

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 9, 2002

TO : Ronald K. Hooks, Regional Director
Ruth Small, Regional Attorney
Thomas H. Smith, Jr., Assistant to Regional Director
Region 26

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: IATSE Local 69 (Various Employers)
Cases 26-CB-4099, 26-CB-4124, 26-CB-4127,
26-CB-4138, 26-CB-4144, and 26-CB-4169

536-2545-0100
536-2545-9900
536-2581-3314

These cases were submitted for advice as to whether the Union violated Section 8(b)(1)(A) and/or (2) of the Act in the operation of its exclusive hiring hall by: (1) failing to provide adequate notice to hiring hall referral system participants before changing the procedures for hiring hall discipline, suspension, and expulsion; (2) threatening hiring hall participants with discipline for accepting employment outside the referral system, in the absence of a hiring hall rule prohibiting such conduct; and (3) maintaining a hiring hall "dress code" rule that discriminatorily limits employees' working attire by requiring them to wear either a Union T-shirt or a collared shirt.

We agree with the Region that: (1) the Union did not unlawfully fail to provide adequate notice to hiring hall referral system participants before changing the procedures for hiring hall discipline, suspension, and expulsion; (2) the Union violated Section 8(b)(1)(A) by threatening hiring hall participants with discipline for accepting employment outside the referral system, in the absence of a hiring hall rule prohibiting such conduct; and (3) the Union violated Section 8(b)(1)(A) by maintaining the discriminatory "dress code" rule.

FACTS

IATSE Local 69 (the Union) operates an exclusive hiring hall providing stagehand labor in and around Memphis, Tennessee. Prior to February 2001, the Region issued a series of complaints alleging that the Union unlawfully operated the hiring hall in a discriminatory

manner, several of which were settled by payments of backpay, disclosing of information, and notice posting and mailings.

In February 2001,¹ the IATSE International Union placed Local 69 in trusteeship, with International Representative William Gearns as Trustee. As Trustee, Gearns instituted a number of changes, including establishing a business office for the Union and appointing a full-time Call Steward to make work assignments and oversee hiring hall operations. On or about April 1, Gearns instituted a new set of hiring hall rules, after having mailed a copy of the new rules to all hiring hall system participants and holding a meeting with Union members at which copies of the new rules were given out and explained. At this meeting, Gearns stated that the new rules were going to be enforced "across the board."

Among the changes made by the new hiring hall rules was a change in the disciplinary procedures. Under the old rules, before a hiring hall disciplinary action such as suspension or expulsion was imposed on a participant, the individual had the opportunity to appeal the decision to the Union's executive board and the general membership. Under the new system, the only appeal is to the Trustee.

The Union's new hiring hall rules set out a schedule of discipline for lateness or failure to appear on a job, ranging from forfeiting one call for the first infraction to permanent removal from the referral list for the fourth failure to report for work in one year.

In addition to the specific disciplinary penalties, the new rules state:

Any person who engages in conduct or behavior damaging to the Union's contractual relations with employers, or conduct or behavior that disrupts or obstructs the referral system or the Union's ability to carry out its duties and obligations shall be subject to appropriate discipline. This behavior includes but is not limited to:

1. Conviction of a felony related to work.
2. Fighting.
3. Theft at work.

¹ All dates hereinafter are in 2001, unless otherwise noted.

4. Harassment covered by Federal law.
5. Threatening harm to any employee, Job Steward, or Union Official while at work, or in connection with work.
6. Consumption of alcohol or controlled substances at work or being under the influence of alcohol or controlled substances at work.

The instant cases involve four instances of discipline imposed upon hiring hall participants.² [FOIA Exemptions 6 and 7(C)] was suspended from the hiring hall for one year, and required to undergo anger management counseling, after he got into an argument with another employee on a hiring hall job that culminated with [FOIA Exemptions 6 and 7(C)] admittedly spitting on the other employee. [FOIA Exemptions 6 and 7(C)] was expelled from the hiring hall after his fourth alleged "no-show" within four months. [FOIA Exemptions 6 and 7(C)] was expelled from the hiring hall after an altercation with a security guard at a job, which included [FOIA Exemptions 6 and 7(C)] use of an offensive racial epithet. [FOIA Exemptions 6 and 7(C)] was suspended from the hiring hall for one year after admittedly drinking alcohol on a hiring hall job, and was required to undergo inpatient alcohol treatment and random drug and alcohol testing for one year thereafter as a condition for reinstatement. Each of these individuals was given the opportunity to appeal his discipline in writing or to meet with Trustee Gearns in person.

In addition to the above discipline, the instant cases involve threats made by the Union's Call Steward to employees working at the annual King Biscuit Blues Festival (KBBF), which was outside the hiring hall referral system and paid less than hiring hall rates. The Call Steward told those employees that they faced possible Union and hiring hall discipline, expulsion, or reduced referral opportunities for working the KBBF job. One of the employees left the job after the threat. There is nothing in either the old or new hiring hall rules that prohibits hiring hall participants from accepting employment with non-hiring hall employers or at less than hiring hall rates. Hiring hall participants had never in the past been subject to, or threatened with, discipline, suspension, or expulsion for accepting employment outside the hiring hall

² All four disciplinary actions went only to the individuals' hiring hall status. No action was taken with regard to union membership.

system, and had not been required to notify the Union of such outside employment.³

The instant cases also involve maintenance of a "dress code" rule in the Union's hiring hall rules, which states that "T-shirts are not allowed except for Union T-shirts; otherwise collared shirts must be worn." The charges also address an incident where the Union's Call Steward sarcastically asked an employee who was wearing a non-union T-shirt (and who had recently asked the Call Steward about the unfair labor practice charge filed over the KBBF threats), "doesn't the dress code apply to you?" and wrote notes on a clipboard. No formal discipline was ever imposed on the employee.

The Region has determined that the discipline imposed on [FOIA Exemptions 6 and 7(C)] was not discriminatorily motivated. The issue submitted for advice is whether the Union violated its duty of fair representation as to these employees.

ACTION

Disciplinary procedures

We agree with the Region that the Union did not unlawfully fail to provide adequate notice to hiring hall referral system participants before changing the procedures for hiring hall discipline, suspension, and expulsion, or otherwise violate the Act by its discipline of [FOIA Exemptions 6 and 7(C) .]

It may be unlawful for a union operating an exclusive hiring hall to fail to give timely notice of changes in hiring hall procedures that may reduce hiring hall system participants' employment opportunities.⁴ Thus, a union violates the Act where it fails to "make a good-faith effort to give timely notice of [a] rule change in a manner reasonably calculated to reach all those who used the exclusive hiring hall."⁵ The Board has presumed that the

³ Subsequent to the KBBF incident, the Union announced a new rule that prohibits referral system participants from performing non-referral system work without permission. The lawfulness of this later rule is currently being investigated by the Region.

⁴ See, e.g., Operating Engineers Local 406, 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983).

⁵ Plumbers Local 230, 293 NLRB 315, 316 (1989).

effect of such conduct is to encourage union membership within the meaning of the Act by demonstrating the union's power over the employee's livelihood.⁶

Here, the new hiring hall rules expressly state that discipline will be imposed for absenteeism, fighting, harassment, and alcohol use on the job, and clearly provide that the only appeal will be to the trustee. These rules were mailed to all hiring hall system participants and Earns held a meeting with Union members at which copies of the new rules were given out and explained as applying "across the board." Therefore, we agree with the Region that the Union provided adequate notice of the new hiring hall rules, including the new disciplinary procedures.

We further conclude that, even if the notice was deficient in some respects, e.g., in not stating more clearly the repercussions of particular conduct that violated the hiring hall rules, the Union's discipline in these cases was reasonable and lawful. The Board has found union conduct that interferes with referral opportunities to be lawful, even in the absence of written or express rules, where the union has not acted arbitrarily and has "used reasonable judgement, considering all that had transpired . . . in concluding that further referral of [the employee] would jeopardize its position as the exclusive supply of the employer's employees."⁷ In the instant cases, the discipline was a reasonable response to these employees' misconduct. There is no evidence that would indicate that the penalties imposed were other than an impartial "across the board" enforcement of the hiring hall rules. Therefore, we agree with the Region the Union did not act unlawfully in its discipline of [FOIA Exemptions 6 and 7(C) .]

Threats for outside work

We further agree with the Region that the Union violated Section 8(b)(1)(A) when Taylor threatened the employees working on the KBBF job that they faced possible discipline, expulsion, or reduced referral opportunities for engaging in such work. In Stage Employees IATSE Local

⁶ Stage Employees IATSE Local 720, 332 NLRB No. 3, slip op. at 2-3 (2000).

⁷ Stage Employees IATSE Local 720, 332 NLRB No. 3, slip op. at 3, quoting Stage Employees IATSE Local 150 (Mann Theatres), 268 NLRB 1292, 1295 (1984).

41 (Theater of Stars),⁸ the Board held that a union violated Section 8(b)(1)(A) of the Act by reducing hiring hall participants' referral opportunities because they secured employment outside the hiring hall's referral system, where there was no established rule prohibiting such outside employment. In the instant cases, there is nothing in either the old or new hiring hall rules that prohibits hiring hall participants from accepting employment with non-hiring hall employers or at less than hiring hall rates. Moreover, hiring hall participants had never in the past been disciplined, or threatened with discipline, for accepting employment outside the hiring hall system, and had not been required to notify the Union of such outside employment. Therefore, we agree with the Region that the Union violated Section 8(b)(1)(A) when Taylor threatened the employees working on the KBBF job that they faced possible discipline, expulsion, or reduced referral opportunities for such work.⁹

Dress code

Finally, we agree with the Region that the Union violated Section 8(b)(1)(A) by maintaining its discriminatory "dress code" rule. While we are aware of no cases directly addressing the lawfulness of Union hiring hall dress code requirements, the Board in BellSouth Telecommunications¹⁰ found that a requirement that employees wear their union representative's insignia implicated employees' Section 7 right to refrain from supporting the union. The Board concluded that the requirement was lawful because of the special circumstances there -- that it advanced BellSouth's public image by conveying to the public that "its employees receive state-of-the-art training, receive a fair wage for a fair day's work, and are subject to an agreement that lessens or eliminates the likelihood of telecommunications service disruptions during

⁸ 278 NLRB 89, 90-91 (1986), enfd. without publication, as noted in Stage Employees IATSE Local 41 (Theater of Stars), 287 NLRB 1063 fn. 2.

⁹ If the Union were to defend its conduct by claiming that Taylor was then instituting a new, unwritten, change in the rules, the Union would nonetheless have violated Section 8(b)(1)(A) by making such a change without adequate notice to its members. See, e.g., Theater of Stars, 278 NLRB at 91. The Union's later decision to make such a change, of course, could not retroactively provide such notice.

¹⁰ 335 NLRB No. 18 (2001).

the terms of the agreement."¹¹ The Board emphasized that the inclusion of the CWA logo was integral to a comprehensive, collectively bargained, uniform policy.

In the instant cases, very different considerations are present. The rule was unilaterally imposed, and there is no evidence of any employer preference for the rule. The Union's justification for the rule, that it is an effort to make employees look more uniformly and identifiably professional and to make employees less noticeable during scene-changing "blackouts" (the Union T-shirts are black), is clearly belied by the alternative of wearing collared shirts of any color or style, and disallowing any other T-shirts, even black ones. In fact, the employee who was questioned about his non-Union T-shirt was wearing a black T-shirt with a small yellow emblem on it. Thus, the Union has demonstrated no special circumstances that overcome the manifest distinction along Section 7 lines inherent in the rule.

Nor does the ability to avoid wearing a Union T-shirt by instead wearing a collared shirt legitimize the policy. The wearing of a collared shirt while engaging in the manual labor at issue appears to be a less desirable alternative to wearing a T-shirt, thus imposing a penalty on those who do not wish to show support for the Union. Moreover, as the Board in BellSouth discussed, such an "opt out" policy implicates Section 7 concerns as it might well "result in individual employees being forced to reveal publicly their individual union sentiments depending on whether they "opted in" or "opted out."¹² Therefore, we agree with the Region that the Union violated Section 8(b)(1)(A) by maintaining its discriminatory "dress code" rule.¹³

Accordingly, the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(1)(A) by threatening the employees working on the KBBF job with possible discipline, expulsion, or reduced referral opportunities, and by maintaining its discriminatory "dress code" rule. The Region should dismiss, absent withdrawal, the allegation that the Union violated the Act by failing to provide adequate notice

¹¹ Ibid, slip op. at 5.

¹² Ibid, slip op. at 6.

¹³ As the rule itself is unlawful, we agree with the Region that the Call Steward's threatening conduct based on the rule is also unlawful.

before changing the procedures for hiring hall discipline,
suspension, and expulsion.

B.J.K.