

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 15**

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**THE INTERNATIONAL ALLIANCE OF )  
THEATRICAL STAGE EMPLOYEES AND )  
MOVING PICTURE TECHNICIANS, ARTISTS )  
AND ALLIED CRAFTS OF THE UNITED )  
STATES, ITS TERRITORIES )  
AND CANADA, AFL-CIO, CLC, LOCAL 142 )**

Charged Party )

and )

**RANDALL H. FINCH, an Individual )**

Charging Party )

and )

**JONATHAN W. MUDRICH, an Individual )**

Charging Party )

and )

**JAMES P. VACIK, an Individual )**

Charging Party )

and )

**Parties in Interest )**

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**Case Nos. 15-CB-005871**

**15-CB-005894**

**15-CB-005924**

**15-CB-070725**

**15-CB-072526**

**MEMORANDUM IN SUPPORT OF COUNSEL FOR GENERAL COUNSEL'S  
EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE**

BEAUFORD D. PINES  
Counsel for General Counsel  
National Labor Relations Board  
Region 15  
600 South Maestri Place, 7th Flr  
New Orleans, LA 70130

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**I.**  
**STATEMENT OF THE CASE**<sup>1</sup>

**A. Introduction**

This case is about a union operating its exclusive hiring hall in such a discriminatory and arbitrary manner that it abandoned its responsibility to the employees who use the hiring hall. The International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC, Local 142 (Respondent or Respondent Union) created and used a seniority roster to make referrals that gave priority referral status to union members to the detriment of non-members. Respondent's hiring hall rules specifically provide that the order of names on the seniority roster should be based on established years of service, yet Respondent based seniority dates on when referral employees became members of the Union, thereby unlawfully encouraging employees to become members of the Union.

Further, the Respondent Union did not uphold its responsibility to employees using its exclusive hiring hall by arbitrarily failing to follow its hiring hall rules without any legally justified explanation. Respondent repeatedly flouted its own written rules which required the union to contact referral employees consistent with the seniority roster. Additionally, Respondent, in contravention of his hiring hall rules, failed to maintain an internet website with a posting of all available work within the Union's jurisdiction as soon as the work is known or has been contracted with an employer. Indeed, the overall arbitrary manner in which the Respondent operated its exclusive hiring hall rose above the level of gross negligence and violates Section 8(b)(1)(A) and (2) of the National Labor Relations Act (Act). Accordingly, the General Counsel respectfully

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<sup>1</sup> Reference to the Exhibits of the General Counsel and Respondent will be designated as "GC" and "R," respectively, with the appropriate number or numbers for those exhibits. Reference to the transcript and the Decision will be designated as "TR." and "ALJD," respectively. An Arabic numeral(s) after "TR." or "ALJD" is a spot cite to a particular page of the transcript or of the ALJD. An Arabic numeral(s) following a page spot cite references specific lines of the page cited. For example, ALJD 7 at 3-7 is page 7 of the ALJD, lines 3-7.

submits all employees harmed by Respondent's discriminatory and arbitrary operation of its exclusive hiring hall are entitled to remedial relief for lost wages and benefits.

**B. Preliminary Matters**

On April 23, 2009, Randall H. Finch, an individual, filed the original charge in this matter with Region 15 of the National Labor Relations Board (the Board), alleging that the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, Local 142 (Respondent Union or the Union) engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, in Case No. 15-CB-005871. (GC-1(a)). Finch filed amended charges in 15-CB-005871 on September 25, 2009 (GC-1(n)) and October 28, 2009 (GC-1(p)).

On June 15, 2009, Jonathan W. Mudrich, an individual, filed the original charge in Case No. 15-CB-005894 (GC-1(d)) alleging that Respondent engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act. Mudrich filed an amended charge on September 25, 2009 (GC-1(j)).

On September 25, 2009, Randall H. Finch, an individual, filed the original charge in Case No. 15-CB-005924 (GC-1(g)) alleging that Respondent engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act.

On November 17, 2009, the Regional Director for Region 15 (Region) of the Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (GC-1(s)). On December 1, 2009, the Region issued an Amendment to Consolidated Complaint (GC-1(y)) setting a hearing date of February 1, 2010. On December 8, 2009, Respondent filed its Answer to the Amended Consolidated Complaint (GC-1(aa)). On March 18, 2010, the Region issued an Order postponing the hearing indefinitely based on settlement discussions (GC-1(gg)).

On December 14, 2011, James P. Vacik, an individual, filed the original charge in Case No. 15-CB-070725 alleging that Respondent engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act (GC-1(ii)). Vacik filed an amended charge on October 30, 2012 (GC-1(rr)).

On January 17, 2012, Randall H. Finch, an individual, filed the original charge in Case No. 15-CB-072526 alleging that Respondent engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act (GC-1(ll)). Finch filed amended charges on March 9, 2012 (GC-1(oo)) and October 30, 2012 (GC-1(uu)).

Collectively, Charging Parties Randall H. Finch, Jonathan W. Mudrich, and James P. Vacik allege in the charges that Respondent violated both Section 8(b)(1)(A) and Section 8(b)(2) of the Act because it discriminatorily and/or arbitrarily failed to properly follow hiring hall procedures and rules. On October 31, 2012, the Region issued an Order Further Consolidating Cases, Consolidated Complaint and Notice of Hearing (Consolidated Complaint) (GC-1(xx)). On November 14, 2012, Respondent filed its Answer to the Consolidated Complaint (GC-1(zz)). On December 17, 2012, the Region issued an Order scheduling the hearing to begin on February 25, 2013 (GC-1(ccc)).

On February 19, 2013, Respondent filed a Motion to Dismiss all Allegations Concerning Unidentified Discriminatees (GC-1(eee)). On February 21, 2013, Counsel for General Counsel filed an Opposition to Respondent's Motion to Dismiss (GC-1(fff)). On February 22, 2013, Respondent filed its First Amended Answer to the Consolidated Complaint (GC-1(ggg)).

On February 25, 2013, the hearing opened before the Honorable Michael A. Marcionese, Administrative Law Judge (ALJ). The Region, consistent with the testimony given during the hearing, amended paragraph 7 of the Consolidated Complaint to read "Since about the dates noted below, the employers and Respondent entered into and since then have maintained agreements and/or past practices requiring that Respondent be the exclusive source of referrals of employees for employment to work as stagehands, riggers and/or in lighting with the employers (TR 907). In

response, Respondent amended its Answer to deny paragraph 7 of the amended Consolidated Complaint (TR 908). On March 1, 2013, ALJ Marcionese closed the hearing (TR 910).

On February 26, 2014, ALJ Marcionese issued his Administrative Law Judge Decision (“ALJD”) recommending that the consolidated Complaint be dismissed in its entirety. ALJ Marcionese concluded the Respondent Union did not operate an exclusive hiring hall with respect to referral of employees to the Mobile Civic Center and Mobile Convention Center under its collective-bargaining agreement with SMG Worldwide; Respondent did not violate Section 8(b)(1)(A) and (2) of the Act through the operation of its nonexclusive hiring hall; Respondent did not violate Section 8(b)(1)(A) of the Act by discriminating in making referrals against Randy Finch and James Vacik because they engaged in activity protected by the Act; and Respondent was not the Section 9(a) representative of and owed no statutory duty to employees of Alabama Power Company, AIG Baker Wharf Inn, LLC, Bayfest, Inc., Dorsett Productions Unlimited, and Gulf Coast Exploreum Science Center. In sum, ALJ Marcionese concluded the Respondent Union did not violate any section of the Act in the operation of its hiring hall. (ALJD 21 at 12)

Regarding the allegation that the Respondent Union operated an exclusive hiring hall, particularly with SMG Worldwide (SMG), ALJ Marcionese relied on SMG’s General Manager Jay Hagerman’s testimony that SMG has the final say as to the source of labor it uses and that it can and has utilized its own employees, employees of subcontractors, and crews traveling with a show or exhibition to do work covered by the collective-bargaining agreement (ALJD 6 at 42) to find that SMG retained discretion to determine when and whether to use Respondent’s referral service (ALJD 8 at 28-30). ALJ Marcionese acknowledged, but apparently disregarded Hagerman’s testimony that in most cases SMG utilizes the hiring hall for skilled employees. (ALJD 6 at 42-44) Further, ALJ Marcionese failed to recognize that contractors and production crews traveling with a show or exhibit that puts on a production at the SMG operated Mobile Convention Center and Civic

Center are not employees of SMG and should not be treated as such. ALJ Marcionese failed to recognize that contractors who work an event at the Mobile Convention Center and Civic Center should not be treated the same as SMG hiring an employee. Indeed, the record evidence does not contain any evidence that SMG hired any stagecraft employee to work an event at the Mobile Convention Center and Civic Center who was not referred through the the Respondent Union's hiring hall.

Further, regarding the allegations that Respondent Union violated Section 8(b)(1)(A) of the Act by discriminatorily and/or arbitrarily making referrals to Charging Parties Randall H. Finch and James P. Vacik based on their protected activity, ALJ Marcionese found the General Counsel has not met its burden of proving an unlawful motivation. (ALJD 11 at 33-35). ALJ Marcionese recognized that charge-filing activity is protected by the Act (ALJD 10 at 41-42 and 11 at 18), but the ALJ reasoned that Finch and Vacik were not discriminated against because they received referrals even after they filed charges against Respondent Union. (ALJD 11 at 8-10 and 35-37) As to Charging Party Randall Finch, ALJ Marcionese notes the record evidence that establishes animus against Finch (ALJD 9 at 34-35 and 10 at 41-42), but the ALJ concluded Respondent Union witnesses Philip Tapia and Kenneth John Brown provided reasonable explanations for the non-referrals to Finch. (ALJD 10 at 45 through 11 at 1) However, for many of the referrals for which employees were referred ahead of Finch despite Finch being entitled to the referral (ALJD 9 at 45 through 10 1-22), ALJ Marcionese does not specify what explanations he found reasonable.

## **II.** **STATEMENT OF ARGUMENT**

A. The ALJ erred in his finding that the Respondent Union does not operate an exclusive hiring hall with respect to SMG Worldwide. [Exception Nos. 1-8 and 16-17]

B. The ALJ erred in his finding that the Respondent Union did not discriminatorily and/or arbitrarily make referrals to Charging Party Randall Finch [Exception Nos. 9-12, 15, and 18]

C. The ALJ erred in his findings that the Respondent Union did not discriminatorily and/or arbitrarily make referrals to Charging Party James A. Vacik. [Exceptions Nos. 10, 13-15, and 18]

D. The ALJ erred in concluding that the Respondent Union did not violate the Act in any manner alleged in the Complaint and in issuing a recommended Order dismissing the Complaint. [Exception Nos. 19 and 20]

### **III.** **STATEMENT OF FACTS**

#### **A. The Respondent Union Has an Exclusive Hiring Arrangement with SMG**

SMG Worldwide (SMG) is a private management company that is hired by government agencies and private companies throughout the world to manage arenas, convention centers and stadiums. (TR 805) In Mobile, Alabama, SMG manages the Mobile Civic Center (Civic Center) and the Mobile Convention Center (Convention Center). Jay Hagerman is the general manager of the Civic Center. Hagerman negotiates all contracts and is responsible for booking events at the Civic Center. (TR 806) Hagerman also oversees a director of operation and the full-time and part-time labor staff in the operations department, as well as stagehands and other personnel hired to work events at the Civic Center. SMG has a core complement of about thirty full-time employees that work at the Civic Center and the Convention Center, including two general managers, a director of finance, a director of marketing, a director of sales and marketing, a director of operation, a manager at the Civic Center, two technicians/electricians at the Civic Center (TR 832-833), maintenance supervisor and a maintenance staff of seven who primarily set up stages, tables, and chairs, remove trash, and clean.

The Respondent Union is signatory to collective bargaining agreements (CBAs) with SMG effective October 1, 2006 (GC-2) and July 1, 2011 that cover the Civic Center and the Convention Center (GC-13; TR 231, 808, 810). Former Business Representative Jonathan P. Mudrich negotiated the 2006 agreement with SMG General Manager Jay Hagerman (Hagerman), and former

Business Representative and Charging Party James Vacik negotiated the 2011 agreement with Hagerman. (TR 507, 553, 810, 847) The relevant provisions in both CBAs are substantially the same. (TR 553) The relevant provisions in the CBAs provide, in pertinent part:

-- SMG recognizes the Respondent Union as the sole and exclusive bargaining agent for all Stagehands, Riggers, Sound and Wardrobe personnel employed by the Employer in SMG facilities. (GC-2 and GC-13, p.1 & 2, Article )

-- The Respondent Union agrees to provide SMG with skilled and experienced personnel as and when requested by the Employer, and SMG agrees to give the Respondent Union Steward, or in his absence the Union Business Agent, as much advance notice of such Personnel needs, or the scheduling thereof, as is reasonably possible (GC-2 and GC-13, p.3, Article 1.3).

-- In the event an electrician is needed to perform general maintenance or repair work in the entertainment and theatrical areas, SMG may subcontract such work or may assign a qualified, regular employee of The Mobile Civic Center to perform the necessary. (GC-2 and GC-13, p.3, Article 1.4).

-- SMG and the Respondent Union will honor all Yellow Card attractions, provided, however, that union members of touring companies permitted to work a live theatrical production in SMG facilities never will outnumber the employees assigned under the CBA to work that production. (GC-2 and GC-13, p.3-4, Article 1.5).

-- Employees represented by the Respondent Union shall perform the designated work at SMG facilities when requested by SMG. ((GC-2 and GC-13, p.16, Addendum A).

Respondent's current President and former Business Agent Philip Tapia admitted the Respondent Union is the primary source of employees for SMG at the Civic Center and the Convention Center. (TR 232) Likewise, former Business Agent and Charging Party James Vacik testified he considered the Respondent Union as the primary source of stagecraft employees for SMG. (TR 554, 616) Also, Tapia admitted SMG recognizes the Union as the sole and exclusive representative for employees the Respondent Union refers to work at the Civic Center and the Convention Center. (TR 232) SMG, per its agreements with the Union and authorization cards signed by referral employees, deducts fees directly from the paychecks of employees referred to work at the Civic Center and the Convention Center. (TR 617) Further, Tapia acknowledged that during the investigation of the unfair labor practice charges underlying the Consolidated Complaint,

the Respondent admitted SMG operates the Mobile Civic Center and Convention Center and that for SMG, the Respondent operates an exclusive hiring hall through which it refers stagecraft employees for employment at the Civic Center and the Convention Center. (TR 740-741)

SMG's General Manager Jay Hagerman testified at the hearing that the CBAs SMG has with Respondent Union do not require SMG to hire only, or first, stagecraft workers represented by the Respondent for events held at the Civic Center and the Convention Center (collectively, hereinafter the SMG Mobile facilities). (TR 811) Hagerman testified the duties performed by stagecraft employees referred through the Respondent Union's hiring hall may also be performed by SMG core staff employees or production crews traveling with a show or a production's contractors. (TR 848) Hagerman acknowledged, however, that Paul Bucannon, the stage manager at the Civic Center, contacts the Respondent Union for stagecraft employees as often as SMG has events requiring such employees, which is sometimes daily. (TR 819, 844) Bucannon contacts the production manager for events to be held at the Civic Center and determines how many and what craft employees the event may need. Bucannon then contacts the Respondent Union and requests the necessary stagecraft employees. (TR 819) Notably, Hagerman did not testify that Bucannon may or may not contact the Respondent Union for referrals. Rather, Hagerman testified in absolute terms that Bucannon contacts the Respondent Union once it is determined how many and what type of stagecraft employees are needed for an event at the SMG facilities.

For some productions held at the Civic Center and Convention Center, for instance the Ringling Brothers Barnum & Bailey Circus, the production company bring in their own production crews to perform their own rigging work, such as unloading and setting up their equipment. (TR 818) However, even when productions bring their own crew with them, Hagerman testified SMG regularly hires stagehand riggers, sound engineers, lighting controllers, loaders, forklift operators,

and electricians through the Respondent Union to assist a traveling production's crew. Hagerman gave the following example:

A concert comes to town. They carry their own road crew with them that operates and puts together their sound and lights. The stagehands assist them in the unloading of the equipment. They assist them in the assembly of lighting equipment and sound equipment. They assist them in unloading of musical instruments and musical equipment. They assist them in the – again, the setting up and plugging in, providing electricity to them. They provide assistance to the traveling crew to get the production of the show up and running. (TR 812)

Hagerman testified stagehands referred through the Respondent Union's hiring hall can also assemble pipe and drape and set up risers, work that is usually done by SMG's own core complement of full-time employees. (TR 816). SMG has some full-time employees, such as two electricians, that also perform the some of the same tasks as those performed by stagecraft employees referred through the Respondent Union's hiring hall. (TR 813) For instance, Mike Forbes is a SMG technician who performs electrical work. (TR 819-820)

The Convention Center has north and south exhibit halls, and it also has ballrooms. (TR 554) The events held at the Convention Center include trade shows, exhibits, Mardi Gras events, and church events. Tapia testified as business representative, he received work orders from the event coordinator at the Convention Center. (GC-25; TR 233, 238) The work orders reflect the number of employees in the various crafts that are required for the load-in, performance, and load-out phases of an event. (TR 239) After Tapia received a work order, he created a call sheet. (GC-40; TR 239) The call sheet is used to check in referral employees at the event and to verify all positions are filled. For instance, if the work order requested five stagehands, Tapia created the call

sheet to have stagehand 1, 2, 3, 4 and 5 as a way to verify five stagehands are referred to the event. (TR 239)

The Civic Center includes the theater, arena, and expo hall. (TR 240, 554) Events held at the theater include concerts, dance recitals, opera, ballet, and large meetings. Concerts are also held at the arena as well as bull riding, monster truck pulls, Mardi Gras balls, trade shows, and an international festival. Mardi Gras balls, concerts, trade shows, and roller derby events are held at the expo hall. The event coordinator at the Civic Center and the Convention Center contacts the Union for referral employees. (TR 241)

There is some work done at the Civic Center that is not performed by stagecraft employees referred through the Respondent Union. For instance, work orders generated by SMG reflect tasks such as placing out tables and chairs, placing pipe and drape to cover doors and placing standing podium and waste baskets in a room are performed by full-time maintenance employees in SMG's in-house operations department. (R-12, 13, 19; TR 590, 624, 823, 825, 834) It is not common but employees referred through the Union, when requested, also install pipes and drapes. (R-19; TR 625, 815) General Manager Jay Hagerman acknowledged it would not make economic sense for SMG to use stagecraft employees referred by the Respondent Union to perform such low skill labor tasks. (TR 835)

SMG also has a manager of projections at the Convention Center, Lew, who works with clients of SMG to coordinate the audio and visual needs for an event. (TR 592, 621, 825) Also, for traveling shows that use the Civic Center Arena, they may have their own craft department heads, such as riggers and electricians. (TR 615) Some traveling shows are yellow card attractions that have a national contract with IATSE that requires use of a certain number of IATSE members locally when a show comes to the Civic Center or Convention Center. (TR 838) For yellow card

attractions, employees that travel with the show cannot outnumber employees referred through the Union. (TR 840)

Some of SMG clients that perform work for events held at the Civic Center and the Convention Center, such as contractors Dorsett Productions Unlimited and Sound Associates, have their own staff employees but also use the Respondent Union's hiring hall for stagecraft employees as the agreement between SMG and the Respondent Union is still applicable. (TR 541, 543) Dorsett Productions has its own staff employees that assemble lighting and sound systems for events held at the Civic Center, and when requested, SMG provides stagecraft employees referred through the Respondent Union to work with employees of Dorsett Productions. (TR 816-817). Likewise, contractor Sound Associates has its own staff employees, including riggers, stagehands, fork operators, and lighting and sound technicians, that assemble lighting and sound equipment at the Civic Center and the Convention Center with the assistance of stagecraft employees referred by the Respondent Union.

Leslie Hayden James, a communications specialist with Alabama Power who handles arranging meeting places for Alabama Power, testified Alabama Power has no agreement with the Respondent Union for the referral of stagecraft employees. (TR 198, 750-751) James testified, however, that when Alabama Power hosts events at the SMG facilities, SMG requires Alabama Power to use stagecraft employees referred through Respondent's hiring hall to work vents held at the Mobile Civic Center. (TR 762)

**B. The Respondent Union Adopted Hiring Hall Rules Effective April 1, 2008 for the Operation of its Exclusive Hiring Hall with SMG and Gave Members Priority Referral Status Over Non-Members**

The Union has a five member committee that governs the operation of its hiring hall. The Business Representative, however, is responsible for the day-to-day operation of the hiring hall and is responsible for the supervision of any representatives who make referrals. (TR 252) Between

April 1, 2008 and October 11, 2009, when Philip Tapia served as business representative, he used an “A” Roster of Union members and a “B” Roster of non-Union members to make job referrals. (GC-6; TR 57, 137, 151, 252) Tapia started with the “A” roster to fill referral requests and only used the “B” roster if there was no employee on the “A” roster who had the skills necessary to do the work. (TR 253) Tapia admits the union members on the “A” Roster enjoyed a benefit of priority referral status not given to the non-union members on the “B” Roster. (TR 391)

Once Tapia called and offered an employee a referral, the employee had 24 hours to accept or decline the referral. (GC-5) The Union’s Hiring Hall Rules provide the business representative shall make a phone record noting the date and time an employee was called, whether the employee answered the telephone, or whether a message was left. (GC-5, Section VII-Referral Operations) Tapia did not make phone records as required by the Hiring Hall Rules. (TR 254)

**C. The Respondent Union Made Referrals Without Using Objective Criteria**

In addition to using a seniority roster that gave priority referral status to union members over non-union members, the Respondent Union also failed to use objective criteria when making referrals through its exclusive hiring hall arrangement with SMG.

**1. Parts of a Job Call**

**(a) Pre-Load In/Load-In**

The set-up of an event, which includes unloading trucks, moving equipment into the venue, assembling the equipment, and preparing for the performance is referred to as the load-in. (TR 243) Referral employees who work with audio and lighting, carpenters who assemble the set, riggers, and employees who work with wardrobes and props are typically referred to work the load-in phase of an event. (TR 244)

**(b) Performance**

At times, depending on the event, there may be a rehearsal prior to the actual performance. (TR 243) During the rehearsal, referral employees perform the tasks they will perform during the actual performance. The referral employees write cues, rehearse cues, record cues, make notes about the action and what scenery needs to be moved on or off-stage, and set sound and lighting levels. (TR 244) The actual show itself is referred to as the performance.

**(c) Load-Out**

The load-out happens after the end of the performance. During the load-out, referral employees disassemble equipment, pack the equipment into crates or boxes, and load the equipment back into trucks. The same craft employees who work the load-in and assemble a set usually return to disassemble a set in the load-out because it is easier for the employees who put a set together to take it apart. (TR 244) Therefore, when a referral employee is offered the load-in phase of an event, the same employee is generally offered the load-out work. The Union's Hiring Hall Rules provide that load-out referral calls are assigned first to referral employees who worked the load-in and staffed the show, second to those who only worked the load-in if they have not been assigned to another job, and third to others on the list to replace any in the first two groups who are unavailable. (GC-5, Section VII-Referral Operations; TR 245) If an employer is in a hurry and wants to speed things up in the load-out phase, the employer may request additional referral employees to work the load-out.

**2. The Respondent Union Discriminatorily and/or Arbitrarily Refused to Refer Randall H. Finch to Jobs in the Proper Order**

Randall Finch has worked in the stagehand industry for over twenty years and has been a member of the Union since October 9, 2006. (GC-6; TR 666) Finch served as a steward between 2006 and 2007, during Jonathan P. Mudrich's tenure as business representative. Finch also served

as secretary-treasurer for the Union between January 2012 and approximately June 2012. (TR 667)  
Finch has never served as business representative for the Union. (TR 725)

Randall Finch has experience and is qualified to perform audio (hooking up microphones, placing speakers and stage monitors, and operating a sound board), lighting (handling lights, running cables to lights, and running the light board), pin rail, stagehand (constructing and moving props and bringing sets in and out), and up and down rigging work. (TR 668)

There are four styles of up-rigging: free style, catwalk, scissors lift, and cherry picker. Freestyle rigging is very dangerous and involves an up rigger straddling a beam and wrapping cables around the beam and connecting cables and shackles to fixtures to points on the ground. (TR 139) Catwalk rigging involves an up rigger working from a steel grade walkway suspended in the air with steel rails on each side. (TR 140) Scissor lift rigging is safe and involves using a scissor lift machine to lift an up rigger to the rigging point. (TR 140, 142) Cherry Picker rigging is also relatively safe and involves an up rigger standing in the basket on the end of a long boom that maneuvers in a three hundred and sixty degrees radius. (TR 140, 142) At the Convention Center, up rigging is done using a scissor lift. (TR 143)

Finch is a qualified down rigger and does the work quite well (TR 146-147) Rex Wilson, who served the Respondent Union as President, Vice President, Sergeant-of-Arms, and Stage Manager/Steward, started performing rigging work in 1978, and worked as the head down rigger at the Wharf in 2008 and 2009, where he observed Finch perform down rigging work in the summer of 2008 and in 2009. (TR 137-138, 141, 145, 171) Respondent Union President "Bud" Cook appointed Wilson to serve as head rigger at the Wharf in March 2008. (TR 145) Wilson informed Cook he would do so but he would only do down rigging work. Between 2008 and 2009, Wilson only worked as a down rigger. (TR 145) To Wilson's knowledge, as long as a referral employee is

qualified to work as a down rigger, there is nothing in the Union's policies and procedures that would prevent the employee from having the option to select down rigging only. (TR 147)

Finch is on the First Hire Crew as a Stagehand for the Convention Center. (GC-7, 9) Since March 1, 2008, at the request of SMG, the Respondent Union has not referred Finch to work the annual Boat Show held at the Mobile Convention Center. (R-6; TR 370, 828) Since April 16, 2008, at the request of SMG, the Respondent Union has not referred Finch to work any events held at the Mobile Civic Center. (R-7; TR 372,-373, 830)

On September 25, 2009, Randall Finch filed the unfair labor practice charge in Case No. 15-CB-005924. (GC-1(g)) Three days later, on September 28, 2009, Business Representative Philip Tapia sent an email communication to Secretary-Treasurer Helen Megginson in which Tapia refers to Finch as "Rat Fink" (GC-17) Tapia notes in the email communication that the SMG date for Rat Fink is 11/22/05. Randall Finch's seniority date on one of the seniority rosters the Union provided to the General Counsel is 11/22/2005. (GC-18) Tapia conceded he sent the email communication to Megginson. (TR 212-213)

Philip Tapia served as the Respondent Union's appointed Business Representative between October and December 2011, and again between October 2012 and January 2013. (TR 264) During those times, Tapia designated Jerry Turner to make calls to referral employees for rigging work. (TR 264) Turner testified he uses the hiring hall seniority roster to make referrals. Randall Finch is the sixth employee with the most seniority on the roster Turner identified as the roster he used to make referrals. (GC-28)

Turner also created a separate list of riggers in 2011 (Rigger List). (GC-22; TR 413) Turner testified he created the Rigger List and that the riggers are arranged on the list according to seniority. (TR 414) Turner testified he used one of the hiring hall's seniority lists in 2011, to create the Rigger List, but Turner could not say which hiring hall list was used to arrange the riggers in

order of seniority on the Rigger List. Turner used the Rigger List to make referrals in 2011, and continued to use the Rigger List to make referrals until February/March/April 2012. (TR 415) Turner admits that prior to March 2012, he did not offer Randall Finch any referrals for rigging work. (TR 416)

The record evidence reflects the Respondent Union failed to refer Randall Finch in the proper order on the following jobs:

i. Order of Venus February 16, 2009 (GC-85)

The event was held at the Convention Center. Randall Finch worked the load-in and load-out phase of the event but not the performance. Like Finch, John Ken Brown and Wayne Stricker worked the load-in and load-out, but Brown and Stricker also worked the performance phase of the event. Tapia testified the performance involved employees climbing a scaffolding tower to operate a spotlight. (TR 275) Randall Finch testified he asked Tapia why he was not also referred to work the performance, and Tapia replied Finch was not at the Union meeting prior to the event and someone else who was at the meeting wanted the work and he, Tapia, referred the people who attended the Union meeting. (TR 673) Tapia testified that he didn't know if Stricker was present at a union meeting when Tapia offered Stricker the referral for the performance. (TR 275) However, John Ken Brown and Wayne Stricker attended the Union's monthly membership meeting on February 9, 2009, which was about 5 days prior to the event. Randall Finch did not attend the meeting. (TR 68-69)

ii. The Nutcracker Benefit Ball at the Convention Center-December 2010

As a stagehand on the First Hire Crew for the Convention Center, Finch, along with Tia Nixon and John Brown, is one of the first employees the Respondent Union is to call for work at the Convention Center. On December 21, 2010, Finch was at home watching the evening news when he saw a segment about the Nutcracker Benefit Ball and he saw employees who work through the

Union decorating and performing other work for the event. (GC-15A; TR 675) Finch was upset that work had started for the ball he normally works and he had not been referred. Finch decided to check the Respondent Union's Myspace webpage to see if the event was listed. Instead of a listing for the Nutcracker Benefit Ball, Finch found the following posting dated December 20, 2010: "New Webmaster! Randy Finch has been appointed our new webmaster. Please address all concerns to him. Thanks and good luck." (GC-15; TR 673) Finch did not make the posting, and he has never served as webmaster for the Union. (TR 674) Finch drafted a letter regarding the posting, and the letter, in pertinent part, reads: "My complaint: Why did I not get a call for the Nutcracker Benefit Ball load in or performance? Why was the work not posted on our website? Who wrote and why, the entry onto the website that stated: New Webmaster! Randy Finch has been appointed our new webmaster. Please address all concerns to him. Thanks and good luck..." (GC-15A; TR 675) Finch gave the letter to Philip Tapia directly or to the Respondent Union's hiring hall committee board, and Tapia response was that anyone could have made the posting. (TR 676) Tapia admitted during the hearing in this matter that only he and Helen Megginson, the Union's Secretary-Treasurer in December 2010, had access to and authority to post and update information on the Respondent Union's Myspace webpage. (TR 250) Finch was referred to work the performance on December 23, 2010.

iii. DPU/U of Mobile – November 10, 2011 (GC-147)

The event was held at the Convention Center. On November 10, 2011, Jerry Turner and Jon Mudrich were referred to work as riggers. Randall Finch was not referred to work the event. Tapia testified Finch was not referred because he had not requested to work as a rigger. (TR 304) Tapia testified a referral employee has to request to be referred as a rigger and has to show aptitude and ability. However Business Representative John Brown testified an employee qualified to work as a rigger should not have to ask to be referred for rigging work. (TR 447)

iv. Camelia Ball – November 21 -23, and 28, 2011 (GC-148)

The event was held at Ft. Whiting. The referred employees performed stagehand work involving decorations, lighting, and floral arrangements. Randall Finch and James Vacik were not referred to work the event. (TR 305) Leslie Wood and John Brown were referred to work the event. Brown is below Finch and Vacik on the seniority roster used at the time of the job. (GC-18) Leslie Wood's name is not listed on the seniority roster at all.

v. Alfa Showbiz – December 1, 2011 (GC-151)

The event was held at the Convention Center. The Respondent Union referred employees to perform stagehand work involving setting up lighting and video projection equipment. Randall Finch is on the First Hire Crew as a stagehand for the Convention Center, and therefore is one of the first employees the Respondent Union is supposed to call, yet Finch was not called for a referral to the job. (GC-7, 9; TR 327) Philip Tapia, Alvin Lee Abbett, and Roderick Beasley were referred to the job, and none of them are on the First Hire Crew for the Convention Center.

vi. DPU/Austal Holiday Party – December 8, 2011 (GC-152)

The event was held at the Convention Center. The Respondent Union referred employees to work as riggers. (TR 328) Business Representative Philip Tapia did not call Randall Finch for the referral. Tapia testified Finch was not qualified to work as a rigger because to his knowledge, Finch had not worked as a rigger for ten or fifteen years. (TR 328) Jerry Turner, who served as Vice President in December 2011, was referred to work the event.

vii. DPU/CHP Load-Out – December 29, 2011 (GC-154)

The event was held at the Convention Center. The Respondent Union referred employees to perform rigging and stagehand work. Randall Finch and James Vacik were not called for the referral. (TR 330) Tapia testified he did not know why Finch was not referred. Finch is on the First Hire Crew for the Convention Center as a stagehand, and therefore is one of the first employees the

Respondent Union is supposed call for the job. Kara Sylve and John Bridges were referred to work as stagehands although they are not on the First Hire Crew for the Convention Center.

viii . DPU/WBC Christmas – January 2, 2012 (GC-155)

The event was held at the Dauphin Way Baptist Church. The Respondent Union referred employees to perform rigging and stagehand work. Randall Finch was not called for the referral. Tapia testified Finch was not qualified to work as a rigger. Tapia also testified the employees referred were present at the Civic Center when he received the call at about 6:00 p.m. to staff the job for 8:30 p.m. and 9:00 p.m. the same day. (TR 331) Tapia did not refer to any seniority list when he made the referrals. Tapia testified there was no way he could have complied with the Hiring Hall Rules that require referrals be given a 24-hour period in which to respond and accept employment. (TR 376) Nonetheless, Tapia acknowledged it only takes a couple of seconds to call an employee on the seniority roster. (TR 394)

ix. Gulf States Horticulture – January 14-17, 2012 (GC-159)

Beginning in mid-January 2012, John Kenneth Brown started making referrals as the business representative. (TR 337, 429) Once an employee is referred to work the load-in for an event, typically the same employee is referred to work the performance and the load-out. (TR 434)

The Gulf States Horticulture event was held at the Convention Center. The Respondent Union referred employees to perform stagehand work, including setting up tables and chairs and installing carpet, pipes and drapes. (TR 430) Brown consulted the First Hire Crew list (GC-9) and for Saturday, January 14, referred himself, Tia Nixon, and Randall Finch because they are all on the First Hire Crew for the Convention Center. Brown then consulted the seniority list call sheet to refer the other employees. James Vacik was referred to work as a stagehand for the load-in on Sunday, January 15. (TR 433) Brown testified Vacik and Finch were not referred to work the event on Monday, January 16 and Tuesday, January 17, because they went to work an event at the

Exploreum. (TR 445) The Exploreum job, however, started on Friday, January 20, 2012, which was after the Gulf States Horticulture job finished on January 17. (GC-160; TR 446) Brown testified he thinks the Exploreum job started on a Monday, but he was not sure. (TR 447) Respondent did not introduce any additional timesheets to establish the Exploreum job started on any date other than Friday, January 20. Furthermore, Brown referred Leslie Wood to work as a stagehand on Tuesday, January 17. (TR 445) Wood's name is not on the seniority list call sheet. (GC-27)

x. Exploreum – January 20-25, 2012 (GC-160)

The event was held at the Exploreum. The Respondent Union referred employees to load-in a dinosaurs traveling exhibit. (TR 448) Randall Finch and James Vacik were referred to work the load-in on January 20 and 23. Finch and Vacik were not referred to work the event on January 24 and 25. Brown testified Finch and Vacik went to work on a different event. (TR 435) Brown, however, did not specify what event and the Union did not present any timesheets to establish Finch and Vacik worked at other events on January 24 and 25.

xi. DPU/CHP Load-In – January 28, 2012 (GC-161, 162)

The event was held at the Convention Center by the Church of His Presence. The Respondent Union referred employees to perform rigging and stagehand work. Business Representative John Brown testified he consulted the First Hire Crew list (GC-9) and the seniority list call sheet (GC-27) and selected employees who were not already working somewhere else. Randall Finch is on the First Hire Crew for the Convention Center as a stagehand, and therefore is one of the first employees the Respondent Union should call, but Finch was not referred. Four employees were referred as stagehands. Brown did not testify that he specifically called and offered Finch the referral. The seniority list call sheet has a section for notes next to each employee's name and phone number. (TR 437) Brown testified he is not sure if he documented who was called and

the response he received or who was not called. (TR 436) The Union did not introduce into evidence any seniority list call sheets with notations of who was called and what was the given response.

xii. Jam Fest Nationals – February 3, 2012 (GC-163)

The dance competition event was held at the Convention Center. The Respondent Union referred employees to perform rigging and stagehand work. Business Representative John Brown testified he consulted the First Hire Crew list (GC-9), and the seniority list call sheet (GC-27), and selected employees for referrals. Randall Finch is on the First Hire Crew for the Convention Center as a stagehand, and therefore is one of the first employees the Respondent Union should call, but Finch was not referred. Eight employees were referred as stagehands. Brown testified he is not sure if he documented who was called and the response he received. (TR 437) The Union did not introduce into evidence any seniority list call sheets with notations of who was called or what was the response.

xiii. DPU Easter Play – February 6, 2012 (GC-165)

The event was held at the Dauphin Way Baptist Church. Business Representative John Brown testified that Vice President Jerry Turner called him after the event was done, and told him to bill Dorsett Productions for a rigging consultation (TR 437-438) The Respondnet Union did not present evidence it made any attempts to follow the seniority roster for the job. Jerry Turner, who testified during the hearing in this matter, offered no explanation for not following the seniority roster to for the job.

xiiii. DPU Stage Take Down – February 6, 2012 (GC-166)

The event was held at Mobile College. Business Representative John Brown testified that Vice President Jerry Turner called him after the event was done, and told Brown Dorsett Productions asked him to work the event. (TR 437-438) The Union did not present evidence it

made any attempts to follow the seniority roster for the job. Jerry Turner, who testified during the hearing in this matter, offered no explanation for not following the seniority roster for the job.

xv. MAMGA Grand Marshall Ball – February 17, 2012 (GC-167)

The event was held at the Convention Center. The Respondent Union referred employees, including Randall Finch, to work as riggers, stagehands, and spotlight operators. However, Jacob Snider and James Murphy were referred to work as stagehands and their names are not on the seniority list call sheet Business Representative John Brown testified he used to make the referrals. (GC-27) Brown testified he is not sure if he documented who was called and the response he received, but most likely he did. Brown further testified he turned over any such documents to the Respondent Union's counsel. (TR 438) The Respondent Union did not introduce into evidence any seniority list call sheets with notations of who was called and what was the given response.

xvi. CHP/DPU – March 23, 2012 (GC-168)

The event was held at the Convention Center. Business Representative John Brown testified he received a call from Mike Dorsett, owner of Dorsett Productions, at 9:25 a.m., and Dorsett stated he needed help on a set-up at 10:00 a.m. that morning day. Brown then called Casey Cowan, who works for Dorsett Productions and is also a member of the hiring hall, and asked Casey to take her husband, Peter Cowan, with her so he could work the event as a referral employee for the Respondent Union. Brown testified he only had thirty-five minutes to refer an employee and it was not possible for him to comply with the Hiring Hall Rules that required him to give a referral employee twenty-four hours to accept a referral. (TR 447) Brown did not testify that he attempted to call any employees in accordance with the seniority list call sheet. Brown conceded during questioning by the General Counsel that he had enough time to call Casey Cowan to get Peter Cowan to the job. (TR 447) Peter Cowan, however, is not on the seniority list call sheet (GC-27) because he was not using the hiring hall at the time the list was created. (TR 439) Brown testified

he does not know when the seniority list call sheet was created. Peter Cowan worked the event as a new hire and was paid by SMG at the new hire rate. (TR 440) Moreover, Brown did not testify that Peter Cowan was on a stand-by roster as provided in the Hiring Hall Rules for quick calls. (GC-5, pg. 7, Section VII)

**3. The Respondent Union Discriminatorily and/or Arbitrarily Refused to Refer James Vacik to Jobs in the Proper Order**

James P. Vacik has worked in the stagecraft industry since 1994, and has been a member of the Union since November 13, 2006. (GC-6, 18) Vacik completed an Employee Referral Hiring Hall Resume Application and gave it to the Union. (GC-11; TR 567-568). Vacik noted in the application his theatrical experience as an audio/visual technician, his stage performance experience, his theatrical construction experience, and his experience as a rigger. Vacik has performed audio work, including wireless microphones, in the Civic Center arena and theater. (568) Vacik has also performed audio work in which he operated an analog audio console, and he has operated the digital audio console at the Saenger Theatre for a symphony.<sup>2</sup> (TR 570) Additionally, Vacik has performed up rigging work from a scissor lift and cherry picker and he has worked as a down rigger but he does not consider himself a rigger. (TR 571) Vacik testified the information in the application reflects he is qualified to work as a stagehand and rigger. (TR 614)

Business Representative Philp Tapia testified that based on his years of experience in the industry, he did not consider James Vacik qualified to perform highly technical microphone placement, selection, and operation work. Tapia described the “highly technical” audio work as setting up wired and wireless microphones, sound systems, and speakers and making sure the

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<sup>2</sup> Gerald Mitchell Teeple, the production and operations manager at the Saenger Theatre, contacts the Union for stage craft employees. (TR 791) Teeple testified he is not aware of Vacik operating the sound board at the theatre. However, Teeple acknowledged he performs many duties, including making sure dressing rooms are stocked and cleaned, meeting trucks at the back door, and making sure everything is unloaded and put on stage safely, and therefore he is not in the audio area during an entire event. Teeple testified he relies upon Audio Technician Josh Murray to handle the audio aspects of an event. (TR 797) The Respondent Union did not call Josh Murray as a witness during the hearing in this matter.

equipment operates properly and noise free because wireless microphones are susceptible to interference. (TR 325) Troubleshooting to correct a noise or a buzz in the audio system merely involves changing locations of the transmitter or receiver, verifying the power is stable, verifying the cable connections are in good condition and working properly. (TR 326) Tapia testified he has worked with Vacik and observed Vacik perform microphone audio work on jobs, and over twenty years, Tapia states he has only seen Vacik do unsatisfactory work about twelve times: an average of less than one unsatisfactory audio job of the many that are performed each year. (TR 327)

Tapia testified there was a seniority list used for the period October through December 2011, that looked similar to the call log but the employees were listed in chronological order by service date rather than alphabetically. (TR 312) The General Counsel presented Tapia several lists Respondent provided as seniority lists (GC-18, 19, 26 and 27) and requested that Tapia identify and/or produce the seniority list used to make referrals between October and December 2011. (TR 313-315) Tapia eventually identified GC-18 as the seniority list he most likely used to make referrals between October and December 2011. (TR 317) Tapia also identified the seniority list used to make referrals after September 15, 2012. (GC-28; TR 317) Tapia admitted the call log (GC-27) may not match the September 15, 2012 seniority list, and in fact it does not match. (GC-28) (TR 321)

The record evidence reflects the Respondent Union failed to refer James Vacik in the proper order on the following jobs:

- i. Alabama Power at the Grand Hotel – October 4, 5, and 7, 2011 (GC-143)

The event was held at the Grand Hotel in Point Clear, Alabama. The load-in was done on Tuesday, October 4 and Wednesday, October 5, and the load-out was done on Friday, October 7. The Union referred employees to perform stagehand work involving setting up sound, light and staging for a business meeting. (TR 300) James Vacik was not referred to work the event. (TR

572) Vacik was available to work the event but neither Tapia nor Helen Megginson offered Vacik the referral. (TR 572) Most of the thirteen employees referred to work the event, except Helen Megginson, had less seniority than Vacik. (TR 572)

Philip Tapia testified Vacik had a conflict and was not available to work the Alabama Power event because he was working the BayFest 2011 event on October 4 and 5. (TR 301) Vacik, however, did not work the BayFest 2011 event on Tuesday, October 4 or Wednesday, October 5. (TR 573) Vacik worked the Miller Stage at the BayFest 2011 event for five hours on Thursday, October 6, eighteen hours on Friday, October 7, and twenty hours on Saturday, October 8. (R-8; TR 301, 380-381)

ii. BayFest-Miller Stage-October 2011 (GC-144; R8)

The BayFest Miller Stage event was held on the following dates: Wednesday, October 5; Thursday, October 6; Friday, October 7; Saturday, October 8, Sunday October 9, and Monday, October 10. James Vacik is generally assigned each year to work the Miller Stage at BayFest. Vaick was available to work on Wednesday, October 5, but he was not referred. (TR 573) Vacik was referred to work the event on Thursday, Friday, and Saturday and worked a total of about forty-five hours (TR 397, 595, 622) Vacik declined the referral for Sunday. (TR 302)

iii. Space Shuttle Out – October 5, 2011 GC-145)

The event was on Wednesday, October 5, at the Exploreum. The referred employees packed up an exhibit and prepared it for shipping, which is considered stagehand work. (TR 303-304) James Vacik was not referred to work the event. Tom Walker and Sydney Benningfield were referred to work the job. Benningfield has less seniority than Vacik on the seniority roster used at the time of the job. (GC-18) Walker's name is not listed on the seniority roster at all.

iv. Camelia Ball – November 21 -23, and 28, 2011 (GC-148)

The event was held at Ft. Whiting. The referred employees performed stagehand work involving decorations, lighting, and floral arrangements. Randall Finch and James Vacik were not referred to work the event. (TR 305) Leslie Wood and John Brown were referred to work the event. Brown has less seniority than Finch and Vacik on the seniority roster used at the time of the job. (GC-18) Leslie Wood's name is not listed on the seniority roster at all.

v. Go Daddy Learn to Read – November 30, 2011 (GC-149)

The event was held at the Civic Center Theater. James Vacik was not called and offered a referral to work the event. (TR 305) The referred employees performed stagehand, house audio, and house lighting work. Business Representative Philip Tapia testified Alvin Lee Abbett received a referral because of his ability to work with audio wireless microphones and his ability with video projection equipment.

Tapia, when asked if Alvin Lee Abbett has more or less seniority than James Vacik, testified he had to consult the seniority list used to make the referrals for the job. (TR 305-306) Tapia could not, however, identify which list was used to make the referral. Tapia testified that one alphabetical list was used to compile a seniority list in 2009, 2010, or 2011. (GC-26; TR 307) Tapia identified another list as a call log used since about June 2011, to notate the date and time calls were made to referral employees and whether the employee answered and accepted or rejected the referral or whether a message was left for the employee. (GC-27; TR 308) Tapia testified call logs should exist for any job referral made after June 2011, yet Tapia conceded he did not have a call log to show who was called for this October 2011 event. Moreover, Tapia testified he could not say the Union had call logs for any of the events employees were referred to, including jobs dating back to the Alabama Power job done on October 4 and 5, 2011. (TR 309) Tapia testified President Emanuel "Bud" Cook gave him the call log form when Tapia assumed the business representative position

again in October 2011, and Cook told Tapia the call log form had been created about two or three months earlier. (TR 311) The Union did not introduce into evidence any call logs for any of the jobs employees were referred to between October 23, 2008 and the date of the hearing in this matter.

vi. Old Shell Road School Christmas – November 30, 2011 (GC-150)

The event was held at the Civic Center Theater. Business Representative Philip Tapia testified that James Vacik was not called and referred because he did not consider Vacik qualified to perform the work. (TR 321) Alvin Lee Abbett, who has less seniority than Vacik, was referred to work the load-in on November 30 as a stagehand, the rehearsal and performance on December 1, as a deck electrician, and the load-out on December 1, as a stagehand. Tapia acknowledged the Union had Vacik complete a hiring hall application in March 2008, in which Vacik noted his experience and qualifications as a stagehand, yet Tapia testified the Union does not use the hiring hall applications to make referrals other than to get a telephone number. (GC-11, 12, and 20; TR 322-323)

vii. Charlie Brown Christmas – December 17, 2011 (GC-153)

The holiday concert event was held at the Civic Center Theater. The Respondent Union referred employees to perform stagehand, house audio, house lighting, and deck work. (TR 328) James Vacik was not called for the referral. There was no question of whether Vacik was qualified to perform the work. (TR 329) Business Representative Philip Tapia testified at the hearing that Vacik's qualifications never came up, yet Tapia acknowledged that in his sworn affidavit prepared prior to the hearing he testified that he did not call Vacik because Vacik was not qualified. (TR 329) Anthony Nervine was referred to work as a stagehand for the load-in and the load-out and as a deckhand for the performance. Nervine is on the First Hire Crew for the Civic Center Theater for

house lighting, not as a stagehand. (GC-9) Nervine has less seniority than Vacik on the seniority rosters. (GC-18, 19, 26, 27, and 28)

viii. DPU/CHP Load-Out – December 29, 2011 (GC-154)

The event was held at the Convention Center. The Respondent Union referred employees to perform rigging and stagehand work. James Vacik was not called for the referral. (TR 330) Business Representative Philip Tapia testified he does not believe Vacik had the required seniority. Kara Sylve and John Bridges were referred to work as stagehands and they are not on the First Hire Crew for the Convention Center. Sylve's name is not on the seniority roster used at the time of the job. (GC-18)

ix. Senior Bowl – January 7, 2012 (GC-157)

The event was a talent contest to see who would sing the national anthem at the Senior Bowl. The Respondent Union referred employees to perform house lighting and house audio work. James Vacik was not called for the referral. Initially Business Representative Philip Tapia testified Vacik was not qualified to perform the work. Tapia testified the Civic Center purchased a new digital audio console in June 2012, and that Vacik is not qualified to operate the console. (TR 333) The job, however, was on January 7, 2012, before the purchase of the new digital audio console. (GC-157; TR 335) Alvin Lee Abbett was referred to perform house audio work. Abbett's seniority date on the list Tapia identified for the referral is March 6, 1998, which is lower than Vacik's May 1, 1994 seniority date on the same list. (GC-18, 26; TR 336) Tapia did not have any documents that establish Abbett's qualifications to perform house audio work or that show Abbett is more qualified than Vacik to perform house audio work. (TR 336) Tapia testified he has worked with Abbett since the early 1990s and that Abbett performs the house audio duties better than James Vacik. Tapia also testified Abbett owns a sound system company called Absolute Entertainment that provides sound reinforcement at various venues and events around the Mobile area. (TR 376-

377) Tapia testified, to his knowledge, Vacik does not operate a sound business similar to Abbett. Tapia conceded, however, owning a business is not the only way for an employee to be qualified to perform house audio work. (TR 395)

x. Gulf States Horticulture – January 14-17, 2012 (GC-159)

As noted above, Business Representative John Brown testified Vacik was not referred to work the event on Monday, January 16 and Tuesday, January 17, because he went to work an event at the Exploreum. (TR 445) However, the Exploreum job started on Friday, January 20, 2012, which was after the Gulf States Horticulture job was finished on January 17. (GC-160; TR 446) Furthermore, Brown referred Leslie Wood to work as a stagehand on Tuesday, January 17. (TR 445) Wood's name is not on the seniority rosters used at the time of the job. (GC-18, 27)

xi. CHP Dorsett – February 5, 2012 (GC-164)

The event was held at the Convention Center. The Respondent Union referred employees to perform rigging and stagehand work. James Vacik was not referred to work the job. Business Representative John Brown referred himself, Charles Motykiewicz, and Leslie Wood to work as stagehands. Brown and Motykiewicz are listed below Vacik on the seniority list call sheet used at the time of the job, and Leslie Wood's name is not on the seniority list. (GC-27) Brown testified he is not sure if he documented who was called and the response he received, but most likely he did. Brown further testified he turned over any such documents to the Respondent Union's counsel. (TR 438) The Union did not introduce into evidence any seniority list call sheets with notations of who was called and what was the given response.

**IV.**  
**ARGUMENT AND AUTHORITIES**

ALJ Marcionese's finding that the Respondent Union does not operate an exclusive hiring hall with SMG ignores the record evidence that SMG signed a collective-bargaining agreement

(CBA) in which it recognizes the Respondent as the sole and exclusive bargaining agent for all stagehands, riggers, sound, and wardrobe personnel (stagecraft employees), and that SMG has a practice of using the Respondent Union as the primary source for stagecraft employees. The instant case is analogous to the Board's decision in *Denver Theatrical Stage Employees' Union No. 7*, 339 NLRB 214 (2003). In *Denver Theatrical Stage Employees' Union No. 7*, the union had an agreement with SMG that provides SMG will "provide competent, qualified and technically skilled intermittent Stage Hands to the satisfaction of the Company." The Board, noting that SMG regularly used the union as its source for hiring stagehands referred to it by the union, affirmed the administrative law judge's findings and conclusions that SMG has a practice of using the union as the exclusive first source for hiring stagehands. *Id.* at 216. In the instant case, the evidence reflects that SMG, as it did in *Denver Theatrical Stage Employees' Union No. 7*, regularly uses the Respondent Union as its source for hiring stagecraft employees. Accordingly, the Board should reach the same conclusion that SMG has a practice of using the Respondent Union as the exclusive first source for hiring stagecraft employees, and as such, the Respondent operates an exclusive hiring hall with SMG.

**A. The ALJ Erred in his Finding that the Respondent Union Does Not Operate an Exclusive Hiring Hall with Respect to SMG Worldwide. [Exception Nos. 1-8 and 16-17]**

The existence of an exclusive hiring hall arrangement may be shown by express contractual provisions or by practice. *Teamsters Local 174 (Totem Beverage)*, 226 NLRB 690 (1976). An exclusive hiring hall is one in which the union is the primary, but not necessarily the only, source of employees for an employer. *Teamsters Local 328 (Blount Bros.)*, 274 NLRB 1053, 1056 (1985) (hiring hall is exclusive whereby employer is limited by period of time before it can go outside the hall to solicit work). A hiring hall can be exclusive even though employers using the hiring hall use some of their own employees on jobs with employees referred through Respondent Union. See

*Carpenters Local 608 (Various Employers)*, 279 NLRB 747, 754 (1986); *Bricklayers Local 8 (California Mason Contractors)*, 235 NLRB 1001, 1003 (1978). The record evidence establishes that the Respondent Union, by agreement and by practice, has an exclusive hiring hall arrangement with SMG.

**1. The Hiring Hall is Exclusive by Agreement**

The CBA the Respondent Union has with SMG provides that SMG recognizes the Respondent as the sole and exclusive bargaining representative for employees who perform stagehand, rigging, and wardrobe work at SMG Mobile facilities: the Mobile Civic Center and the Mobile Convention Center. (GC-2, 13) The agreement also provides, in pertinent part, that “in the event an electrician is needed to perform general maintenance or repair work in the entertainment and theatrical areas, the Employer may subcontract such work or may assign a qualified regular employee of the Mobile Civic Center to perform the necessary work,” which indicates SMG recognized it is required to use the Union as the primary source for stagecraft employees for jobs not performed by SMG’s core complement of employees at the SMG Mobile facilities. This understanding is further reflected in General Manager Jay Hagerman’s testimony that Paul Bucannon, the stage manager at the Civic Center, contacts the Respondent Union for stage craft employees as often as SMG has events requiring such employees, which is sometimes daily. Hagerman testified that Bucannon contacts the production manager for events to be held at the Civic Center; determines how many and what craft employees the event may need, and then contacts the Respondent Union and requests the necessary employees. (TR 819, 844) Consistent with General Manager Hagerman’s testimony that SMG contacts Respondent Union when it needs stagecraft employees, Respondent’s current President and former Business Agent Philip Tapia and Charging Party and former Business Agent James Vacik both testified they interpreted the CBA to mean Respondent served as the primary source of stagecraft employees for SMG and its clients and

contractors who use the Civic Center and the Convention Center (TR 232, 554, 616). Moreover, Respondent, by the testimony of Tapia during the hearing, admitted that SMG operates the Mobile Civic Center and Convention Center and that for SMG, the Respondent Union operates an exclusive hiring hall through which it makes referrals for employment at SMG's Mobile facilities. (TR 740-741)

The record evidences establishes that not only does SMG use the Respondent Union's hiring hall as a primary source for stagecraft employees, SMG also requires clients and contractors who use the Civic Center and Convention Center and who need to supplement their staff employees to acquire needed stagecraft employees through the Respondent Union's hiring hall. For instance, Leslie James, who handles planning events for Alabama Power Company, testified without contradiction that when Alabama Power hosts events at the Civic Center, it is required to use stagecraft employees referred through the Respondent Union. (TR 762) Additionally, the evidence reflects that other SMG clients and contractors, such as Dorsett Productions, Sound Associates, and Zimblich Brothers Florists, also are required to use stagecraft employees referred through the Respondent Union if they need to supplement their core staff employees. (GC-25; TR 541, 543)

In situations such as those present in this case where the totality of the evidence reflects that SMG contacts the Respondent Union for stagecraft employees to work at SMG's Mobile facilities, the Board has found an exclusive hiring hall arrangement exists by virtue of the parties' conduct in interpreting the agreement. *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690 (1976)(finding that there was an exclusive hiring hall given totality of the circumstances and the interpretation given and practice of parties operating under contract provision that requires company to give consideration to hiring employees nominated by referral hall). Indeed, the language in the CBA that SMG "recognizes the Union as the sole and exclusive bargaining agent for all Personnel [stagehands, riggers, sound, wardrobe]" would be rendered meaningless by any interpretation other

than SMG intended to seek such employees first and primarily through the Respondent Union's hiring hall, particularly since Respondent "submitted proof and the Employer is satisfied that the Union has been designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." (GC-2, 13, pp. 2 and 3, Article 1.1)

The fact there are limited circumstances when SMG and its clients and contractors do not contact the Union for stagecraft employees, such as when their own core staff employees can perform some of the work, does not negate a finding of exclusivity. *Carpenters Local 608 (Various Employers)*, 279 NLRB 747 (1986) In *Carpenters Local 608*, the union's agreement with various employer associations permitted the employers to select half the employees on a jobsite and the union selected the other half of employees. The union argued that its hiring hall was non-exclusive in nature because in order for such an arrangement to be considered exclusive, "all" hiring authority must be reserved to the union. The Board, in agreement with the administrative law judge, concluded that an exclusive hiring hall can also exist even where an employer retains the right to bring in a certain number or percentage of employees onto a job. *Id.* at 754. Moreover, the Board has found an exclusive hiring hall arrangement exists even when production companies bring their own wardrobe personnel to work at the Broadway in Chicago where the collective-bargaining agreement provides the union agrees to furnish competent wardrobe attendants satisfactory to the employer to perform work as required. *Theatrical Wardrobe Union Local 769 (Broadway In Chicago)*, 349 NLRB No. 12 (2007).

Accordingly, it is respectfully urged that the Board, after reviewing the cumulative record evidence, conclude that the ALJ erred in his finding that the Respondent Union does not operate an exclusive hiring hall arrangement with SMG by agreement.

## 2. The Hiring Hall is also Exclusive by Practice

The Board has found that an exclusive hiring hall can lawfully be based on oral understandings, course of conduct, or practice between the parties. *Teamsters Local 200 (Bechtel Construction)*, 357 No. 192 (2011) citing *Longshoremen ILWU Local 19 (Albin Stevedore Co.)*, 144 NLRB 1443 (1963); *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB 777 (1984) enfd. Mem. 782 F.2d 1030 (3d Cir. 1986); *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690 (1976); *Teamsters Local 293 (Beverage Distributors)*, 302 NLRB 403 (1991). As noted above, the cumulative record evidence demonstrates that SMG's conduct shows it recognized the Union as the first and primary source of stagecraft employees for events held at the Mobile Civic Center and the Mobile Convention Center. Further, SMG requires clients and contractors that use its Mobile facilities, such as Dorsett Productions, Sound Associates, and Zimblich Brothers Florists, to also use the Union as the primary source of stagecraft employees to supplement their core staff of employees for events held at SMG's Mobile facilities. The Board has held that where there is consistency in hiring employees referred by the union and where the union is aware of such practice, an exclusive hiring arrangement exists. *Teamster Local 328, (Blount Brothers)*, 274 NLRB 1053, 1057 (1985) citing *Plumbers Local 17 (FSM Mechanical)*, 224 NLRB 1262, 1263 (1976); *Carpenters Ohio Valley Council (Catalytic, Inc.)*, 267 NLRB 1223, 1226 (1983).

Significantly, in *Plumbers Local 17*, the collective-bargaining agreement provided the union will be a source of employees but the employer will have the sole right concerning who is hired. The administrative law judge reasoned that the referral system did not appear to be more than an availability service for use of out-of-work members in need of work and concluded the union did not operate an exclusive hiring hall. The Board disagreed. The Board noted it was the consistent practice of employers that signed the agreement to hire individuals referred by the union and the union was aware of the practice. The Board concluded that in reality, the union had an unwritten

exclusive hiring hall arrangement with the employers. The Board's reasoning in *Plumbers Local 17* is also applicable in the instant case. Based on the uncontroverted record evidence that SMG consistently contacts the Respondent Union for stagecraft employees and hires the employees referred by the Respondent, the Board should conclude that the Respondent Union has an exclusive hiring hall arrangement with SMG.

ALJ Marcionese's decision to "credit the testimony of Hagerman over any contradictory testimony offered by the Charging Parties that would suggest that an exclusive hiring hall arrangement existed in practice" is in contravention to the record evidence. (ALJD 7 at 41-43) As such, the Board should base its findings on a *de novo* review of the entire evidentiary record. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950). In doing so, the Board should note that the testimony of Leslie James, who the Respondent presented as a witness, corroborates the testimony given by Charging Party James Vacik and Respondent Union President and former Business Agent Philip Tapia, which establishes the Respondent Union served as the primary source of stagecraft employees for SMG. Despite this corroboration, ALJ Marcionese inexplicably carves out a portion of Hagerman's testimony and ignores other testimony, such as SMG's Manager Paul Bucannon contacting the Respondent on almost a daily basis for the referral of stagecraft employees, to support his finding that the Respondent did not have an exclusive hiring hall arrangement with SMG.

However, the record evidence, including the testimony given by Jay Hagerman, establishes that the only way stagecraft employees are hired to work events hosted at the Mobile Convention Center and the Mobile Civic Center, both of which are operated by SMG, is to be referred through the Respondent Union or 1) be part of SMG's core employee crew; 2) be part of a crew traveling with a production that uses the Convention or Civic Center for an event, or 3) be an employee of one of SMG's clients or contractors who perform certain tasks at the Convention or Civic Center. It

is critical to note that individuals who are employed by and travel with a production company that visits the SMG facilities are not employees of SMG. Likewise, SMG's clients and contractors are not employees of SMG. The very essence of SMG utilizing the services of a contractor to perform work at its Mobile facilities is not the same as SMG hiring an employee to perform stagecraft work at the SMG facilities. The record does not contain any evidence that SMG hires stagecraft employees directly off the street who were not referred through the Respondent Union's hiring hall.

Given that the only way stagecraft employees not employed by SMG or a traveling production company or a SMG client/contractor are hired to work events hosted at SMG's facilities is to go through the Respondent Union's hiring hall, it is urged that the Board conclude Respondent Union operates an exclusive hiring hall with SMG, and as such, it cannot discriminatorily and/or arbitrarily apply its hiring hall rules in making referrals to SMG. To apply the reasoning of the ALJ that the Respondent's hiring hall is not exclusive when the totality of the evidence establishes at the very least the Respondent Union operates a *de facto* exclusive hiring hall for SMG will result in an effect on employees not envisioned within the meaning of the Act. Indeed, in unionized work settings, it is common for work performed by union employees to be subcontracted out and in those situations the unionized employees do not lose protection of the Act just because part of the work they perform is subcontracted out. The same concept should be applicable in this case.

Moreover, to the extent ALJ Marcionese cites the Board's decision in *Development Consultants, 300 NLRB 479 (1990)*, to support his decision that Respondent Union does not operate an exclusive hiring hall with SMG; the ALJ's dismissal of SMG's alleged discrimination in making referrals based on an applicant's non-membership in the union or based upon the Respondent's failure to follow its hiring hall rules or other objective criteria in making referrals to SMG is misplaced. (ALJD 8 at 38-46) In *Development Consultants*, the union had a collective-bargaining agreement with various contractors that provided the union shall be recognized as the principal

source of laborers and shall be given the first opportunity to refer qualified applicants for employment. The Board found that the contractual language was subject to the interpretation that it only requires the union has the first opportunity to refer applicants when the contractor decides to use the hiring hall, and in light of the testimony of several contractors that they hired laborers off the street without using the union's hiring hall and without objection from the union, the Board concluded there was no exclusive referral system by practice. *Id.* at 480. The instant case, however, is distinguishable from *Development Consultants*.

In the instant case, the Respondent Union's CBA is with SMG, the sole employer who operates the Mobile Convention Center and Civic Center, and there is no record evidence that SMG has hired any stagecraft employees directly off the street who were not referred by the Respondent Union. Rather, the record evidence reveals that Jay Hagerman testified in absolute terms that SMG contacts the Respondent for stagecraft employees to work events at its Mobile facilities. The fact that SMG even requires clients and contractors who use its Mobile facilities to hire needed stagecraft employees through the Respondent's hiring hall further establishes SMG's understanding of its exclusivity in the CBA with the Respondent and by practice that stagecraft employees must be hired through the Respondent Union's hiring hall.

Accordingly, it is respectfully urged that the Board, after reviewing the CBA, the testimony regarding how the CBA has been interpreted, and the practice of SMG consistently contacting the Respondent for the referral of stagecraft employees, conclude that the ALJ erred in his finding that the Respondent Union does not operate a *de facto* exclusive hiring hall arrangement with SMG. See *Teamsters Local 174 (Totem Beverages)*, *supra*.

**B. The ALJ erred in his finding that the Respondent Union did not discriminatorily and/or arbitrarily make referrals to Charging Party Randall Finch [Exception Nos. 9-12, 15, and 18]**

The Respondent Union's departure from clear and unambiguous referral procedures when it refused to refer qualified employees violated Section 8(b)(1)(A) and 8(b)(2) of the Act. *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 200 NLRB 147 (1975); *Plumbers Local 44 (Welded Construction)*, 313 NLRB 1 (1993). As set forth above, the evidence reflects that the Respondent Union has an exclusive hiring hall arrangement with SMG. Even if Respondent operates a non-exclusive hiring hall for employers other than SMG, it still unlawfully retaliated against Randall Finch and James Vacik for their participation in Section 7 activity. *Teamsters Local 17 (Universal Studios)*, 251 NLRB 1248, 1257 (1980); *Carpenters Local 537 (E.I. DuPont)*, 303 NLRB 419 (1991). A union may not retaliate against employees for engaging in protected activity. *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174 (2000). Moreover, the Respondent operated its hiring hall in an arbitrary manner when it, without using objective criteria, failed to refer Randall Finch and James Vacik in the proper order to jobs they were qualified to perform.

The record evidence reflects that Randall Finch was determined to have the Respondent abide by its Hiring Hall Rules. Finch had to file an unfair labor practice charge with the Board to obtain a copy of the agreement between the Union and SMG effective October 1, 2006. (GC-2; TR 729, 730) On September 25, 2009, Finch filed the unfair labor practice charge in Case No. 15-CB-005924. (GC-1(g)) Three days later, on September 28, 2009, Respondent's Business Representative Philip Tapia sent an e-mail communication to Respondent's Secretary-Treasurer Helen Megginson in which Tapia refers to Finch as "Rat Fink" (GC-17) It is well known in labor circles the term "rat" is used when a person does not align with the wishes of a union. Tapia initially denied he uses the term "rat," yet he ultimately admitted he sent the e-mail communication to Megginson. (TR 212-213)

Further, about December 20, 2010, Respondent posted on its Myspace webpage “New Webmaster! Randy Finch has been appointed our new webmaster. Please address all concerns to him. Thanks and good luck.” (GC-15; TR 673) Finch had never served as webmaster for the Union. (TR 674) Tapia conceded during the hearing in this matter that only he and Helen Megginson had access to and authority to post and update information on the Union’s Myspace webpage. (TR 250) Collectively, the evidence reflects the Respondent Union was not very fond of Finch.

Respondent’s Hiring Hall Rules provide, in pertinent part, any cutbacks, crew reductions and/or layoffs by an employer shall be done in reverse seniority order of hire on a first hired will be last released basis. (GC-5) Business Representative Philip Tapia acknowledged the intent of the provision is for cutbacks and crew reductions to be handled in reverse seniority of hiring. (TR 246) Yet, Tapia admitted there were occasions when an employer made requests to make reductions by department and employees were allowed to switch crafts and bump other employees. (TR 356) Respondent never amended its Hiring Hall Rules to reflect cutbacks and crew reductions could be done by department, so Respondent never informed employees of any change.

Additionally, Respondent’s Hiring Hall Rules provide, in pertinent part, “[t]he Referral Hiring Hall shall have a crew(s) assembled consisting of the *most skilled and experienced* members of the Hiring Hall, known as the “First Hire Crew,” and *shall be the first members referred for hire to all available work offered by an employer at the crews assigned venue.*” (GC-5, Section V-First Hire Crews) (emphasis added) Randall Finch is on the First Hire Crew as a stagehand for the Convention Center, yet there were jobs at the Convention Center for which Respondent did not call and offer Finch the referral. Moreover, Finch is qualified to and has performed up and down rigging work. Nevertheless, Respondent refused to refer Finch to rigging jobs. (TR 697)

The record evidence clearly reflects the Respondent Union ignored its Hiring Hall Rules and refused to refer Randall Finch to jobs in the proper order according to his place on the First Hire

Crew as a stagehand for the Convention Center, his ranking on the seniority roster, and/or in accordance with other provisions of the Hiring Hall rules. Respondent Union's discrimination against Finch and arbitrary refusal to refer him in the proper order include the following:

- referring employees ahead of Finch because they attend Union meetings (See GC-85);
- referring employees ahead of Finch at the Convention Center although he is on the First Hire Crew (See Nutcracker Ball 2010, GC-148, 151, 154, 159, 161, 162, 163);
- permitting employees to switch crafts on a job and bump Finch (See GC- 160);
- referring employees ahead of Finch because they are with the business representative at time of request for employees (See GC-155); and
- not calling Finch for rigging jobs although he is a qualified rigger (See GC- 147, 152).

Notwithstanding the plethora of evidence that shows the Respondent discriminatorily and/or arbitrarily refused to make referrals to Charging Party Randall Finch, ALJ Marcionese reasoned that despite the incidents of non-referral, Finch received multiple other referrals during the period of time he filed charges against the Respondent and such referrals belie any claim that the Respondent was intent on retaliating against Finch for unlawful reasons. (ALJD 11 at 7-11) ALJ Marcionese's reasoning is flawed as the Board has recognized that even if a union continues to refer an employee who engages in protected activity, a union's arbitrary reduction in referrals given to an employee violates the Act. *Denver Theatrical Stage Employees' Union No. 7*, 339 NLRB 214, 220 (2003).

Accordingly, it is respectfully urged that the Board find the ALJ erred in his findings that the Respondent Union did not discriminatorily and/or arbitrarily make referrals to Charging Party Randall Finch.

**C. The ALJ erred in his findings that the Respondent Union did not discriminatorily and/or arbitrarily make referrals to Charging Party James A. Vacik. [Exceptions Nos. 10, 13-15, and 18]**

The record evidence reflects that James Vacik, like Randall Finch, also filed unfair labor practice charges with the Board regarding Respondent Union's failure to abide by its Hiring Hall Rules. Vacik is qualified to and has performed audio work, including setting up wireless microphones, in the Civic Center arena and theater and also at the Saenger Theatre. (GC-11; TR 567-568) Despite this, Respondent Union ignored its Hiring Hall Rules and refused to refer James Vacik to jobs in the proper order according to his ranking on the seniority roster and/or in accordance with other provisions of the rules. Respondent's discrimination against Vacik and arbitrary refusal to refer Vacik in the proper order include the following:

- referring employees with less seniority ahead of Vacik (See GC-143, 144, 145, 148, 149, 153, 154, and 164); and
- refusing to call Vacik for jobs he was qualified to perform (See GC-150 and 157).

ALJ Marcionese, in applying the same reasoning to James Vacik that he applied to Randall Finch, noted Vacik was referred to some jobs after he filed charges against the Respondent and surmised that if the Respondent Union was intent on retaliating against Vacik, it would not have referred Vacik to jobs. Again, as noted above regarding the ALJ's reasoning with Finch, the Board has determined a union's arbitrary reduction in referrals given to an employee violates the Act. *Denver Theatrical Stage Employees' Union No. 7, supra.*

Accordingly, it is respectfully urged that the Board find the ALJ erred in his findings that the Respondent Union did not discriminatorily and/or arbitrarily make referrals to Charging Party James Vacik.

**D. The ALJ erred in concluding that the Respondent Union did not violate the Act in any manner alleged in the Complaint and in issuing a recommended Order dismissing the Complaint. [Exception Nos. 19 and 20]**

A union operating a hiring hall, irrespective of whether it is exclusive or nonexclusive, owes referral applicants a duty of fair representation and is obligated to operate the hiring hall in a manner free from any arbitrary or invidious considerations. *Teamsters Local 200, supra, citing Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898 (1985); *Operating Eng'rs Local 4 (Carlson Corp.)*, 189 NLRB 366 (1971). Respondent Union's departure from clear and unambiguous referral procedures by refusing to refer qualified employees in the proper order in accordance with its hiring hall rules violates Section 8(b)(1)(A) and 8(b)(2) of the Act. *Operating Eng'rs Local 18 (Ohio Contractors Assn.)*, 200 NLRB 147 (1975); *Plumbers Local 44 (Welded Construction)*, 313 NLRB 1 (1993).

In the instant case, the Respondent Union's self-established Hiring Hall Rules provide, in pertinent part, [t]he 'A' roster will be arranged on the basis of years of service as a stagehand and/or exhibition employee within the Union's geographic jurisdiction and persons will be referred beginning with the most senior member who has the necessary experience, skill and job classification required to effectively perform the work offered by the employer." (GC-5, Section IV-Two Level Referral System) Notwithstanding this rule that specifically requires a seniority roster based on years of service as a stagehand, Respondent, between April 1, 2008 and October 11, 2009, maintained a seniority roster based on the date an employee joined the Union, and used the roster to refer employees to jobs with various employers. Respondent listed members of the Union on the "A" Roster and non-members were listed on the "B" Roster. (GC-6; TR 57, 137, 151) The Union members on the "A" roster were given priority referral status over non-Union members on the "B" roster. Respondent Union made referrals to over 100 jobs using the "A" roster between April 1, 2008 and August 9, 2009, (GC-40 through 142) as well as numerous other jobs as it

continued to use the “A” roster for referrals through October 11, 2009. Respondent’s creation and use of the “A” roster to make referrals was not only a direct contravention of the Hiring Hall Rules, it also encouraged membership in the Union. The Board has found that such conduct violates Section 8(b)(1)(A) and (2) of the Act. *Teamsters Local 328 (Blount Bros.)*, 274 NLRB 1053, (1985) (the operation of the hiring hall discriminated in favor of union members and particularly active union members, i.e., those who had exposure or access to the business agent).

Accordingly, it is respectfully urged that the Board find that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by giving Union members priority referral status over non-union members.

Furthermore, the Respondent Union ignored its Hiring Hall Rules and refused to refer employees to jobs in the proper order according to their ranking on the seniority roster and/or in accordance with other provisions of the rules. Respondent’s propensity to make referrals in an arbitrary manner include the following:

- permitting employees to substitute for each other without consulting the seniority roster (See GC-68);
- referring employees whose names are not on the seniority roster (See GC- 167, 168);
- permitting employees to switch crafts and bump other employees from a job (See GC- 107, 137, 138);
- granting referrals to employees who attend Union meetings (See GC- 85); and
- making referrals without consulting the seniority roster without any justifiable explanation (See GC- 165, 166);

ALJ Marcionese, based on his finding that the Respondent Union operated a nonexclusive hiring hall, even with SMG, reasoned that the Respondent was not required to make referrals in a nondiscriminatory manner nor was Respondent required to follow objective criteria in the operation of the hiring hall. (ALJD 8 at 38-40) Again, the ALJ’s finding ignores the documentary and

testimonial record evidence that establishes the Respondent Union operated an exclusive hiring hall arrangement with SMG. Consequently, ALJ Marcionese erred in issuing a recommended Order dismissing the Complaint. ALJ Marcionese should have concluded that the Respondent Union operated its exclusive hiring hall in a discriminatory and arbitrary manner and ordered that the Respondent Union must make whole any employees adversely affected by its discriminatory and/or arbitrary operation of its hiring hall for any loss of earnings and other benefits as prescribed in *F.W. Woolworth Co.*,<sup>3</sup> plus interest as computed in *New Horizons for the Retarded*.<sup>4</sup> Additionally, ALJ Marcionese should have recommended that the Respondent Union issue a Notice to Members/Employees regarding its discriminatorily and/or arbitrarily operating its exclusive hiring hall with SMG.

**V.**  
**CONCLUSION**

Based on the foregoing, the General Counsel respectfully requests that the Board grant the Exceptions stated above, find that the Respondent Union violated Sections 8(b)(1)(A) and (2) of the Act by operating its exclusive hiring hall in a discriminatory and/or arbitrary manner, and order Respondent Union to take all actions it deems necessary and appropriate to effectuate the purposes of the Act. The General Counsel further asks for an order finding the violations of Sections 8(b)(1)(A) and (2) as alleged in the complaint, and all other just and proper relief.

Date: April 16, 2014

Respectfully submitted,

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/s/ Beauford D. Pines

BEAUFORD D. PINES

Counsel for General Counsel

National Labor Relations Board

Region 15

600 South Maestri Place, 7th Floor

New Orleans, LA 70130

Dial 504-589-6395

Fax 504-589-4069

[bpines@nlrb.gov](mailto:bpines@nlrb.gov)

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<sup>3</sup> 90 NLRB 289 (1950).

<sup>4</sup> 283 NLRB 1173 (1987).

## CERTIFICATE OF SERVICE

The undersigned Counsel for General Counsel certifies that the foregoing Counsel for General Counsel's Memorandum in Support of Counsel for General Counsel's Exceptions to Decision of the Administrative Law Judge has been electronically filed with the Office of Executive Secretary, National Labor Relations Board, and forwarded by electronic transmission to:

David C. Tufts, Esq.  
Kimberly C. Walker, Esq.  
J. Cecil Gardner, Esq.  
The Gardner Firm, P.C.  
210 S. Washington Avenue  
P.O. Drawer 3103  
Mobile, AL 36652

[dtufts@thegardnerfirm.com](mailto:dtufts@thegardnerfirm.com)  
[kwalker@thegardnerfirm.com](mailto:kwalker@thegardnerfirm.com)  
[jcg@thegardnerfirm.com](mailto:jcg@thegardnerfirm.com)

M. Jefferson Starling, III, Esq. (Counsel to Alabama Power Co.)  
Balch & Bingham LLP  
Post Office Box 306  
Birmingham, AL 35201-0306  
[jstarling@balch.com](mailto:jstarling@balch.com)

Barry Johnson Parker, Esq. (Counsel to Bayfest, Inc.)  
Maynard, Cooper & Gale, PC  
11 North Water Street, Suite 27000  
Mobile, AL 36602  
[bparker@maynardcooper.com](mailto:bparker@maynardcooper.com)

David F. Walker, Esq. (Counsel to Dorsett Productions Unlimited LLC)  
Crosby Law Firm PC  
6404 Hillcrest Park Court  
Mobile, AL 36695  
[dwalker@crosbylegal.com](mailto:dwalker@crosbylegal.com)

Also forwarded by first-class U.S. Mail to:

SMG Worldwide  
300 Conshohocken State Road, Suite 770  
West Conshohocken, PA 19428

AIG Baker Wharf Inn, LLC  
700 Montgomery Hwy, Ste. 186  
Vestavia, AL 35216-1868

The Explore Center, Inc. d/b/a Gulf Coast Exploreum Science Center  
65 Government Street  
Mobile, AL 36602

Date: April 16, 2014

\_\_\_\_\_  
/s/ Beauford D. Pines

BEAUFORD D. PINES  
Counsel for General Counsel  
National Labor Relations Board  
Region 15  
600 South Maestri Place, 7th Floor  
New Orleans, LA 70130