

**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 and Randall H. Finch and Jonathan W. Mudrich and James P. Vacik.** Cases 15-CB-005871, 15-CB-005924, 15-CB-072526, 15-CB-005894, 15-CB-070725

December 16, 2014

#### DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND HIROZAWA

On February 26, 2014, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

#### ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

*Beauford D. Pines, Esq., and Nairea K. Nelson, Esq.,* for the General Counsel.

*J. Cecil Gardner, Esq., Kimberly C. Walker, Esq., and David C. Tufts, Esq.,* for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Mobile, Alabama, on February 25 through March 1, 2013. Randall H. Finch, an individual, filed the initial charge in Case 15-CB-005871 on April 23, 2009. He amended the charge twice, on September 25, 2009, and October 28, 2009. On September 25, 2009, Finch also filed his second charge, in Case 15-CB-005924. Jonathan W. Mudrich, an individual, filed the charge in Case 15-CB-005894 on June 15, 2009, and amended it on September 25, 2009. Based on the first two charges filed by Finch and the charge filed by Mudrich, the General Counsel issued a consolidated complaint against the Respondent, International Alliance of Stage Em-

<sup>1</sup> The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

ployees and Moving Picture Technicians, Artists, and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, Local 142 (the Union or Local 142), on November 17, 2009.<sup>1</sup> On December 14, 2011, while the case was pending a hearing, James P. Vacik, an individual, filed the charge in Case 15-CB-070725, which he amended on October 30, 2012. Finch filed his third charge in this matter, in Case 15-CB-072526, on January 17, 2012, which he amended twice, on March 9 and October 30, 2012. Based on these new charges, the General Counsel issued a new consolidated complaint on October 31, 2012, incorporating the allegations of the initial complaint and adding new ones.

The consolidated complaint alleges that the Respondent Union, since October 23, 2008, has violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) through the operation of a hiring hall serving various employers in the Mobile, Alabama area. Specifically, the complaint alleges that the Respondent failed and refused to refer the individual Charging Parties, as well as Jon P. Mudrich and others "whose names are currently unknown to counsel for the Acting General Counsel" for employment for arbitrary and/or discriminatory reasons, or in bad faith, and to encourage membership in the Union; that it referred employees without using objective referral criteria; and that it failed to follow hiring hall rules. The Respondent's conduct in operating the hiring hall is alleged to have breached the Respondent's fiduciary duty owed to employees it represents, and to have encouraged employers utilizing the hiring hall to discriminate against employees based on their membership or nonmembership in the Union.

On November 15, 2012, the Respondent filed its answer to the consolidated complaint, denying the unfair labor practice allegations and asserting several affirmative defenses, including that the allegations are not supported by a timely-filed charge under Section 10(b) of the Act, that no unit employees suffered any damage, loss, or injury as a result of the Respondent's operation of its hiring hall, and that any deviation from hiring hall rules was inadvertent error or mistake. The Respondent also specifically denied that it maintained an exclusive hiring hall and that it had a collective-bargaining agreement with all of the named employers.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

SMG Worldwide (SMG), one of the Employers identified as having a collective-bargaining agreement with the Respondent, is a limited liability company with an office and place of business in Mobile, Alabama, where it is engaged in the business of managing the operations at the Mobile Civic Center and the Mobile Convention Center, and at other entertainment and con-

<sup>1</sup> A settlement agreement was executed by the Respondent in about March 2010. Although a hearing scheduled at the time was postponed "pending settlement," the settlement agreement was never approved by the General Counsel's office.

vention facilities in the area. SMG annually derived gross revenues in excess of \$500,000 from its business and purchased and received at its Mobile facility goods valued in excess of \$5000 directly from points outside the State of Alabama. The Respondent admits, and I find, that SMG is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.<sup>2</sup>

## II. ALLEGED UNFAIR LABOR PRACTICES

The undisputed evidence in the record establishes that Respondent Local 142 did not have a formal hiring hall prior to 2008. In about February 2008, International Representative Scott Haskill met with the Respondent's officers, including President Bud Cook and Business Representative Philip Tapia, and suggested the local establish a hiring hall with a set of rules, policies, and procedures. Haskill advised the local that, if they did not, the International Union would not represent them if they got into trouble over referrals. Haskill presented Respondent with a set of rules it could use. Thereafter, the Respondent submitted the rules to its membership for a vote and, upon approval, the new hiring hall with its formal rules was created, effective April 1, 2008. The Respondent then created two rosters for use in making referrals. Roster A consisted of union members, listed by date of membership. Roster B consisted of nonmembers who had been referred to work by the Union. There is no dispute that, in making referrals after April 2008, the Respondent referred its members on the A roster before nonmembers on the B roster. This practice continued until Finch filed his unfair labor practice charges in 2009. Effective October 1, 2009, the Respondent's members approved an amended set of hiring hall rules which, *inter alia*, eliminated the A and B rosters. Now, the Respondent uses one seniority list with names of all employees who had used or desire to use the Union's referral service to obtain work in the Mobile area, listed by the date they first worked in the stagecraft industry, without regard to membership status.

In addition to the seniority rosters, the Union has maintained a First Hire list, as called for in the hiring hall rules, for each venue it services. The First Hire list, by craft, identifies those individuals with the highest skill and most seniority working at a particular venue. The individuals on the First Hire crew are supposed to be the first ones in their respective craft to be referred to the venue in question. As to all other venues or other crafts, their referral would be based on their place on the seniority list. There is no dispute that, from April 1, 2008, until July 2009, the Respondent did not have any written First Hire lists, even though it had first hire crews for several venues, including the Mobile Civic Center and Convention Center. The Respondent's first written First Hire list was created on July 1, 2009. Charging Party Finch is listed as the first hire stagehand

for the Convention Center and Charging Party Vacik is listed as the first hire lighting technician at the Arena, part of the Mobile Civic Center.<sup>3</sup> Alleged discriminatee Jonathan P. Mudrich, is the first hire audio technician at the Civic Center's theatre.

Under the Respondent's constitution and bylaws, the business representative is responsible for the administration and operation of the hiring hall. As noted above, Tapia was the business representative when the hiring hall was established in 2008.<sup>4</sup> He served in this capacity, an elected position, until January 2011 when he was succeeded by Charging Party Vacik. Charging Party Finch served as a job steward under Business Representatives Mudrich and Vacik. Vacik stepped down as business representative in August 2011. Tapia was appointed to finish out his term, through December 2011. In January 2012, Tapia became the Respondent's president, succeeding Cook. John Kenneth Brown was elected as business representative, a position he still held at the time of the hearing.

During the period covered by the complaint, the Respondent has had two collective-bargaining agreements with SMG covering work performed at the Mobile Civic Center and Convention Center. The first was effective from October 1, 2006, through September 30, 2009. This agreement was negotiated by Jonathan P. Mudrich, who was the Union's business representative at the time and SMG General Manager Jay Hagerman. Both men signed the agreement along with International Union Representative Donald Gandolini. This agreement was succeeded by the current contract, which is effective July 1, 2011, through September 30, 2014. Charging Party Vacik negotiated the current agreement while serving as the Respondent's business representative. Hagerman also represented SMG for the 2011 agreement. Vacik, Hagerman and Gandolini signed this agreement. Both contracts contain almost identical provisions with respect to recognition and the hiring of employees represented by the Respondent.

Both agreements open with several "Whereas" paragraphs recognizing the employer's need from time to time for skilled stagehands and other craftspeople to perform work related to presentation of entertainment and theatrical events and the Respondent having such individuals as members who are available to perform the required work and expressing the mutual desire of the parties to set forth the terms under which such work will be performed. Article 1, "Scope of Work and Recognition," identical in both contracts, sets forth the arrangement for hiring of personnel as follows:

1.1 Subject to the limitations set forth in the remainder of this Article or elsewhere in this Agreement, the Employer recognizes the Union as the sole and exclusive bargaining agent for all Personnel employed by the Employer in the Mobile Civic Center. The Union has submitted proof and the Employer is satisfied that the Union has been designated or

<sup>2</sup> The complaint alleges that five other named parties in interest are also employers engaged in commerce within the meaning of the Act. At the hearing, based on documents furnished pursuant to subpoena, the parties were able to stipulate as to jurisdiction over these other entities. It is unnecessary to make particular findings with respect to each as the Board's jurisdiction in this matter is established based on SMG's status as an employer within the meaning of the Act.

<sup>3</sup> Vacik is qualified for lighting and audio. He testified that he elected to be first hire for lighting because every event requires lighting while there is not always sound for an event.

<sup>4</sup> Jonathan P. Mudrich, the father of Charging Party Mudrich and a named discriminatee himself, was the business representative from 2005 until Tapia was elected in 2008.

selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes.

1.2 (a) *When requested by the Employer*, Personnel represented by the Union shall perform work required by the Mobile Civic Center in connection with the stage-related aspects of the Mobile Civic Center's presentation of entertainment and theatrical events, and sports competitions and exhibitions.

(b) With respect to entertainment and theatrical events, the work of Personnel may include, but shall not be limited to, truck and car loading and unloading, the "Move-In", "Performance", and "Move-Out" of shows and attractions, the staging of theatrical equipment, and the wardrobe requirements in connection therewith.

(c) With respect to entertainment and theatrical events, and sports competitions and exhibitions, the work of Personnel also may include stage lighting; slide projection; filming, taping, photographing, or broadcasting, or support thereof; and sound amplification, provided, however, that (i) individual(s) designated by and traveling with the Show, who possesses the specialized skill, ability and knowledge of the Show, may be permitted by the Employer to direct or coordinate Personnel in the performance of any such duties, and (ii) *any such duties may be performed by persons other than Personnel covered by this Agreement, including but not limited to the Employer's stage manager and/or Assistant Stage Manager, the Employer's contractor, or the Show or its contractor.*

(d) *The Union acknowledges that the setup and tear down of meeting rooms, including seating, risers, and other house equipment, in connection with entertainment, theatrical events, sports competitions and exhibitions, or with trade and industrial shows, flat shows, or conventions, whether in the Arena, Theater, or Expo Hall, will be performed by employees other than Personnel covered by this Agreement, unless Personnel are directed to do so by the Employer on a case-by-case basis, in which event they shall be compensated in accordance with this Agreement.*

(e) It is expressly understood that all Personnel are subject to the assignment, engagement, selection, direction, and control of the Mobile Civic Center's General Manager, Stage Manager (or Assistant Stage Manager), and/or Director of Operations, or their respective designee(s), who will coordinate the respective needs of the Show and the Mobile Civic Center.

1.3 The Union agrees to provide Personnel skilled and experienced in performing the aforementioned work, *as and when requested by the Employer*, and the Employer agrees to give the 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.

1.4 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, as in the past. If the Employer

assigns an electrician who is a regular full-time or regular part-time employee of the Mobile Civic Center, such employee shall be paid in accordance with the terms and conditions of employment normally applicable to such full-time or part-time employee.

1.5 The Employer and the Union will honor all Yellow Card attractions, provided, however, that union members of touring companies permitted to work a live theatrical production in the Mobile Civic Center never will outnumber the Personnel assigned under this Agreement to work that production. *There are no fixed manning requirements or provisions applicable to the Mobile Civic Center, subject to the Yellow Card requirements described herein.* The Employer will not invoke this provision for the purpose of depriving Personnel of legitimate work assignments, and will notify the Union Business Representative of any events to which Personnel may be assigned under this Agreement.

1.6 In the event the parties hereto disagree as to who shall do certain work at the Mobile Civic Center, the Employer shall attempt to resolve any such work dispute by meeting with the Union and any other party to the dispute. In the event a mutually satisfactory solution cannot be reached at such meeting, the Employer will make the final decision with respect thereto, subject to the union's right to grieve.

[Emphasis added.] Yellow Card attractions, referred to in section 1.5, are travelling shows that operate under a collective-bargaining agreement with the International Union.

The two contracts between the Respondent and SMG also included an "Addendum A" which "outlines the agreement between [the Respondent] and SMG relating to the services or personnel at the Mobile Convention Center" which provides as follows:

It is agreed between the parties that *when requested by SMG*, personnel represented by IATSE shall perform the designated work at the Mobile Convention Center Exhibit Hall. The work, conditions, safety, management rights, visitation, and assignment shall be governed by the provisions in that agreement entered into between SMG and IATSE on or about [date of agreement]. [Emphasis added.]

Hagerman was subpoenaed to testify by the Respondent. He has been the general manager at the Civic Center and Convention Center for SMG since 1994. As noted above, he negotiated and signed both collective-bargaining agreements for SMG. Hagerman testified that neither agreement requires SMG to hire stagehands exclusively through the Union's hiring hall. SMG can and has utilized its own employees, employees of subcontractors and crews traveling with a show or exhibition to do work covered by the Agreement. Hagerman acknowledged that, in most case, it will utilize the hiring hall as a convenient source of skilled employees. In all cases, SMG has the final say as to the source of labor.

The General Counsel initially alleged in the complaint that five other employers in the Mobile area who utilize stagehands from time to time have collective-bargaining agreements that required the Respondent to be the exclusive source of referrals of employees to perform work within the Respondent's trade

jurisdiction. However, at the hearing, no such collective-bargaining agreements were offered into evidence. Philip Tapia served as the Respondent's business representative from January 2008 through December 2010 and again from October through December 2011, when he was elected president of the Union, the position he held when testifying at the hearing. As business representative, Tapia was in charge of administering the hiring hall. He testified without dispute that the Respondent did not have a collective-bargaining agreement with any of these employers.<sup>5</sup> Representatives of several of these employers, who were subpoenaed by the Respondent, appeared at the hearing and testified that they had no agreement with the Union requiring them to use the Respondent's hiring hall as the exclusive source of labor. The testimony of these employer representatives revealed that each had, from time to time, utilized the Respondent as a source of employees because it was convenient to do so, not because they were under any contractual obligation. All testified consistently that they had hired stagehands, including union members, directly without contacting the Respondent or utilizing the hiring hall. Faced with this evidence, counsel for the General Counsel amended the complaint at the hearing to allege that by contract "or practice," the Respondent has been the exclusive source of referrals of employees within its trade jurisdiction.

The General Counsel's theory of the case rests upon a finding that the Respondent operated an exclusive hiring hall for jobs in the stagehand craft in the Mobile area. Under the Act, a union that operates an exclusive hiring hall may not discriminate against and among employees in the way it refers employees for employment. *Laborers Local 334 (Kvaerner Songer)*, 335 NLRB 597 (2001). A union that operates a nonexclusive hiring hall is not obliged to follow a nondiscriminatory referral system because, in such cases, the union lacks the power to put jobs out of reach of employees. *Carpenters Local 537 (E. I. duPont)*, 303 NLRB 419 (1991). It is well established that the party asserting the existence of an exclusive hiring hall has the burden of proof. *Id.* at 420.

The evidence described above fails to establish that, by contract or "practice," the Union operated an exclusive hiring hall with respect to any of the employers named in the complaint. SMG is the only employer with whom the Respondent had a collective-bargaining agreement and that agreement, on its face, does not create an exclusive referral system. Rather, it provides that the employer may utilize the Union as a source of employees when it deems it necessary. The collective-bargaining agreement established the wages, hours, and terms and conditions of employment of employees referred to the Civic Center and its venues only when the Union referred such employees. It does not govern the terms and conditions of SMG's own employees, who perform some of the work that stagehands do, and it doesn't govern the terms and conditions of contractor employees who are utilized from time to time. I 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.

The General Counsel's case is even more unsustainable as to the other named employers. None ever recognized the Union as the 9(a) representative of its employees. None ever signed a collective-bargaining agreement with the Union. None ever signed any agreement with the Union that would require them to use the Union as the exclusive source of employees in the craft. Moreover, credible testimony from representatives of these noncontract employers shows the nonexclusive nature of the Respondent's referral service. The fact that these employers, from time to time, elected to obtain through the Union the services of skilled stagehands for specific functions, by itself, does not create an exclusive hiring hall by any stretch of the imagination.

A union's duty to act fairly and impartially drives from its status as exclusive collective-bargaining representative of employees in a specified unit. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). In this case, the Union had never been recognized by Alabama Power, the Wharf, BayFest, the Explorem, or DPU as exclusive representative of any unit of employees. Thus, the Union owed no duty to assist its members or others in finding employment with these employers who could and did hire individuals directly. The General Counsel's reliance on those cases where the Board found a "de facto" exclusive hiring hall are not apposite to the situation here, with the exception of SMG. In those cases, there was at least recognition of the union, a bargaining relationship and a collective-bargaining agreement between the union and the employer. See *Teamsters Local 200 (Bechtel Construction)*, 357 NLRB 1844 (2011); *Teamsters Local 293 (Beverage Distributors)*, 302 NLRB 403 (1991); *Teamsters Local 328 (Blount Bros.)*, 274 NLRB 1053, 1057 (1985); *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB 777 (1984); *Teamsters Local 174 (Totem Beverages)*, 226 NLRB 690 (1976).

Because SMG had a collective-bargaining agreement with the Union which contained referral language, those cases relied on by the General Counsel are relevant. However, I find that they are distinguishable from the facts here which show, as described above, that SMG retained discretion to determine when and whether to use the Union's referral service. Accordingly, I find that even as to SMG, the Union did not operate a "de facto" exclusive hiring hall.

Without this predicate finding of an exclusive hiring hall, much of the General Counsel's case falls apart. Thus, any allegations that the Union violated the Act with respect to referrals to employers other than SMG must fall because the Union owed no statutory duty to the potential or actual employees of these employers who had not recognized it as the 9(a) representative of their employees. Even as to SMG, because the Respondent operated a nonexclusive hiring hall, it was not required to make referrals in a nondiscriminatory manner nor was the Union required to follow objective criteria in the operation of the hiring hall. See *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174 (2000); *Carpenters Local 537 (E. I. DuPont)*, supra; *Development Consultants*, 300 NLRB 479 (1990). Accordingly, I shall recommend dismissal of those

<sup>5</sup> The five employers, named as parties in interest in the complaint, are: AIG Baker Wharf Inn, LLC (the Wharf); BayFest, Inc.; Dorsett Productions Unlimited (DPU); Gulf Coast Explorem Science Center (Explorem); and Alabama Power Company.

allegations in the complaint that are based on alleged discrimination in making referrals based on an applicant's nonmembership in the Union or based upon the Union's failure to follow its hiring hall rules or other objective criteria in making referrals to SMG.

A union that operates a nonexclusive hiring hall still owes its members a duty not to retaliate against them for exercising their Section 7 rights and may be found to violate Section 8(b)(1)(A) where it discriminates against members in retaliation for their protected activities. *Teamsters Local 17 (Universal Studios)*, 251 NLRB 1248, 1257 (1980), cited with approval by the Board in *Carpenters Local 537 (E. I. DuPont)*, 303 NLRB at 420. Accord: *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 441, 441 fn. 1 (1990); *Development Consultants*, 300 NLRB 479, 480 (1990). In this case, the General Counsel alleges that the Respondent discriminated against Charging Parties Finch and Vacik in making referrals based on their protected activity.

Finch has worked in the industry for over 20 years and has been a member of the Respondent Union since October 9, 2006. He served as steward when Jonathan P. Mudrich was business representative, in 2006–2007. Finch more recently served as the elected secretary-treasurer, from January to June 2012. He is listed on the first hire crew for the Convention Center as the first hire stagehand, which means he should be the first stagehand referred when the convention center requests a referral. Finch has experience in all aspects of stagehand work, including lighting and rigging, although he admitted that prefers not to work certain freestyle up-rigging jobs that require a rigger to work on open beams. Finch also has a history of filing charges against the Respondent, including three of the charges involved in this case.

There is no dispute that, on March 1, 2008, Mary Gordon Forde, SMG's event services manager for the Convention Center, informed Cook, the Respondent's president at the time, that the producer of the Gulf Coast Boat Show had requested that Finch no longer work on any boat shows due to his slow response and poor quality of work. Finch admitted that he has not worked a boat show at the Convention Center since then. Around the same time, Hagerman sent a letter to the Respondent, dated April 16, 2008, stating that SMG would no longer allow Finch to work as part of a stagehand call at the Civic Center because he was perceived to be slowing down work and had exhibited a bad attitude toward SMG management and employees. Finch has not been referred to work any events at the Civic Center since April 2008.

There is some evidence in the record that some officials of the Respondent bore animus toward Finch. On September 28, 2009, 3 days after Finch had filed his second charge against the Union and amended his first charge, Tapia sent an email to then Secretary-Treasurer Helen Megginson in which he referred to Finch as "Rat Fink." On December 20, 2010, while Finch's charges were awaiting a hearing in this case, someone posted a sarcastic comment on the Respondent's webpage identifying Finch as the Respondent's new webmaster and directing members to "address all concerns to him." There is no dispute that Finch never served as the Respondent's webmaster. It is also undisputed that only Business Representative Tapia and Secre-

tary-Treasurer Megginson had access to and the authority to post information on the Respondent's webpage.

The General Counsel cites a number of specific instances where it is claimed Finch should have been referred to a job instead of someone else on the list. The first incident cited by the General Counsel was the Order of Venus event at the Convention Center on February 16, 2009. Finch was referred to work the load-in and load-out for this Mardi Gras related event, but he was not referred to work the performance phase. According to Finch, when he questioned Tapia about this, Tapia told him that Finch had not been at a recent union meeting and another member who was at the meeting requested to work the event. The General Counsel also cites a number of events at the Convention Center where it is claimed that someone was referred to a job ahead of Finch even though Finch was the First Hire Stagehand for that venue. The first such event was the annual Nutcracker Ball in December 2010. Finch had worked this event every year. According to Finch, he was watching the evening news on December 21 and saw a report about the event and saw other stagehands working at the Convention Center in preparation for it. Finch had not been called by Tapia for this job. Finch testified that he checked the Respondent's webpage to see if the event was listed and that is when he discovered the sarcastic comment about him being the new webmaster. After Finch submitted a written complaint about this to Tapia and the Respondent's hiring hall board, he was referred to the event on December 23.

Other events at the Convention Center, to which the General Counsel claims others were referred ahead of Finch despite his being on the First Hire crew for that venue are: Alfa Showbiz on December 1, 2011; a December 29, 2011 event for Church of His Presence (CHP) at the Convention Center for DPU; the Gulf States Horticulture show on January 14–17 (Finch was referred for the first day and not the remainder of the show); another DPU event for CHP on January 28, 2012; and Jam Fest Nationals, a dance competition, on February 23, 2012. The General Counsel also cites an incident on January 2, 2012, involving an event for Dauphin Way Baptist Church. There is no dispute that employees other than Finch were referred to perform rigging and stagehand work. Tapia claimed that the call for employees came in to the Union at 6 p.m. for a job that started at 8:30 p.m., less than 2 hours away. Tapia testified that he referred two employees who were present at the Civic Center when he received the call rather than using the seniority roster. Finally, the General Counsel cites a referral to the Explorem to help with setting up and taking down a travelling dinosaur exhibit.<sup>6</sup> Finch and Charging Party Vacik were referred for 2 days to do the load-in. The complaint is that they did not work the next 2 days (January 24 and 25, 2012). John Kenneth Brown was the business representative at the time, having succeeded Tapia after Tapia was elected president. Brown testified that he recalled that Finch and Vacik had another job on January 24 and 25.

As already found, the Respondent Union did not operate an exclusive hiring hall with respect to work at the Mobile Con-

<sup>6</sup> The Explorem is one of the employers with whom the Union had no contract.

vention Center and had no contractual or statutory obligation to fairly represent employees of the other employers named in the complaint, such as DPU and the Exploreum. Thus, to establish a violation of the Act regarding these nonreferrals for Finch, the General Counsel must prove that the Respondent, in failing to make a referral, was motivated by protected activity engaged in by Finch. While there is no question that Finch's charge-filing activity was protected, and although there is some evidence that there was no love lost between Finch and Tapia, I find that the General Counsel has not met his burden of proving causation between Finch's protected activity and the nonreferrals. The Respondent's witnesses, Tapia and Brown, provided an explanation for the nonreferrals which was not unreasonable. Finch's testimony was not entirely credible because he tended to exaggerate his rigging skills and experience in the face of contradictory testimony from the Respondent's witnesses. I also note that, during his testimony, Finch took an unusually long time to answer some questions, even when posed by counsel for the General Counsel, suggesting that he was contemplating the consequences of whatever answer he gave. I also note that SMG management, which operates the Convention Center, had already expressed their displeasure with Finch's work performance. Finally, the record shows that, despite these incidents when Finch was allegedly denied a referral by the Respondent, he received multiple other referrals to the Convention Center and other venues during the period of time after he filed charges against the Union. This evidence tends to belie any claim that the Respondent was intent on retaliating against Finch for unlawful reasons.

Charging Party Vacik has worked in the industry since 1994 and has been a member of the Respondent since November 13, 2006. As noted above, Vacik is on the First Hire crew for the Arena at the Civic Center as Head Lighting. Vacik also has substantial audio experience and has worked as a stagehand and rigger. As noted previously, Vacik also served as the Respondent's business representative, in charge of making referrals, from January to August 2011. He filed one of the charges in this case, on December 14, 2011. There is no evidence of any specific animus towards Vacik over the exercise of any protected activity.

The General Counsel does not allege that Vacik was passed over for referrals to the Arena where he was on the First Hire crew. Rather, the General Counsel cites a number of events between October 4, 2011, and February 5, 2012, where records kept by the Respondent show that employees with less seniority than Vacik were referred to jobs at other venues. Three of the events occurred around the same time: an Alabama Power Company business meeting held at the Grand Hotel in Point Clear, Alabama, on October 4, 5, and 7, 2011; The BayFest Miller Stage on October 5, 6, 7, 8, and 9, 2011 (Vacik usually works this event every year and in fact worked the event on October 7 and 8 and declined to work on October 9); and the load out of the Space Shuttle exhibit at the Exploreum on October 5, 2011. All of these events were presented by employers who did not have a contractual relationship with the Union. Thus, there was no obligation for the Respondent to follow objective criteria or act fairly in making these referrals. The only thing the Respondent was prohibited from doing was

denying a referral because of a members protected activity. As with the allegations regarding Finch, the General Counsel has the burden of proving an unlawful motivation. I find that, in this instance, he has not met his burden. Vacik in fact was referred and worked one of these events during this period. If the Respondent were intent on retaliating against Vacik, why would they have referred him for 3 days at the BayFest job? Vacik declined 1 of the 3 days he was offered work. It's possible that he also declined work on October 5, a day all three events shared.

The other events which Vacik was allegedly passed over for discriminatory reasons involve primarily audio work. There was disagreement in the testimony over the extent of Vacik's skill and qualifications for this work. I note that Vacik's testimony about work he performed at a venue not named in the complaint (the Saenger Theater), was not corroborated by the production manager at that facility, Mitch Teeple, who testified that another individual actually performed the work that Vacik claimed to have done. In light of Vacik's questionable credibility regarding his expertise and experience, I cannot say that the testimony of the Respondent's witnesses as to the reasons Vacik was not referred to these jobs was pretextual.

Having found that the General Counsel has not met his burden of proving that the Respondent discriminated against Finch and Vacik in making referrals because they had engaged in protected activity, I shall recommend that these allegations in the complaint be dismissed as well. *Carpenters Local 537 (E. I. DuPont)*, supra.

#### CONCLUSIONS OF LAW

1. 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.

2. The Respondent was not the 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.

3. The Respondent did not violate Section 8(b)(1)(A) and (2) of the Act through the operation of its nonexclusive hiring hall.

4. The 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.

5. The Respondent has not violated the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

The complaint is dismissed.

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.