International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Local 720, AFL–CIO (AVW Audio Visual, Inc.) *and* Steven Lucas. Case 28–CB–4351

January 31, 2008

SECOND SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On July 16, 2007, the Board issued an Order denying Charging Party Steven Lucas' request for review of the Regional Director for Region 28's compliance determination in this case. Subsequently, Lucas filed a petition for review with the United States Court of Appeals for the Ninth Circuit of the Board's Order denying review and the remedial order in the underlying decision. On August 29, 2007, the Board rescinded its order denying review of the compliance determination and thereafter sua sponte sought remand of the case to reconsider its denial of Lucas' request for review of the compliance determination. On September 25, 2007, Lucas voluntarily moved for dismissal, without prejudice, of his petition for review. On October 10, 2007, the court granted Lucas' motion for voluntary dismissal.

Upon further consideration of Lucas' request for review, the National Labor Relations Board[1] has decided to amend the remedy in its June 2, 2004 Supplemental Decision and Order (*IATSE II*).[2]

At issue in this proceeding is whether the Board ordered the appropriate remedy for the violations found in *IATSE II*. In the subsequent compliance determination, the Regional Director for Region 28 determined that the Respondent was obligated to make Lucas whole only for lost employment opportunities with AVW Audiovisuals, Inc. (AVW). Lucas has maintained that the appropriate make-whole remedy is backpay for lost employment opportunities with all relevant signatory employers. On reconsideration, we find merit in the Charging Party's arguments and we further find, as discussed below, that the limited backpay remedy ordered by the administrative law judge in *IATSE I* did not fully remedy the violations alleged in the complaint and found by the Board. Therefore, we modify the remedy ordered there to reflect the range of employment opportunities lost to Lucas by reason of the Respondent's unlawful conduct.

The relevant facts and procedural history of the case are as follows. The Union operated an exclusive hiring hall under a collective-bargaining agreement with an employer group that included employer AVW. Until May 1994, Lucas was referred to signatory employers through the hiring hall. In May 1994, a union representative told Lucas that the Union would no longer refer him out because of complaints about his conduct.[3] In March 1995, Lucas sought and was refused readmission to the hiring hall. Lucas protested the refusal to the union president, and submitted a letter by a clinical psychologist, who stated that she had tested Lucas and found him fit for employment. Lucas also informed AVW of his availability for work. On March 22, 1995, AVW requested Lucas by name from the hiring hall. The Respondent refused to refer Lucas, citing the 1994 expulsion. Lucas filed a charge with the Board.

Based on Lucas' charge, a complaint issued, alleging that the Union violated Section 8(b)(1)(A) and (2) by refusing, on March 14, 1995, to register Lucas on its exclusive referral roster, and by refusing, on March 22, 1995, to issue Lucas a work referral pursuant to a name request by AVW. At the hearing, counsel for the General Counsel made an unopposed motion to amend the complaint to allege that the Respondent refused to refer Lucas "on or about March 14, 1995, *and continuing thereafter"* (emphasis added).

Administrative Law Judge Michael D. Stevenson found that the Union had violated Section 8(b)(1)(A) and (2) by "permanently barring Steven Lucas, since on or about March 22, from using its referral system."[4] With respect to the backpay remedy, the judge stated as follows:

> [h]aving found that the Respondent unlawfully denied Steven Lucas referral to [AVW], I shall recommend that Respondent be ordered to . . . pay[ ] him backpay equal to the amount of wages that he would have earned had he not been unlawfully denied referral to AVW Audio Visual, Inc. since March 22, 1995 . . . . It will be left to compliance proceedings for the determi-

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

[2] 341 NLRB 1267 (*IATSE II)*. The Board's original Decision and Order, 332 NLRB 1 (2000) (*IATSE I*), is discussed below. In *IATSE II*, the Board determined, as the law of the case, that the Respondent violated Sec. 8(b)(1)(A) and (2) by refusing to refer Charging Party Lucas for employment through its exclusive hiring hall.

[3] On May 16, 1994, Lucas filed a charge alleging that the refusal to refer him was unlawful. Shortly thereafter, the Union expelled Lucas from the hiring hall, citing misconduct over a 15-year period. The General Counsel dismissed Lucas' charge based on evidence provided by the Union that his expulsion was due to complaints about his behavior.

[4] 332 NLRB 1, 9 (2000) (*IATSE I*).

> nation of the nature and extent of Lucas's employment opportunities *at AVW Audio Visual, Inc*. after March 22, 1995.

Id. at 9–10. (Emphasis added.)

In addition, the judge ordered the Respondent to cease and desist from "failing and refusing to register for referral Steven Lucas in accordance with its exclusive hiring hall agreement with AVW Audio Visual, Inc., *or any other employer with whom it has an exclusive hiring hall agreement.*" (Emphasis added.)

The Respondent filed exceptions to the findings of unfair labor practices. The General Counsel filed a limited exception seeking reversal of the judge's failure to order a make-whole remedy running to all employers having a referral agreement with the Union, rather than limiting relief to lost opportunities with AVW. The General Counsel argued that the broader remedy was appropriate for the violations found, and cited the complaint amendment at the hearing.

On September 12, 2000, the Board issued its original Decision and Order in this proceeding, *IATSE I*. The Board reversed the judge's findings and dismissed the complaint, finding that, inter alia, the Respondent's permanent expulsion of Lucas from the hiring hall did not violate the Union's duty of fair representation. Because it reversed the findings of violations, the Board did not address the General Counsel's exception.

Lucas subsequently filed a petition for review with the Ninth Circuit Court of Appeals. The court granted Lucas' petition, reversed the Board's decision, and remanded the case for entry of an order in favor of Lucas.[5] With respect to the appropriate remedy, the court's sole finding in this regard was that it need not consider Lucas' request for reimbursement of expenditures for psychological testing, stating in this regard only that it left "the appropriate remedy to the Board."

On remand, in *IATSE II*, the Board accepted the court's decision as the law of the case, and found that the Respondent violated Section 8(b)(1)(A) and (2) by refusing to readmit Lucas to its exclusive hiring hall.[6] With regard to the remedy, the Board stated that it "adopt[ed] as [its] remedy and Order the recommended remedy and Order" of the judge, and that, like the judge, the Board would leave for compliance the determination of "the nature and extent of Lucas' employment opportunities at AVW Audio Visuals, Inc., after March 22, 1995, when the Respondent failed to refer Lucas." 341 NLRB at 1267. However, the Board's Order was not expressly limited to employment lost at AVW. In this regard, paragraph 2(b) of the Board's order requires the Respondent to:

> Make Steven Lucas whole for any loss of earnings and other benefits he may have suffered as a result of the Respondent's failure and refusal to refer him from its exclusive hiring hall, with interest as set forth in the remedy section of the judge's decision.

Id. at 1268.

Subsequently, the Respondent filed a petition for review of the remedy ordered in *IATSE II* with the Ninth Circuit. The Respondent argued that the Board's supplemental order exceeded the scope of the remand by awarding a remedy that went beyond issuance of "an appropriate remedial order in favor of Lucas." Both the General Counsel and the Charging Party filed cross-motions for enforcement and oppositions to the Respondent's petition. On February 11, 2005, the Ninth Circuit granted the Board's motion for summary denial of the Respondent's petition for review and for summary enforcement of the Board's supplemental order.

On June 30, 2005, the Regional Director issued a compliance specification and notice of hearing, the terms of which required the Respondent to pay the Charging Party backpay for *all* lost employment opportunities, not just those with AVW. In its answer, the Respondent asserted, in relevant part, that the language of the judge and the Board limited the Respondent's backpay obligation to employment opportunities with AVW. On October 7, 2005, the Regional Director withdrew the compliance specification and cancelled the notice of hearing. On July 21, 2006, the Regional Director issued a compliance determination based on an interpretation of the Board's remedial language limiting backpay to lost employment with AVW.

The Charging Party subsequently filed an appeal with the General Counsel of the Regional Director's compliance determination. Lucas argued, inter alia, that the appropriate remedy under the Board's Order is to make him whole for all employment opportunities he lost as a result of his unlawful exclusion from the hiring hall. The Charging Party asserted that language in the judge's decision and carried over into the Board's Supplemental Decision and Order, which appears to limit backpay to lost employment opportunities with AVW, was a "scrivener's error," and that basing backpay on that erroneous language would deny him a full remedy for the Respondent's unlawful conduct. The General Counsel denied the Charging Party's appeal.

Thereafter, Lucas filed the instant request for review pursuant to Section 102.53 of the Board's Rules and Regulations. As noted above, on July 16, 2007, the

[5] *Lucas v. NLRB*, 333 F.3d 927 (2003).
[6] 341 NLRB 1267 (2004) (*IATSE II*).

Board denied Lucas' request for review, essentially on procedural grounds. The Board noted that the Charging Party had failed to file a motion for reconsideration of the Supplemental Decision and Order, and further noted that compliance proceedings are not the proper forum for litigating the provisions of the remedial order in the underlying unfair labor practice proceeding, citing *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999). Lucas then sought review with the Ninth Circuit of the remedy provisions of the Supplemental Decision and Order. Thereafter, the Board rescinded its Order denying review and the court granted Lucas' motion for voluntary withdrawal of his petition for review.

The Board has reconsidered the arguments raised by the Charging Party in light of the entire record. Having duly considered the matter, we grant the Charging Party's request for review, reverse the Regional Director, and remand the case to the Regional Director to undertake compliance proceedings and issue a compliance specification that will make Lucas whole for all lost employment opportunities from employers that were signatories to the exclusive hiring hall agreement during the relevant period. We believe that this outcome is appropriate both procedurally and substantively.

1. *Procedure*. In our Order denying the Charging Party's request for review, we stated that because the Charging Party had failed to file a request for reconsideration of the remedial provisions of *IATSE II*, he was precluded from challenging the Regional Director's compliance determination. The effect of this holding was, in essence, to preclude Lucas from challenging the Regional Director's interpretation of the remedial language in the Supplemental Decision and Order and in the underlying judge's decision. While we continue to believe that compliance proceedings are not the proper forum for addressing the merits of a Board remedial order, we find that reconsideration is appropriate here due to ambiguity in the scope of the Board's remedial order in *IATSE II*.

On reconsideration, we hold that the Supplemental Decision and Order was not sufficiently clear to put Lucas on notice that the order in *IATSE II* was limiting his backpay remedy. Although the relevant language of the judge's decision stated that Lucas was entitled to "backpay equal to the amount of wages that [Lucas] would have earned had he not been unlawfully denied referral to AVW Audio Visual, Inc.," the Board's Supplemental Decision and Order required the Respondent to "[m]ake Steven Lucas whole for *any* loss of earnings and other benefits he may have suffered as a result of the Respondent's failure and refusal to refer him from its exclusive hiring hall, with interest as set forth in the remedy section of the judge's decision." (Emphasis added.) This broader reference in the Board's order to "*any* loss of earnings" and the reference to "interest" as set forth in the remedy section of the judge's decision can reasonably be interpreted as awarding the Board's standard remedy for the violation of refusing to refer an employee through an exclusive hiring hall, and not a remedy limited to the loss of earnings incurred solely by the unlawful failure to refer Lucas to AVW.

Indeed, the subsequent litigation of the case before the Ninth Circuit and in the compliance proceedings bears out the ambiguity of the Board's order. Specifically, in opposing the Respondent's petition for review both the Charging Party and the General Counsel referred to the backpay and reinstatement remedy as the "standard remedy," which, as discussed below, typically would include backpay for all lost employment opportunities.[7] In addition, the Regional Director for Region 28 apparently ini-

[7] For example, in the General Counsel's motion for summary denial of the Respondent's petition for review and for summary entry of a judgment enforcing the Board's order, the General Counsel stated that:

> [i]n its Supplemental Decision and Order, the Board "accepted the court's decision as the law of the case" and entered—as "the appropriate remedial order for the violations found"—an order awarding Lucas back pay and reinstatement to the hiring hall (the remedy previously recommended by the ALJ). . . . To be sure, in its decision this Court found no need to consider Lucas' argument that he was entitled to monetary relief *in addition to* [emphasis in original] the standard reinstatement and back pay remedy recommended by the ALJ, and hence "le[ft] the appropriate remedy to the Board.". . . But it is clear . . . that this Court simply left to the Board's discretion a determination of whether Lucas would be entitled to a quantum of monetary relief over and above the *standard back pay award that the ALJ had recommended and the Board ultimately ordered*." [Emphasis added.]

In addition, in Lucas' opposition to the Respondent's petition for review, Lucas characterized the Board's actions after the Ninth Circuit's decision issued as follows:

> [i]n accepting the remand . . . the Board faithfully followed this Court's mandate and applied its traditional notice posting and make whole remedy. Indeed, *the Board's remedial order was identical to orders issued in hundreds of similar hiring hall discrimination cases over the past 50 years*. . . . [W]hen Mr. Lucas previously stated that this Court remanded this case "solely" for entry of a judgment in his favor, he . . . never argued that the remedy must be limited to him alone, or that it must be limited only to the job that he lost at [AVW], as opposed to the many other jobs which Local 720 kept him from fulfilling for over one year. [Emphasis added.]

Further, in his reply brief in opposition to the Respondent's petition for review, the General Counsel stated that:

> the Union contends that this Court should remand this case to the Board a second time so that the Union may argue that Lucas—who, this Court concluded, was entitled to a remedial order in his favor to remedy the Union's unfair labor practices—should be denied the standard Board remedy of reinstatement and backpay.
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> . . . [W]e pause to stress that not only does the plain import of the Court's *Lucas* decision foreclose the Union's challenge to the Board's remedial order, but also this Court . . . [has]—at least implicitly—*rejected the contention that the Board should be permitted to consider denying Lucas the standard relief of reinstatement and back pay*." [Emphasis added.]

tially shared the view of the Charging Party and counsel for the General Counsel, as his initial compliance specification provided for backpay for all lost employment, not just employment with AVW. Thus, we find significant evidence that the Board's Supplemental Decision and Order in *IATSE II* was subject to two reasonable interpretations, and we find further that, prior to the issuance of the Regional Director's Compliance Determination, the Charging Party could not fairly have been required to guess which one would eventually provide the basis for the determination of the scope of his backpay remedy. Thus, the Charging Party's request for review of the Regional Director's Compliance Determination was the first opportunity for the Charging Party to challenge the limitation on the remedy.

2. *Substantive law*. We find further that a backpay remedy covering *all* lost employment opportunities is appropriate for the violations found. In *IATSE I*, the judge found that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by "permanently barring" Lucas from the hiring hall. 332 NLRB at 9. Similarly, in *IATSE II*, the Board adopted as the law of the case the court's finding that "the Union's refusal to readmit Lucas to its exclusive hiring hall violated Section 8(b)(1)(A) and 8(b)(2) of the Act." 341 NLRB at 1267. Almost without exception, the remedy ordered by the Board for unlawful refusals to refer employees from exclusive hiring halls has been, and is, that "the Union shall make [the employee] whole for any loss of earnings and benefits sustained by him as a result of the Union's failure and refusal to refer him for employment." *Stage Employees IATSE Local 1412 (Various Employers),* 312 NLRB 123 (1993) (union arbitrarily banned an employee permanently from the exclusive hiring hall).[8]

It appears clear from these cases that, to the extent that the judge's order limits Lucas' backpay to employment opportunities lost at AVW, the remedy deviated from the "standard" relief ordered in like cases. The judge in *IATSE I* did not articulate a rationale for a limited backpay remedy, and we find no basis in the record of this matter for such a limitation.

For the foregoing reasons, we clarify the scope of the Board's remedial order in *IATSE II* to provide a standard backpay remedy. Accordingly, we order the Respondent to make Steven Lucas whole for any loss of earnings and other benefits he may have suffered as a result of the Respondent's refusal to refer him from the exclusive hiring hall, with interest. Backpay and interest are to be computed in the manner set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

ORDER

It is ordered that this proceeding be remanded to the Regional Director for Region 28 for further action consistent with this Decision.

[8] Other cases apply the same remedy. See, e.g., *Stagehands Referral Service*, 347 NLRB No. 101 (2006) (arbitrary denial of referrals); *Electrical Workers Local 48 (Oregon-Columbia Chapter)*, 344 NLRB 829 (2005) (out-of-order dispatch); *Electrical Workers Local 28*, 342 NLRB 101 (2004) (egregious errors in dispatching employees*); Ironworkers Local 433 (Steel Fabricators Assn.)* 341 NLRB 523 (2004) (union's actions made registering for referral futile); *Denver Theatrical Stage Employees Local 7 (IATSE)*, 339 NLRB 214 (2003) (referrals made without reference to objective criteria); *Local 1, Amalgamated Lithographers of America (Metropolitan Lithographers Assn.)*, 336 NLRB 801 (2001) (referrals denied because of unsuccessful candidacy for union office); *Pipefitters & Steamfitters Local 247*, 332 NLRB 1029 (2000) (unexplained denial of opportunity to register on referral list); *Electrical Workers Local 3 (White Plains),* 331 NLRB 1498 (2000) (referral conditioned on command of union's constitution and bylaws); *Painters Local Union No. 1255 (Alaska Constructors),* 241 NLRB 741 (1979) (unlawful temporary ban from hiring hall); *Electrical Workers Local 367 (Penn-Del-Jersey Chapter, NECA),* 230 NLRB 86 (1977), enfd. 578 F.2d 1375 (3d Cir. 1978), cert. denied 439 U.S. 1070 (1979) (same).