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 REPLY 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 (CGC), submits this Reply Brief in Support of his Limited Cross Exceptions to the Decision of Administrative Law Judge Lisa D. Thompson (ALJ).

I. INTRODUCTION[1]

On July 23, 2014, 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) filed its Answer Brief to CGC's Limited Cross Exceptions to the ALJ's Decision and recommended Order. In it, Respondent continues to misstate the evidence and the ALJ's holding and analysis to suit its position. In the following Reply Brief, CGC will respond to and correct those misstatements of fact and law.

II. ANALYSIS

A. Respondent misstates the evidence and sanctions sought by CGC in response to Respondent's willful refusal to comply with validly issued subpoenas, including the subpoena issued to John Hanson.

On December 9, 2013, a month and a half prior to the hearing, CGC issued a Subpoena Duces Tecum to Respondent's Custodian of Records seeking testimonial and documentary evidence. (G.C. Exh. 3(e)). On December 10 and 11, 2013, CGC issued subpoenas ad testificandum to Respondent's officers, including John Hanson. (G.C. Exhs. 4 and 6). On December 16, 2013, Respondent filed a petition to revoke the Subpoena Duces Tecum. (G.C. Exh. 3(d)). Respondent never filed a petition to revoke the subpoenas ad testificandum issued to Respondent's officers. Well prior to the hearing, the ALJ issued a

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[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 ___).

written decision granting in part (Requests 11, 13, and 18) and denying in part Respondent's Petition to Revoke the Subpoena Duces Tecum. (G.C. Exh. 39).

At the hearing, Respondent refused to produce *any* of the subpoenaed witnesses or *any* of the subpoenaed documents. Despite this fact, Respondent then proceeded to call as its sole witness John Hanson, one of the individuals who willfully refused to comply with CGC's subpoena to appear and testify during CGC's case in chief. CGC immediately objected, stating:

> Your Honor, at this point I'm going to state my objection as I stated off the record to Mr. Hanson's testimony in this case. Mr. Hanson was subpoenaed to appear pursuant to a subpoena that I issued to him. He did not appear. I will also note that Respondent was issued a subpoena to produce various documents and they did not do so. So to the extent any documents -- in the event you were to somehow allow Mr. Hanson to testify despite my objection, any documents that arguably would be encompassed within that subpoena I would 1 object to, and request that you bar from being received into evidence based upon Respondent's noncompliance.

(Tr. 325-326).

The ALJ reserved ruling on CGC's objection and allowed Hanson to testify, stating that she would allow the parties an opportunity to argue the issue in their post-hearing briefs. (Tr. 326-327). Following Hanson's direct examination, CGC was given the chance to cross-examine Hanson. Before doing so, CGC made it clear that by doing so he was in no way waiving any objections he had to Hanson's presentation by Respondent as a witness or to any of the documents introduced through him during his direct examination. (Tr. 394:20-24). Upon being given assurances by the ALJ that proceeding would not constitute a waiver, CGC cross-examined Hanson. Hanson's cross-examination is entirely self-contained and not dependent upon his direct examination. During his cross-examination, Hanson admitted

several critical facts, including, but not limited to, that Respondent is a labor organization which operates an exclusive referral service for between 35-40 contractors who have collective bargaining agreements with Respondent requiring them to first seek and obtain referrals for bargaining unit positions through Respondent' referral service before being allowed to seek employees from any other source. Hanson also admitted that Respondent received Lucas' June 4, 2014 information request and never responded to it. Additionally, Hanson admitted that Respondent informed Richardson that he was required to pay the internal fines in order to be referred out again, and that it never informed Richardson of anything to the contrary.

At the conclusion of the hearing, the ALJ instructed the parties to brief the issue of the appropriate sanctions (if any) regarding Respondent's refusal to comply with CGC's subpoenas and her order requiring compliance with substantially all of CGC's Subpoena Duces Tecum. (Tr. 416-417).

In footnote 3 of its post-hearing brief, CGC moved to strike Hanson's direct testimony, stating, in pertinent part, the following:

> 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 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 found Respondent willfully refused to produce any of the subpoenaed documents or make any of the subpoenaed witnesses available for 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: (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 CGC to use secondary evidence to prove any element of his case-in-chief. (ALJD 4-5).

Hanson testified "on behalf of Respondent" during his direct examination, but not during cross-examination. 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 ruling, and her ruling should be upheld. See *Perdue Farms*, 144 F.3d at 834 (Board reviews a judge's imposition of sanctions under an "abuse of discretion" standard).

In its Answer Brief to CGC's Limited Cross Exceptions, Respondent accuses CGC of changing or somehow fabricating his position regarding the appropriate sanctions. There has been no fabrication or change in position. At the hearing, CGC immediately objected when Respondent called Hanson to the stand to testify and introduce documents as part of Respondent's defense, because Respondent and Hanson had failed to comply with CGC's subpoenas. Failure to object at that time could have been interpreted as a waiver. The ALJ reserved ruling on the objection and allowed Respondent to examine Hanson. CGC then cross-examined Hanson after the ALJ gave CGC assurances that doing so would not constitute a waiver of any objections he may have. Again, failure to cross-examine Hanson could later have been interpreted as a waiver. At the end of the hearing, the ALJ instructed the parties to brief the issue of whether sanctions were appropriate. CGC and Respondent both briefed whether sanctions were appropriate under the circumstances. As stated above, CGC argued that, based on the circumstances, Respondent's exhibits and Hanson's direct testimony should be stricken as an appropriate sanction for his and Respondent's willful non-compliance and overall contumacious conduct. The ALJ agreed and struck the evidence offered through Hanson on behalf of Respondent.

Contrary to Respondent's claims, CGC did not change its position. The first time CGC ever gave his position was in his post-hearing brief, based on the ALJ's instructions. In that brief, CGC clearly articulated what sanctions he believed were appropriate under the unique circumstances of this particular case and the reasons why. CGC continues to maintain

that those sanctions are appropriate. Thus, there has been no change in position or recent fabrication.

Respondent also argues the ALJ struck all of Hanson's testimony, but later relied upon portions of it in making her findings and conclusions. In support of its argument, Respondent cites to footnotes 35, 59, 76, and 82 of the ALJ's Decision. A close examination of those footnotes shows that, in each instance, the ALJ only refused to consider evidence offered during Hanson's direct examination, not his cross examination. In footnote 35, the ALJ credited Lucas' testimony concerning his conversation with Hanson regarding Respondent's $100 botched dispatch program over the testimony offered by Hanson, because the only time Hanson testified about this $100 botched dispatch program was during his direct examination. (ALJD 9, fn. 35). In footnote 59, the ALJ addressed Respondent's attempt to paint Lucas as a paranoid, violent, racist and sexist individual who takes no responsibility for his own actions as irrelevant. The ALJ held in this footnote that "to the extent *Respondent proffered* documents or testimony to support its theory, they are stricken and given no weight due to the previously imposed sanctions against it." (ALJD 14, fn. 59)(emphasis added). In footnote 76, the ALJ refused to consider Hanson's testimony and various documents Respondent offered through him to support its arguments that it fined Richardson for violating Respondent's work rules, because all of the evidence was offered during Hanson's direct examination. Similarly, in footnote 82, the ALJ refused to consider the evidence Respondent offered through Hanson concerning how Richardson's alleged outbursts and continued threatening behavior was so pervasive that it caused employers to issue "no hire" letters for Richardson, because that evidence was offered during Hanson's direct examination. In short, each footnote is

consistent with the ALJ's ruling to sanction Respondent by striking the evidence offered during Hanson's direct examination, but not during his cross examination.

Respondent notes the ALJ relied upon Hanson's testimony in footnotes 43 and 62 in making certain findings and conclusions, and that by doing so, the ALJ was inconsistent in her rulings. Again, a review of both footnotes demonstrates that the ALJ was citing to Hanson's cross-examination testimony, not his direct-examination testimony. In footnote 43, the ALJ cited to Hanson's cross-examination testimony in which he acknowledged that Respondent received Lucas' June 4, 2013 information request and that it never contacted Lucas about the request, never expressed any concerns about the request, and never provided him with any of the information. (Tr. 402-405). This is corroborated by Lucas' testimony. In footnote 62, the ALJ cited to Hanson's cross-examination testimony regarding Richardson's ongoing personal conflict with Antoine (Jersey) Gilliam, which later led Respondent to impose the fines against Respondent. This is corroborated by Richardson's testimony.

Respondent also contends the ALJ relied upon Hanson's testimony finding that Respondent operated an exclusive referral service for employers other than GES. Hanson's testimony concerning the exclusive nature of the referral service occurred during his cross-examination, not his direct examination. He testified, in pertinent part, as follows:

> Q: Okay. And Local 720 has collective bargaining agreements with approximately how many contractors?
> A: Over 60. Between 60 and 70.
> …
> Q: BY MR. GOLLIN: And does your dispatch system -- or your referral system, do you -- of those 60 or 70 contracts, how many of which contain in them a referral procedure or a employment procedure regarding dispatches through Local 720?
> A: Just about all of them.
> Q: Okay. And approximately how many of those 60 to 70 contracts that provide for a referral procedure require the contractor to contact Local 720 first

> in order to fill certain positions covered by the collective bargaining agreement?
> A: There is a -- there are quite a few. And then there's some that are supplemental.
> Q: How many would you say do?
> A: Of the 60, I would say 40 -- 35, 40.
> …
> Q: BY MR. GOLLIN: So, Mr. Hanson, out of the approximately 35 to 40 collective bargaining agreements that you have with contractors in the Las Vegas area for which you have an employment procedure or a referral procedure, how many of those contractors are required to contact Local 720 first in order to obtain referrals before they're able to go and obtain employees from some other source?
> A: Just about all of them. Of the 35 to 40, right.

(Tr. 395-398).

Respondent argues that the ALJ erred in relying upon Hanson's cross examination without admitting his direct examination because there was no foundation as to his knowledge and authority. Respondent argues that without the identification and other testimony at the beginning of his testimony, the subsequent cross-examination of Hanson was meaningless. In short, Respondent argues that Hanson's testimony has to be admitted in whole or stricken as whole. This argument is without merit.

CGC independently established a foundation for Hanson's knowledge and authority during his cross-examination. Hanson acknowledged during his cross-examination that, at all material times, he was Respondent's business representative; that he was familiar with Respondent's collective-bargaining relationships; that he was familiar with and responsible for administering Respondent's referral procedure; and that he was involved in each of the events giving rise to the alleged unfair labor practices. This is all established without regard to anything he stated on direct examination.

Moreover, Respondent cites to no legal authority to support his position that the Board is required to admit all or none of a witness's testimony when, as here, the witness has failed

to comply with a Board subpoena and an ALJ's order. The Board has upheld sanctions against a party who fails to comply with subpoenas, including barring them from examining witnesses. See, e.g., *McAllister Towing & Transportation Co., Inc.*, 341 NLRB 394 (2004); *International Metal Co.*, 286 NLRB 1106, 1112 fn. 11 (1986); and *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)."

B. Respondent ignores the evidence in arguing that CGC failed to establish that it operates an exclusive referral service for any contractor other than GES.

As stated above, Hanson's cross-examination testimony, combined with the testimony of Noel Cummins and Steven Lucas, establish that Respondent has collective-bargaining agreements with area contractors in which the contractor is required to first obtain referrals through Respondent's referral service before going to any other source. Under Board law, an exclusive referral arrangement exists where the union retains exclusive authority for referrals for a period of time before an employer can hire on its own from some other source. See *Carpenters Local 608 (Various Employers)*, 279 NLRB 747, 754 (1986), citing *Mountain Pacific Chapter AGC*, 119 NLRB 883 (1957); *Boilermakers Local 587 (Stone & Webster)*, 233 NLRB 612, 614 (1977); *Carpenters Local 78 (Murray Walter)*, 223 NLRB 733, 734735 (1976).

C. Respondent owes a duty of fair representation to all users of its exclusive referral service, regardless of their membership in the union.

Respondent contends that it had no duty of fair representation in these cases, particularly to non-members, because Nevada is a right to work state. Respondent has failed to cite any authority supporting its position. Respondent continues to contend that it cannot be required to represent individuals for free. However, Respondent has failed to address that

it assesses and collects mandatory referral fees from all non-members who seek to use its exclusive referral service. In other words, Respondent is not being asked to do anything for free, and there is no merit to any of Respondent's constitutional claims.

III. 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.

Respectfully submitted this 6th day of August 2014.

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CERTIFICATE OF SERVICE

I hereby certify that **GENERAL COUNSEL'S REPLY 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 6th day of August 2014, on the following:

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