 8(b)(1)(B) representative. In *Elevator Constructors of New York & New Jersey Local One (National Elevator Industry, Inc.)*, 339 NLRB 977

(2003), a foreman, referred to in the elevator industry as a “mechanic in charge,” had no authority to hire or fire employees of the sort possessed by the show runners. He did have the authority to resolve employee disputes and problems including job assignments, like the show runners, and also to resolve pay disputes and assign overtime. The Board concluded that the fines issued to this individual violated Section 8(b)(1)(B) as they would likely have an inhibiting effect on his future conduct as a supervisor, company representative, and grievance adjuster. Similarly, in *Elevator Constructors Local 36, (Montgomery Elevator Co.)*, 305 NLRB 53 (1991), the Board held that a “mechanic in charge” was fined by his union because of the way he interpreted the contract regarding the use of a crane. According to the Board, the imposition of the fine would potentially have an adverse effect upon his future performance as a management representative and grievance adjuster. In finding a violation of Section 8(b)(1)(B), the Board was not dissuaded by the individual’s lack of participation in the collective-bargaining process or the formal contract grievance procedure.

The duties and responsibilities of the Employers’ show runners are significant as they impact on the Employers’ contractual relationship with the Union and the resolution of employee grievances/complaints. The case law and the facts in this case support a finding that Daniels, Kring, Rovner, and similarly situated show runners employed by the Employers constitute collective-bargaining representatives or grievance adjusters under Section 8(b)(1)(B) of the Act, and I so find.

2. The alleged threat to discipline

This case is complicated by the fact that the show runner hyphenates all have other duties and responsibilities, beyond their duties as bargaining representatives, grievance adjusters, and supervisors. As is clear from the testimony of Daniels, Kring, and Rovner, the show runners write program episodes themselves, and rewrite and polish the episodes written by others. Those writing duties performed by the show runners are covered by the MBA and, as noted, Daniels, Kring, Rovner, and apparently most of the other show runners are members of the Union.

It is axiomatic that unions have a First Amendment right to communicate with their members. *U.S. v. CIO*, 335 U.S. 106, 121 (1948); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940). It is equally certain that a union may discipline a member for violations of its rules and regulations.¹⁹

However, when a union disciplines a member for a disagreement over the method by which that member performs his/her duties as a collective-bargaining representative or grievance adjuster, that union has violated Section 8(b)(1)(B) of the Act. Typically, where an individual has a dual role, one of which is collective-bargaining representative or grievance adjuster, the Board will determine in which capacity the union sought to discipline the individual. The Board has set forth this distinction as follows: “We recognize that a union’s discipline of a supervisor-member falls outside the proscription of Section

¹⁹ Conduct directed at the grievance adjuster or bargaining representative’s performance of non-8(b)(1)(B) duties is not unlawful. *Sheet Metal Workers Local 33 (Cabell Sheet Metal)*, 316 NLRB 504 fn. 3 (1995).

8(b)(1)(B) where the offense occasioning the discipline involves a matter purely of internal union administration, unrelated, either directly or indirectly, to any dispute between the union and the employer. This rule results in the finding of no violation where, for instance, a supervisor-member is disciplined for failing to pay his union dues or disturbing a union meeting. *Carpenters Local 14 (Max M. Kaplan Properties)*, 217 NLRB 202, 202 (1975).

The Board's approach is in conformity with the Supreme Court. In fact, in a case dealing with the same Union as in the matter at hand, also involving hyphenates, the Supreme Court held that the Union violated the Act when it took disciplinary action against the hyphenates for crossing a picket line during an economic strike to perform duties only as supervisors, bargaining representatives, and grievance adjusters. *American Broadcasting Co. v. Writers Guild of America, West*, 437 U.S. 411 (1978).

It is now necessary to consider the Union's conduct to determine whether that conduct "restrained or coerced" the show runners in the performance of their duties as collective-bargaining representatives or grievance adjusters. If the Union's conduct had a foreseeable adverse effect on the Employers' show runner duties as grievance adjusters or collective-bargaining representatives, that conduct would constitute a violation of Section 8(b)(1)(B) of the Act. *NLRB v. Electrical Workers Local 340 (Royal Electric)*, 481 U.S. 573, 581, 585 (1987); *Electrical Workers Local 1547 (Veco, Inc.)*, 300 NLRB 1065 (1990), *enfd.* 971 F.2d 1435 (9th Cir. 1992).

The complaint specifically alleges that the Union restrained and coerced the show runners by its threatening statements made to them on July 26 at the Pinot Bistro restaurant and in several letters sent to them on August 2 and 11. According to the complaint, these statements, allegedly made by David Young, threatened the show runners with "discipline, or other retaliatory action." However, while counsel for the General Counsel and counsels for the Employers do not specifically acknowledge so, it is clear to me from their oral representations at hearing and posthearing briefs, that the threats that were allegedly made by Young were implicit, rather than explicit.

Specifically, paragraph 10(a) of the complaint sets forth the conduct that allegedly occurred at the Pinot Bistro. As is discussed in detail earlier in this decision, the Union hosted a dinner meeting for the show runners at the Pinot Bistro restaurant on July 26. Both Greg Daniels and Tim Kring testified about their attendance at this meeting. I have already noted that both Daniels and Kring appeared very conflicted about the underlying issue of writing services for webisodes. They were obviously uncomfortable in the position they found themselves, between their Union and their Employers. Never the less, I believe each man attempted to testify truthfully. Yet, in many respects their testimony was vague and imprecise. In part this was the result of being asked not only what Young said at that the meeting, but their "impressions" of what he said.

It is clear that Young was asking the show runners to support the Union's position and not perform writing services until an agreement was reached with management, at which time the Union would so advise the membership. It is equally clear that nothing was said about fines, or any other internal union disci-

pline. Daniels testified that he had an "understanding" of the way unions worked, and that repercussions could follow from a failure to abide by a union's direction to its members. Still, he testified that Young did not "explicitly" say that any such thing would happen to a show runner who failed to support the Union's position. Daniels was somewhat contradictory about whether Young said anything about a show runner not assigning other writers to work on webisodes. However, when pressed by the undersigned, he acknowledged that Young never made a "prescriptive comment" about not assigning others to work on the webisodes. In the final analysis, all that Daniels testified that Young was asking of the show runners was that they not perform writing duties on webisodes until the Union and the Employers reached an agreement on the issues of compensation and residuals.

Kring testified similarly to Daniels. He indicated that he could not recall specifics about Young's presentation, but that in general Young wanted the show runners to put forth a "united front" and not perform witting services without an agreement. Kring testified that Young did not want the show runners "to write the content" for the webisodes. According to Kring, it was his "sense" that he should not be assigning others to write the webisodes either, and it was his "interpretation" that the show runners were being asked to stop doing any work on the webisodes.

It appears that there were a significant number of the Employers' show runners present for the Pinot Bistro dinner meeting. Presumably, the General Counsel called to testify as witnesses Daniels and Kring, because they were best able to support the allegations in the complaint. However, in terms of presenting "probative" evidence of unlawful conduct, those two witnesses left a lot to be desired. In fact, the testimony of Daniels and Kring is most notable for what they agree that Young did not say. Daniels testified that Young never mentioned anything about fines or discipline for not supporting the Union, and that Young never spoke about the assignment of writing duties to members of the writing staffs. Kring's testimony was similar to that of Daniels, with Kring testifying that he could not recall any "specifics." The two witnesses' testimony of their "impressions," "understandings," or "sense" of Young's comments was not particularly helpful or probative. In fact, from their testimony, I see no evidence that Young issued any threats, either expressed or implied, to the show runners at the Pinot Bistro dinner meeting.

As is reflected by the language of the Act, for there to be a violation of Section 8(b)(1)(B), there must be conduct that is "restraining or coercing." Clearly, Young wanted the show runners not to perform writing services on webisodes until an agreement had been reached. According to Daniels and Kring, he did not define writing services for the assembled show runners, likely assuming they knew what the term meant. Apparently counsel for the General Counsel and counsels for the Employers would contend that Young's failure to do so would constitute a suggestion to the show runners that performing writing services also included their collective bargaining and grievance adjustment duties, such as producing the webisodes. However, I am unaware of any case law that would require the Union to affirmatively explain to experienced show runners

what is meant by the term writing services, and counsel has not cited any such case to me.

Not only did Young not indicate that writing services included the show runners' production duties, or for that matter the assignment of writing duties to the writing staff and the review of that work, but he never mentioned anything about discipline for those members who did not follow the union line. Once again, counsel for the General Counsel and counsels for the Employers apparently contend that such a threat to discipline was implicit in Young's request that the show runners put forth a united front and not perform writing services on the webisodes until an agreement was reached with the Employers. Such an inference is a leap of faith that I am not willing to make.

Counsel for the General Counsel and counsels for the Employers correctly argue in their posthearing briefs that actual harm to a representative's performance of 8(b)(1)(B) duties is not necessary for a violation of the Act. The Board has held that actual union discipline is not a prerequisite to finding a violation, and that the mere threat of disciplinary action is sufficient under certain circumstances. *Typographical Union Local 403 (Pennwell Printing)*, 274 NLRB 1492 (1985). Also, the threat need not be expressed, as an implied threat may be adequate to establish a violation. *Masters, Mates & Pilots (Marine Transport)*, 301 NLRB 526, 563-564 (1991), *enfd.* in part and remanded 955 F.2d 212 (4th Cir. 1992).

However, in the case before me there is absolutely no evidence that Young made any mention whatsoever of discipline at the Pinot Bistro meeting. In fact, from the testimony of Daniels and Kring, it appears that the meeting was very congenial with the Union merely requesting of its members, who happened to be show runners, that they support the Union's position. Although Daniels testified that it was his "understanding of the way unions work" that unless he followed the Union's direction that he could be disciplined, that was nothing more than idle speculation on Daniels' part. Certainly, nothing that he testified to as having been said by Young should have reasonably given Daniels that impression.

The only evidence offered by the General Counsel to prove the allegation regarding Young's statements at the Pinot Bistro meeting on July 26 was the testimony of Kring and Daniels.²⁰ From that testimony, I find no probative evidence to support the complaint allegation that Young threatened the show runners, either expressly or impliedly, with discipline for performing their 8(b)(1)(B) duties.²¹ Accordingly, the General Counsel

²⁰ While show runner, Robert Rovner, did not attend the Pinot Bistro meeting, he did attend a different dinner meeting for show runners hosted by the Union at the Beverly Hilton in July. Although he did not testify directly about the substance of this meeting, presumably the Union used this opportunity to restate its position on writing for the webisodes. In any event, Rovner testified that at no point had the Union threatened him, and that his decision not to write webisodes was not based on any threats.

²¹ Young did not testify regarding the Pinot Bistro meeting. He was not called as a witness by the General Counsel or the Employers, and his testimony on behalf of the Respondent was limited to other matters. However, it is beyond question that a Respondent can stand mute, and

having failed to meet her burden of proof, I shall recommend that complaint paragraph 10(a) be dismissed.

Paragraph 10(b) of the complaint alleges that on August 2 and 11, the Union sent letters to show runner hyphenates threatening them with discipline, or other retaliatory action, for acting in their capacities as 8(b)(1)(B) representatives of the Employers. As noted in detail above, the Union sent two letters to its show runner members dated August 2. One of the documents was a cover letter (GC Exh. 19), asking the show runners to forward the attached second letter to their writing staffs. (GC Exh. 17.) In the cover letter, the Union stated that the support of the show runners was "important in ensuring that [their] staff understands both the spirit and the letter of the attached request." In the attached second letter, the Union, addressing both show runner hyphenates and staff writers, stated its position that writing services for webisodes required the negotiation through the Union of a full labor agreement, and that a writer's personal services contract did not require the writer to "perform writing or rewriting/polishing services" separately from such a collective-bargaining agreement. The Union classified those individuals with personal service contracts as "writer-producers, story editors and other writers in similar positions."

Contrary to the contention of the General Counsel and Employers, I see nothing in the August 2 correspondence from the Union as could reasonably be construed as a demand that show runner hyphenates cease the performance of their nonwriting work. The attached second letter makes it clear that those individuals with personal service contracts who should not be performing services for webisodes without a negotiated collective-bargaining agreement are "writer-producers, story editors and other writers in similar positions." (Emphasis added by me.) I see no evidence, expressed or implied, that the letter is written in an attempt to "restrain or coerce" show runners in their capacity as collective-bargaining representatives and/or grievance adjusters. Further, there is certainly nothing in these documents as mentions or even alludes to fines or other discipline for failure to follow the union line.

Similarly, I see nothing unlawful about the Union's letter to show runner hyphenates and members of their writing staffs dated August 11. (GC Exh. 18.) Once again, the Union is restating its position that compensation and residual fees for the performance of writing services on webisodes must be provided for in a negotiated collective-bargaining agreement. The readers are asked to "remain patient," and to notify the Union if the Employers or their attorneys contact them about the performance of writing services on the webisodes. Where are the threats, expressed, implied, or otherwise, designed to cause the show runner hyphenates to refuse to perform their 8(b)(1)(B) duties? I simply do not see it.

All three of these documents are in evidence and "speak for themselves." (GC Exh. 17-19.) Of course, the General Counsel and the Employers argue that the documents should not be viewed in a vacuum, and that when coupled with the Union's other actions establish that the Union's intention was to "re-

the burden of proof still remains with the General Counsel to establish an alleged violation of the Act by a preponderance of the evidence.

strain or coerce” the show runner hyphenates in violation of the Act. As I have already concluded, Young’s statements at the Pinot Bistro restaurant did not constitute a violation of the Act. However, counsel for the General Counsel and counsel for the Employers offered other evidence, not alleged in the complaint, as support for their theory of the case. This evidence consisted of testimony from Vivi Zigler, the Employer’s vice president of digital entertainment and new media, and correspondence from several lawyers representing show runner hyphenates. (GC Exhs. 10, 21.) In both instances, I have concluded that the evidence, if offered to prove the truth of the matter asserted, that being that the Union’s action was designed to threaten or coerce the show runner hyphenates into not performing their nonwriter duties, was inadmissible as hearsay.

Zigler testified as to a number of conversations that she had with show runner hyphenates about their alleged reluctance to work on the Employers’ planned webisodes, as long as the Union objected to such work being performed outside the parameters of a negotiated collective-bargaining agreement. This testimony was permitted so as to establish the Employers’ subsequent course of action.²² However, so far as the truth of any statements made by show runner hyphenates about their feelings, why they declined to work on webisodes, or any contact they may have had with representatives of the Union, that testimony is plainly hearsay and inadmissible. Further, so far as the written statements made by attorneys representing Daniels and Kring about the alleged reasons for their clients’ reluctance to work on webisodes, or the contact they may have had with representatives of the Union, such evidence constitutes hearsay and is inadmissible, except as it establishes the Employer’s subsequent course of action.

I find no credible, probative, or admissible evidence to support the General Counsel’s contention that the Union’s letters of August 2 and 11 sent to show runner hyphenates threatened them with discipline, either implicitly or explicitly, for performing their 8(b)(1)(B) duties. Accordingly, the General Counsel having failed to meet her burden of proof, I shall recommend that complaint paragraph 10(b) be dismissed.

As mentioned above, unions have a First Amendment right to communicate with their members. *U.S. v. CIO*, supra; *Thornhill v. Alabama*, supra. That is precisely what the Union was doing at the July 26 dinner meeting at the Pinot Bistro and through its letters of August 2 and 11. The Union was appealing to its show runner hyphenate members to put forth a united front, and to refrain from performing any writing duties on the

²² I have no reason or basis to conclude that Zigler was not testifying truthfully about her conversations with various show runner hyphenates.

planned webisodes until such time as the Union and the Employers entered into a new agreement. The evidence supports a conclusion that the show runners voluntarily agreed to support the Union’s efforts. Even more to the point, there is a total absence of probative evidence that the Union “restrained or coerced” the show runners from acting in their capacities as representatives of the Employers for the purposes of collective bargaining or adjustment of grievances.²³

In summary, as I reflect on the evidence offered by counsel for the General Counsel and counsels for the Employers in support of the alleged violations of the Act, I am really at a loss to see where there is any significant credible, probative, or admissible evidence of any violation of the Act as alleged in the complaint.²⁴ Accordingly, based on the above, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Universal Network Television, LLC. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. NBC Studios, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondent, Writers Guild of America, West, Inc., is a labor organization within the meaning of Section 2(5) of the Act.

4. The Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

ORDER

The complaint is dismissed.

²³ In her posthearing brief, counsel for the General Counsel makes a brief, passing argument that the assignment by the show runners of the writing of webisodes “to themselves” constitutes 8(b)(1)(B) duties. Counsel cites the case of *Electrical Workers Local 77 (Bruce-Cadet)*, 289 NLRB 516, 519 (1988). However, I am of the view that the cited case is a distinguishable anomaly, with facts involving a “jurisdictional dispute” unique to that case. It is not on point with, and does not serve as precedent for, the matter before the undersigned.

²⁴ In view of the paucity of evidence, I am reminded of the words from an old television commercial, “Where’s the beef?”

²⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.