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

Advice Memorandum

DATE: March 29, 2011

TO : James J. McDermott, Regional Director
Region 31

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

SUBJECT: Writers Guild of America-West (ABC, Inc.) 536-5075-0125
Case 31-CB-12839 536-5075-0187
536-5075-5091-3300
Writers Guild of America-East (ABC, Inc.) 596-0420-5500
Case 31-CB-12840

These cases were submitted for advice as to (1) whether the Writers Guild of America-West ("WGAW") and the Writers Guild of America-East ("WGAE") violated Section 8(b)(1)(A) or 8(b)(2) by prohibiting financial core payers from competing for Writers Guild Awards and, in December 2009, excluding from consideration the nomination of a financial core payer in the Daytime Serials category; and (2) whether the charges alleging such violations are barred by Section 10(b). We conclude that the allegation pertaining to the individual nominee is barred by Section 10(b) because the affected parties had actual or constructive notice of the alleged unfair labor practices outside the 10(b) period. Moreover, we conclude that the Awards eligibility rule does not violate Section 8(b)(1)(A) or 8(b)(2) because it is an internal union rule governing the benefits of union membership, unrelated to terms and conditions of employment, and not required by the parties' collective bargaining agreement.

FACTS

For many years, the WGAW and WGAE (collectively, the "WGA" or "Guilds") have been the collective-bargaining representatives of professional writers for screen, television, and other media. The WGA membership includes writers of daytime serials ("soap operas") employed by television production companies, including ABC, whose terms and conditions of employment have been governed by successive labor agreements with the Alliance of Motion Picture and Television Producers ("AMPTP"). The AMPTP is a multi-employer bargaining association whose members are engaged in motion picture or television production. Charging Party, ABC, is a member of the AMPTP.

Beginning over 60 years ago, the WGA has annually presented awards to recognize excellence in writing for projects created under the Guilds' jurisdiction. Over time, and to reflect the growth in the entertainment industry, the Awards have evolved to recognize additional categories of writing. There is no evidence that there has ever been a labor agreement compelling the Guilds' presentation of its Awards. The WGA bears the entire expense of the Awards, including the cost of the nomination and selection processes, the ceremony at which the Awards are presented, and the Awards statuettes.

Prior to a strike in late 2007, the Guilds had not specifically excluded individuals from Awards eligibility based on WGA membership status, but instead restricted eligibility to writers of projects developed under the jurisdiction of the Guilds' collective bargaining agreements. The WGA maintains limited exceptions to this jurisdictional requirement for certain categories not traditionally within the Guilds' jurisdiction — TV Animation, Documentary Screenplay, and Videogame Writing. Under the rules applicable to these three categories, a writer does not have to work under a WGA collective bargaining agreement or be a WGA member to compete. If the writer is not a Guild member, however, the Awards eligibility rules require that the individual join the WGA organizing caucus for the work area in question — e.g., the Videogame Writers Caucus or the Animation Writers Caucus. This requirement is an internal WGA rule unrelated to the employment status of any writer. Also, the Guilds maintain an additional jurisdictional exception for writers whose services are performed under an affiliate guild's jurisdiction for two categories of awards — Best Original Screenplay and Best Adapted Screenplay. (The affiliate guilds are the Australian Writers Guild, Writers Guild of Canada, Writers Guild of Great Britain, Irish Playwrights and Screenwriters Guild, and the New Zealand Writers Guild.)

To be considered for an Award in most categories, writers or their representatives (i.e., agents, managers and publicists) must submit scripts to the WGA. With respect to daytime serials, however, the Guild will accept nominations from producers and "head writers" to ease the WGA's administrative burden.

Although employers have this limited role in the nomination process, only full WGA members participate in the judging process. The judging in five Awards categories — Best Comedy Series, Best Drama Series, Best New Series, Best Original Screenplay, and Best Adapted Screenplay — is accomplished by a popular vote of the entire WGA

membership. The other Awards, including the Daytime Serials category, are each judged by a panel of Guild members with experience in the genre being judged.

The WGA went on strike from November 5, 2007, until February 21, 2008, when it reached a new agreement with the AMPTP effective through May 1, 2011. During the strike, 28 employees represented by the WGA became financial core payers and crossed the Guilds' picket line. Prior to the 2007-08 strike, the WGA had few financial core payers; between 1997-2007 the number of financial core payers ranged from a low of three to a high of seven. After more represented employees selected financial core status in light of the strike, the WGA was confronted with a previously-unencountered situation related to its annual Awards. Specifically, for the 2008 Awards three of the four shows nominated in the Daytime Serials category had at least one staff writer on the "writing team" who voluntarily selected financial core status. There is no evidence that any financial core payers had been nominated for a WGA Award prior to the 2008 Awards cycle.

The issue of financial core payer eligibility for Awards was referred to the Guilds' respective governing bodies. At special meetings conducted in January 2008, the WGA adopted the following Awards eligibility provisions: (1) financial core payers would not be eligible to be nominated in the future; and (2) financial core payers already nominated for the 2008 awards would be removed from the list of nominees and ineligible to win.

Thereafter, on April 18, 2008, the WGA presidents sent a message regarding participation in the strike to their members, stating in part:

> Yet among the many there were a puny few who chose to do otherwise, who consciously and selfishly decided to place their own narrow interests over the greater good. Extreme exceptions to the rule, perhaps, but this handful of members who went financial core, resigning from the union yet continuing to receive the benefits of a union contract, must be held at arm's length by the rest of us and judged accountable for what they are – strikebreakers whose actions placed everything for which we fought so hard at risk. . . . Those who went financial core did not share in the adversity; and should not share in our victory. **They cannot vote in our elections, run for guild office, attend Guild meetings and other events, or participate in the Writers Guild Awards**.

(Emphasis supplied). There was extensive media coverage about the April 18 letter. Moreover, the April 18 letter formed the basis of unfair labor practice charges filed by the AMPTP later in 2008.[1]

On July 1, 2008, the WGA distributed a notice to all employees covered by WGA collective bargaining agreements, including the head writers who submit nominations for the Daytime Serials category, informing them of their right to become "agency fee payers" rather than full members of the WGA. Beginning on that date, the WGA has specifically stated in its annual Beck[2] notice that financial core payers do not enjoy the right to "Compete and receive Writers Guild Awards." Moreover, the Guilds treat Awards-related expenditures as members-only benefits that are non-chargeable for Beck accounting purposes.

In October 2008, the head writer of ABC's *One Life to Live* nominated the program for a 2009 WGA Award in the Daytime Serials category. Of the twelve writing team members nominated, four were financial core payers. Those financial core payers were deemed ineligible for the Award. Shortly thereafter, on December 8, 2008, the Guilds issued a press release announcing the 2009 Awards nominees, which excluded reference to the four financial core payers of ABC's *One Life to Live* writing team. These nominations received extensive press coverage in prominent entertainment publications. Also, at the February 7, 2009 Awards ceremony, the WGA excluded the names of the financial core payers from the listed Award nominees.

In December 2009, another ABC daytime serial, *All My Children*, was nominated for the 2010 WGA Awards by that show's head writer. One member of the *All My* Children writing team, the alleged discriminatee in the instant case, was a financial core member and deemed ineligible for the Award under the Guilds' policy. On December 14, 2009, the WGA issued a press release announcing the nominations for the 2010 Awards that excluded the alleged discriminatee from the list of the *All My Children* writers nominated in

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[1] On September 23, 2010, the Region issued a complaint against the Guilds, alleging that the WGA's dissemination of the April 18, 2008 communication, which included a list of the individuals who elected to become financial core payers during the 2007-08 strike, violated Sections 8(b)(1)(A) and 8(b)(2) by attempting to "blacklist" those writers. The issue of Awards eligibility for financial core payers was not included in the AMPTP's 2008 charges or the resulting complaint issued by the Region.

[2] See Communications Workers v. Beck, 487 U.S. 735 (1988).

the Daytime Serials category. As customary, the nominations for the 2010 WGA Awards received extensive national press coverage. Moreover, four days after the announcement of nominations, one entertainment publication "reminded" awards show pundits that financial core payers were not eligible for WGA Awards.[3]

Thereafter, on January 19, 2010, ABC's Vice President of Daytime Programming Operations spoke with the WGAE's Director of Programs and Events about the alleged discriminatee's exclusion from the nominee list for *All My Children*. The Director of Programs and Events stated that the employee in question "was not eligible" for a WGA award because he was "essentially fi-core" which was a "nice way of saying" that he "crossed the picket line during the 2008 WGA strike."

ABC filed charges against the Guilds on June 30, 2010, alleging the WGA's Award eligibility rules violate Section 8(b)(1)(A) and 8(b)(2) of the Act.

ACTION

We conclude that the allegation pertaining to the individual nominee is barred by Section 10(b) because the aggrieved parties had actual or constructive notice of the alleged unlawful Guild rule outside the 10(b) period. Moreover, we conclude that the WGA Awards eligibility rule does not violate Section 8(b)(1)(A) or 8(b)(2) of the Act because it is an internal union rule governing the benefits of union membership, unrelated to terms and conditions of employment, and not required by the parties' collective bargaining agreement. Accordingly, the Region should dismiss the charges, absent withdrawal.

Section 10(b) Issue

Section 10(b) of the Act precludes issuance of a complaint based upon any unfair labor practice occurring more than six months prior to the filing of the underlying charge with the Board. However, the six-month period does not begin to run until the aggrieved party has actual or

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[3] See *The Suds Report: Dec. 18, 2009*, TV GUIDE CANADA, December 18, 2009(available at http://www.tvguide.ca/Soaps/Suds/Articles/091218 suds report NB.htm) ("Below are the soap opera writing nominees for the 2010 Writers' Guild Awards. Awards show pundits should be reminded that certain writers were not eligible because there are a variety of head writers . . . who chose to cross the picket lines to pen their serials during the 2007-08 writers' strike.")

constructive notice of the conduct that constitutes a violation of the Act.[4] The party raising Section 10(b) as an affirmative defense bears the burden of establishing that a complaint is time barred.[5] A charging party may be charged with constructive notice if it fails to exercise "reasonable diligence" by which it would have learned of the unfair labor practice.[6] Such knowledge may be imputed where the charged party is "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred"[7] or the conduct in question was sufficiently "open and obvious" to provide clear notice.[8]

We conclude that ABC had actual or constructive notice of the Guilds' Awards eligibility policy well outside the 10(b) period, which began December 30, 2009. The implementation, existence, and application of the WGA Awards eligibility rules were openly posted, communicated, and then publicized by extensive press coverage well before that date. Moreover, four financial core payers of ABC's *One Life to Live* writing team nominated for the 2009 Awards were excluded from the WGA's announcement of the 2009 nominations, the related press coverage, and the listing of

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[4] Vanguard Fire & Security Systems, 345 NLRB 1016, 1016 (2005), enfd. 468 F.3d 952 (6th Cir. 2006).

[5] United Kiser Services, LLC, 355 NLRB No. 55, slip op. at 1-2 (2010).

[6] Ibid. (holding allegations time-barred where union could have discovered newly-hired employees were represented by another union if it had exercised due diligence); Nursing Center at Vineland, 318 NLRB 337, 339 (1995) (finding "constructive knowledge incorporates the notion of due diligence, i.e., a party is on notice not only of the facts actually known to it but also facts that with reasonable diligence it would have necessarily discovered").

[7] Transit Union Local 1433 (Phoenix Transit System), 335 NLRB 1263, 1263 fn.2 (2001).

[8] Compare Moeller Bros. Body Shop, 306 NLRB 191, 192 (1992) (union chargeable with constructive notice that employer was not making benefit payments for all unit employees where employment of extra employees should have been obvious even to an occasional visitor, and union left the worksite unmonitored for long periods of time) with R.G. Burns Electric Inc., 326 NLRB 440, 441 (1998) (10(b) period tolled with respect to employer's discriminatory hiring policy where it was not obvious that people working at jobsite were new hires rather than existing employees transferred from other employer projects).

the nominees at the Awards ceremony itself. Again in late 2009, ABC nominated the writing team for *All My Children* in the Daytime Serials category for the 2010 Awards. WGA omitted the financial core payer on that team from its announcement of nominees and related press coverage. We conclude that the "open and obvious" nature of the Guilds' exclusion of financial core payers from award consideration provided at least constructive if not actual notice to the Charging Party within the 10(b) period.

We also conclude that the employee supposedly aggrieved by the WGA actions was repeatedly provided specific notice of his ineligibility outside of the 10(b) period. For example, beginning July 1, 2008, he was advised in the Guilds' annual Beck notice that as a financial core member he was not eligible to compete for WGA Awards. The alleged discriminatee was again made aware of the Guilds' policy on December 14, 2009, when the nominations for the 2010 Awards were announced and extensively reported in the press and his name was excluded from the list of *All My Children* writers nominated in the Daytime Serials category.

Because the allegedly aggrieved parties had actual or constructive notice of the Guild's implementation of the Awards eligibility rule and its application to the 2010 Awards well before the Section 10(b) period, the allegation regarding the individual nominee is time-barred.

Section 8(b)(1)(A) and (2) Issue

Given the WGA's intent to continue applying the Awards eligibility rule at issue, we have considered whether the WGA's exclusion of financial core payers from Award consideration violates the Act and have concluded that the rule violates neither Section 8(b)(1)(A) nor 8(b)(2).

The proviso of Section 8(b)(1)(A) guarantees the "right of a labor organization to prescribe its own rules with respect to the acquisition and retention of membership therein." In Allis-Chalmers, the Supreme Court found legitimate under this proviso both an internal union rule prohibiting members from crossing a picket line and the discipline resulting from a member's violation of the rule.[9] Thus, a union has the inherent authority to discipline its members through fine or expulsion from membership in order to maintain solidarity and be an effective representative of its members' economic interests.[10] Although a union is

[9] NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, 181-84 (1967).

[10] Ibid.

not authorized to fine non-members for crossing a picket line or selecting non-member status,[11] the Board has long recognized that a union is privileged to withhold union membership from individuals who crossed the union's picket line.[12] Thus, the Section 8(b)(1)(A) proviso preserves the Guilds' right to deny full membership status to the financial core payers who crossed the WGA picket line during the 2007-08 strike.

Furthermore, the Board has specifically acknowledged that Section 8(b)(1)(A) does not "reach the purely internal enforcement of union rules having no impact on the employment relationship" and not relating to the union's role as collective bargaining representative.[13] The Board also has specifically upheld in a variety of contexts the promulgation and enforcement of internal rules withholding from non-members extra-contractual membership benefits not affecting the terms and conditions of employment.[14]

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[11] See, e.g., Pattern Makers League of North America v. NLRB, 473 U.S. 95, 101 (1985), and cases cited therein.

[12] See Pattern Makers Association of Los Angeles, 199 NLRB 96, 96 (1972) (finding privileged by the proviso to Section 8(b)(1)(A) the union's decision to expel four employees from membership when they crossed the union's picket line after resigning).

[13] Office Employees Local 251 (Sandia Natl. Laboratories), 331 NLRB 1417, 1422, 1424-25 (2000) (Board found no violation where intraunion discipline of officers for misuse of funds had speculative impact on the employer-employee relationship and did not "significantly implicate the rights and duties established by the Act").

[14] See, e.g., American Postal Workers (Postal Service), 300 NLRB 34, 35 fn.6 (1990) (finding union did not violate 8(b)(1)(A) by refusing to allow nonmember unit employees at union hall meeting to discuss proposed route changes that did not involve grievance processing or other fundamental rights of union representation under the contract); Pottery Workers (Colton Mfg.), 254 NLRB 696, 699-701 (1981)(holding union did not violate the Act by withholding strike benefits from members who later resigned and returned to work during the strike). See also National Association of Letter Carriers (Postal Service), 240 NLRB 519, 523-24 (1979) (finding imposition of union rule denying union health plan coverage to members accepting temporary supervisor positions changed no term or condition of employment where contract only required flat employer contribution to health benefits and was privileged by 8(b)(1)(A) proviso). Compare Teamsters Local 670 (Stayton

For example, in Food and Commercial Workers, Local 222, the Board upheld a union rule denying strike benefits to any of its members if either the member or the member's spouse worked behind a picket line operated by the union.[15] In considering whether the union illegally restrained or coerced the non-member spouse in the exercise of his Section 7 right to cross the union's picket line, the Board found the rule had at most a secondary impact because the non-member was not being denied a benefit to which he was entitled.[16] The Board then found no violation because the rule was a valid internal rule related to the acquisition or retention of membership which violated no policy of the Act, and any impact on the non-member was incidental.[17]

Likewise, the Guilds' rule prohibiting financial core payers from participating in the WGA Awards is a valid rule related to membership which violates no policy of the Act and has only an incidental effect on non-members. The rule does not implicate any bargaining agreement rights or terms and conditions of employment of the employees under the Guilds' jurisdiction. While receiving a WGA Award may be considered prestigious in the entertainment industry and could assist with future employment prospects, the

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Canning), 275 NLRB 911 (1985), enfd. 856 F.2d 1250 (9th Cir. 1988) (finding union violated Section 8(b)(1)(A) by denying nonmembers access to union's pharmacy and eye and dental clinics in violation of strike settlement agreement provision that prohibited retaliation against nonstrikers). In Teamsters Local 670, the Board did not reach the question of whether the union's conduct would have violated the Act if it had not breached the strike settlement agreement. Id. at fn. 2.

[15] Food and Commercial Workers, Local 222 (Iowa Beef Processors), 245 NLRB 1035, 1035-36 (1979).

[16] Id. at 1038. In its analysis, the Board referenced Scofield v. NLRB, 394 U.S. 423 (1969), without addressing the propriety of applying the Scofield balancing approach in a non-disciplinary context. Though citing Scofield, the Board simply "balance[d] the legitimacy of the union interest at stake with the interest that the General Counsel claim[ed was] contravened by the union action." 245 NLRB at 1038. Compare Professional Musicians Local 47, Case 31-CB-11023, et al., Advice Memorandum at 4, fn.5 (May 29, 2008) (concluding that internal union rules that do not subject members to union fines or penalties are not analyzed under Scofield).

[17] Food and Commercial Workers, Local 222 at 1038.

challenged rule has no definitive impact on the affected employee's employment relationship and does not relate to the union's collective bargaining role. Moreover, ABC's ministerial role in facilitating the provision of the extra-contractual membership benefit by submitting scripts for consideration in the Daytime Serials category does not convert the union-provided benefit into a term or condition of employment. Simply put, the Guilds' rule prohibiting financial core payers from participating in the WGA awards does not affect the employment status of such employees, any terms or conditions of employment, or any benefit under the applicable labor agreement.

Rather, the eligibility rules govern a membership benefit offered by the Guilds distinct from their collective bargaining role. When employees under the Guilds' jurisdiction exercise their right to select financial core status, they are released from the obligations of full WGA membership (such as supporting the Guilds' strike), but they also give up their rights to the extra-contractual benefits of that membership, such as the ability to compete for the WGA Awards. In the absence of any impact on the employment relationship, the exclusion of financial core payers from Awards consideration does not restrain or coerce employees in violation of Section 8(b)(1)(A) of the Act.

Finally, because there is no evidence that the Guilds' maintenance of its Awards eligibility rules caused or attempted to cause ABC to discriminate against WGA-represented employees as to hire, tenure, or terms and conditions of employment, we find no violation of Section 8(b)(2) of the Act.[18]

Accordingly, the Region should dismiss the instant charges, absent withdrawal.

B.J.K.

[18] See, e.g., Service Employees Local 87 (Able Bldg. Maint. Co.), 349 NLRB 408, 411 (2007) (Board upheld ALJ dismissal of Section 8(b)(2) where no evidence that union attempted to cause discharge of employee who violated union bylaw prohibiting employment with two or more signatory employers).