

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

Advice Memorandum

DATE: April 2, 2001

TO : Rochelle Kentov, Regional Director
Region 12

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

SUBJECT: International Alliance of Theatrical
Stage Employees Local 835, AFL-CIO
(Various Employers) 536-0100
Case 12-CB-4746 536-2545-2553
535-2545-2554
536-2545-2554

This case was submitted for advice regarding (1) whether the Union¹ may require hiring hall users to sign a form which contains a) a clause holding the Union harmless from any and all liabilities that may arise in the course of referral; and b) a clause authorizing employers to deduct the Union's referral assessment fee from their paychecks, and (2) whether the Union charged nonmembers excessive referral fees in violation of Section 8(b)(1)(A) and (2) of the Act.

FACTS

The Union operates an exclusive hiring hall in Orlando, Florida, pursuant to a collective bargaining agreement with approximately six large decorating companies² and 100 smaller decorating companies. The Union refers individuals to work in Orlando and other areas. The work entails setting up and dismantling trade shows and exhibits at show sites, including the Orange County Convention Center. Most referrals involve working the "in" or "out" of a show. Each job is usually of short duration, lasting only one to three days. Thus, individuals may be referred to various employers several times a week.³

¹ International Alliance of Theatrical Stage Employees Local 835, AFL-CIO.

² These are called general service contractors.

³ According to the collective bargaining agreements, once an employee completes a job, the employee is referred to the next available position. Employers can fill up to one-half

Each week, the Employers send all employee paychecks to the Union. Every Friday, the Union distributes the paychecks to the employees. The Union processes many pay discrepancies on behalf of hiring hall users. According to the Union,⁴ it processed about 1000 of these discrepancies in 1999. The Union asserts that the resolution of these discrepancies is integral to the operation of its hiring hall.

The Union charges both union members and nonmembers a referral assessment fee amounting to 4% of gross pay. In addition, union members pay \$40.00 per quarter in dues, which they submit directly to the Union. The Union's referral fee includes the cost of renting the hiring hall. The only union officer who maintains offices in the hiring hall is the business agent, who devotes all her time to referral issues. The Union's referral fee does not include negotiating expenses, since the Union's collective bargaining agreements are negotiated by the International Union.

In order to use the hiring hall, an employee is expected to sign the Union's "Application and Authorization for Referral" form (or "referral form"). By signing the form, the employee requests referrals under the hiring hall and agrees to abide by certain provisions. The following two provisions, paragraphs 5 and 6, are at issue here. Paragraph 5 of the form provides:

I agree to execute any documents necessary to authorize my current or future employer to deduct and withhold from my gross earnings the Union's regular referral assessment and to remit same to the Union, pursuant to any agreement the Union has with that employer.

Paragraph 6 of the referral form provides:⁵

of their requirements for a job by requesting specific employees. Union referrals fill the remaining slots.

⁴ March 2000 Union newsletter.

⁵ The Union's attorney explained that paragraph 6 was meant to relieve the Union from liability should an employee be injured on the job. The attorney stated that the clause is ineffective and he has instructed the Union to remove the clause from the form.

I agree to hold harmless the Union, its agents, officers and representatives from any and all liabilities which may arise directly or indirectly in the course of referral to employment.

The Union also gives each starting hiring hall user an "Authorization for Checkoff of Dues and Assessment" form. That form states the following:

I, the undersigned, hereby authorize my current and future employers to deduct from my gross weekly earnings the union dues and/or work assessments owed to the [Union] and to remit same to the Union. This authorization shall be valid for one year from the date of my signing, and shall renew and continue in effect from year to year thereafter unless terminated by me in writing sent by certified or registered mail to the Union within thirty (30) days of its annual renewal date.

There is no evidence that the Union informed hiring hall users that they had a right to pay the 4% assessment fee directly to the Union, rather than through payroll deduction.

James Zitis joined the Union when it was formed in June 1998.⁶ At around that time, a union representative gave him the referral form. On about June 25, 1998, Zitis, and all other initial users of the Union's hiring hall, signed the form. During a union meeting, a union representative told Zitis that every user of the hiring hall was required to complete the form. On October 16, 1998, Zitis withdrew his union membership. However, he continued to pay the 4% referral fee by payroll deduction.

On May 15, 2000, Zitis sent a letter to then union business representative Susan Wolfgang. Zitis stated that effective immediately, he was revoking his "dues" (i.e. referral fee) authorization and that the checkoff authorization must immediately cease being enforced. By

⁶ On June 18, 1998, the Union split from I.A.T.S.E. Local 631, which represents stagehands working at stage shows and concerts. Zitis was formerly a member of Local 631.

letter of May 18, Wolfgang replied that as a nonmember, Zitis had not authorized dues checkoff and that the Union did not receive any dues from any employer deducted on his behalf. Wolfgang further explained that Zitis had signed a referral agreement, in which he agreed to pay a work assessment to cover the Union's cost of administering the referral system. Wolfgang also stated that Zitis had a right to revoke his checkoff authorization at any time, but that all persons eligible to be referred had to sign a referral agreement. Wolfgang also told Zitis to inform her if he wished to revoke the referral agreement or the checkoff authorization form⁷. On May 31, 2000, Wolfgang sent a letter to the Employers' payroll departments, instructing them to stop withholding the 4% referral fee from Zitis' paycheck. From that date until the present, Zitis has paid the 4% referral fee directly to the Union.

Clay Wayman signed the referral form on around May 12, 1998. He was a member of the Union until December 1999, when he ceased paying union dues. Wayman continued to pay the 4% assessment by payroll deduction until about July 14, 2000, when he left the Orlando area and stopped using the hiring hall.

The Union's financial statements⁸ for July 1998 through June 1999 indicate that the Union received a total of \$342,653 in referral fees: \$336,059 through employer deductions, and \$6,594 through direct payments to the Union. The Union also received \$76,297 in membership dues. During that same period, the Union incurred \$276,211 in expenses. The 1999 financial statement contained one line item, "organizing expenses," that clearly did not relate to the operation of the hiring hall. Organizing expenses totaled \$1,075.

The Union's financial statements for July 1999 through June 2000 indicate that the Union received a total of \$439,434 in referral fees: \$429,660 through employer deductions, and \$9,834 through direct payments to the

⁷ Wolfgang referred to this checkoff authorization form as a "work assessment authorization" form.

⁸ The charging party's legal counsel, National Right to Work Legal Defense Foundation, submitted a copy of the Union's LM2 for the period of July 1998 to June 1999. Right to Work asserts that the expenses attributable to the operation of the hiring hall are \$38,401 in office and administrative expenses, and \$30,236 in salary expenses.

Union. The Union also received \$71,664.21 in membership dues. During that same period, the Union incurred \$509,993 in expenses. The 2000 financial statement contained one line item, "dues and subscriptions," that clearly did not relate to the operation of the hiring hall. Dues and subscriptions expenses totaled \$31,127.⁹

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(1)(A) and (2) by requiring employees to sign a referral form which included a clause authorizing employers to deduct the Union's referral fee from their paychecks. We also conclude that the clause in the referral agreement in which users agreed to hold the Union harmless from liability did not violate the Act. Finally, we conclude that the Union did not charge nonmembers excessive hiring hall referral fees.

A. The Referral Form Clause Authorizing Checkoff Deduction

Employees have the right to determine the method they will use to pay union fees and dues,¹⁰ and "[a]ny conduct, expressed or implied, which coerces an employee in his attempt to exercise this right" violates Section 8(b)(1)(A) of the Act.¹¹ For this reason, a union may not require employees to meet their financial obligations to the union by executing checkoff authorizations.¹² This principle has

⁹ The Union agrees that dues and subscriptions expenses, and organizing expenses, are not chargeable to nonmembers as a cost of operating the hiring hall.

¹⁰ Bellkey Maintenance Company, 270 NLRB 1049 (1984); Columbia Transit Corp., 246 NLRB 483, 488 (1979); Herman Brothers, Inc., 264 NLRB 439, 492 (1982) ("The Act guarantees to each employee the right to determine for himself, free from coercion, whether he shall sign a checkoff authorization or not");

¹¹ Hope Industries, 198 NLRB 853, 857 (1972).

¹² Intl. Union of Electrical Workers, Local 601 (Westinghouse Electric Corp.), 180 NLRB 1062 (1970); Columbia Transit Corp., 246 NLRB at 488; Intl. Union of District 50, UMW, 173 NLRB 87, 87 (1968) (where employees have no choice but to authorize the checkoff or lose their

been extended to hiring hall fees. Thus, a union that operates a hiring hall may not use a system of referral which requires individuals to pay their hiring hall fees through dues checkoff in order to be referred for employment.¹³ Consequently, a union cannot require an individual who wishes to use the hiring hall to sign a referral card which has a dual-purpose; that is, which serves both as a job referral slip and as a dues checkoff authorization. To do so would have the effect of conditioning the individual's job referral on a dues checkoff authorization, and thus unlawfully deprive the employee of the right to select the method by which to make payments to the Union.¹⁴

In the instant case, the Union requires all hiring hall users to sign the Union's referral form before the Union refers them to a job. Under paragraph 5 of the referral form, the user agrees to authorize payment of referral fees through payroll deduction.¹⁵ The evidence

jobs, its use is coercive. The "essence of this finding is that each employee has a right to sign or not to sign a checkoff authorization and he must be given the opportunity to decide this for himself").

¹³ Bellkey Maintenance Co., 270 NLRB at 1056; United Assn. of Journeymen & Apprentices, etc., 237 NLRB 207, 210 (1978) (union unlawfully imposed a 10 cent assessment by coercing nonmember users of a hiring hall into signing checkoff authorization forms).

¹⁴ See Bellkey Maintenance Co., 270 NLRB 1049 (union unlawfully required hiring hall users to fill out job referral slip which included a dues-checkoff authorization); Communications Workers Local 1101 (New York Telephone), 281 NLRB 413, 417 (1986). But see Intl Union of District 50, 173 NLRB 87 (if the card were offered with the option to cross out the checkoff authorization or were submitted along with another which omitted the checkoff authorization and each employee had his uncoerced choice as to the manner in which he would sign, no violation would be found).

¹⁵ The hiring hall user agrees "to execute any documents necessary to authorize my current or future employer to deduct and withhold from my gross earnings the Union's regular referral assessment and to remit same to the Union, pursuant to any agreement the Union has with the Employer."

indicates that the Union does not inform hiring hall users, prior to signing the form, that they have a right to pay the Union's hiring hall fee directly to the Union, rather than through the payroll deduction system set out in the referral form. Under these circumstances, we conclude that the Union, by requiring employees to sign a job referral form that includes a clause authorizing checkoff deductions, unlawfully deprived the user of the right to select the method by which to pay the hiring hall fees to the Union.

[FOIA Exemptions 2 and 5

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B. The Referral Form Clause Relieving the Union of Liability

Section 7 affords employees the right to form, join or assist unions and the right to engage in concerted activities, and also "the right to refrain from any or all of such activities." Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union "to restrain or coerce employees in the exercise of their rights guaranteed in Section 7." Union conduct that does not interfere with employees' Section 7 rights thus does not violate Section 8(b)(1)(A).

In the instant case, as discussed above, the Union requires all hiring hall users to sign the Union's "Authorization for Checkoff of Dues and Assessment" form. Under paragraph 6 of the referral form, employees agree to "hold harmless the Union, its agents, officers and representatives from any and all liabilities which may arise directly and indirectly in the course of referral to

16 [FOIA Exemptions 2 and 5

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employment." The Union asserts that the purpose of paragraph 6 is to relieve the Union of liability in the event that a hiring hall user is injured while working on a referred job. The clause on its face has no relation to employees' Section 7 rights regarding unionization or concerted activity. Further, there is no evidence that the Union has interpreted the clause as a waiver of Section 7 rights or that employees' Section 7 rights have been affected by the clause. Moreover, both Union members and nonmembers are required to sign the form. Under these circumstances, we conclude that paragraph 6 of the referral form bears no relation to employees' Section 7 rights. Accordingly, the Union did not violate Section 8(b)(1)(A) of the Act by requiring employees to sign a referral form containing the "hold harmless" clause.

C. The Union's Hiring Hall Fees

It is well established that "a union is free to charge individuals referred for employment [through a hiring hall] a fee reasonably related to the value of the service provided."¹⁷ In other words, the hiring hall fee must represent the nonmembers' pro rata share of the cost of operating the hiring hall.¹⁸

1. Extant Board method for determining excessive hiring hall fees

¹⁷ Communication Workers Local 22 (Pittsburgh Press), 304 NLRB 868, 868 (1991) (quoting Hagerty Ct. II, see below at n. 20) (finding that no fees could lawfully be collected because the referral system was not valid); accord Teamsters Local 667 (Spector Freight System), 248 NLRB 260, 260 (1980), enfd., 654 F.2d 254 (6th Cir. 1981); Coal Producers' Association, 165 NLRB 337, 338 (1967); Robinson Bay Lock Constructors, 123 NLRB 12, 23-25 (1959), enf. denied in part, 275 F.2d 914 (2d Cir. 1960) (refusing to enforce Board order requiring reimbursement of member dues), cert. denied, 366 U.S. 909 (1961).

¹⁸ Morrison-Knudsen Co., 291 NLRB 250, 251 (1988); IATSE, Local 640 (Associated Independent Theatre Co.), 185 NLRB 552, 558 (1970); Local 825, Operating Engineers (Homan), 137 NLRB 1043, 1044 (1962) (contract specified that nonmembers would pay a pro rata amount of the hiring hall expenses).

In Homan,¹⁹ the Board adopted a discretionary rule that it would not process a general allegation of excessive nonmember hiring hall fees where nonmember fees were "roughly equivalent" to union membership dues, and where there was no evidence that the hiring hall was operated discriminatorily:

The fact that the fee paid by a nonmember is roughly equivalent to the monthly dues of a member is not, in our opinion, sufficient in and of itself to establish that the former has been required to pay more than his fair share for the use and operation of the hiring hall.²⁰

In Hagerty II,²¹ the Board endorsed the General Counsel's formulation, adopted by the Administrative Law Judge, of "an acceptable method" for determining the types of expenditures which lawfully may be charged to nonmembers for use of the hiring hall.²² Under this formula, the union was permitted to collect "all union expenses except those

¹⁹ 137 NLRB at 1044. In Homan, union members paid \$10 per month, \$1.10 of which went to the International, while nonmembers paid \$9 per month.

²⁰ Id.

²¹ J.J. Hagerty, 153 NLRB 1375, 1377 (1965) ("Hagerty II"), (on remand from 321 F.2d 130 (2d Cir. 1963) ("Hagerty Ct. I")), denying enforcement of 139 NLRB 633 (1962) ("Hagerty I")), enfd., 385 F.2d 874 (2d Cir. 1967) ("Hagerty Ct. II"), cert. denied, 391 U.S. 904 (1968).

²² The Board wrote that:

We have considered the various items found by the Trial Examiner to be properly chargeable to the operation of the hiring hall and the policing of existing contracts, and, without necessarily endorsing the classification of each and every item, we find that the formula urged by the General Counsel and adopted by the Trial Examiner is an acceptable method of determining the costs chargeable to the permit men for the use of the hiring hall.

Hagerty II, 153 NLRB at 1377.

which are 'institutional' in character; i.e., expenses incurred by the Union as an organization rather than in the course of making or policing collective bargaining agreements."²³ Although the Board, in permitting expenses incurred "in the course of making or policing collective bargaining agreements," was referring to those which pertained to the value of the hiring hall services,²⁴ the formula which it applied did not require the union to delineate those expenses from other general expenses incurred by the union. Thus, chargeable expenses included all office expenses, such as rent, salaries, phone, publications, stationery, and payroll taxes.²⁵

The ALJ, while adopting the General Counsel's formula, noted that "a result far harsher to the Union would be fully justified" ²⁶ The ALJ distinguished those expenses related to the union's services as an employment agency to which the union was entitled, from services unrelated to the hiring hall that the union rendered as a statutory representative.²⁷ The ALJ explained:

The other services the Union renders permit men are services it renders as their statutory bargaining representative, and as to this permit men are "free riders," (*The Radio Officers' Union of the Commercial Telegraphers Union, AFL (A.H. Bull Steamship Company) v. N.L.R.B.*, 347 U.S. 17, 41), as the Union had no union-security clause in its contract which would have required

²³ Id. at 1379.

²⁴ See *NLRB v. Local 138, Intl. Union of Op. Engineers*, 385 F.2d at 876-77, enfining. Hagerty II.

²⁵ They did not include per capita taxes or assessments to the international union; litigating costs of that or other related cases before the Board; or other institutional expenses incurred as an institution rather than as a bargaining agent, such as meetings, dinners and conventions or contributions to other organizations. Hagerty II, 153 NLRB at 1379.

²⁶ Id. at 1380.

²⁷ Id. at 1379.

nonmembers to pay the equivalent of dues in return for the Union's services.²⁸

Thus, for example, the ALJ noted that it was possible that "not all the annual salaries, and not all the miscellaneous office expenses, should be charged to the hiring hall services."²⁹

In sum, although Hagerty described permissible expenses as only those pertaining to the value of the hiring hall services, the formula which it applied did not require the union to delineate those expenses from other general expenses incurred by the union. Thus, the Board did not reject the "rough equivalency" of hiring hall fees and dues standard, as set out in Homan, in assessing whether hiring hall fees are excessive.³⁰ Accordingly, under Homan and Hagerty, unions may charge nonmember hiring hall users fees which include representational as well as union institutional expenses without inviting a Board challenge, so long as these fees are "roughly equivalent" to union dues and the hiring hall is not operated in a discriminatory manner.³¹

²⁸ Ibid.

²⁹ Id. at 1380.

³⁰ Compare Morrison-Knudsen, 291 NLRB at 251 (prima facie case made out where nonmember hiring hall fees were double the amount of dues paid by union members, where there was no discrimination alleged), with IATSE, 185 NLRB at 558-59 (Board dismissed charge of excessive hiring hall fees where union's admittedly "less-than-rigorous" accounting figures indicated that over 2-year period union collected more hiring hall fees than it had expenses, as Board found no evidence of discriminatory operation of the hiring hall and it surmised that "over a more representative period of years, the assessment and their proper allocations would be equalized") and Coal Producers' Association, 165 NLRB at 338-39 (service fee of \$1.45 per month plus 1% of benefits for prior employees who participated in union benefit plans was reasonably related to the value of services rendered by the union to members, who paid \$.75 per month plus 2% of pay).

³¹ Under Hagerty I, 139 NLRB at 636-37, if a union discriminates against nonmember hiring hall users based on

2. Post-Hagerty decisions relating to nonmember objectors

Subsequent to Hagerty II and Homan, the Supreme Court and the Board have held that in certain circumstances unions may not compel nonmembers to pay full union dues as a condition of employment, even though the nonmembers are subject to a union security clause requiring union membership as a condition of employment. In General Motors,³² the Supreme Court held that employment conditioned on membership, for purposes of Section 8(a)(3), requires only "payment of initiation fees and monthly dues," not actual union membership. According to the Court, "[m]embership" as a condition of employment is whittled down to its financial core."³³

Subsequently, in CWA v. Beck,³⁴ the Court held that, with respect to nonmember bargaining unit members covered by a union security clause who object to paying for the expenditure of funds for nonrepresentational activities (i.e., activities unrelated to collective bargaining, contract administration, or grievance adjustment), such employees may not be compelled to pay full union dues as a condition of employment. Instead, the "financial core" amount that they may be charged is limited to representational expenses.³⁵ According to the Court, unions which have negotiated a union security clause need not tolerate "free riders" (employees who receive the benefits of union representation but refuse to pay their fair share of the costs of representation). Such employees must pay for the union's representational services; they just cannot be compelled to pay for the nonrepresentational expenses.³⁶ According to the Board, unions must prorate their expenses

their union membership, then the union may not collect any fee.

³² NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

³³ Ibid.

³⁴ 487 U.S. 735, 760 (1988).

³⁵ Id. at 752-54. See California Saw, 320 NLRB at 224 (applying Beck).

³⁶ Id. at 750.

between representational and nonrepresentational activities for nonmember objectors who are covered by a union security clause.³⁷

While Beck does not involve hiring halls in the absence of a union security clause, it does confirm that, absent a union security clause, nonmember hiring hall users are "free riders" with respect to those union representational services that are not germane to the operation of the hiring hall. Specifically, Hagerty II's formula, which does not require unions to delineate expenses that are germane to the operation of the hiring hall from certain other expenses, and Homan's holding that hiring hall fees may be "roughly equivalent" to union dues (which include representational expenses), are incompatible with the statutory scheme of the proviso to Section 8(a)(3) as evidenced by the Supreme Court's decision in Beck. Thus, hiring halls in states containing right to work laws must carefully assess fees to nonmembers so as to include only those costs, including costs of maintaining and policing the hiring hall contract, that are directly related to the operation of the hiring hall. Charges for other activities are excessive and therefore unlawful. Accordingly, each hiring hall expense should be examined to determine whether it is germane to the operation of the hiring hall.³⁸

3. Application of principles to the Union's referral fee

In the instant case, the Union charges both member and nonmember hiring hall users a referral fee, amounting to 4% of gross pay. In addition, the Union charges union members \$40.00 per quarter in dues. The evidence supports the conclusion that the Union's 4% referral fee reflects the cost to the Union of operating the hiring hall. The Union operates a busy hiring hall, in which jobs are usually of short duration and individuals may be referred to various employers several times a week. The Union processes numerous pay discrepancies³⁹ and grievances, all on behalf

³⁷ California Saw, 320 NLRB at 231, 237-39.

³⁸ See "Inlandboatmen's Union," Advice Memorandum Case 19-CB-8229, et al., dated June 4, 1999, in which we concluded that unions may charge nonmembers only for the cost of operating the hiring hall where the nonmembers are not covered by a union security clause.

³⁹ For example, the Union processed about 1000 hiring hall pay discrepancies in 2000.

of hiring hall users. All the pay discrepancies, and the brunt of grievances, concern hiring hall referral issues.⁴⁰ The Union also engages in little to no organizing activity from the hiring hall, and what organizing expenses the Union does accrue are not part of the referral fee. Finally, the only union officer who maintains offices in the hiring hall is the business agent, who devotes all her time to referral issues. Thus, the rental and overhead expenses which the Union includes in its referral fees are germane to the operation of the hiring hall. In short, the evidence indicates that the expenses which the Union incurs in performing its functions, such as processing applications, referring employees to multiple job sites, distributing paychecks and resolving discrepancies and grievances, are integral to its role in administering the hiring hall. On the basis of these factors, we conclude that the 4% referral fee which the Union charges nonmembers for the use of its hiring hall is not excessive.

CONCLUSION

For the foregoing reasons, we conclude that the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(1)(A) and (2) by requiring employees to sign an "Application and Authorization for Referral" form that authorized employers to deduct the Union's referral assessment fee from employees' paychecks. [FOIA Exemptions 2 and 5

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B.J.K.

⁴⁰ For example, grievances address issues such as the failure to obtain work assignments and the order in which employees are sent home from a job.