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**International Brotherhood of Teamsters, Local 727
and Ron Maxwell.** Case 13–CB–060708

July 13, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On March 5, 2012, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.³

¹ As no exceptions were filed to the judge's dismissal of the unfair labor practice allegations relating to the Respondent's operation of its referral service for movie-production work, we find it unnecessary to pass on the Respondent's exception to the finding that its movie-work referral service constituted an exclusive hiring hall.

² We adopt the judge's findings, for the reasons stated in his decision, that the Respondent violated the Act in operating its exclusive hiring hall for trade-show work by both failing to adequately notify registrants of its new rule prohibiting employees from remaining in "will call" status for more than 12 consecutive months and suspending registrant Ron Maxwell from the referral list pursuant to that rule. We clarify, contrary to the judge's language suggesting otherwise, that both actions violated both Sec. 8(b)(1)(A) and Sec. 8(b)(2). See *Plumbers Local 519 (Sam Bloom Plumbing)*, 306 NLRB 810, 810 fn. 1 (1992), enfd. 15 F.3d 1160 (D.C. Cir. 1994); *Plumbers Local 38 (Bechtel Corp.)*, 306 NLRB 511, 511–512 (1992), enfd. mem. 17 F.3d 393 (9th Cir. 1994).

We find it unnecessary to pass on the judge's further finding that the Respondent also suspended Maxwell from the trade-show referral list in retaliation for Maxwell's failing to help the Respondent organize a company that he previously owned, as such a finding would not materially affect the remedy. We shall amend the judge's conclusions of law accordingly.

³ The Respondent argues that a make-whole remedy for Ron Maxwell is inappropriate because he would have remained in "will call" status and therefore would not have been referred to any jobs. We agree with the judge that awarding the standard make-whole remedy is appropriate and that determining whether Maxwell actually suffered any loss is properly left to the compliance stage of this proceeding. See *Plumbers Local 32 (Alaska Pipeline)*, 312 NLRB 1137, 1139 (1993), enfd. 50 F.3d 29 (D.C. Cir. 1995), cert. denied 516 U.S. 974 (1995). At that stage, the parties may litigate whether, even if the Respondent had adequately and timely notified Maxwell of the rule change, he would not have removed himself from "will call" or that, even if he had done so, his position on the referral list would not have entitled him to a job.

We shall modify the judge's recommended Order and substitute a new notice to conform to the Board's standard remedial language.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 1 in the judge's decision.

"1. By failing to adequately and timely notify everyone on its trade-show referral list of its 12-month 'will call' rule and suspending Ron Maxwell and refusing to refer him to any trade shows with signatory employers since April 2011 because he allegedly violated the rule, Teamsters Local 727 has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Teamsters, Local 727, Park Ridge, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing to take reasonable steps to adequately and timely notify all employees on its trade-show referral list of its rules for using its exclusive hiring hall.

(b) Suspending anyone from its trade-show referral list and/or refusing to refer them to any trade shows for violating its exclusive hiring hall rules before it has taken reasonable steps to adequately and timely notify them of the rules, or for other arbitrary or discriminatory reasons.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind Ron Maxwell's suspension from the trade-show referral list.

(b) Make Ron Maxwell whole for any loss of earnings or benefits he suffered as a result of being suspended and denied referrals to any trade shows since April 2011, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Maxwell's unlawful suspension and, within 3 days thereafter, notify Maxwell in writing that this has been done and that the suspension will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all hiring hall and referral records, and any other records and documents, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its office and hiring hall in Chicago, Illinois, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees and members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has ceased operating the hiring hall involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all individuals whose names appeared on the Respondent's hiring hall list at any time since April 2011.

(f) Within 14 days after service by the Region, sign and return to the Regional Director for Region 13 sufficient copies of the notice for posting by Global Experience Specialists (GES), Freeman, and other employers signatory to the trade-show agreement, if willing, at all places where notices to employees are customarily posted in the Chicago metropolitan area.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. July 13, 2012

Brian E. Hayes	Member
Richard F. Griffin, Jr.,	Member
Sharon Block,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to take reasonable steps to adequately and timely notify all employees on our trade-show referral list of our rules for using our exclusive hiring hall.

WE WILL NOT suspend anyone from our trade-show referral list or refuse to refer them to any trade shows for violating our exclusive hiring hall rules before we have taken reasonable steps to adequately and timely notify them of the rules, or for other arbitrary or discriminatory reasons.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, rescind Ron Maxwell's suspension from the trade-show referral list.

WE WILL make Ron Maxwell whole for any loss of earnings or benefits he suffered as a result of being suspended and denied referrals to any trade shows since April 2011, with interest, in the manner set forth in the Board's decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Maxwell's unlawful suspension and, within 3 days thereafter, notify Maxwell in writing that this has been done and that we will not use the suspension against him in any way.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 727

Kevin McCormick, Esq., for the General Counsel.
Stephanie Brinson, Esq., for the Respondent Union.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that Teamsters Local 727 has operated exclusive hiring halls for trade show and movie production work in the Chicago metropolitan area in an arbitrary and discriminatory manner in violation of Section 8(b)(1)(A) and (2) of the Act. Specifically, the General Counsel alleges that, since about April 2011, the Union has unlawfully failed to timely inform workers that they would be suspended from the trade show referral list if they remained in "will call" (unavailable) status for 12 consecutive months, and suspended and refused to refer the Charging Party (Maxwell) to either trade shows or a particular movie production (Autumn Frost) because he had been suspended pursuant to its 12-month "will call" rule and/or for other arbitrary and discriminatory reasons.¹

Local 727 denies the allegations in their entirety. Although the Union admits that it maintains a referral list for trade show work and a compilation or "book" of employment applications for movie work, it denies that it has operated an exclusive hiring hall for either type of work. It further denies that it violated the Act in any respect even assuming that it does operate exclusive hiring halls as defined by Board law.

¹ The underlying charge was filed on June 29, 2011. The complaint issued on October 14, 2011, and was subsequently amended at the hearing on January 9, 2012. (GC Exh. 1; Tr. 17-18.)

Following a prehearing conference, the case was tried on January 9 and 10, 2012. Thereafter, on February 14, the General Counsel and the Union filed posthearing briefs. Based on the briefs and the entire record,² for the reasons set forth below, I find that a preponderance of the evidence supports all but the last of the allegations that the Union unlawfully refused to refer Maxwell to "Autumn Frost."³

FINDINGS OF FACT

I. THE ALLEGED EXCLUSIVE HIRING HALLS

As indicated above, a threshold issue in this case is whether Local 727 even operates exclusive hiring halls for trade show and movie production work. As the General Counsel acknowledges, under extant law a union owes a duty of fair representation (i.e. a duty to act fairly and impartially) in the operation of a hiring hall only if it is the employer's exclusive source of labor. Thus, if Local 727 has not operated exclusive hiring halls as alleged, it had no duty to provide adequate notice of its referral criteria. Compare *Electrical Workers IBEW Local 11 (Los Angeles NECA)*, 270 NLRB 424, 426 (1984), *enfd.* 772 F.2d 571 (9th Cir. 1985) (exclusive hiring hall), with *Carpenters Local 537 (E.I. du Pont)*, 303 NLRB 419, 420 (1991) (non-exclusive hiring hall). However, for the reasons set forth below, I find that the General Counsel established that the Union has, in fact, operated exclusive hiring halls for both types of work during the relevant period.

A. Trade Shows

The relevant facts regarding trade show work are essentially undisputed. Local 727 maintains so-called "outside" collective-bargaining agreements with various trade show and convention production companies that recognize the Union as the exclusive representative for all "referral employees" within its jurisdiction. Two such production companies are Global Ex-

² Unless otherwise stated, cited evidence has been credited, to the extent supportive, and contrary evidence discredited. In evaluating witness credibility, all relevant and appropriate factors have been considered, including, not only the demeanor of the witnesses, but their apparent interests, if any, in the proceeding, whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts, "inherent probabilities, and reasonable inferences which may be drawn from the record as a whole" (*Daikichi Corp.*, 335 NLRB 622, 623 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003) *mem.* quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)). See also *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983).

³ Jurisdiction is uncontested. The Respondent Union admits, and I find, that Third Act Pictures (the producer of "Autumn Frost") is a motion picture/video production company affiliated with Warner Bros. Pictures; that it is party to an agreement with the Union; that it purchased and received over \$50,000 in goods, products, and services directly from outside Illinois during the past year; and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union also admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act. (GC Exhs. 1 and 8; Tr. 17-18.)

perience Specialists (GES) and Freeman.⁴ Consistent with the standard Local 727 trade show agreement, the most recent 2009–2013 outside agreements with GES and Freeman set forth the following provisions regarding the “referral system”:

ARTICLE 2—REFERRAL SYSTEM

2.1 The Union shall maintain a Referral System which shall in all respects comply with all applicable provisions of the law and the following provisions:

(a) The Company agrees that at least twenty-four (24) hours prior to its commencement of a job (except in the situations described in (c) below), it will notify the Union of its numerical requirements of Referral Employees.

(b) To the extent the Union is able to make available to the Company all or any part of such requested Referral Employees (who are satisfactory to the Company), the Company agrees to employ all such persons on the terms and conditions hereinafter stated.

(c) The Union agrees to notify the Company as promptly as possible but, in any event, within reasonable hours following the Company's notification to the Union, if it is unable to fill such requests in whole or in part, whereupon the Company shall have the right to hire whoever is available and such persons shall not be subject to this Agreement. Failure on the part of the Union to notify the Company within twelve (12) hours of the Company's notification to the Union shall be treated as if the Union has notified the Company that no Referral Employees could be furnished.

(d) The labor call, for the last day of the move out of a show, shall be made by the Company as soon as practicable, but no later than noon the day before the last day of move out, absent extraordinary circumstances.

(e) The Company shall have the right to reject any Referral Employee referred by the Union.

(f) In situations in which the Company's needs cannot be adequately predicted, the Company agrees to give the Union such notice of its need for Referral Employees as is reasonable and the Union agrees to respond to such requests with the promptness required of the situation.

(g) Should a dispute arise out of the number of positions required for Stand-by-Labor, the Union and the Company agree to meet immediately to resolve the issue or issues. The designated Union Representative and the Show Site Freight Manager of the Company shall resolve the issue or issues in a timely fashion without any work stoppages, slow downs and/or lock outs. Union Steward, Dock and Traffic personnel can be included in the number of personnel called for Stand-by-Labor.

(h) All fork lift drivers referred by the Union shall be trained and certified pursuant to OSHA standards as soon as is practical.

(i) Anything herein to the contrary notwithstanding, it is understood and agreed that the Company will continue

to employ on an irregular and temporary basis such casual employees as it deems necessary, and that such employees are not subject to this Agreement. The Company agrees that it will endeavor to schedule its working force in such manner as to insure that, in the absence of unusual circumstances, such casual employees will not be assigned to work which falls within the definition of Referral Employees. However, no casual employees will be employed under this Section unless the Union Referral List is exhausted.

(j) The Union agrees to make every reasonable effort to meet the Contractors request (by name) for Dock, Traffic and Leadmen Personnel. The Company agrees to rotate these requests on a non-discriminatory basis among the most senior referral employees who are qualified and willing.

(Jt. Exh. 1; GC Exhs. 1(c) and (e), 4, 10.)

Pursuant to the foregoing provisions, the companies obtain all of their unit labor through Local 727, i.e. they do not advertise for workers or hire “off the street.” Although the companies have exercised their right under the agreement and employed casuals if the union referral list was exhausted, this has occurred only rarely.

With respect to the actual referral procedures, as permitted by the agreement, the companies often request dock, traffic, and lead workers by name from the union referral list (GC Exh. 11). Per the agreement, the companies attempt to rotate these requests among the listed employees and Local 727 makes every reasonable effort to refer those requested. With respect to other unit personnel, such as forklift operators and checkers, the companies simply request a specific number of workers. The Union then selects the particular workers to refer from its referral list, normally by seniority.

In either situation, Local 727 or the company may sometimes reject the individual worker requested or selected for one reason or another. For example, the Union may reject a request because the company failed to rotate properly as required under the agreement. And the company may reject a selection because the worker is not qualified. However, the company's requests are usually honored. (Tr. 87–89, 91–102, 114–124, 127–129, 246, 284–290, 319; see also GC Exhs. 13–22; and R. Exh. 1 (November 2009 Local 727 Trade Show Referral Rules, and January 2010 Local 727 Trade Show Referral Policy).)

Based on the foregoing, in agreement with the General Counsel, I find that Local 727 operates an exclusive referral system for trade show work. It is well established that an exclusive hiring hall may be created by written or oral agreement or by practice. See *Southwest Regional Council of Carpenters (Perry Olsen Drywall)*, 358 NLRB No. 3, slip op. at 1 fn. 2 (2012), and cases cited there. Here, as set forth above, the parties' written agreement and practice clearly indicate that applicants must go through the Union to obtain work with the signatory companies, i.e., they cannot be hired directly by the company off the street or through a referral from other sources. Although a company may request or reject particular workers on the union referral list, and hire casuals or other workers if the Union is unable to fill a numerical request from the list, the

⁴ GES and Freeman also maintain “inside” agreements with the Union covering their regular full-time warehouse employees (Tr. 103, 108, 115–116).

Board has repeatedly held that such provisions or limited exceptions do not render an otherwise exclusive referral arrangement nonexclusive. See, e.g., *Theatrical Wardrobe Union Local 769 (Broadway in Chicago)*, 349 NLRB 71, 72–73 (2007) (employer hired outside the union list on a few occasions when the list was exhausted); *Pipefitters Local 247 (Inland Industrial Contractors, Inc.)*, 332 NLRB 1029, 1031–1032 (2000) (employer had right to request up to 50 percent of employees by name and to hire from other sources if union failed to furnish workers within 48 hours); *Ironworkers Local 843 (Norglass, Inc.)*, 327 NLRB 29, 31 (1998) (employer had right to request 50 percent of employees by name, to reject any applicant referred by the union, and to employ applicants directly at jobsite if union was unable to fill the employer’s requisition with 24 hours); and *Operating Engineers, Local 513*, 197 NLRB 1046, 1047–1048 (1972) (employer had right to request by name an unlimited number of registrants who had worked for at least 30 days during the preceding 12-month period, to also request by name other registrants up to 50 percent of its workforce, and to refuse to hire any applicant referred from the union).

The Union’s posthearing brief fails to address any of the foregoing precedent. Further, the only case it cites, *Kvaener Songer, Inc.*, 343 NLRB 1343 (2004), enfd. sub nom. *NLRB v. Laborers Local 334*, 481 F.3d 875 (6th Cir. 2007), does not support its position. Although the Board found that the hiring hall in that case was nonexclusive, contrary to the Union’s suggestion the Board did not do so because the agreement permitted the employers to make direct hires if the union failed to fill a labor call within 48 hours (a finding that obviously would have been inconsistent with the precedent cited above). Rather, the Board found that the hall was nonexclusive because the agreement required hiring “in accordance with the hiring procedure existing in the territory” where the work is performed, and the evidence established that employees in the local territory regularly sought and secured employment without going through the union. See 343 NLRB at 1345; and 481 F.3d at 881. As indicated above, there is no such evidence here; indeed, the evidence indicates the opposite.

B. Movie Productions (Autumn Frost)

Local 727 has also entered into collective-bargaining agreements with movie and television production companies. One such agreement, executed July 2011, was with Third Act Pictures, an affiliate of Warner Bros. Pictures, for a movie tentatively titled “Autumn Frost” (also known as “Superman”), which began around the same time. See GC Exh. 8 (stipulation of facts). The agreement generally covered “all employees hired within the jurisdiction of Teamsters Local 727” and set forth the following provisions regarding “employment”:

ARTICLE 6—Employment

(a) The parties hereto recognize the conditions in this industry require frequent hiring of drivers on a daily non-continuing basis. For this purpose, the Union shall maintain, for the convenience of the Producer and the employee a referral service which shall in all respects comply with all applicable provisions of law.

(b) The Producer agrees to request referrals for all drivers required for work covered by the Agreement, from the Union. This provision is subject to the following conditions:

1. Chauffeurs will be referred to the Producer from the Union on a non-discriminatory basis, and such referrals will in no way be affected by membership or any aspect thereof.

2. The Producer retains the right to reject any applicant referred from the Union. (GC Exh. 3)

Local 727 and Third Act also executed a sideletter addendum the same day, which repeated the first sentence in article 6, paragraph (a) and added the following:

For this purpose, the Union shall provide a referral list to the Transportation Coordinator for use during the production which shall, in all respects, comply with the applicable provisions of law on a non-discriminatory basis and such referral shall in no way be affected by union membership. (GC Exh. 2)

Although not formally part of the “Autumn Frost” agreement with Third Act, Local 727 has also adopted certain rules for movie work. In relevant part, these rules state as follows:

All referrals will be made by Producer’s choice and in accordance with these rules. Upon request, Local 727 will provide the employer or the employer’s designated agent with either paper or electronic copies of applications and accompanying documentation for all Movie Referral Employees. The employer or the employer’s designated agent will notify the Union of the Movie Referral Employees it selects. Such selection must be made on a non-discriminatory basis. The employer or the employer’s designated agent will contact the Movie Referral Employees directly. (R. Exh. 1, “Supplement to the Local 727 Trade Show Referral Rules for Movie Work.”)

It is undisputed that these rules were adopted by Local 727 in December 2009, and have applied to all movie work within its jurisdiction since that time. See GC Exh. 8 (stipulation of facts); and R. Exh. 7 (minutes of union board and membership meetings adopting or approving supplemental rules). It is likewise undisputed that, consistent with the rules, the Union has maintained a “Movie Book” of alphabetized “Application[s] for Referral—Movie,” which is provided to the transportation coordinator for hiring (GC Exh. 24; Tr. 248; R. Br. 5).

Finally, the parties herein also stipulated that there was no advertising for Chicago drivers, and that no drivers were hired “off the street” or outside the union list, for “Autumn Frost” or any other production by a Warner Bros.-affiliated company in the Chicago metropolitan area. If someone who was not on the union list was interested in working as a driver, they were referred to Local 727 to put their name on the list. (See GC Exh. 8 (stipulation of facts).)

Based on the foregoing, in agreement with the General Counsel, I find that Local 727 operated an exclusive referral system for “Autumn Frost” during the relevant period. In arguing to the contrary, the Union relies primarily on the testimony of William Hogan III, a referral employee on the trade show list

(and cousin of Maxwell), who is frequently hired as a movie transportation coordinator and was hired by Third Act as its transportation coordinator to select and hire the crew for “Autumn Frost.”⁵ Specifically, the Union cites Hogan’s testimony that he does not actually use the movie book very often when serving as a transportation coordinator, did not use the book in hiring on “Autumn Frost,” and could “hire guys off the street” if he wanted to (Tr. 254). However, Hogan acknowledged that he uses mostly the same workers over and over on each production (which would explain why he does not need to reference the book very often), and that they all have to be “associated” with the Union. Further, consistent with the parties’ stipulation, he acknowledged that if he is going to hire someone “off the street” he will “send them down” to the Union to fill out an application (Tr. 254–255). See also his testimony, Tr. 269–271 (although he talked to and/or “decided” to hire three particular workers for “Autumn Frost” or other productions before they had “been through” the union hall application process, he did not actually hire them until after they had done so); and the Union’s December 2009 supplemental rules, R. Exh. 1 (providing that any individual who was already on the Local 727 trade show referral list would remain eligible to also perform movie work, even without a CDL, but that “any new individuals applying for movie work must have a current CDL and must provide a copy of said CDL, including any and all endorsements, to Local 727”). Indeed, Hogan admitted that he did not hire Maxwell for “Autumn Frost” because Maxwell told him that he had been “suspended” by the Union (Tr. 262–263).

Local 727 also contends that there was no exclusive hiring hall for “Autumn Frost” because Hogan had complete discretion in choosing who to hire. However, as indicated above, the record indicates that Hogan could only hire workers who had provided an application and any required licenses and documents to the Union and were included or added to its list/book. Thus, as with trade show work, the Union was the gatekeeper, i.e., it determined whether or which workers could be considered or hired by Hogan. Accordingly, as discussed above, it had a duty to operate the gate fairly and impartially.⁶ See also *Denver Theatrical Stage Employees’ Union No. 7*, 339 NLRB 214, 216 (2003) (finding exclusive hiring hall where the agreement required that, should a stagehand be directly hired by the employer, the employee “must obtain a registered referral slip from the Union before going to work” and the employers had a practice of using the union as the exclusive source for hiring stagehands); *Morrison-Knudsen Co.*, 291 NLRB 250, 258–259 (1988) (finding exclusive hiring hall even though company interviewed and made commitment to employ, and in

some infrequent or special circumstances actually employed, individuals before they were sent to the union hall for a referral slip); *Plumbers Local 17 (FSM Mechanical Contractor, Inc.)*, 224 NLRB 1262, 1263 (1976), *enfd.* 575 F.2d 585 (6th Cir. 1978) (finding exclusive hiring hall even though employers had sole right to determine who was hired and selected the employees from the union’s list, as the employers would not employ the individuals until they were cleared by the union); and *Operating Engineers, Local 513*, 197 NLRB at 1049 (finding exclusive hiring hall even though employer selected individuals for hire, as the employer sent them to the union hall for clearance before permitting them to go to work).⁷

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Trade Show Referrals

1. Failing to notify workers of 12-month “will call” rule

As indicated above, the first alleged violation is that the Union failed to adequately notify workers that they could be suspended from its exclusive trade show referral list if they remained on “will call” for 12 months. For the reasons set forth below, I find that this allegation is supported by a preponderance of the evidence.

As described by several witnesses, the “will call” procedure applies when workers are not going to be available for trade show assignments for an indefinite period of time, either because they have been hired to do movie production work or for some other reason such as another temporary or secondary job (e.g. policeman or fireman), a vacation, or illness. In such circumstances, the workers will notify the union office (Gate 5 at McCormick Place), either by phone or in writing, that they will be unavailable, and they “will call” the Union when they again become available for assignment.

The “will call” procedure has been in effect at the union hall for at least 30 years, well before Local 727 took over the hall from its predecessor (Local 714) around early 2009. Although the procedure is not set forth or posted anywhere in writing, the

⁵ Notwithstanding his familial relationship to Maxwell, Hogan was called and questioned by the General Counsel as an adverse witness under FRE 611(c) without objection from the Union. (Tr. 231.)

⁶ For reasons fully discussed *infra*, contrary to the General Counsel’s contention, I find that Hogan acted solely as the agent of Third Act and not the Union when selecting and hiring referral employees for “Autumn Frost.” Nevertheless, the fact that the actual selection and hiring of movie referral employees was done solely by a company agent does not absolve the Union of its duty to act fairly and impartially in determining whether or which workers may be considered or hired by the company.

⁷ Again, the Union’s posthearing brief fails to address any of these Board decisions. Moreover, the only decision it cites—a recent, February 2, 2012 ALJ decision in *Big Moose, LLC*, 15–CA–19735 (JD (ATL)–04–12)—is clearly distinguishable. Indeed, the parties in that case stipulated that the union (Theatrical Stage Employees Local 478) did not operate an exclusive hiring hall. See JD. at 2. In any event, the judge’s decision has no precedential value as it has not yet been reviewed by the Board. See generally *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174, 175 fn. 2 (2000), and cases cited there. For similar reasons, I have also given no weight to *Teamsters Local 509 (ABC Studios)*, 357 NLRB No. 138 (2011), the primary case cited in the General Counsel’s posthearing brief. The Board specifically noted (fn. 1) that no exceptions had been filed to the judge’s finding in that case that the movie referral list constituted an exclusive hiring hall arrangement. I have likewise placed no reliance on *Laborers Local 334 (Kvaerner Songer, Inc.)*, 335 NLRB 597, 599 (2001), also cited by the General Counsel, in evaluating the exclusivity issue. See fn. 2 of the Board’s decision (noting that no exceptions had been filed to the judge’s finding that the union did not violate Sec. 8(b)(1)(A) and (2) of the Act by refusing to refer an applicant through its hiring hall). See also fn. 9 of the Board’s decision in the subsequent case involving the same parties, *Laborers Local 334 (Kvaerner Songer, Inc.)*, 343 NLRB 1343 (2004), discussed *supra*.

record indicates that the referral employees are familiar with it.⁸ Indeed, Maxwell himself acknowledged that, when he was first added to the trade show referral list in May 2010, the union steward (Patrick Nallon) told him that he would be put in “will call” status while he was working on movies (which Maxwell notified Nallon he was doing at the time).⁹ (Tr. 23–24, 28–32, 34–45, 47, 50, 75–80, 145–150, 260, 267, 289, 296, 305–309, 318, 336, 340.)

The record is less clear when the alleged 12-month rule was adopted or became effective. However, it appears to be of more recent vintage. Thus, the Union contends that the rule is derived from a referral rule of conduct that the Union’s executive board formally adopted in November 2009 requiring individuals on the list to make themselves available for work (Tr. 13; Br. 1). Further, Michael McManus, who has been the Union’s director of trade show referrals since October 2009, testified that he first began reviewing the trade show referral list to determine if any workers had violated the rule in “the early part of 2011,” approximately a year after the list was initially ranked in February 2010 pursuant to the new referral rules. He testified that, as a result, Maxwell—who as indicated above had initially been placed on “will call” in May 2010 because he was doing movie work—and four other individuals were subsequently suspended from the trade show referral list by the executive board.¹⁰ This is confirmed by the minutes of an executive board meeting held on May 31, 2011. The minutes indicate that the board had previously agreed, during an April 28 “phone poll,” to suspend Maxwell from the referral list “for his failure to take calls in the referral system,” and that it voted at the May 31 meeting to suspend the four other individuals for

⁸ But see the testimony of employees Thomas Hogan (Tr. 34) and Anthony Pomonis (Tr. 58–63, 70–72), which appears to confuse or conflate “will call” with “on call.” While “will call” means the employees call the Union, “on call” means that the Union calls the employees, i.e. the employees are available, but there is no immediate assignment for them, and the Union calls them when assignments arise.

⁹ Nallon, like William Hogan III, is Maxwell’s cousin (Tr. 219).

¹⁰ Maxwell had submitted his application for movie work in March 2010, which Local 727 added to the movie book. See Tr. 145 and GC Exh. 24. Maxwell testified, and payroll records confirm, that although he was subsequently added to the trade show list in May, he continued working on movies or television series back-to-back for the next 6–7 months, through the end of November 2010. Maxwell testified that he did not call the union office to make himself available for trade show referrals thereafter because: (1) he was out of town the first 2 weeks of December; (2) he knew there was little or no trade show work in January and February and he was near the bottom (#274) on the list; and (4) he anticipated that he would go back to work on one of the pilots he had been working on in the spring (Chicago Code) if it was picked up. In addition, he performed some other trade show or convention work (obtained outside the hiring hall) in March and May 2011 as a freight manager/supervisor for a company owned by his brother-in-law. (Tr. 145–148, 151–153, 156, 205–214, 221–222, 226; GC Exh. 23.) As for the other four individuals, the referral list indicates that three were likewise listed as “will call” prior to being suspended by the executive board. See GC Exhs. 13–15a (Simone [#202], Knesek [#205], Brocato [#216], and Hustad/Husead [#180]). However, the record does not reveal why they were on “will call.”

the same reason. (Tr. 209–214, 292, 308–312, 331, 338–341; R. Exh. 5.)¹¹

Like the “will call” procedure itself, the 12-month rule was not specifically set forth or posted anywhere in writing. Indeed, the November 2009 referral rule of conduct cited by the Union as the written source of the 12-month rule does not even generally state that individuals on the list must make themselves available for work. Rather, the rule more narrowly states, “By agreeing to take a call, those referred must . . . [n]ot refuse the type of work to which you have registered to perform” (R. Exh. 1, p. 2, par. (c)). Contrary to the Union’s contention, this rule on its face appears to be directed to individuals who have indicated that they are available to take a call and have actually been referred to a job, not to individuals, like Maxwell, who have indicated they are unavailable.¹²

Further, unlike the “will call” procedure, the 12-month rule was not otherwise widely disseminated by the Union or known or understood by the referral employees. Thus, there is no record evidence that the Union ever told any referral employees directly that the rule prohibited them from remaining on “will call” due to movie or other work for 12 months or more. Nor is there any evidence that employees learned this from any other source. Although McManus, the Union’s referral director, testified that it was “general knowledge” among employees on the list that they were required to make themselves available to work at least some trade shows even if they were doing movie work (Tr. 310, 313), neither Maxwell nor any of the five employee witnesses called by the Union testified that they had ever heard of such a requirement. Indeed, only two employee witnesses (Leonard Casey Jr. and Vincent Renella) testified that they had heard even generally of a 12-month rule prohibiting them from being on “will call” or “gone” for more than a year. (See Tr. 56 and 81 (testifying that they had heard of such a rule by “word of mouth” from coworkers).)

Moreover, William Hogan III—who as noted above frequently works as a movie transportation coordinator—testified that, while he recalled actually seeing a rule at some point stating that employees could be suspended for being on “will call,” the rule did not apply when employees were placed on “will call” due to movie work (Tr. 260–261). Although it is unclear where Hogan would have seen any such rule (as discussed above, no such rule was written down anywhere), he certainly

¹¹ Contrary to the Union’s posthearing brief (p. 12), the minutes do not indicate that the executive board “adopted” the previous, April 28 phone poll or took any other additional action at the May 31 meeting regarding Maxwell’s suspension. No such motion is recorded.

¹² The Union’s posthearing brief (p. 5) also quotes from the Local 727 Trade Show Referral Enforcement Policy, which was also approved by the union executive board on May 31, 2011 (R. Exh. 5, p. 2). However, the policy is not in evidence. (Although the Union’s brief cites to R. Exh. 7, p. 6, the cited reference is not the May 31, 2011 policy, but a copy of the minutes of an earlier December 20, 2009 general membership meeting.) In any event, the quoted section of the policy only generally describes the director of referrals’ duty to monitor and investigate violations of the trade show referral rules and policy, and the secretary-treasurer’s discretionary authority to recommend that the executive board suspend individuals from the trade show referral list for any violation of or deviation from the rules or policy.

had good reason to believe that the rule would not apply when employees were doing movie work. Thus, he testified that he had himself worked on movies back-to-back from the spring of 2010 until November or December 2011 (well over a year) without being suspended from the trade show list. (Tr. 267–268; see also the April 1–December 31, 2011 trade-show referral lists, GC Exh. 13–22, which list him [# 45 or #49] as either on a specific movie, “N/A” [not available], or “W/C” [will call] during that period.) Finally, he and four of the Union’s five employee witnesses testified that they had never heard of anyone (not even Maxwell) being disciplined or suspended from the trade show list for being on “will call” too long (Tr. 31, 55, 69, 80, 260). (The fifth employee witness, Thomas Hogan, was never asked.)

In sum, a preponderance of the evidence indicates that: (1) the Union failed to take reasonable steps to directly notify all workers on the trade show referral list of the 12-month “will call” rule, relying instead on word of mouth, and (2) relatively few if any referral employees actually knew about the rule or how it was being interpreted and applied by McManus and the Local 727 executive board during the relevant period. The Board in similar circumstances has held that unions have failed to satisfy their duty of fair representation. See *Plumbers Local 230*, 293 NLRB 315, 316 (1989) (finding violation where union relied heavily on “word of mouth” and otherwise took a “slipshod” approach to notifying applicants, and a number of employees did not learn of the change in a timely fashion). Accord: *Plumbers Local 38 (Mechanical Contractors of Northern California)*, 306 NLRB 511, 532 (1992), *enfd.* in relevant part mem. 17 F.3d 393 (9th Cir. 1994). See also *Sheet Metal Workers Local 19*, 321 NLRB 1147 (1996); *Electrical Workers Local 11 (Los Angeles NECA)*, 270 NLRB at 426; and *Boilermakers Local 667 (Union Boiler Co.)*, 242 NLRB 1153, 1155 (1979).¹³ Accordingly, in agreement with the General Counsel, I find that Local 727 violated Section 8(b)(1)(A) of the Act by failing to adequately notify workers of the rule.

2. Suspending and refusing to refer Maxwell to any trade shows

As indicated above, the General Counsel also alleges that Local 727 violated Section 8(b)(2) of the Act by actually implementing the 12-month “will call” rule and suspending and refusing to refer Maxwell to any trade shows before giving adequate notice of the new rule or how it would be applied. As discussed above, this allegation is well supported by the evidence, including Referral Director McManus’ testimony and the minutes of the May 31, 2011 union executive board meeting. Indeed, Local 727 admits that it suspended Maxwell from the trade show list pursuant to the rule (Tr. 13–14; and R. Br. 1, 17–22). Accordingly, I find that the Union’s actions in this respect violated the Act as alleged. See, e.g., *Plumbers Local 230*, above. See also *Plumbers Local 519 (Sam Bloom Plumbing)*, 306 NLRB 810, 810 fn. 1 (1992).

This is not the end of the matter, however; as noted above, the General Counsel also alleges that the Union suspended and

refused to refer Maxwell to any trade shows for discriminatory reasons.¹⁴ Specifically, the General Counsel contends that the Union suspended and refused to refer Maxwell because it believed that he had an ownership interest in Convention Cartage Systems (CCS), a company it was attempting to organize, and was not helping the organizing effort. The General Counsel further contends that the Union actually suspended Maxwell for this reason in March 2011, approximately 1–2 months before the executive board’s reported April 28 vote by “phone poll” to suspend him pursuant to the new 12-month “will call” rule. Thus, the allegation is at least arguably noncumulative.¹⁵

I find that this allegation is supported by a preponderance of the evidence as well. First, the record indicates that Maxwell did, in fact, have a connection with CCS. Indeed, Maxwell started CCS in 1994 and was an original owner and president of the company. The company eventually encountered difficulties and, in 2000 or 2001, Maxwell sold the company (then operating under the name Maxwell Inc. d/b/a CCS) to his brother-in-law. However, he has continued to perform freight-supervisor work for the company (now operating under the name Tractor Company d/b/a CCS) on an intermittent or occasional basis. He charges CCS a flat rate of \$1000/week for such intermittent or occasional work, which he bills or invoices through another company (Empties, Inc.), which is owned by several other individuals, and for which he serves as president. (Tr. 140–143, 205–208, 221, 225–230.)

Second, Maxwell first heard a rumor that he was suspended in March, while he was working for CCS (see fn. 10, *supra*) and well before either the executive board’s reported April 28 “phone poll” vote or his 12-month “will call” anniversary in May.¹⁶ Maxwell called the union office to inquire about the matter in early April, and left a couple of messages asking to

¹⁴ Unlike the previous allegations, this allegation does not require a finding that Local 727’s trade show referral list was the exclusive source of labor for signatory employers. See generally *Newspaper & Mail Deliverers’ Union (City & Suburban Delivery System)*, 332 NLRB 870 fn. 1 (2000), and cases cited there (union’s refusal to refer an individual through a nonexclusive hiring hall may violate the Act if the refusal is in retaliation for the individual’s protected activity).

¹⁵ But see fn. 20, *infra*. Although the current record is insufficient to determine if Maxwell (who as previously noted had a very low number on the referral list) would have been referred to any trade shows absent his suspension, such a showing is not required to find a violation. The determination whether Maxwell was actually denied any jobs, and is therefore entitled to backpay, is properly left to the compliance proceeding. See *Bricklayers Local 1 (Denton’s Tuckpointing, Inc.)*, 308 NLRB 350, 353 (1992), and cases cited there.

¹⁶ Maxwell testified that Robert Voss, the chief union steward (and, like William Hogan III and Patrick Nallon, one of his cousins), confirmed the rumor when he ran into Voss one morning at McCormick Place (where the union office is located and CCS was working a trade show). However, in response to the Union’s hearsay objection, the General Counsel represented that Maxwell’s testimony was being offered solely to show when Maxwell learned that he was suspended, and not as proof that he was suspended. Further, in apparent reliance on the General Counsel’s representation, the Union ultimately decided not to call Voss to testify about either his duties as chief steward (i.e. whether he was a union agent) or the alleged conversation. See Tr. 153–155. Accordingly, I have not relied on this testimony as evidence that Maxwell was actually suspended in March 2011.

¹³ Again, the Union’s posthearing brief fails to address any of this precedent or cite any contrary precedent.

speak to John Colli Jr. or Sr., the union president and secretary/treasurer, respectively. Although neither ever responded, Michael Jain, a union business agent,¹⁷ eventually called Maxwell back. Jain told Maxwell that he had been suspended from the list “because we believe you have ownership in CCS.” Maxwell responded that he did not have any ownership interest in the company. However, Jain replied that the Union had “seven lawyers that can prove otherwise.” Maxwell challenged Jain to produce the evidence, but Jain said that it was up to Maxwell to produce a document showing that he did not have any ownership in CCS. Accordingly, Maxwell stated that he would submit an affidavit to that effect. (Tr. 152–155, 159–160, 177.)¹⁸

Third, Maxwell did, in fact, subsequently mail a “sworn statement” to the Union by certified letter dated April 28. The statement stated:

I Ronald E. Maxwell Jr. duly swear that I do not and never have had any ownership in “A Tractor Co. DBA-CCS Trucking.” I occasionally work as an independent contractor hired by said company when the need arises.

The letter also requested “any and all correspondence” regarding his suspension, noting that he had not to date received any “written official suspension notification, nor any documentation as to the reason for this suspension.” Although the Union received the letter on May 2, and Maxwell requested a “swift” response “as lost wages have already [begun] to accumulate,” the Union never responded. (GC Exh. 6; Tr. 161–162.)¹⁹

¹⁷ The Union admits that Jain is its agent within the meaning of Section 2(13) of the Act.

¹⁸ Jain also testified about this phone conversation, and denied that he ever told Maxwell that he was suspended because he had an ownership interest in CCS. Indeed, he denied that Maxwell’s suspension even came up during the conversation. However, Jain otherwise confirmed much of Maxwell’s testimony. Thus, Jain admitted that Maxwell had left a phone message at the office in February or March 2011; that he called Maxwell back; that the Union was attempting to organize the CCS drivers at the time; that he initially asked Maxwell during their conversation about his ownership interest in CCS; that they then had a “back and forth” discussion about the issue; that Maxwell mentioned going to court over the matter; and that he responded that the Union had a lot of attorneys. (Tr. 276–277.) Further, Jain never offered any alternative reason why Maxwell had called the Union. Finally, as discussed infra, Maxwell’s version of the conversation is consistent, not only with his own subsequent actions, but with other substantial evidence. On balance, therefore, I find that Maxwell’s testimony is more worthy of belief.

¹⁹ Maxwell testified that he thereafter tried again to reach one of the Collis by phone to find out the status of the situation. However, as before, they never returned his call. Further, although Jain eventually called him back in early June, Jain told him that the Union was still waiting to get a letter from CCS itself stating that he had no ownership in the company. Again, I credit Maxwell’s testimony. Jain admitted that he had a second phone conversation with Maxwell (which he said occurred in April or May). He also admitted that Maxwell asked about his suspension during this second conversation. Nevertheless, according to Jain, he responded that he was “not in a position to discuss it,” and Maxwell would have to speak with somebody else. (Tr. 276–277.) (Although the Union’s posthearing brief [p. 13] describes Jain’s testimony regarding the phone calls with Maxwell differently, the descrip-

tion is incorrect and incomplete, and, like the brief’s discussion of the trade show referral enforcement policy [see fn. 12, supra], unsupported by record evidence.) For essentially the same reasons set forth above, I find that Maxwell’s version of the conversation is more credible.

tion is incorrect and incomplete, and, like the brief’s discussion of the trade show referral enforcement policy [see fn. 12, supra], unsupported by record evidence.) For essentially the same reasons set forth above, I find that Maxwell’s version of the conversation is more credible.

Fourth, the Union’s own trade show referral records confirm that Maxwell was suspended prior to either the executive board’s reported April 28 “phone poll” vote or his 12-month “will call” anniversary in May. (See GC Exh. 14 (#271)), which lists him as “suspended” on the April 21 trade show list. The Union failed to offer any testimony or evidence to explain this apparent inconsistency.²⁰ It also failed to explain why the Board voted to suspend Maxwell by “phone poll” on April 28 (which, contrary to the Union’s contention [Br. 17, 20, 22], was likewise before an “entire year” or “over a year” had elapsed), rather than voting on the matter at the May 31 meeting as it did with respect to the other four individuals who were suspended.²¹ Nor has it offered any explanation why it treated Maxwell differently than Hogan, who as indicated above was not suspended even though he also performed movie work while on “will call” for an extended period. Although Hogan worked on movies back-to-back the entire time, while Maxwell did so for just the first 6–7 months (see fn. 10, supra), Referral Director McManus testified that such distinctions are irrelevant, i.e., that even if individuals work on movies the entire year that they are on “will call,” they would probably be suspended from the trade show list (Tr. 309–310).

Finally, the Union does not dispute that suspending and refusing to refer from its hiring hall an individual who performs work for a company that the Union is attempting to organize, because of the individual’s perceived ownership interest in the company and failure to support the organizing effort, would have a reasonable tendency to coerce employees in the exercise of their rights under Section 7 of the Act and cause or attempt to cause an employer to discriminate against the individual in violation of Section 8(a)(3) of the Act. See generally *Newspaper & Mail Deliverers’ Union (City & Suburban Delivery System)*, 332 NLRB 870 (2000). See also *Plumbers Local 420 (Carrier Corp.)*, 347 NLRB 563, 564 (2006); and *New Mexico District Council of Carpenters (A. S. Horner, Inc.)*, 176 NLRB 797, 799 (1969), *enfd.* 454 F.2d 1116, 1119 (10th Cir. 1972).

tion is incorrect and incomplete, and, like the brief’s discussion of the trade show referral enforcement policy [see fn. 12, supra], unsupported by record evidence.) For essentially the same reasons set forth above, I find that Maxwell’s version of the conversation is more credible.

²⁰ Although Maxwell was still listed as “will call” on the April 1 list (GC Exh. 13), this could have been due to administrative delay. In any event, the record indicates (Tr. 205), and the General Counsel appears to concede (Br. 25), that Maxwell continued working for CCS through the end of March, and therefore remained unavailable to take trade show assignments off the list until at least April 1.

²¹ It is also noteworthy that, unlike Maxwell, there is no record evidence that the other four individuals whom the executive board voted to suspend on May 31 were actually listed as “suspended” on the trade show referral list until after the executive board’s actions were adopted by the general membership on September 25, 2011. (See R. Exh. 6 (minutes of general membership meeting), and GC Exhs. 17 (September 28 referral list, ##169 and 200) and 18 (Sept. 29 referral list, ##189 and 192).) (The referral lists, if any, between May 30 and September 28, were not introduced into the record by either party.)

Accordingly, I find that the Union violated Section 8(b)(1)(A) and (2) of the Act as alleged.

B. Movie Referrals (“Autumn Frost”)

As indicated above, the General Counsel alleges that Local 727 unlawfully refused to refer Maxwell to “Autumn Frost” for essentially the same reasons, i.e. because he had been suspended for violating the 12-month “will call” rule and/or because of his perceived ownership of CCS and failure to support the union organizing campaign. However, I find that the General Counsel has failed to prove this additional allegation by a preponderance of the evidence. There is no record evidence that Local 727 has removed Maxwell’s application from the movie book (GC Exh. 24). Nor is there any admissible evidence that the Union told Hogan, Third Act’s transportation coordinator, that he could not hire Maxwell for “Autumn Frost.” Although Maxwell testified, pursuant to the General Counsel’s offer of proof, that Hogan told him during a May 2011 phone conversation that he had received a text message from Local 727 stating that he should not hire Maxwell, I rejected this testimony, to the extent it was offered as substantive evidence that Hogan had actually received such a text message from the Union, on the ground that it was both hearsay, since Hogan was an agent of Third Act (a nonparty) and not the Union, and uncorroborated.²² (Tr. 168, 177, 196–204.)

The General Counsel challenges this evidentiary ruling, arguing that Hogan was, in fact, an agent of the Union under Section 2(13) of the Act.²³ However, the record fails to support the General Counsel’s argument. Hogan was selected and hired directly by Third Act, is not a union official or steward, and is actually prohibited by union rules from even being a member of the Union while serving as transportation coordinator or 12 months thereafter. (See GC Exhs. 8 (stipulation of facts) and 9 (Third Act’s May 10, 2011 “Deal Memo” with Hogan); R. Exhs. 1 (Local 727 supplemental movie rules) and 8 (Hogan’s dues record); and Tr. 139, 234–236, 241–242, 252, 255–256, 258, 268, 297, 314.)

Further, while Hogan was presumably required to comply with the parties’ collective-bargaining agreement, there is no evidence that his duties and responsibilities as the transportation coordinator were jointly determined and regulated by both

Third Act and the Union. Indeed, the transportation coordinator position is only briefly mentioned in the agreement. (See GC Exh. 3, p. 2 (“The Transportation Captain shall be the first person hired after the local Transportation Coordinator”), and GC Exh. 2 (sideletter addendum), p. 1 (“the Union shall provide a referral list to the Transportation Coordinator for use during the production”).) Cf. *Electrical Workers, Local 6 (San Francisco Elec. Contractors Assn.)*, 318 NLRB 109, 126–127 (1995), enfd. mem. 139 F.3d 906 (9th Cir. 1998) (finding that three-member referral appeal committee, which was created by the parties’ contract and included one member appointed by the union, was an agent of union).

Finally, there is insufficient evidence that the Union manifested to referral employees that Hogan was its agent. On the contrary, the relevant provisions of the Union’s December 2009 supplemental rules for movie work (quoted in full in part I.B, above) clearly state that the individual who will make the selection and contact the referral employees directly is “the employer’s designated agent” (R. Exh. 1).²⁴

The General Counsel also cites Maxwell’s testimony, pursuant to the same offer of proof, that Hogan subsequently told him, during a June 2011 telephone conversation, that Secretary-Treasurer Colli told him that the Union would reinstate Maxwell if Maxwell would get the CCS drivers to sign Local 727 cards (Tr. 196–197). However, I rejected this testimony for the same reasons.²⁵ In any event, even assuming arguendo that this testimony is both admissible and credible, it does not establish that the Union had suspended Maxwell from the movie book as well as the trade show list. Maxwell’s testimony indicates that Hogan and Colli spoke about Maxwell’s suspension only in general terms. Further, as noted above, Hogan was not only Third Act’s transportation coordinator for “Autumn Frost,” he was also Maxwell’s cousin. Thus, Colli might reasonably have assumed that Hogan was inquiring about Maxwell in his personal rather than professional capacity, i.e. was inquiring only about how Maxwell could get reinstated on the trade show list (the only list the documentary evidence indicates the executive board formally voted to suspend him from), and not about how Maxwell could be hired for “Autumn Frost.”

The General Counsel also cites Maxwell’s testimony (Tr. 183–185) that the Union stopped sending him dues notices and refused to accept his dues in June 2011. However, there is no substantial record evidence that the Union requires workers to be members in order to be included in the movie book.²⁶ Al-

²² See, e.g., *Auto Workers Local 651 (General Motors)*, 331 NLRB 479, 481 (2000) (uncorroborated testimony properly rejected as unreliable hearsay). Hogan had not, at that point, been called to testify. Further, when subsequently called by the General Counsel as an adverse witness, Hogan denied that he ever received such a text message. Indeed, as mentioned above, Hogan testified that the only person who told him Maxwell had been suspended was Maxwell himself (Tr. 262–264). And no other evidence of the text message was offered into evidence.

²³ GC Br. 13–15, 24. The General Counsel does not contend that Maxwell’s testimony is admissible under the hearsay rules even if Hogan is not an agent of the Union; that there is independent evidence to corroborate Maxwell’s testimony; or that Maxwell’s testimony can be effectively corroborated or converted into substantive or affirmative evidence merely by discrediting Hogan. Thus, given my finding that Hogan is not a union agent, it is unnecessary to make credibility determinations regarding his or Maxwell’s testimony about their conversation. See generally *Brooks v. U.S.*, 309 F.2d 580, 582 (10th Cir. 1962).

²⁴ The circumstances of this case are therefore clearly distinguishable from *Teamsters Local 25*, 358 NLRB No. 15 (2012), where the transportation coordinators were appointed by the union and the union admitted that they were its agents within the meaning of Sec. 2(13) of the Act. See slip op. at 4–5 and fn. 13.

²⁵ On subsequent examination by the General Counsel, Hogan acknowledged that he tried to have a phone conversation with Colli in the spring of 2011, but Colli told him he did not want to talk to him about it (Tr. 263).

²⁶ Nor is there any such unfair labor practice allegation in this case. Cf. *Boilermakers Local 154 (Western Pennsylvania Service Contractors Assn.)*, 253 NLRB 747 (1980), enfd. mem. 676 F.2d 687 (3d Cir. 1982) (union’s systemic discrimination against nonmembers in the operation of hiring hall violated Sec. 8(b)(1)(A) and (2) of the Act).

though Maxwell testified that all referral employees doing movie work are members (Tr. 163, 165), the basis for his knowledge of other employees' membership status was never established. Indeed, both he and other employee witnesses testified that they assumed or believed that the transportation coordinator also must be or is a union member (Tr. 67, 76, 162, 166), even though, as discussed above, the record shows the opposite.

Further, as noted by the Union, the relevant provisions of the sideletter addendum to its agreement with Third Act (also quoted in full in part I.B above) specifically state that referrals "shall in no way be affected by union membership" (GC Exh. 2). Contrary to the General Counsel's posthearing brief (pp. 2–3, 11), nothing in the parties' stipulation of facts (GC Exh. 8) or the movie book (GC Exh. 24) indicates that the parties have not complied with these provisions or otherwise required membership as a condition of being included in the book or hired. Nor does Hogan's testimony support such a conclusion. Hogan testified that he did not hire Maxwell on "Autumn Frost" because Maxwell told him that he was "suspended" from the list, not that he was no longer a union member (Tr. 262–263). This is consistent with Maxwell's testimony that Jain had previously assured him during their first conversation that he was "just suspended off the list," and not "out of the Union," and that his subsequent conversation with Hogan occurred in May, before he found out that the Union would no longer accept his dues (Tr. 159, 167). Moreover, Hogan testified that he did not know if referral employees have to be members of Local 727, and that he "never really thought about" it. Although he testified that he has "always just hired union members," he explained that by "members" he meant "guys that were . . . associated with . . . the Union somehow," and that he did not know whether the individuals in the movie book were actually dues-paying union members in good standing. (Tr. 250–251.)

Finally, the General Counsel cites Maxwell's testimony (Tr. 178–179) that he has not been hired for any movies since his suspension. However, as discussed above, it is the movie production company (through its transportation coordinator), and not the Union, that selects and hires the crew for movie work. Further, Hogan testified that he did not hire Maxwell on "Autumn Frost" because Maxwell himself told him he was suspended, not because the Union told him Maxwell was suspended or ineligible for movie work. And no evidence whatsoever was introduced by the General Counsel regarding the reasons Maxwell was not selected or hired for any other movie or television productions.

Accordingly, for all the foregoing reasons, this last allegation is dismissed in its entirety.²⁷

²⁷ The complaint also includes a general allegation that Local 727 failed to apply objective criteria in making referrals to "Autumn Frost" (GC Exh. 1(c), par. IX (b); GC Exh. 1(e); and Tr. 17–18). The General Counsel, however, failed to offer any substantial evidence in support of this allegation, i.e. there is no substantial record evidence that the Union failed to use objective criteria in deciding who was eligible to be included in the movie book that was provided to Hogan. Indeed, the General Counsel's posthearing brief does not even address the allegation. Accordingly, this allegation is dismissed as well.

CONCLUSIONS OF LAW

1. By failing to adequately and timely notify everyone on its trade show referral list of its 12-month "will call" rule and suspending Ron Maxwell and refusing to refer him to any trade shows with signatory employers since April 2011 because he allegedly violated the rule and/or for discriminatory reasons, Teamsters Local 727 has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the Act.

2. The Union did not otherwise violate the Act as alleged in the complaint.

REMEDY

The appropriate remedy for Local 727's unlawful conduct is an order requiring the Union to cease and desist and to take certain affirmative action. Specifically, the Union will be required to rescind Maxwell's suspension and to make him whole for any loss of earnings and other benefits that may have resulted from its unlawful conduct.²⁸ Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest compounded daily as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). The Union shall also be required to remove from its files any reference to Maxwell's suspension from the trade show referral list, and to notify Maxwell in writing that this has been done and that the suspension will not be used against him in any way. In addition, the Union will be required to post a notice in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010). See, e.g., *Teamsters Local 25*, 358 NLRB No. 15 (2012).

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended²⁹

ORDER

The Respondent, International Brotherhood of Teamsters, Local 727, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing to take reasonable steps to adequately and timely notify everyone on its trade show referral list of its rules for using its exclusive hiring hall.

(b) Suspending anyone from its trade show referral list and/or refusing to refer them to any trade shows for violating its exclusive hiring hall rules before it has taken reasonable steps to adequately and timely notify everyone of the rules, or for other arbitrary or discriminatory reasons.

²⁸ As indicated above, the record indicates that the Union also suspended four other individuals on May 31 for their "failure to take calls in the referral system." However, both the charge and the complaint are narrowly drafted and there are no unfair labor practices alleged or affirmative remedies sought with respect to anyone but Maxwell.

²⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind Ron Maxwell's suspension from the trade show referral list and make him whole for any loss of earnings or benefits he suffered as a result of being suspended and denied referrals to any trade shows since April 2011, with interest, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to Maxwell's unlawful suspension, and within 3 days thereafter notify Maxwell in writing that this has been done and that the suspension will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all hiring hall and referral records, and any other records and documents, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its office and hiring hall in Chicago, Illinois, copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has ceased operating the hiring hall involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former members whose names appeared on the Respondent's hiring hall list at any time since April 2011.

(e) Within 14 days after service by the Region, sign and return to the Regional Director for Region 13 sufficient copies of the notice for posting by Global Experience Specialists (GES),

Freeman, and other employers signatory to the trade-show agreement, if willing, at all places where notices to employees are customarily posted in the Chicago metropolitan area.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 5, 2012

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail to take reasonable steps to adequately and timely notify everyone on our trade show referral list of our rules for using our exclusive hiring hall.

WE WILL NOT suspend anyone from our trade show referral list or refuse to refer them to any trade shows for violating our exclusive hiring hall rules before we have taken reasonable steps to adequately and timely notify everyone of the rules, or for other arbitrary or discriminatory reasons.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL rescind Ron Maxwell's suspension from the trade show referral list and make him whole for any loss of earnings or benefits he suffered as a result of being suspended and denied referrals to any trade shows since April 2011, with interest, in the manner set forth in the Board's decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Maxwell's unlawful suspension, and within 3 days thereafter notify Maxwell in writing that this has been done and that we will not use the suspension against him in any way.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 727

³⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."