

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES - SAN FRANCISCO**

**INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES, MOVING PICTURE
TECHNICIANS, ARTISTS AND ALLIED CRAFTS
OF THE UNITED STATES, ITS TERRITORIES
AND CANADA, LOCAL 720, AFL-CIO, CLC
(Global Experience Specialists)**

and

Case 28-CB-107693

STEVEN LUCAS, an Individual

and

Case 28-CB-113281

JAMY RICHARDSON, an Individual

**GENERAL COUNSEL'S BRIEF IN SUPPORT
OF LIMITED CROSS EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted,

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Andrew S. Gollin, Counsel for General Counsel, submits this Brief in Support of his Limited Exceptions to the Decision of Administrative Law Judge Lisa D. Thompson (“ALJ”):

I. INTRODUCTION¹

The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, Local 720, AFL-CIO, CLC (Respondent) operates an exclusive referral service that provides signatory contractors with skilled labor to perform stagehand work at trade shows, conventions, exhibits, and performances in the Las Vegas area. As the operator of an exclusive referral service, Respondent has certain statutory obligations toward those individuals who use the referral service, regardless of whether they are members of the union.

On May 7, 2014, the ALJ issued her Decision finding that Respondent breached its statutory obligations when: (1) it failed or refused to provide Charging Party Steven Lucas with information he requested on around June 4, 2013; (2) it maintained an unlawful internal rule that allowed it to suspend individuals from the referral service if they failed to pay internal union fines; and (3) applying its unlawful internal rule against Charging Party Jamy Richardson and suspending him from the referral service for over six months for non-payment of internal union fines. Included with her Decision, the ALJ also issued a recommended Order addressing the steps Respondent needs to take to address the above violations.

The CGC takes limited exceptions to the ALJ’s Decision and recommended Order. First, while the ALJ correctly granted sanctions against Respondent for its willful disregard of the CGC’s subpoenas and the ALJ’s order, there are some inconsistencies concerning the ALJ’s statements as it relates to the CGC’s motion. Second, in finding Respondent violated the Act

¹ The General Counsel’s Exhibits will be referred to as (G.C. Exh. ____). Transcript citations will be referred to by page number and line number as (Tr.____:____), unless the Transcript cite covers multiple pages. The ALJ’s decision will be referred to as (ALJD ____).

when it failed or refused to respond to Lucas's June 4 information request, the ALJ found Respondent's conduct violated both Section 8(b)(1)(A) and 8(b)(2) of the Act, but the complaint only alleged Respondent's conduct violated Section 8(b)(2). Third, although the ALJ correctly found that Respondent violated Section 8(b)(1)(A) by maintaining the unlawful rule allowing for suspension from the referral list of users who fail to pay internal union fines, she failed to specifically list that violation among her conclusions, even though she addressed the violation in her proposed remedial notices. Finally, there is a technical error in the ALJ's proposed remedial notice which states that Respondent will not interfere with employees Section 7 rights. Each of these issues will be addressed below.

II. PROCEDURAL OVERVIEW

On June 21, 2013,² Steven Lucas filed an unfair labor practice charge against Respondent in Case 28-CB-107693, alleging that it violated Section 8(b)(1)(A) of the Act by refusing to provide him with requested information related to Respondent's referral service. (G.C. Exh. 1(a)-(b)). On August 30, the Region issued a Complaint and Notice of Hearing and Affidavit of Service in Case 28-CB-107693. (G.C. Exh. 1(c)-(d)). On September 12, Respondent filed its Answer to Compliant and Certificate of Service. (G.C. Exh. 1(e)). On September 13, Jamy Richardson filed an unfair labor practice charge, and on November 26 filed an amended unfair labor practice charge, against Respondent in Case 28-CB-113281, alleging that it violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by refusing to dispatch him for work due to the Union's internal disciplinary policy in a manner that was arbitrary, discriminatory or in bad faith. (G.C. Exhs. 1(f)-(i)). On November 27, the Region issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing and an Affidavit of Service in Cases 28-CB-107693 and 28-CB-113281. (G.C. Exh. 1(j)-(k)). On December 5, the Region issued an

² All dates are 2013, unless otherwise stated.

Amendment to Consolidated Complaint and an Affidavit of Service in Cases 28-CB-107693 and 28-CB-113281, alleging that Respondent also violated Section 8(b)(1)(A) of the Act by has maintained a rule in Article VIII, Section 3 of its Work Rules and Procedures for Referents that conditions eligibility for dispatch/job referral upon the payment of fines. (G.C. Exh. 1(l)-(m)). On December 10, Respondent filed its Answer to Consolidated Complaint and Amendment to Consolidated Complaint and Certificate of Service in Cases 28-CB-107693 and 28-CB-113281. (G.C. Exh. 1(n)). Respondent's Answers denied all or substantially all of the allegations in the Complaints and Amendments to Complaint, including all jurisdictional allegations, the Board's jurisdiction, its status as a labor organization, the names and titles of its officers and agents, and that it operated an exclusive referral service, and it raised a number of affirmative defenses.

On December 30, Respondent filed its Request (to Regional Director) to Reschedule Hearing Date in Cases 28-CB-107693 and 28-CB-113281. (G.C. Exh. 1(o)). On January 2, 2014, the Region issued an Order Denying Respondent's Request to Reschedule Hearing Date and Affidavit of Service in Cases 28-CB-107693 and 28-CB-113281. (G.C. Exh. 1(p)-(q)). On January 6, 2014, Respondent filed an Appeal of the Regional Director's Order Denying Respondent's Request to Reschedule Hearing Date to the Associate Chief Judge. (G.C. Exh. 1(r)). CGC opposed Respondent's Appeal. (G.C. Exh. 1(t)). On January 21, 2014, the Associate Chief Judge denied Respondent's Appeal. (G.C. Exh. 1(u)). The hearing occurred on January 21-22, 2014 in Las Vegas, Nevada.

On December 9, a month and a half prior to the hearing, the CGC issued a Subpoena Duces Tecum to Respondent's Custodian of Records seeking testimonial and documentary evidence. (G.C. Exh. 3(e)). On that same date, the CGC mailed a courtesy copy of the subpoena duces tecum to Respondent's attorney, Kristina Hillman. On December 10 and 11, the CGC

issued subpoenas ad testificandum to Respondent's officers, including John Hanson. (G.C. Exhs. 4 and 6). On that same date, the CGC also sent courtesy copies of these subpoenas to Attorney Hillman. On December 16, Attorney Hillman filed a petition to revoke the subpoena duces tecum. (G.C. Exh. 3(d)). Well prior to the hearing, the ALJ issued a written decision granting in part (Requests 11, 13, and 18) and denying in part Respondent's petition to revoke. (G.C. Exh. 39). In her Order, the ALJ granted Respondent's petition to revoke paragraphs 11, 13, and 18, and required Respondent to produce all of the remaining subpoenaed documents.

At the hearing, Respondent refused to produce *any* of the subpoenaed witnesses or *any* of the subpoenaed documents. Respondent's counsel freely admitted at the outset of the hearing, and in the presence of the ALJ, that because Respondent was denied its belated request for a postponement, he was going to do everything in his power to impede the proceedings. As the record reflects, Attorney Sokol held true to his word by denying undisputed facts, rejecting stipulations, refusing to present subpoenaed witnesses, and defying the ALJ's order to produce subpoenaed documents. To make matters worse, Attorney Sokol then proceeded to call as his sole witness John Hanson, who was one of the individuals the CGC subpoenaed to appear and testify during the CGC's case in chief, and then attempt to introduce through him documents clearly encompassed by the CGC's Subpoena Duces Tecum. The CGC moved for sanctions against Respondent for its willful non-compliance. The ALJ stated that she withhold ruling and have the parties brief the issue.

In footnote 3 of its post-hearing brief, the CGC moved to strike, stating:

...CGC requests that the ALJ sanction Respondent for its contumacious conduct, including its refusal to comply with the subpoenas served on its Custodian of Records and on its officers ... The subpoenaed witnesses and documents were relevant to establishing a multitude of disputed issues in these cases, both procedural and substantive, including, but not limited, Respondent's status as a Section 2(5) labor organization, the status of its officers as Section 2(13) agents,

Respondent's status as the Section 9(a) collective-bargaining representative of units of employees, Respondent's collective-bargaining relationships and agreements with employers engaged in interstate commerce, Respondent's operation of an exclusive referral service, and the various allegations and purported defenses related to Lucas's information request, Respondent's internal union rules and procedures, and Respondent's application of those rules and any resulting suspensions.

The Board has held it is "entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party." *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004), *enfd.* 156 Fed. Appx. 386 (2nd Cir. 2005); see also *Teamsters Local 776 (Pennsylvania Supply, Inc.* 313 NLRB 1148, 1154 (1994)(adverse inferences properly drawn against the party who refuses to comply with the subpoena with respect to the subject matters sought by the subpoena); and *Equipment Trucking Co.*, 336 NLRB 277, 277 fn. 1 (2001) (striking portions of the respondent's answer that were affected by the respondent's noncompliance with the General Counsel's subpoena). The Board's authority to impose such sanctions flows from its inherent interest in maintaining the integrity of the hearing process. *McAllister Towing & Transportation Co.*, *supra* at 396. The exercise of the authority to sanction a party that fails to comply with a Board subpoena is a matter committed in the first instance to the judge's discretion. *Id.* See also *Peerless Importers*, 345 NLRB 1010, 1011 (2005).

At the hearing, CGC objected to Respondent calling Business Representative John Hanson to appear and testify as part of Respondent's defense, because Hanson refused to comply with the General Counsel's subpoena to appear and testify as part of his case in chief. CGC also objected to each and every document introduced through Hanson, as those documents clearly were encompassed by the subpoena issued to Respondent's Custodian of Records. The ALJ stated that she would withhold ruling on those objections and allow the parties to brief the issues. CGC maintains his objections and moves to strike Hanson's testimony on *direct* examination and all of the documents introduced through him, with the exception of G.C. Exh. 10 (Respondent's Constitution and Bylaws), which Hanson identified and authenticated on cross-examination. The Board has precluded a defiant party from calling and questioning officials as its own witnesses, as well as introducing documents through those witnesses, where the defiant party has failed to comply with subpoenas calling for the testimony of those same officials and production of those same documents. See *Hedison Manufacturing Co.*, 249 NLRB 791, 795 (1980), and *Louisiana Cement Co.*, 241 NLRB 536, 537 fn. 2 (1979).

Respondent may argue such sanctions are unwarranted because CGC had the ability to cross-examine Hanson regarding his testimony and the documents, and that CGC had the ability to introduce rebuttal witnesses to refute that evidence. Each argument should be rejected. One should not permit a party to hold hostage the administrative proceedings by staking out positions which are

patently indefensible and make a mockery of the Board's procedures and the ALJ's rulings. Accepting these arguments would set a precedent that respondents are free to disregard valid subpoenas, wait for the General Counsel and the charging party to present their case(s) without the subpoenaed witnesses and documents, and then selectively present those same witnesses and documents as part of its defense. Such a result would effectively do away with Section 11 of the Act. Therefore, CGC requests that the ALJ strike Hanson's testimony on direct examination and each of Respondent's exhibits introduced through him, but not strike his testimony on cross-examination.

In her written decision, the ALJ struck John Hanson's direct testimony and all of the documents introduced through him. (ALJD 2-4).

III. FACTUAL SUMMARY

A. CASE 28-CA-107693 (LUCAS)

1. Background

Lucas is currently a non-member, registered user of Respondent's exclusive referral service. (Tr. 121: 8-19). He has used the referral service for over 30 years. During that period of time, Lucas and others have successfully pursued unfair labor practice charges against Respondent over issues arising out of the operation of its exclusive referral service.³ As the ALJ noted, the litigation has resulted in substantial acrimony and distrust between the parties.

³ Lucas was involved in at least two prior Board cases against Respondent. In the first case, the judge found Respondent unlawfully barred Lucas from using its exclusive referral service in March 1995 because of his alleged misconduct. The Board then reversed. *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1 (2000). Lucas then appealed, and the Ninth Circuit Court of Appeals reversed. See *Lucas v. NLRB*, 333 F.3d 927 (9th Cir. 2003). Thereafter, the parties spent the next five years litigating over the appropriate remedy owed to Lucas. *Stage Employees IATSE Local 720 (AVW Audio Visuals, Inc.)*, 341 NLRB 1267 (2004) and *Stage Employees IATSE Local 720 (AVW Audio Visuals, Inc.)*, 352 NLRB 29 (2008). According to Respondent's counsel, Lucas received a "nice chunk of change" as a result of this litigation. (Tr. 317-318). In the second case, Lucas, and two other individuals, Michael Young and Michael Serwe, alleged Respondent unlawfully refused to provide requested information and suspended employees from the referral for non-payment of fines. The cases were severed prior to the Board's decision. *Stage Employees IATSE Local 720 (Production Support Services)*, 352 NLRB 1081(2008) (this case was decided by a two-member Board). Based on Respondent's claim that Lucas has a history of filing meritless charges or complaints, and that he fails to take responsibility for his own actions and, instead, falsely blames Respondent for all issues related to his referrals, these prior decisions show that Lucas and others have pursued meritorious charges related to Respondent's exclusive referral service. See *Spring City Knitting Co.*, 285 NLRB 426, 434 (1987).

2. Bases for Lucas's Information Requests

In around February and March, after Respondent had implemented its new, computerized dispatching system, Lucas began having some concerns that he might be losing out on work due to communication errors by Respondent's dispatchers. Some of those particular situations are summarized in Lucas's March 11 email to Business Representative Hanson, President Cook, and Secretary-Treasurer Poveromo. (G.C. Exh. 16). At the hearing, Lucas explained his concerns, and that part of the issue was that he was not fully aware of some of the changes that resulted from Respondent's change from the old referral system to the new, automated system.

In this March 11 email, Lucas sought \$1500 because of what he believed were the botched dispatches in February and March. (Tr. 181-182). He testified that he made this demand because he reported to jobs that were not there, and thereafter was signed out and unavailable to be referred out for work. (Tr. 181-182). Lucas, who in the past has had to resort to litigation in order to protect his rights, also threatened to file suit if Respondent did not address the situation. That same date, Business Representative Hanson replied to Lucas's email, stating that he did not appreciate his (Lucas's) threats of litigation. (G.C. Exh. 17(a)). The two exchanged emails on March 20. (G.C. Exhs. 17(b) and (c)). Lucas explained why he was concerned, and Hanson offered a glib response regarding the time of day that Lucas had sent his email. The emails are an example of the disdain and distrust that has developed through the years between Respondent and Lucas.

On around March 22, Lucas was at Respondent's offices picking up his paycheck. He had a conversation with Business Representative Hanson and President Cook about his concerns surrounding the botched dispatches. (Tr. 185-186). Lucas explained one of the situations. He told Hanson that he had cancelled an Audio 1 call, which is the head audio position, because he

was doing a videotape operator position for a callback at Caesar's Palace. Hanson acknowledged that the dispatchers did not know the difference between an A1 and videotape operator position, which is something that Lucas believed the dispatchers should be able to differentiate. (Tr. 185-186). Hanson informed Lucas that he (Lucas) could file a claim for botched dispatches, which Respondent would investigate. If Respondent found that there was merit to the claim, then the Union had a program where it would pay the aggrieved individual \$100 for the botched dispatch. (Tr. 184-186).

3. Lucas's Initial Information Request

Later that day, Lucas sent President Cook and Business Representative Hanson an email stating that he did not consider the \$100 botched dispatch remedy Hanson described in their conversation to be sufficient, considering the money Lucas lost on the job in question and the fact that he had not been requested to work for that company again since the "debacle." Lucas stated that he was going to pursue a charge with the Board. In this email, Lucas stated that he was "respectfully requesting access to the dispatch records to clarify the errors made by IATSE 720 dispatchers." (G.C. Exh. 18).

On March 27, Hanson sent Lucas a document with Lucas's "current years dispatch record." (G.C. Exh. 19). The information provided was non-responsive and inaccurate, and it only served to heighten Lucas's concerns and suspicions regarding how Respondent was operating its referral service and why it was withholding relevant information. (Tr.188-192).

4. Lucas's June 4 Information Request

To address these concerns and suspicions, on June 4, Lucas emailed a clearer information request to President Cook, Business Representative Hanson, and Secretary-Treasurer Poveromo. (G.C. Exh. 22). The request states:

Dear John Hanson, Business Representative IATSE Local 720 Stagehands, Danl' Cook, President IATSE Local 720 Stagehands, Ronald Poveromo, Secretary Treasurer IATSE Local 720 Stagehands,

I wish to review all dispatch records to insure the IATSE 720 Stagehands hiring hall is operated in a non discriminatory fashion. I am also requesting the current rules and procedures to be eligible for dispatch through IATSE Local 720 Stagehands hiring hall.

To emphasize, I respectfully request to review all dispatch records, for all jobs Local 720 stagehands has dispatched any referent, to any employer signatory to a contract with 720 Stagehands.

Myself and other referents are seeking the IATSE Local 720 Stagehands dispatch records of all referents, and all jobs, to all employers signatory to a collective bargaining agreement with Local 720 Stagehands from May 2012 to April 30, 2013.

Additionally, Steven Lucas and other referents are requesting dispatch records of all referents, and all jobs, to all employers signatory to a collective bargaining agreement with Local 720 Stagehands from December 4, 2012 to June 4, 2013.

Provide the requested dispatch information within 14 days of this writing otherwise I have no alternative than to file an Unfair Labor Practice with the National Labor Relations Board.

Very truly yours,

Steven Lucas
Referent #101632

(G.C. Exh. 22).

There is no dispute that Respondent received Lucas's June 4 information request, and it did nothing to respond to it. (Tr. 402-405). Respondent never contacted Lucas regarding the request, never sought to clarify or limit his request, and it never provided him with any of the information he requested. Thereafter, Lucas filed the unfair labor practice charge in Case 28-CA-107693. The Region found merit to the allegation and issued a Complaint alleging that Respondent violated Section 8(b)(1)(A) of the Act by failing or refusing to provide Lucas with the information he requested on June 4.

B. CASE 28-CA-113281 (RICHARDSON)

1. Background

Richardson is a member user of Respondent's exclusive referral service. He has used the referral service for 10 years. In late 2012, Richardson began having issues with another member, Antoine "Jersey" Gilliam. (Tr. 406-407). The two got into a physical altercation at Respondent's offices. After which, Richardson went to Hanson for assistance in dealing with Gilliam. Richardson believed that Hanson failed to do anything about it, and he was upset and vocal about Hanson's lack of assistance. On December 27, 2012, Hanson fined Richardson for his comments, under Article VIII of the Respondent's Work Rules and Procedures for Referents. (G.C. Exh. 23).

2. Respondent's Work Rules and Procedures for Referents

Respondent's Work Rules and Procedures for Referents contain a disciplinary code that divides offenses or infractions into three categories: major, moderate, and minor. Major offenses include conviction of felony related to work, physical assaults, and theft at work. Moderate offenses include falsifying documentation, harassment, verbal assault, conduct or behavior damaging to union's contractual relations, consumption of alcohol or controlled substances at work. Minor offenses include failure to appear before the rules committee, chronic tardiness (defined as three (3) times in twelve (12) consecutive months), violation of health and safety rules, job jumping, failure to notify the Union before performing non-Union work that falls within the traditional scope of the Union's jurisdiction, contacting a member of the Committee with the intent of influencing past, present, or future appeals or complaints, contacting any Union or Employer official, representative, or employee with the intent of soliciting work, and failure to maintain current valid address with Local 720. The commission of

these offenses results in a fine. The fine depends on the type and number of offenses. Article VIII, Section 3 of Respondent's Work Rules and Procedures for Referents states:

Failure to pay a minor offense fine within fourteen (14) days from the time the fine is imposed shall result in removal from the Local 720 referral system until such fine is paid. Failure to pay a moderate or major fine with in thirty five (35) days, from the time the fine is imposed shall result in removal from the Local 720 referral system until such fine is paid. (G.C. Exh. 13, page 7).

The Work Rules and Procedures for Referents also set forth an appeals procedure through which users can challenge a fine. Richardson successfully appealed that December 27, 2012 fine. (G.C. Exh. 24).

3. Respondent Fined Richardson

On around March 28, Richardson had another altercation with Gilliam outside of Respondent's offices, and Hanson fined him \$2000 for the altercation. (Tr. 406-408)(G.C. Exh. 25). Richardson appealed the reprimand and fine. The appeal hearing occurred on June 25. (Tr. 276-278) Respondent denied the appeal, and fined Richardson \$4000. (Tr. 278-279). Respondent issued Richardson a letter on July 11, informing him that he needed to pay the fine within a specified period of time, otherwise he would be suspended from the referral list. (G.C. Exh. 27). Richardson could not pay the fine, and he was suspended from the referral list for several months. (Tr. 279-280). Thereafter, he filed the unfair labor practice charge in Case 28-CA-113281.

4. Respondent's November Explanation of Richardson's Fine

In late November, Richardson called President Cook to discuss his suspension. (Tr. 280-281). Richardson asked Cook if Respondent would let him return to work and work off the \$4000 fine by deducting amounts from his paychecks. Cook refused, stating that Richardson would need to pay the fine in full before he could return to the referral list. Cook added that he

might consider allowing Richardson to pay off the fine in installment plans. (Tr. 281:5-11). Respondent offered nothing to refute this evidence.

Respondent suspended Richardson from the referral list until January 2014.

IV. ANALYSIS OF EXCEPTIONS

A. **The ALJ properly sanctioned Respondent by striking John Hanson’s direct-examination testimony, but not his cross-examination.**

The ALJ correctly found the subpoenas in question were properly served and were clear and unambiguous regarding the documents requested and the witnesses to be produced. The ALJ also correctly found Respondent willfully refused to produce any of the subpoenaed documents or make any of the subpoenaed witnesses available for the CGC’s case. (ALJD 4). As a sanction for Respondent’s “obstructionist” behavior and its “wanton disregard for the order and the authority of the Board”, the ALJ properly granted the CGC’s motion to strike. Specifically, the ALJ: (1) struck from the record and gave no weight to Respondent’s Exhibits 1-10 proffered during the hearing; (2) struck from the record and gave no weight to testimony of John Hanson *on behalf of Respondent*; and (3) permitted the CGC to use secondary evidence to prove any element of his case-in-chief. (ALJD 4-5).

The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including, but not limited to, permitting the party seeking production to use secondary evidence, precluding the noncomplying party from presenting or rebutting evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party. See, e.g., *International Metal Co.*, 286 NLRB 1106, 1112 fn. 11 (1986) (precluding employer from introducing into evidence documents it had failed to produce in response to the General Counsel’s subpoenas). As the Board stated in *McAllister Towing & Transportation Co., Inc.*, 341 NLRB 394 (2004), its authority to impose such sanctions “flows from its inherent

‘interest [in] maintaining the integrity of the hearing process.’ *NLRB v. C. H. Sprague & Son, Co.*, 428 F.2d 938, 942 (1st Cir. 1970); see also *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (approving Board's application of the ‘preclusion rule’ as being necessary to ensure compliance with subpoenas).” Thus, sanctions are appropriate in response to a deliberate destruction of evidence or an intentional refusal to honor the subpoena because such willful acts undermine the integrity of the hearing process. Additionally, sanctions serve to redress a party's misconduct which interferes with the Board's processes and the cause of justice, and to discourage similar misconduct in the future.

The exercise of this authority is a matter committed in the first instance to the judge's discretion. See *NLRB v. American Art Industries*, 415 F.2d 1223, 1229-1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970) (finding trial examiner did not “abuse his discretion” in precluding employer from introducing evidence on number of employees in unit after employer refused to produce relevant subpoenaed documents). See also *Midland National Life Insurance Co.*, 244 NLRB 3, 6 (1979) (discussing the discretion of a trial examiner to refuse to allow evidence where evidence is not made available pursuant to a subpoena); cf. *Equipment Trucking Co.*, 336 NLRB 277 fn. 1 (2001) (no abuse of discretion where the judge struck the respondent's answer regarding allegations related to agents who evaded subpoenas with the aid of the respondent). Accordingly, the Board reviews the judge's imposition of sanctions under the “abuse of discretion” standard. See *Perdue Farms*, 144 F.3d at 834 (applying “abuse of discretion” standard).

As stated above, the CGC moved for sanctions against Respondent's for refusing to comply with the CGC's subpoenas to produce documents and witnesses, including John Hanson. As part of its motion, the CGC moved to strike John Hanson's direct testimony, but not his

cross-examination testimony, as well as Respondent's Exhibits 1-10. The ALJ granted the CGC's motion, stating that she was striking Hanson's testimony that was offered "on behalf of Respondent." Hanson testified "on behalf of Respondent" during his direct examination, but not during cross-examination. As a result, the ALJ struck his direct testimony only. If the ALJ had intended to strike all of Hanson's testimony, including his cross-examination, then there would have been no need for her to add the phrase "on behalf of Respondent" to her ruling. The ALJ's findings and conclusions were consistent with this interpretation.

The only potentially ambiguous statement is when the ALJ stated the CGC objected and moved to strike the admission of "all of Respondent's exhibits as well as the testimony of John Hanson due to Respondent's deliberate refusal to comply with the General Counsel's subpoenas and [her] Order granting in part and denying in part Respondent's Petition to Revoke." In reality, the CGC's motion was limited to striking Hanson's testimony on direct examination, and the ALJ's findings and conclusions were consistent with her granting that motion, as opposed to striking all of Hanson's testimony.

Also, as part of the sanctions for Respondent's non-compliance, the ALJ allowed the CGC to use secondary evidence. To the extent the CGC used secondary evidence, it was minimal--almost all of which went toward proving that Respondent was a Section 2(5) labor organization and its officers were Section 2(13) agents, both of which Respondent later admitted before the close of the hearing. Respondent refers to those secondary documents in her decision. However, both allegations were proven through John Hanson when he testified on cross-examination. (Tr. 395-397). Therefore, there was no need for the ALJ to rely upon secondary evidence to prove either of those allegations.

B. Respondent violated Section 8(b)(1)(A) when it failed or refused to respond to Lucas's June 4 request for information, but not Section 8(b)(2).

Within a union's broad duty of fair representation there exist a number of more specifically defined obligations. For example, a union operating an exclusive referral service is "automatically obligated" to provide users of the referral service with requested relevant information so that the users can determine whether they are being treated fairly. See *Local No. 324, International Union of Operating Engineers, AFL-CIO (Michigan Chapter, Associated General Contractors of America, Inc.)*, 226 NLRB 587 (1976). See also *Operating Engineers Local 3 (Kiewit Pacific Co.)*, 324 NLRB 14 (1997); and *Operating Engineers Local 513 (Various Employers)*, 308 NLRB 1300 (1992). In the absence of some good reason for withholding the requested information, a user is entitled to the requested referral information "as a matter of right" and does not need to show that he/she reasonably believes that he/she had been unlawfully denied referrals. See *Operating Engineers Local 513 (Various Employers)*, 308 NLRB at 1303; *Bartenders and Beverage Dispensers Local 165 (Nevada Resort Assn.)*, 261 NLRB 420 (1982) (Board held that union required to disclose hiring hall records to referral applicants despite record "naked" of evidence of discriminatory treatment). Cf. *Boilermakers Local 197*, 318 NLRB 205 (1995) (the Board applied a different standard, stating request needs to be based on a "reasonable belief" of unfair treatment). It is a violation of Section 8(b)(1)(A) of the Act for a union to fail or refuse to provide a registrant with requested information.

The ALJ correctly found that Respondent violated Section 8(b)(1)(A) of the Act by failing or refusing to respond to Lucas's June 4 information request. There is no allegation or evidence that Respondent violated Section 8(b)(2) by this conduct. As a result, the ALJ erred in her findings and conclusions that Respondent's conduct also violated Section 8(b)(2).

C. The ALJ correctly found, but failed to include in her Conclusions of Law, that Respondent maintained an unlawful rule prohibiting users of its exclusive referral service from being referred until they paid internal union fines levied against them.⁴

A union operating an exclusive referral service may not refuse to refer an employee for his/her failure to pay a union-imposed fine or assessment, unless it is directly related to the costs of operating the referral service. See *Intl. Longshoremen's & Warehousemen's Union, Local. 13 (Pacific Maritime Association)*, 228 NLRB 1383, 1385 (1977) (“while a labor organization may freely fine a member for violation of a membership rule, ‘the same rule could not be enforced by causing the employer to exclude him from the workforce ... without triggering a violation of Section 8(b)(1)(A) and 8(b)(2)), enfd. 581 F.2d. 1321 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979). Similarly, a rule providing that a referent may be suspended from the union’s referral list for failure to pay internal union fines is facially unlawful because a union cannot affect an employee’s employment status for violating an internal union regulation. See *Id.* See also *Fisher Theater*, 240 NLRB 678, 691 (1979)(a refusal to refer for nonpayment of a fine is ordinarily unlawful, regardless of why the fine was imposed). In other words, while a union may legitimately impose a fine and/or assessment, a union may not rely upon an employment-related sanction, such as not referring an employee, to enforce the collection of such fine and/or assessment. See *Intl. Longshoremen's & Warehousemen's Union, Local. 13 (Pacific Maritime Association)*, 228 NLRB at 1385 (“while a labor organization may freely fine a member for violation of a membership rule, ‘the same rule could not be enforced by causing the employer to exclude him from the workforce...without triggering a violation of §8(b)(1) and (2) ...”)(citing *Scofield, et. al. v. NLRB*, 394 U.S. 423, 429 (1969)).

⁴ The Consolidated Complaint and Amendment to Consolidated Complaint contain two separate allegations regarding Article VIII, Section 3 of Respondent’s Work Rules and Procedures for Referents. The first concerns the rule itself; and the second concerns the application of the rule to bar Richardson from the referral service until he paid the \$4,000 internal fine levied against him.

In general, when a union operating an exclusive referral service prevents an employee from being hired or causes an employee's discharge, even if it does so pursuant to an internal union rule, the Board presumes that the effect of the union's action is to unlawfully encourage union membership, in violation of Sections 8(b)(1)(A) and 8(b)(2) of the Act, because the union has displayed to all users of the hiring hall its power over their livelihoods. See *Operating Engineers Local 18 (Ohio Contractors Ass'n)*, 204 NLRB 681, 681 (1973), enf. denied on other grounds and remanded per curiam, 496 F.2d 1308 (6th Cir. 1974), reaff'd, 220 NLRB 147 (1975), enf. denied, 555 F.2d 552 (6th Cir. 1977). That presumption may be rebutted where the union's action was pursuant to a lawful union security clause or was necessary to the effective performance of its representative function. See e.g., *Philadelphia Typographical Union No. 2 (Triangle Publications)*, 189 NLRB 829, 830 (1971) (union lawfully caused employee's layoff because employee, while serving as union treasurer, embezzled substantial union funds, threatening the union's financial survival); *Carpenters Local 522 (Caudle-Hyatt)*, 269 NLRB 574, 576 (1984) (union lawfully caused discharge of employees who repeatedly had circumvented hiring hall and obtained work directly from employer); *Stage Employees IATSE Local 150 (Mann Theatres)*, 268 NLRB 1292, 1295-96 (1984) (union lawfully refused to refer employee with extensive history of misconduct and incompetence on various jobs to which he had been referred—resulting in virtually every contractor issuing no re-hire letters to employee); *Longshoremen ILA Local 341 (West Gulf Maritime Assn.)*, 254 NLRB 334, 337 (1981) (union lawfully refused to refer employee who had engaged in wildcat strike in violation of contractual no-strike clause); *Local 873, AFL-CIO (Komomo-Marian Division, Central Indiana Chapter, NECA)*, 250 NLRB 928, 928 n.3 (1980) (union lawfully refused to refer employee who had been dropped from its apprenticeship program because of excessive absenteeism).

Article VIII of Respondent's Work Rules and Procedures for Referents state that a user will be fined for infractions, ranging from physical assault and theft to tardiness and failure to notify Respondent before performing non-union work that falls within Respondent's jurisdiction. Although the fines vary depending on the seriousness of the infraction, as does the amount of time given to pay the fine, Section 3 makes clear that failing to pay the fine within the specified time will result in suspension from the referral list. The ALJ correctly found that Respondent's rule violates Section 8(b)(1)(A) of the Act and addressed that violation in her proposed remedial order. The ALJ, however, erred in failing to address this finding in her Conclusions of Law.

D. The ALJ made a technical error in her proposed remedial order by stating Respondent will not "interfere" with Respondent's Section 7 rights.

As stated above, the ALJ correctly found that Respondent violated Section 8(b)(1)(A) of the Act. In her proposed remedial order, the ALJ's postings indicated that Respondent will not in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act. Section 8(b)(1)(A) of the Act, however, prohibits labor organizations from restraining or coercing employees in the exercise of their rights guaranteed in Section 7. The word "interfere" is not present. As a result, the ALJ erred in including the word "interfere" in her proposed postings.

V. CONCLUSION

As the ALJ correctly held, Respondent operates an exclusive referral service and, therefore, has a duty of fair representation to all who use the referral service to obtain their employment. Respondent breached that duty when it failed to respond to and provide information in response to Lucas's June 4 request. Respondent also breached that duty when it maintained an internal rule stating that employees who fail to pay internal union fines within the specified time period will be suspended from the referral list. Respondent also violated the Act

when it applied this rule to bar Richardson from the referral list for six months. With the above revisions, the ALJ's findings and conclusions should be affirmed by the Board.

Respectfully submitted this 9th day of July 2014.

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CERTIFICATE OF SERVICE

I hereby certify that **GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** in Cases 28-CB-107693 and 28-CB-113281 was served via E-Gov, E-Filing, E-Mail, and UPS Overnight Mail, on this 9th day of July 2014, on the following:

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