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10 UNITED STATES OF AMERICA
11 NATIONAL LABOR RELATIONS BOARD

12 LABORERS' INTERNATIONAL UNION OF) Case No. 28-CB-065507
13 NORTH AMERICA LOCAL 872)

14 Respondent /Union)

15 and)

16 STEPHANIE SHELBY, an individual,)

17 Charging Party)

18 **BRIEF IN SUPPORT OF**
19 **EXCEPTIONS TO THE DECISION**
20 **OF THE ADMINISTRATIVE LAW**
21 **JUDGE**

22 **I. INTRODUCTION**

23 Stephanie Shelby came into the Union's office on October 4. She became disruptive and
24 twice called an office employee a "bitch." She was asked to leave because of her profanity.
25 When she refused, the office employee asked Joe Taylor, another employee, to come downstairs
26 and again ask her to leave. She became more abusive towards him and repeatedly called him
27 various epithets. She remained in the parking lot of the Union office for 20 or 30 minutes further
28 causing a disruption before she was finally removed by the police. This case can be summed up by
Ms. Shelby's own admissions:

Q BY MS. SENCER: Ms. Shelby, do you believe it's right to be called a
bitch at work?

A No.

Q Is it right to be called a mother fucker at work?

A No.

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Q Is that how you want to be treated at work?

A No.

Q Now, you've been in to the Union a number of times since the trespass notice has been in place, correct?

A Yes.

Q Okay. And you've been able to conduct your business with the Union, correct.

A Yes.

Q And, in fact, you've been called out at least twice since then, correct?

A Yes.

Q Okay. One of which is the employment that you're still currently in, which has been over two months now, correct?

A Yes.

Q Okay. Did you call in in November, 2011 for your dispatch? Excuse me, for your out-of-work roll call?

A Yes, uh-huh.

Q And this hasn't affected your, the issue of October 4, 2011 did not affect your spot when you called in November, 2011 did it?

A No.

Q Have you been denied any opportunity to update your skills?

A No.

(Tr. 227:16-228:19).

The Complaint in its entirety should have been dismissed. We shall address both the failure of the ALJ to dismiss the complaint in its entirety as well as the over breath of the remedies directed by the ALJ.

II. STATEMENT OF FACTS

At all relevant times, Stephanie Shelby has been a member Local 872. Nevada, of course, is a right to shirk state and Ms. Shelby's membership is voluntary.

Prior to the incident on October 4, Ms. Shelby had been in the Union's office and had raised questions about her referral status. There had been at least one prior heated conversation

1 between her and Ms. Rocio Lucero, one of the office employees who serves as a dispatcher. Tr.
2 114-115.

3 The dispute which is the subject of this case occurred on October 4, 2011. It was a dispute
4 over Ms. Shelby's skill sheet. The dispute on that date had to do with whether she could update her
5 skill sheet. Tr. 139-141.

6 After Ms. Shelby became dissatisfied with Ms. Lucero's refusal to acknowledge Ms.
7 Shelby's claimed but undocumented skills, the conversation degenerated. Ms. Shelby concedes
8 that she raised her voice towards Ms. Lucero first. Tr. 196:16-18. Thus, contrary to the ALJ, Ms.
9 Shelby was the first one to raise her voice in the confrontation which led to her exclusion. Ms.
10 Lucero did not curse at her. Tr. 196:19-20.

11 Ms. Shelby concedes that she used the epithet "look bitch" directed at Ms. Lucero. Tr.
12 169:3-5. Ms. Lucero testified that Ms. Shelby used that epithet twice. Tr. 143.

13 Ms. Lucero explained she never had a member use an epithet directed at her before. Tr.
14 125. This was the first time that this kind of disturbance has occurred where a member has used
15 epithets directed at her. Tr. 128. She explained that members have sworn, but not directed at her.
16 This is consistent with the findings of the ALJ that although swearing has occurred in the hiring
17 hall this is the first time it has been directed at a clerical employee. Ms. Shelby's conduct was
18 "belligerent." ALJD 8:16-17.

19 Ms. Lucero before taking any other action asked Ms. Shelby to leave. Tr. 125:6. When she
20 refused Ms. Lucero then told her that she would call "Metro" if she "kept yelling and screaming . .
21 ." Tr. 125:4-5. At that time, she called Joe Taylor to come down and handle the situation. Mr.
22 Taylor received a call from Ms. Lucero and could hear Ms. Shelby screaming during the phone
23 call. Tr. 55:24-56:3, 72. Mr. Taylor could hear her screaming and yelling and left his office to
24 head downstairs. Tr. 56:11-12. The ALJ generally found this sequence of events. ALJD 8:33-34.

25 Mr. Taylor testified that the first thing he did when he got downstairs was to ask Ms.
26 Shelby to "calm down . . ." Tr. 57:2, 74. Ms. Shelby's response was continued profanity.¹ When
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¹ Mr. Taylor's reluctance to use profanity is reflected at Tr. 57:1-4.

1 Ms. Shelby failed to calm down, he told her to leave. Tr. 75. Mr. Taylor asked Ms. Shelby to
2 leave “because she was just screaming and that was it.” Tr. 127:20-22.

3 Mr. Taylor did not immediately call Metro but waited until he got her outside of the
4 building. Outside of the building, she continued her string of epithets directed at Mr. Taylor and
5 others. Tr. 56-60. Ms. Shelby remained in the parking lot yelling and screaming for about 20 or
6 30 minutes until Metro arrived. Tr. 77.

7 The most persuasive evidence in this case is the brief recording of the phone conversation
8 in which Mr. Taylor asked Metro to come to the Union hall to deal with Ms. Shelby. Anyone who
9 listens to the tape can tell that Ms. Shelby was totally out of control and continually screamed
10 epithets directed at Mr. Taylor and the Union. The CD which contains an audio recording of the
11 phone call confirms that Ms. Shelby was out of control. Resp Ex 1.²

12 Respondent does not contend that Ms. Shelby made any direct threats. She was however
13 totally out of control and Ms. Lucero rightfully testified that she was concerned about what would
14 happen and was somewhat intimidated by Ms. Shelby’s irate outburst. Tr. 145-151. She was
15 certainly concerned for her safety with that kind of outburst.

16 It is true that Ms. Lucero was behind a bullet proof glass and locked door. Nonetheless, an
17 irate person who has totally lost her temper and engaged in that kind of behavior is unpredictable.
18 Whether or not Ms. Shelby made a direct threat, Ms. Lucero reasonably believed that there was
19 good reason to ask Ms. Shelby to leave. When she refused to leave, Mr. Taylor acted more than
20 reasonably and asked Metro to assist the Union in removing her from the Union’s property.

21 When the police finally arrived, Ms. Shelby did not immediately calm down and she was
22 handcuffed. She left the premises with the police. By the time she left, she had calmed down. Ms.
23 Shelby only calmed down after she was handcuffed and apparently in order to be allowed to leave.

24 During the course of these events, the police asked the Union to read a no trespass
25 statement to Ms. Shelby. Mr. Taylor did so in order to effectuate the request that she be removed

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27 ² The Board should review the CD. It demonstrates Ms. Shelby was out of control. It is not
28 possible to make a transcript of the recording. The Judge’s decision to reject the exhibit should be
reversed. See ALD p. 10, note 8. It corroborates the findings of the ALJ that Ms. Shelby was out
of control and swearing loudly.

1 from the property. See General Counsel Exhibit 5, p. 2. The reading of the No Trespass statement
2 was at the request of the police, it was not initiated by Mr. Taylor. Thus as a condition of removing
3 Ms. Shelby, the Respondent was required by the police to read the statement.

4 The statement is clear that if she did not leave immediately, she would be subject to arrest
5 for a misdemeanor. The next statement, however, is not clear as to what the consequences would
6 be if Ms. Shelby subsequently returned to the premises:

7 Your subsequent return to the premises after being warned not to return will
8 subject you to immediate arrest for trespassing.

9 It isn't clear whether this will subject Ms. Shelby to an immediate arrest if she ever
10 returned or whether she would have to be warned again at that time not to return to the premises
11 before she would be arrested. Mr. Taylor was asked to read the statement to Ms. Shelby by the
12 police.

13 Mr. Taylor's understanding of the subsequent effect of this order is very unclear. It was not
14 his intent to completely ban her in perpetuity from the property. Tr. 63:19-21. However, his
15 understanding of the trespass directive was that she would not be allowed back on to the property.
16 He had no understanding whether she needed police escort. Tr. 63:7.

17 It is however clear that Mr. Taylor sought to have her removed at that time. She was
18 removed on October 4.

19 Ms. Shelby has been back to the Union at least four times since October 4. Tr. 175. She
20 has also attended a Union meeting without escort. Tr. 176-177. There is no evidence the
21 Respondent has enforced the police escort requirement; it appears Ms. Shelby has obtained the
22 police escort since as we have noted she has been to the hall without police escort.

23 Ms. Shelby claims that she called Ms. Lucero the day after the incident and apologized to
24 her. Tr. 170-176. Ms. Lucero denies that. Tr. 129:12-14. She also denies sending Ms. Shelby "a
25 copy of her skill sheet" Id. Ms. Shelby has been at the hall and has been polite but of course
26 she has had police officers with her. Tr. 129:18-25. ALJD 12: 5-10.

27 There is corroboration in the record that Ms. Shelby did not call Ms. Lucero but rather

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1 called another person, Ian. Tr. 67:18-68:1. Ian is not a dispatcher but a cashier.³ Tr. 111:1-10.

2 Finally, and of importance to the Section 8(b)(2) allegation, Ms. Shelby has consistently
3 worked since about November 17, 2011; first for Southern Nevada Flagging and then for Six Star
4 Janitorial. Tr. 159:12-14. She has received jobs through what the ALJ describes as the second
5 track system and has had no need to use the hiring hall. ALJ 12: 8-32.. She has had no reason to be
6 registered on the out of work list nor has she been registered on the out of work list since that date.
7 Nothing the Union has done in this case affected her work or even registration in the hiring hall.

8 Finally, there have been incidents of other individuals using the Union’s hall who have
9 engaged in conduct which has required them to be “trespassed.” Mr. Stevens identified three
10 examples where in at least two cases individuals came back and used the Union facilities after
11 being told to leave. Tr. 312:6-315:13. The record does not establish Ms. Shelby has made any
12 effort to seek or modify the content of the no trespass order.⁴ This is a critical finding. Ms. Shelby
13 who still believes that she was in the right has steadfastly refused either to apologize to Ms. Lucero
14 to ask the Union to modify or remove the restriction. She only filed an unfair labor practice charge
15 over this. As we shall show below, the question is one of timing. The ALJ properly found that the
16 Union had every right to remove her on October 4. The question then becomes at what point does
17 the union have to rescind the request by Metro that she be” “trespassed” when she never made that
18 request of the Union. Additionally is there any violation where Ms. Shelby has not used the hiring
19 hall from October 4, 2011 to the date of the hearing.
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24 ³ Not only did she apologize to the wrong person, an individual who was not involved in the
25 incident, but she carefully avoided apologizing to Ms. Lucero, whom she had sworn at. Her
26 apology was effectively meaningless. Furthermore, to the extent that she failed to apologize to Ms.
27 Lucero, but did attempt to talk to others at the Union about the statement, she in fact ratified her
28 statement made to Ms. Lucero.

26 ⁴ The ALJ sustained the objection to precisely this question. Tr. 226:20-227:13. As we show, the
27 Union was entitled to have her removed from the property and given a “no trespass.” The burden
28 does not shift at that point to the Union but rather in our view requires Ms. Shelby at some point if
she believes it is a permanent order to seek to remove it, because the Union validly imposed a “no
trespass” based on her conduct of October 4. Ms. Shelby is just too self-righteous to do that.

1 **III. THERE IS NO VIOLATION OF THE ACT**

2 **A. A SUMMARY OF THE RESPONDENT’S POSITION**

3 First, there is no claim in this case that the Union in any respect breached its duty of fair in
4 the operation of the hiring hall. There is no claim that Ms. Shelby was denied employment, that
5 her skill sheet was improperly recorded or there was any other conduct affecting her work. See
6 Respondent’s Exhibit 2.

7 The Acting General Counsel’s theory was that the Union could not ask her to be removed
8 from its property because she was engaged in protected concerted activity requesting her skill
9 sheet. The theory is that swearing – both at an office employee and Mr. Taylor - is protected
10 concerted activity. If all Ms. Shelby had done was question her skill sheet, we would agree that
11 consistent with those cases that allow a worker to see his or her referral records or referral records
12 of the Union, there might be a violation.

13 The problem is that when Ms. Shelby was not satisfied with the response she got from Ms.
14 Lucero, she called Ms. Lucero a “bitch.” Whether she lost the protection of the Act at that point is
15 irrelevant because all Ms. Lucero did was ask her to leave.⁵ She was not told she could never
16 come back nor was she told that she was in anyway prohibited from dealing with the issue
17 concerning her skill sheet. On October 4, however, she obviously became quite upset and irate and
18 Ms. Lucero had every reason to ask her to leave. The ALJ properly rejected this theory. He
19 properly found that Ms. Shelby was not engaged in protected activity and the Union had a right to
20 remove her from the hall.

21 The matter escalated not because of Ms. Lucero’s actions or statements but because of Ms.
22 Shelby’s loss of temper and her inability to control her actions. She continued her string of
23 epithets directed at Mr. Taylor when he asked her to calm down and she refused. This behavior
24 continued and escalated when Ms. Shelby went outside and remained on the Union property. Ms.
25 Shelby stayed on Union property and continued her outburst until she was asked to leave the Union
26 property by the police. She had escalated it once again. At that point, the Union’s effort to have
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28 ⁵ Moreover, the discussion with Ms. Lucero appeared to have been completed.

1 her removed by the police was lawful.

2 **B. THE VERY BROAD DUTY OF FAIR REPRESENTATION STANDARDS**
3 **GOVERNS THE UNION’S CONDUCT WITH RESPECT TO SECTION 8(B)(2)**

4 The Union violates Section 8(b)(2) only when it affects the employment of a member.
5 *Radio Officers v. NLRB*, 347 U.S. 17, 40 (1954). Section 8(b)(2) is written in terms prohibiting
6 the union from discriminating “against an employee in violation of section 8(a)(3) . . .” Section
7 8(a)(3) applies on where there is some impact upon the employment relationship because that
8 section bars discrimination by an employer. Here the facts demonstrate that there was no impact
9 on Ms. Shelby’s employment.

10 Ms. Shelby is entitled to be on the out of work list and to remain on the list, she is required
11 to physically appear at the Union only once every three months. Otherwise, she can register by
12 phone. Tr. 163:2-7 (Testimony of Ms. Shelby). The evidence in this case indicates that since
13 October 4, there has been no occasion on which Ms. Shelby was required to appear in person at the
14 Union hall. She has been working since November of 2011, shortly after the incident on October
15 4. *Id.* Because she has been working, she has not been on the out of work list. Assuming that
16 there is some prospective entitlement to sign up at the hall for the out of work list, a violation of
17 the Act based this restriction in the ability to register on the out of work list would be completely
18 speculative.⁶ Since there is no interference with her ability to work, the Respondent’s conduct does
19 not involved its exclusive status and does not trigger any duty of fair representation.

20 In any case, there is no impact upon Ms. Shelby’s employment.

21 Q Now, you’ve been in to the Union a number of times since the trespass
22 notice has been in place, correct?

23 A Yes.

24 Q Okay. And you’ve been able to conduct your business with the Union,
25 correct.

26 A Yes.

27 Q And, in fact, you’ve been called out at least twice since then, correct?

28 ⁶ See [IBEW, Local 24, 356 NLRB No. 89, p. 26-27 \(2011\)](#) (hiring hall registrant entitled to see records to determine whether he has been improperly denied referrals).

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A Yes.

Q Okay. One of which is the employment that you're still currently in, which has been over two months now, correct?

A Yes.

Q Okay. Did you call in in November, 2011 for your dispatch? Excuse me, for your out-of-work roll call?

A Yes, uh-huh.

Q And this hasn't affected your, the issue of October 4, 2011 did not affect your spot when you called in November, 2011 did it?

A No.

Q Have you been denied any opportunity to update your skills?

A No.

(Tr. 227:23-228:19).

There simply has been no effect whatsoever upon her employment.

We agree that if Ms. Shelby does not ask to clarify whether she could come to the hall without police escort, she may be slightly inconvenienced by being escorted by the police. Nothing in Board's law suggests that the Union has violated the Act by requiring Ms. Shelby to have a police escort.⁷ Absent an impact on her employment, there is no violation of Section 8(b)(2). The ALJ found that "inconvenience" was an interference.

This finding is incorrect. First, although we do concede that there is some inconvenience, it does not in any way prevent or hinder and certainly does not "interfere" with Ms. Shelby's ability to obtain employment. To the extent for example that workers are all required to appear at the hall once or twice a year for purposes of maintaining their registration that is certainly a "inconvenience" which is well within a Union's duty of fair representation and administration of the hiring hall. But as noted this inconvenience has not affected any employment issue for Ms. Shelby who has continuously worked. There are many inconveniences and the requirement that workers appear at the hall is probably far more of an interference. In any case, all that Ms. Shelby

⁷ There is no showing that in fact the police escort is required or that Nevada law requires an escort. That seems to be Ms. Shelby's view. As noted above, she simply hasn't clarified whether she can come back to the hall without a police escort but apparently sought one on each occasion.

1 has to do is either ask that the Union rescind any requirement (or any requirement for police escort)
2 or simply make those arrangements for any infrequent visit to the hall. We know particularly that
3 her need to appear at the hall with an escort is very infrequent thus this is at least a very infrequent
4 inconvenience.

5 With respect to the violation of section 8(b)(2) the General Counsel must prove that the
6 Union breached its duty of fair representation. Thus, all the Union has to do in this is establish that
7 its reasons for taking action on October 4 had to do with its function of representing its members
8 and in operating a hiring hall. Ms. Shelby is a registrant but the remaining 4,000 members of
9 Local 872 are also owed a duty. Here, the Union's obligation is not only to the entire membership,
10 but to Ms. Lucero and the other dispatchers employed by the Local.

11 Certainly, the Local cannot have one individual swearing at office employees and then
12 refusing to leave the hall when asked to do so because of their irate behavior. Such conduct is
13 disruptive and the Union had more than a legitimate reason to ask her to leave to quiet the
14 disruption.

15 The Board has recently clarified this standard in *United Autoworkers Local 376*, 356 NLRB
16 No. 164 (2011). In that case, the Board held that operating or administering the union security
17 provisions of a contract, the union need only show that it had some reason for a particular rule
18 regarding the administration of the union security clause. Simply put, it seems all that the Union
19 had to do was have some rational basis for the particular rule at issue. "A union breaches its duty of
20 fair representation if its actions affecting employees whom it represents are arbitrary,
21 discriminatory, or in bad faith." *Id.* at p. 11. An action is arbitrary, in turn, "only if, in light of the
22 factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a
23 'wide range of reasonableness' as to be irrational." *Id.*, quoting *Air Line Pilots Assn. v. O'Neill*, 499
24 U.S. 65, 67 (1991). Cf. *International Association of Machinists Local 2777*, 355 NLRB No. 177
25 (2010) (applying the same standard but finding no rational basis for the union's rule). In those
26 cases, the impact upon jobs was more direct; those cases involved the direct enforcement of the
27 union security obligation and the right of workers to continue working. Here, it would have been
28 irrational for the Union to have allowed Ms. Shelby to continue to scream epithets without taking

1 any action. It was not outside a “wide range of reasonableness” to have her trespassed even if that
2 meant she needed a police escort to return for an indefinite period.

3 Here, because there has been no effort to restrict Ms. Shelby’s access to the hiring hall and
4 at best a de minimis inconvenience, the Union’s rationale is compelling and meets the duty of fair
5 representation standard.⁸

6 Our analysis is confirmed by the allegation of the complaint in paragraph 6(a). The
7 allegation is that Joe Taylor had her removed from the facility. There is no claim in the complaint
8 that Ms. Lucero’s request that Ms. Shelby leave was a violation of the Act. Thus, as we
9 demonstrated, Ms. Shelby escalated her conduct to the point where her repeated epithets directed at
10 Ms. Lucero and Mr. Taylor warranted not only removal from the facility but further action. In any
11 case, she lost the protection of the Act.

12 The Board has recognized that a union even has the right to refuse to allow a member to use
13 a hiring hall if there was substantial misconduct by the individual. See *Theatrical Stage Employees*
14 *Local 720*, 332 NLRB 1 (2000) *petition for review granted*, *Lucas v. NLRB*, 333 F.3d 927 (6th Cir.
15 2003), *on remand*, 341 NLRB No. 147 (2004) (accepting 9th Circuit law as the case). Thus, the
16 Board’s decision in *Local 720* stands for the proposition that the Union has a right to take even far
17 more severe action by prohibiting an employee from using the hiring hall altogether so long as it
18 has a basis grounded in preserving the integrity of the hiring hall.

19 The ALJ found that the Union’s action lacked rationality because it was in effect a
20 permanent restriction. The problem with this analysis is two fold. First, on October 4 and at least
21 for some period of time thereafter, the Union was entitled to require Ms. Shelby to have a police
22 escort. That the ALJ found. All the ALJ found was that at some subsequent point the Union had
23 to rescind the trespass order. The problem is defining that point where the Union had to rescind
24 the police escort requirement. As noted above, this requirement was placed by Metro and not by
25 the union as a condition of removing Ms. Shelby on October 4. The union could not have had her
26 removed on October 4 unless it complied with the police request to read the no trespass order.

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28 ⁸ Had the Union told Ms. Shelby she was unwelcomed to come back to the hall but do her business
by phone, the same concept would apply.

1 Secondly, Ms. Shelby never asked the Union to rescind it or modify it. Second, the filing of a
2 charge with the Labor Board went beyond simply requesting that the Union eliminate the police
3 escort requirement. Most of her complaints were found by the Region to be unfounded and the
4 ALJ has rejected additional allegations. Third, the No Trespass order was not permanent; it was
5 indefinite.

6 Since the Union was correct in excluding her from the hall unless he came with a police
7 escort based on the request of the police on October 4 and for at least some period thereafter it was
8 lawful to make that provision indefinite at that time pending further developments. Because Ms.
9 Shelby never requested that it be removed, the Union did not breach its duty of fair representation
10 in failing to do something that it was never asked to do by Ms. Shelby nor in doing something
11 which never affected her right to use the hiring hall (as distinguished from using the hall for other
12 purposes)..

13 Finally the ALJ failed to distinguish the reasons Ms. Shelby has visited the hall. She has not
14 sought to come to the Union to use the referral system. She has had no need to do so since she has
15 worked continuously from shortly after the incident until the date of the hearing. Her visits to the
16 hall with police escort or without have been for other purposes. But if she has been there for other
17 purposes, none has been related to any matter concerning her job or affecting the Union's exclusive
18 status or the hiring hall. Thus the inconvenience of getting an escort does not invoke any concerns
19 under the duty of fair representation. The failure to find that she sought use of the hiring hall is
20 fatal to a finding of a violation of the Act.

21 Here, the Union's action was reasonable based upon its legitimate goal of preventing
22 disturbances and disruptions of the hiring hall. The ALJ thus, properly found that the Union did
23 not violate Section 8(b)(2).

24 **C. THERE IS NO VIOLATION OF SECTION 8(b)(1)(A)**

25 **1. The ALJ improperly found that there was a violation of Section 8(b)(1)(A).**

26 The ALJ found that the Union's conduct violated Section 8(b)(1)(A) "by imposing a
27 restricted access rule against Ms. Shelby's access to the hiring hall..." See ALJD P.19:3-4. As we

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1 shall show, that finding was erroneous.

2 **2. Ms. Shelby’s conduct lost the protection of the Act.**

3 Had Ms. Shelby’s actions and comments been limited to questioning her skill sheet, we
4 agree she would have been entitled to protection under the Act. However, once she swore at Ms.
5 Lucero and twice called her a “bitch,” she lost protection of the Act. As noted above, the ALJ
6 found that the Union’s conduct did not violate Section 8(b)(2). The arguments we have made
7 above govern Section 8(b)(1)(A). Here, as noted above, there was no interference with her
8 employment. As the ALJ correctly found “it may be true that Respondent had a legitimate reason
9 to limit her access and ask Ms. Shelby to leave the hiring hall premises on October 4 when she
10 swore at Union Agents and refused to leave the hall..” What we challenge is the subsequent
11 finding that “the same is not true after she calmed down late that day.” She didn’t calm down as
12 noted above until Metro came and handcuffed her. She was threatened with arrest if she didn’t
13 calm down. She was threatened that she couldn’t drive home if she didn’t calm down. The Union
14 had no way of knowing whether this was going to be a repeat performance by Ms. Shelby or
15 whether she would come back and swear further at the Union. Thus, the Union at that moment had
16 every right to impose the trespass order as requested by the police. As noted above moreover, Ms.
17 Shelby never took any action and asked the Union to rescind the police escort. Ms. Shelby never
18 gave assurances to the Business Manager or otherwise gave assurances that this conduct would not
19 be repeated. For these reasons just as there is no violation of Section 8(b)(1)(A).

20 **3. Just like employees who lose the protection of the Act for an inappropriate**
21 **incident, Ms. Shelby lost the protection of the Act.**

22 If an employee of any employer launched this torrent of expletives directed at other
23 employees, the employee would lose the protection of the Act. If any employee refused to leave an
24 employer’s premises, after having been asked to do so, that employee would lose the protection of
25 the Act. There is no reason to apply a different standard in this case to Ms Shelby’s conduct
26 particularly where the Union’s response has not prevented her from working.

27 Counsel for Acting General Counsel relies upon *Plaza Auto Center*, 355 NLRB No. 85
28 (*2010*), *petition for review granted in part*, 664 F.3d 286 (9th Cir. 2011). That case is inapposite but

1 even if we were to apply those rules, it would still compel a finding that Ms. Shelby lost the
2 protection of the Act.

3 *Plaza Auto Center* applied the *Atlantic Steel*, 245 NLRB 814 (1979), factors to determine
4 whether an employee's outburst lost the protection of the Act. Applying those factors to the case at
5 hand, Ms. Shelby's conduct directed at Ms. Lucero lost the protection of the Act.

6 First, the place of discussion was in a public place where there was at least one member
7 present. This is a hiring hall where workers may be waiting around for a job call and potentially
8 arguing among themselves. The confrontation began at a dispatch window or business office
9 window and the conduct was in the presence of not only Ms. Lucero but other office employees.
10 That factor weighs against protection.

11 The subject matter of discussion was Ms. Shelby's skill sheet. We agree that that is entitled
12 to protection. However, it was her individual concern and was not asserted on a concerted basis.
13 This does not weigh in favor of protection or is neutral.

14 The third factor is the "nature of the employee's outburst." Here, it was first directed at
15 Ms. Lucero, an office employee. It was not directed at a member or an officer of the Union. It was
16 directed at an employee. It wasn't a generalized comment about Ms. Shelby's dispute over her
17 skill sheet. The outburst was then directed at another union employee, Joe Taylor. Her conduct
18 was sustained profanity and epithets over almost a 30 minute period. In this case, Ms. Shelby's
19 conduct included refusing to leave the premises after she was asked to do so. Those in facts weigh
20 conclusively against protection.

21 Finally, the fourth factor has to do with whether the outburst was provoked by an unfair
22 labor practice. Since there is no allegation of an unfair labor practice on the part of Ms. Lucero or
23 the Union, that factor weighs against protection.

24 Fundamentally, the Union has a legitimate right to maintain order at the dispatch window.
25 Although members can grumble and complain, they can't swear at the workers who are hired to
26 maintain the dispatch system. The Union has a right to ask discourteous members to leave the
27 premises.

28 There is no authority that a union's public office, open to other members, non-members and

1 the public, should be treated similarly to a union meeting where a different level of protection
2 exists. See 29 U.S. C. § 411(a)(1)(protection of speech between members). The effective operation
3 of the union’s office, including its dispatch and referral system, requires a level of civility and
4 decorum which Ms. Shelby violated. Here, the union’s duty of fair representation to all of its 4000
5 members, requires it to maintain order; Ms. Shelby’s outburst interfered with the ability of Local
6 872 to efficiently and fair represent every other member.

7 Assuming for sake of argument, however, that Ms. Shelby did not lose the protection of the
8 Act when she called Ms. Lucero a “bitch” twice or when she was asked to leave by Ms. Lucero, the
9 agent of the Respondent. It wasn’t a permanent request, but at that time the discussion had
10 deteriorated. Ms. Shelby certainly lost the protection of the Act when she steadfastly refused to
11 leave the premises. Ms. Shelby then further lost the protection of the Act when she began
12 swearing at Mr. Taylor. Mr. Taylor asked her to calm down. She refused. Her repeated outbursts
13 of swearing at him which could be heard on a telephone conversation certainly lost the protection
14 of the Act.⁹

15 In summary, then, Ms. Shelby may have had the protection of the Act initially, but as her
16 conduct and outburst grew in intensity and continued until the police finally removed her, she lost
17 the protection of the Act.

18 The ALJ found that Ms. Shelby lost the protection of the Act. The Union had the right to
19 take forceful action at that time just like an employer would have the right to terminate an
20 employee. The Union however did not go so far to eliminate Ms. Shelby’s right to seek work
21 imposed only an inconvenience.

22 **D. ASSUMING FOR THE MOMENT THAT HER CONDUCT WAS PROTECTED,**
23 **THERE IS NO VIOLATION OF SECTION 8(b)(1)(A) INDEPENDENT OF A**
24 **SECTION 8(b)(2) ALLEGATION**

25 Section 8(b)(1)(A) is much more limited then Section 8(a)(1). We agree that a violation of
26 Section 8(b)(2) usually creates a derivative violation of Section 8(b)(1)(A). However, the proviso

27 ⁹ Ms. Shelby claims that she didn’t know who Mr. Taylor was. That of course is irrelevant since
28 Mr. Taylor was the agent of the Respondent. Moreover, it shows that her conduct lost the
protection of the Act since she was repeatedly swearing (mother fucking) at someone who had
asked her to leave the premises and she didn’t know who he was.

1 in Section 8(b)(1)(A) permits a labor organization “to prescribe its own rules with respect to the
2 acquisition or retention of membership therein” To the extent that Ms. Shelby’s rights of
3 membership were affected, that right is protected by the proviso. Here, however, the only the right
4 effected was her ability to come into the Union hall. Because her job was not affected, the proviso
5 protects the Union’s action.

6 In *Laborers’ Union Local No. 324*, 318 NLRB 589 (1995), the union implemented a rule
7 prohibiting the passing out of literature and solicitation in a hiring hall. The Board rejected the
8 Union’s position that the rule served a legitimate purpose. Ms. Shelby’s conduct is far different
9 from the relatively benign but annoying conduct of the individual in that case. The contrast
10 illustrates the legitimacy of the Union’s action here in response to her outburst. Moreover, as
11 previously noted, this is not the first time a “no-trespass” procedure has been used.

12 The Ninth Circuit refused to enforce in part the Board’s order in *Laborers’ No. 324* stating:

13 The key statute in this case, Section 8(b)(1)(A), 29 U.S.C. §
14 158(b)(1)(A), provides that it is an unfair labor practice for a union to
“restrain or coerce” employees in the exercise of their Section 7 rights.
15 [footnote omitted] Under Section 7, an employee has the right to engage
in “concerted activities for the purpose of collective bargaining or other
16 mutual aid or protection” 29 U.S.C. § 157. The Section 7 rights
have long been understood to include the right of employees to be
17 critical of the union and its management. See, e.g., *Operating Engineers
Local 400 (Hilde Construction Co.)*, 225 N.L.R.B. 596 (1976)(the right
18 to “question the wisdom” of the leadership of one’s union and to “pursue
a course designed to align” the leadership with the member’s own views
is a Section 7 right); [citations omitted]. At the same time, Section
19 8(b)(1)(A)’s proviso has been interpreted to mean that a union’s right to
govern its “purely internal affairs” is protected and therefore falls outside
20 the scope of Section 8(b)(1)(A). *NLRB v. Retail Clerks Local No. 1179*,
526 F.2d 142 (9th Cir. 1975). See *NLRB v. Boeing Co.*, 412 U.S. 67, 36
21 L. Ed. 2d 752, 93 S. Ct. 1952 (1973); *Scofield v. NLRB*, 394 U.S. 423, 22
L. Ed. 2d 385, 89 S. Ct. 1154 (1969); *NLRB v. Allis-Chalmers Mfg. Co.*,
22 388 U.S. 175, 18 L. Ed. 2d 1123, 87 S. Ct. 2001 (1967).

23 It is thus not surprising that a recurring question under Section
8(b)(1)(A) is when the enforcement of a union rule is deemed to infringe
24 upon the protected rights of union members because the rule does not
concern “purely internal union affairs,” and when it is insulated from
25 unfair labor practice scrutiny. See, e.g., *Carpenters Union Local 25 v.
NLRB*, 769 F.2d 574, 581 (9th Cir. 1985); *Financial Institution
Employees Local 1182 v. NLRB*, 752 F.2d 356, 362 (1984); *Retail
26 Clerks*, 526 F.2d at 145. The leading Supreme Court case articulating the
test for when a union may enforce a rule without violating Section
27 8(b)(1)(A) is *Scofield*. The Court in *Scofield* held that Section 8(b)(1)(A)
leaves a union free to enforce a properly adopted rule which reflects a
28 legitimate union interest, impairs no policy Congress has imbedded in
the labor laws, and is reasonably enforced against union members who

1 are free to leave the union and escape the rule. *Scofield*, 394 U.S. at 430.
2 All sides agree that *Scofield* governs our analysis in this case. They
3 disagree, however, on whether Local 324's rule satisfies the test and on
4 whether enforcement of the rule is a predicate to finding a violation of
5 Section 8(b)(1)(A).

6 Local 324 persuasively argues that its non-distribution/ non-solicitation
7 rule fully satisfies the *Scofield* test. The union points out that it has a
8 legitimate interest in protecting the efficient and orderly operation of its
9 hiring hall during dispatch hours, and that a rule serving such a purpose
10 cannot possibly impair any Congressional policy imbedded in the labor
11 laws. In addition, Local 324 argues that without enforcement, a facially
12 valid rule can never amount to an unfair labor practice.

13 *Laborers' Union Local No. 324 v. NLRB*, 123 F.3d 1176, 1178-1179 (9th Cir. 1997). This
14 reasoning applies here with more force.¹⁰

15 Thus, Section 8(b)(1)(A) provides only a limited protection relating to "union tactics
16 against violence, intimidation and reprisals or threats thereof." See *NLRB v. Teamsters Local 639*,
17 362 U.S. 274, 290 (1960). As such, there is no violation of Section 8(b)(1)(A). Moreover as noted
18 above because Ms. Shelby has worked and not sought to invoke the hiring hall, the union role in
19 maintaining the exclusive referral system has not been invoked.

20 **E. THE ACTING GENERAL COUNSEL'S ARGUMENT WAS PROPERLY
21 REJECTED BY THE ALJ**

22 The Acting General Counsel claims that Ms. Shelby was entitled to swear at an office
23 employee. The theory extends to give Ms. Shelby the right to remain in the hall after being asked
24 to leave by Ms. Lucero. The theory extends furthermore to protecting Ms. Shelby's tirade directed
25 at Mr. Taylor for 20 to 30 minutes. General Counsel would then protect her refusal to leave the
26 Union property after being asked by Mr. Taylor to do so because of her tirade. Plainly, and as
27 found by the ALJ, she lost the protection of the Act.

28 This case then boils down to whether the "no trespass" directive which apparently
emanated from the police is a violation of the Act. As noted, the Union's actions are tested against
the duty of fair representation standard. See *Autoworkers, supra*. The Union has not interfered in
any way in Ms. Shelby's efforts to work. Indeed, she has worked almost consistently since this

¹⁰ In that case, the Union threatened to have the individual arrested for distributing literature in the parking lot. The threat to prosecute was found to be an unfair labor practice since the union could not establish a basis for such a rule.

1 incident. The Union is protecting the interest of its office employees, its members and respective
2 dispatching system by asking Ms. Shelby to leave. The “no trespass” was never intended to be
3 permanent. Ms. Shelby has not asked that it be removed or modified. There is no evidence that
4 the Union considers it permanent even though it was indefinite. There is no evidence it has
5 actually impeded Ms. Shelby’s access to the hall and no evidence it interfered with any hiring
6 issue. Ms. Shelby will be allowed access to the hall unescorted provided there is no repeat of the
7 unfortunate incident.

8 **IV. THE REMEDY AND THE NOTICE**

9 There are a number of problems with the Remedy and the Notice which we address.

10 1. The Union is entitled to maintain in its records the decision of the ALJ and the
11 Board. The Union is entitled to maintain the record of this case. Moreover, nothing prohibits it
12 from maintaining *in* Ms. Shelby’s file, a record of this incident in case there is a repeat incident.
13 Even if it is required to notify the Las Vegas Police that the police escort requirement has been
14 rescinded, nothing prohibits the Union from maintaining the CD showing her outburst and
15 maintaining records regarding this in case there is a repeat by Ms. Shelby. Thus, the
16 “expungement remedy” is overbroad and should be modified or tailored. There is effectively no
17 way to expunge this incident from her record and the Union should not be required to do so.

18 2. The Union as a remedy does not contest that it would be appropriate to notify the
19 Las Vegas Police that no further escort is needed. That is the only limited and narrowly tailored
20 remedy which would be appropriate. Such a remedy

21 3. Paragraph (a) of the cease and desist Order at page 20:1-3 is overbroad. The only
22 finding of the ALJ was the requirement for the police escort. There is no finding that there was
23 any other way in which Ms. Shelby’s access was limited. Ms. Shelby must abide by the rules
24 imposed on everyone else. Thus, paragraph A would have to be limited if there is a remedy to only
25 restricting her access by requiring a police escort.

26 4. Paragraph C at page 20:8-9 is overbroad for the reasons stated immediately above.

27 5. The requirement at page 20:15-18 to notify the police that Ms. Shelby is a

1 welcomed dues paying member without any restrictions is unnecessary. First, even though this is a
2 right to shirk state, the dues issue is irrelevant. Second, all that the union has to do is rescind the
3 no access rule without a police escort. Notifying the police of anything additional would be
4 inappropriate. Nor does this remedy anything since there is no evidence her dues status is an issue
5 with the police.

6 6. The intranet posting or internet posting at Page 30:25-34 is unnecessary and
7 inappropriate. It goes well beyond the Board’s discretion with respect to an appropriate remedy.
8 Although we generally recognize that it is appropriate to require intranet notice posting, because
9 only Ms. Shelby was affected by her own inappropriate outburst no such notice is necessary. No
10 other members ever engaged in this kind of misconduct and they don’t need to receive
11 electronically the notice. To the extent that the notice is posted in the hiring hall, this would be the
12 only appropriate notice. It is also particularly appropriate because the Notice doesn’t reveal the
13 fact that Ms. Shelby engaged in unprotected conduct and it was only the union’s failure allegedly
14 to *subsequently* remove the no trespass order without police escort which is the subject of the
15 remedy. Thus, the notice is totally misleading.

16 7. The Notice itself is overbroad. It is not even consistent with the Order of the ALJ.
17 First, the Notice has language about “choose not to engage in any of these protected activities.”
18 That is irrelevant since it is not applicable in this case.

19 The second quote, “we will not” is inconsistent with the ALJ’s finding. At no point did the
20 ALJ find that Ms. Shelby was excluded from the hall because she challenged the system of
21 maintaining skills. That “we will not” should be deleted in its entirety. It is not supported by any
22 findings.

23 The third “we will not” is overbroad because the ALJ did not find that she was banned from
24 the hall because of her “union or other concerted activities.” Rather the finding if supported is only
25 that it breached the Union’s duty of fair representation because it was irrational to impose a
26 permanent police escort requirement.

27 The fourth “we will not” language is overbroad for the reasons previously argued. The fact
28 is that this is simply limited to a very single issue and that is whether the no trespass order which

1 required the police escort should not prohibit her from coming to the hall restrained her.

2 The Notice is not supported by even the findings.

3 **V. CONCLUSION**

4 Ms. Shelby, as found by the Judge, engaged in severe or unprotected conduct. The Union
5 was as found by the ALJ, entitled to remove her from the hall. The requirement of police escort
6 was imposed at the request of Metro. Ms. Shelby did not request that it be limited or that it be
7 removed. The Union’s action did not breach its duty of fair representation and the complaint
8 should be dismissed in its entirety. In the alternative the remedy should be modified as requested
9 above.

10 Dated: June 28, 2012

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

13 By: /s/ David A. Rosenfeld
14 DAVID A. ROSENFELD
Attorneys for Respondent/Union

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1 **PROOF OF SERVICE**

2 I am a citizen of the United States and resident of the State of California. I am employed in
3 the County of Alameda, State of California, in the office of a member of the bar of this Court, at
4 whose direction the service was made. I am over the age of eighteen years and not a party to the
5 within action.

6 On June 28, 2012, I served the following documents in the manner described below:

7 **BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE**
8 **ADMINISTRATIVE LAW JUDGE**

9 On the following part(ies) in this action:



11 (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy
12 through Weinberg, Roger & Rosenfeld’s electronic mail system from
13 kshaw@unioncounsel.net to the email addresses set forth below.



15 (BY E-Gov SYSTEM) I electronically served the above-described document on the
16 following parties by electronically filing the foregoing with the NLRB on June 28, 2012.

17 Executive Secretary
18 National Labor Relations Board
19 1099 14th Street N.W.
20 WASHINGTON, D.C. 20570

Stephanie Shelby
609 Bursting Sun Avenue
North Las Vegas, NV 89032-8239

Shelby5454@gmail.com

21 VIA E-GOV, E-FILING

VIA EMAIL

22 Pablo Godoy
23 Larry Smith
24 NLRB, Region 28
25 600 Las Vegas Boulevard South, Suite 400
26 Las Vegas, NV 89101

Pablo.Godoy@nlrb.gov
Larry.Smith@nlrb.gov

27 VIA EMAIL

28 I declare under penalty of perjury under the laws of the United States of America that the
foregoing is true and correct. Executed on June 28, 2012, at Alameda, California.

/s/Katrina Shaw
Katrina Shaw