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International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of The United States, its Territories and Canada, AFL–CIO, CLC, Local 838 and Cory B. Swartz and Freeman Decorating Company.
Case 27–CB–093060

August 23, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

Upon a charge filed on November 13, 2012 (and amended on January 23, 2013), by Cory B. Swartz, the General Counsel issued a complaint and notice of hearing on March 28, 2013, against the Respondent Union, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL–CIO, CLC, Local 838. The complaint alleged that the Union violated Section 8(b)(1)(A) of the Act by maintaining an attendance rule that conditions hiring hall users' eligibility for job referral upon the payment of assessments to the Union for noncompliance with that rule.

On January 24, 2014, the General Counsel, the Charging Party, and the Respondent filed with the Board a joint stipulation of facts and a motion to transfer this proceeding to the Board. The parties waived a hearing before an administrative law judge and agreed to submit the case directly to the Board for findings of fact, conclusions of law, and a Decision and Order based on the stipulated record. On April 30, 2014, the Board approved the stipulation of facts and granted the motion. Thereafter, the General Counsel and the Respondent filed briefs. On March 19, 2015, the General Counsel, the Charging Party, and the Respondent filed a joint motion to supplement the stipulated record.

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

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Freeman Decorating Company (the Employer) is a corporation headquartered in Dallas, Texas, with branch offices throughout the United States. The Employer is engaged in the business of producing special events, including trade shows in Salt Lake City, Utah. During the

calendar year ending December 31, 2012, the Employer, in conducting these operations, performed services valued in excess of \$50,000 in states outside the State of Utah.

The parties stipulated, and we find, that Freeman Decorating Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Stipulated Facts

Since at least May 2012, the Union and the Employer have maintained an agreement requiring that the Union be the exclusive source of referrals for employment with the Employer. The agreement states in relevant part:

The Company grants the Union the exclusive right to refer applicants to be employed by the Company to perform work covered by this Agreement and will communicate all labor needs exclusively to the Union Business Representative and the show site Job Steward.

Since at least May 13, 2012, the Union has maintained, as part of its job referral procedure, an attendance rule that includes the following provisions for failure to comply with the rule:

Any referent who fails to report to work on time will automatically be suspended from the referral list until referent has paid a \$25.00 assessment. . . .

Any referent, who fails to report to work, or whose replacement does not report to work on time, will be suspended from the referral procedure until the referent has paid a \$100.00 assessment.

Any referent who fails to report to work the second time will automatically be suspended from the Referral list until the Referent has paid a \$150.00 assessment.

Failure to report to work for the third time will cause the referent to be automatically suspended from the referral list until the referent has paid a \$200.00 assessment.

A referent who fails to report to work for the fourth time will automatically be permanently removed from the referral list.¹

¹ The parties agreed in their joint motion to supplement the stipulated record that the original stipulation included an incorrect version of the attendance rule. They further agree that the correct version, quoted above, has minor textual differences from the initial submission, but that "both contain language that conditions subsequent referrals on payment of outstanding assessments for failing to show up to work on time, or at all."

Pursuant to the attendance rule, referents will be notified by regular mail of each offense and may request an appeal before a referral committee (composed of five union members in good standing) within 10 days of the notice. The parties stipulated that: (a) Utah and Idaho, the only locations in which the Union operates its hiring hall, are right-to-work states; and (b) membership in the Union is not a condition of employment or a requirement to be eligible for referral for employment under the Union's job referral procedure. The parties further stipulated that maintaining an attendance rule addresses a legitimate concern of the Respondent in the effective performance of its representative function as the administrator of the hiring hall.

The General Counsel challenges the lawfulness of the four provisions of the attendance rule that condition a referent's inclusion on the referral list upon payment of outstanding fines for violations of attendance rules; he does not challenge the lawfulness of the fines themselves. Nor does he challenge the provision under which a referent will be permanently removed from the referral list upon failing to report for work for the fourth time. Finally, the General Counsel does not contend that the assessment of the attendance rule fines is applied disparately against members and nonmembers of the Union.

B. The Parties' Contentions

The General Counsel's complaint alleged that the Union violated Section 8(b)(1)(A) by maintaining an attendance rule that "conditions eligibility for dispatch/job referral on the payment of fines." In his brief to the Board, the General Counsel asserts that, as a per se matter, a union may not refuse to refer an employee for employment in order to enforce the collection of a fine or assessment. The General Counsel acknowledges that the Union had a legitimate interest in policing the attendance of referents, and that attendance rules such as the Respondent's are designed to "insure that workers whom unions refer actually show up for work and show up on time, so as to preserve a union's reputation and relationship with employers to which it supplies labor." The General Counsel contends, however, that although the Union could lawfully fine referents for lateness or failure to appear, pursuant to Board precedent it could not lawfully condition referents' work eligibility on the payment of that fine. See *Fisher Theatre*, 240 NLRB 678 (1979); *ILWU, Local 13 (Pacific Maritime Assn.)*, 228 NLRB 1383 (1977), enf. 581 F.2d 1321 (9th Cir. 1978), cert. denied 440 U.S. 935 (1979).

The Union contends that Section 8(b)(1)(A) was not intended to prohibit conduct like its attendance rule, which regulates the proper operation of its hiring hall for legitimate purposes, and was necessary to (a) ensure that

referents show up for their assignments at trade shows, which are large one-time events that must be assembled quickly; (b) prevent no-shows from adversely affecting referral opportunities for other referents; and (c) reimburse the Union for the administrative cost of finding replacements for no-shows. The Union asserts that the General Counsel's allegation of a per se violation lacks merit, and the cases cited by the General Counsel are distinguishable: both involved the enforcement of internal union rules that applied only to members, unlike the rule here, which applies to members and nonmembers alike, and does not affect membership status. Finally, the Union asserts that, to the extent that any inference can be drawn that its attendance rule was unlawful, that inference was rebutted by the showing that its action was necessary to the effective performance of its function of representing its constituency.

C. Discussion

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization to "restrain or coerce employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein" In *Mountain Pacific Chapter*, 119 NLRB 883, 895 (1957), enf. denied 270 F.2d 425 (9th Cir. 1959), the Board found that an exclusive hiring hall arrangement was per se unlawful because it inherently encouraged union membership. Thereafter, in *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961), the Supreme Court rejected the Board's per se approach and upheld the legality of hiring hall referral systems. Although the Court acknowledged that "the very existence of a hiring hall encourages union membership," it held that "the only encouragement or discouragement of union membership banned by the Act is that which is 'accomplished by discrimination.'" *Id.* at 674-676 (quoting *Radio Officers v. NLRB*, 347 U.S. 17, 43 (1954)). The Court noted that in the Taft-Hartley amendments, Congress "aimed its sanctions only at specific discriminatory practices," and did not intend to limit unions' attempts to enforce otherwise valid, contractually established hiring hall procedures. *Id.* at 676.

When it operates an exclusive hiring hall, a union has a duty of fair representation to all applicants using the hall,

² Owing to the proviso, Sec. 8(b)(1)(A) does not prohibit a union from requiring its members to adhere to internal union rules or from imposing intraunion discipline. See *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1420 (2000) ("Sec. 8(b)(1)(A) reaches only the external enforcement of union rules, impacting the employment relationship, and not their purely internal enforcement.").

whether members or nonmembers. See *Breining v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989). As part of this duty, the union must operate its exclusive hiring hall “in a fair and impartial manner. This code of acceptable conduct necessarily extends to the institution of any referral rules which . . . cannot be discriminatory or arbitrary.” *Boilermakers Local 374 (Combustion Engineering)*, 284 NLRB 1382, 1383 (1987), enf. 852 F.2d 1353 (D.C. Cir. 1988).

In *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), enf. denied on other grounds 555 F.2d 552 (6th Cir. 1977), the Board explained that, in the hiring hall context, when a union interferes with a referent’s employment status for reasons other than the failure to pay dues, initiation fees, or other fees uniformly required, a rebuttable presumption arises that the interference is intended to encourage union membership in violation of Section 8(b)(1)(A).³

A union may rebut the presumption by establishing that referrals are made pursuant to a valid union-security provision, or that its conduct did not violate its duty of fair representation and was necessary for the effective performance of its representational function. *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985), enf. mem. 843 F.2d 1392 (6th Cir. 1988); *Boilermakers Local 433 (Riley Stoker Corp.)*, 266 NLRB 596, 599 (1983).

Here, because the Union’s attendance rule affects referents’ employment status by providing for the suspension of workers from referral until their late-show/no-show assessments are paid, we find that the General Counsel has established a rebuttable presumption that the rule would “encourage union membership” within the meaning of *Operating Engineers Local 18 (Ohio Contractors Assn.)*, above. Accordingly, we must next evaluate whether the Union has rebutted this presumption.

Consistent with the foregoing principles, we first consider whether the rule is consistent with the Union’s duty of fair representation. In order to show that it is not, the General Counsel must show that the union acted “so far

³ As the Board explained in *Operating Engineers*:

When a union prevents an employee from being hired or causes an employee’s discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power. But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.

204 NLRB at 681.

outside a ‘wide range of reasonableness’ as to be irrational.”⁴ Here, we find the General Counsel failed to make such a showing. The parties stipulated that the Union’s policy “addresses a legitimate concern of Respondent in the effective performance of its representative function as the administrator of the hiring hall.” Significantly, unlike in other cases where the Board has found that a union acted unlawfully in the operation of its hiring hall, there is no indication that the Union’s policy is arbitrary, discriminatory, or has been applied in bad faith.⁵ On the contrary, the Union’s policy is reasonably designed to ensure the effective operation of its hiring hall, applies to members and nonmembers alike,⁶ is plainly articulated and relies on objective criteria, and there is no evidence it has been discriminatorily applied.

Having determined that the Union’s rule did not violate the Union’s duty of fair representation, we next consider whether the rule is necessary to the Union’s effective performance of its function of representing its constituency. In *United Brotherhood of Painters, Decorators & Paperhangers of America, Local Union No. 487 (American Coatings, Inc.)*, the Board explained the Union’s rebuttal burden:

It is plain that union actions reasonably designed to preserve the integrity of contractually prescribed referral practices, even though those actions bring changes in job status to individual employees, are of a nature meeting the burden of rebuttal. . . . What is reasonable, moreover, is not to be narrowly construed in matters of this sort. (citations omitted).

226 NLRB 299, 301 (1976). The Board accords a union deference when determining what conduct is reasonable to ensure the effective performance of its representative function. Once a valid objective is shown, the Board will not substitute its judgment for the union’s in determining what response is reasonable. “The Board does not, and should not, substitute itself for the Union in weighing the *wisdom* of the stated objective.” *Id.*, quoting *Chicago Federation of Musicians, Local 10, American Federation of Musicians (Shield Radio & T.V. Productions, Inc.)*, 153 NLRB 68, 84 (1965) (emphasis in original).⁷ Additionally, so long as a

⁴ *Air Line Pilots Assn. v. O’Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).

⁵ Cf. *Stagehands Referral Service*, 347 NLRB 1167, 1170–1171 (2006), enf. 315 Fed.Appx. 318 (2d Cir. 2009) (finding that union failed to refer a hiring hall member for “arbitrary and invidious reasons unrelated to any objective standards for referral”), and the cases cited therein.

⁶ Cf. *Fisher Theatre*, 240 NLRB 678 (1979) (union rule requiring payment of fines before referral applied only to union members).

⁷ See also *Local 644, United Brotherhood of Carpenters & Joiners of America (Tousley-Iber Co.)*, 271 NLRB 1125, 1147 (1984). (“[A]

union's chosen means of preserving the integrity of its contractual referral system is lawful, the Board does not require a union to demonstrate that it was the best or only means available. See *Millwrights' Local 1102 (Planet Corp.)*, 144 NLRB 798, 801–802 (1963) (otherwise valid union effort to enforce its hiring hall procedures not unlawful “simply because [the union] may have had other avenues of recourse open to it.”)⁸

Applying this analysis, we find that the Union's attendance rule is reasonably designed to serve its stated objective of ensuring “the effective performance of its hiring hall referral function so as to preserve Respondent's reputation and relationship with employers to which it supplies labor.”⁹ As the Union explained, the policy addresses its “interests in establishing an effective and prompt means of getting [a referent] to show up for work and preventing him from adversely affecting others missing the call he took.” The assessments enumerated in the policy, which range from \$25 for lateness to \$200 for a third failure to report, are reasonable both in scope and execution. Indeed, by imposing a series of incremental assessments before exercising the most severe (and lawful) remedy—exclusion from the hiring hall—the Union's rule on its face is plainly designed to ensure fair and predictable progressive outcomes. And, as the Union explained in its brief, its progressive fines cannot be effectively enforced without suspensions “because offenders could continue with impunity to violate the no show rules, and take calls without consequence. By the time the trade show is over, the damage is done to the Union, the Employer, and the public.”

Given that trade shows last for a short time only, it is surely rational for the Union to take preemptive measures to deter hiring hall users from committing attendance infractions, in order to facilitate the referral of available workers, to allow for the potential removal of offenders

union may seek as well to act to preserve lawful advantages it has obtained by contract in filling employment opportunities . . . so long as it does not exceed that objective. It is not for [the Board] to pass on the wisdom of a union-stated objective, where it is discernibly . . . related to the lawful concerns of unit employees.”)

⁸ Citing *Ohio Contractors*, our dissenting colleague misstates the nature of the rebuttal burden by suggesting that a union must demonstrate that its chosen means of enforcing a hiring hall rule is the most effective or most viable means of ensuring compliance with that rule. However, *American Coatings*, decided subsequent to *Ohio Contractors*, explains that a union may rebut the presumption by showing that its chosen employment-related sanction is a reasonable means of ensuring the integrity of its contractual referral system. A union need not prove that the means it chooses to protect its referral system will be the best means available. See *American Coatings*, supra; *Planet Corp.*, supra, at 802.

⁹ As noted above, the parties stipulated that the rule addresses a legitimate concern of the Union in the effective performance of the hiring hall.

from the eligible pool upon nonpayment, and to cover administrative costs.¹⁰ In this way, the rule reasonably serves the shared goal of the Union and the hiring hall users in sustaining the ongoing viability of the hall.¹¹ Accordingly, we conclude that the Union's rule is necessary to the effective performance of its function of representing its constituency.

We recognize that in the cases cited by the General Counsel, *ILWU Local 13 (Pacific Maritime Assn.)* and *Fisher Theatre*, the Board found that the respective unions violated the Act by refusing to refer employees who failed to pay union-imposed fines. But we disagree with the General Counsel's assertion that either of those cases established a per se rule whereby a union may never refuse to refer an employee for that reason. Indeed, in both cases, the Board carefully evaluated the unions' particular conduct rather than making a per se determination of unlawfulness. Moreover, and contrary to our dissenting colleague, we find that those cases are factually distinguishable. Both involved fines that were imposed to enforce internal union rules against members unrelated to the unions' hiring halls; *Pacific Maritime* concerned the nonpayment of “caucus and convention assessments and fines,”¹² and *Fisher Theatre* concerned employees who had been fined for violating their union's internal prohibition on bumping.¹³ Thus, it cannot be said that the unions' actions in either case were “reasonably designed

¹⁰ The dissent contends that no evidence was adduced that the incremental fine amounts were directly tied to the administrative costs of referents' noncompliance with attendance rules. As a preliminary matter, we note that the General Counsel did not challenge the amounts of the fines or contend that they were unlawful. In any event, we find that requiring the Union to make such a showing does not comport with our precedent, which emphasizes that the Board will not second-guess the wisdom of the Union's chosen approach to preserving the integrity of its referral system. See *American Coatings*, supra, at 301.

¹¹ The dissent argues that the Union has not adduced sufficient evidence regarding its justification for the rule and the circumstances that led the Union to enforce its attendance-related fines through non-referral. Again, this does not comport with our precedent. Where, as here, the Union has identified the legitimate interest in ensuring prompt, reliable referrals to employers, our role is not to substitute our judgment for the Union's in how it addresses this interest. The Union's rule that provides for a nondiscriminatory series of progressive assessments and ultimately the employment-related sanction of nonreferral is a reasonable means for ensuring the integrity of the referral system. See *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432, 433–434 (1983) (declining to scrutinize a union's rationale for imposing an employment-related sanction on a referent who violated a facially lawful, “published, well-known union rule” that served “legitimate, non-discriminatory” purposes relating to the effective operation of the hiring hall). Contrary to the dissent, the temporary suspension from referral is not a punishment for failure to pay the fines; it is part of a progressive system aimed at deterring absences that negatively impact the hiring hall.

¹² 228 NLRB at 1385.

¹³ 240 NLRB at 685–690.

to preserve the integrity of contractually prescribed referral practices.” *American Coatings*, 226 NLRB at 301. Here, on the other hand, the assessments imposed by the Union, and enforced via nonreferral, went to the effective administration of the hiring hall itself rather than the policing of unrelated internal union discipline. Additionally, unlike in *Pacific Maritime* and *Fisher Theatre*, the assessments imposed by the Union in this case were applicable to both members and nonmembers who used the hiring hall.

Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 23, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

The union rule challenged here bars hiring-hall users who were late for assigned jobs, or who failed to report, from being referred to future jobs unless they pay a fine to the union. The issue presented is not whether the Union has a legitimate interest in policing job attendance, whether the challenged rule is related to that interest, or whether fines for attendance infractions are permissible. The issue, rather, is whether the Union may lawfully enforce attendance-related fines by preventing employees who do not pay the Union from being referred by the hiring hall.

It is well-established that operation of a hiring hall in a discriminatory manner to encourage union membership violates the Act. *Teamsters Local 357 (Los Angeles-Seattle Motor Express) v. NLRB*, 365 U.S. 667, 675 (1961). However, the Board has also acknowledged that—regardless of the presence or absence of explicit discrimination—a hiring hall rule that denies access to employment is presumptively unlawful. *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), enf. denied on other grounds 555 F.2d 552 (6th Cir. 1977). This presumption is based in the nature of the influence that a hiring hall operator wields in controlling whether employees can pursue their livelihoods. As the Board explained in *Ohio Contractors*, “[w]hen a un-

ion prevents an employee from being hired or causes his discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power.” *Id.* at 681.

A union that administers a hiring hall can rebut this presumption by showing that its action was “necessary to the effective performance of [the union’s] function of representing its constituency.” *Id.* Thus, the refusal to refer for employment can be justified, but not by a mere showing that the sanction is convenient to those operating the hiring hall, or has been implemented in a nondiscriminatory manner. The union bears the heavier burden of showing that the use of this sanction is “essential to its effective representation of employees.” *Id.*

On the stipulated record here, it seems clear to me that the Union has failed to carry its burden to show that denial of employment was “necessary to the effective performance of [the union’s] function of representing its constituency”—i.e., the effective operation of the hiring hall. It may be (contrary to the General Counsel’s argument) that there are circumstances where a union could not effectively address hiring-hall attendance infractions without imposing fines enforceable by denying referrals—but in this case, at least, the Union has not made such a showing.

The essential facts here are straightforward. The Union’s attendance rule imposes a series of progressive assessments on hiring hall referents who are late or fail to report to assigned jobs: \$25 for lateness, \$100 for the first absence, \$150 for the second absence, and \$200 for the third absence. A referent is automatically suspended from the hiring hall until those assessments are paid to the Union. On the fourth absence, the referent will be permanently removed from the hiring hall, a provision of the rule that the General Counsel does not challenge. No evidence has been adduced regarding the Union’s justification for the rule or the circumstances that may have led to its adoption. Similarly, no evidence in the record demonstrates that the existence or size of the fine is related to any administrative costs incurred by the hiring hall in replacing an absent or tardy employee.¹

The goal of the rule, as stipulated, is “the effective performance of [the Union’s] hiring hall referral function so as to preserve [the Union’s] reputation and relationship

¹ Thus, we are not presented with the question whether such a fine directly tied to administrative costs incurred by the union in addressing absence or tardiness would be considered part of the expenses associated with running a hiring hall that can properly be charged to hiring hall users.

with employers.” But viewing that goal as legitimate does not mean that the Union met its rebuttal burden to show that its fine-enforcement mechanism—the aspect of the rule challenged by the General Counsel—was necessary and thus lawful. On this score, the majority errs in treating the Union’s bare assertions as if they were evidence.² The majority relies on the Union’s contention, asserted in its brief, that its fines cannot be enforced without suspensions “because offenders could continue without impunity to violate the no show rules, and take calls without consequence.” But no record evidence actually supports this contention. There is no evidence, for example, that shows that the Union adopted the rule in response to attendance abuses, much less that the Union’s rule was a response to the failure of pro-attendance measures that did *not* involve extracting fines through suspensions from the hiring hall.

In my view, there is simply nothing in the stipulated record to explain why the suspension of referents to enforce the Union’s attendance-related fines is necessary—that is, essential—to the effective operation of the hiring hall.³ My colleagues reason—without evidentiary support—that the Union’s rule is necessary “to deter hiring hall users from committing attendance infractions, in order to facilitate the referral of available workers, to allow for the potential removal of offenders from the eligible pool upon non-payment, and to cover administrative costs.” But this rationale confuses the general goal of the Union’s rule with the specific means used to achieve that goal. The crucial fact here is that the denial

² See *Plasterers’ Local 232 (John J. Ruhlin Construction)*, 268 NLRB 795, 798 (1984)(rejecting union’s “bald assertion” in support of necessity defense); *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382, 1385 (1984)(same).

³ Although the majority nominally applies the correct legal standard, its substantive discussion centers not on the necessity of the rule, but on whether the rule was “reasonably designed to serve its stated objective” and “rational.” This approach neglects the heightened burden that applies in cases where a union has prevented an employee from being hired. See *Operating Engineers Local 18*, supra, 204 NLRB at 681; *Stagehands Referral Service, LLC*, 347 NLRB 1167 (2006), enfd. 315 FedAppx. 318 (2d. Cir. 2009). Indeed, the majority’s approach is essentially indistinguishable from the Board’s analysis in general duty-of-fair representation cases, where it asks only whether “the union’s behavior is so far outside a ‘wide range of reasonableness’ as to be irrational.” *Air Line Pilots Assn. v. O’Neill*, 499 U.S. 65, 67 (1991), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). This surely cannot be the same test that applies where, as here, a presumption of unlawful conduct by the Union has already been established.

of employment is being used solely to punish users’ failure to pay fines to the Union, rather than to address the underlying attendance issues. Under the rule, notably, a hiring hall user is free to miss assigned jobs three times—provided he is willing to pay the Union for the privilege and notwithstanding the likely harm to the effective operation of the hiring hall. By contrast, referents who repeatedly fail to report for jobs face suspension from the hiring hall, a measure that actually does directly address the potential negative effects of repeated no-shows—and which is not challenged by the General Counsel.

The Board has observed that a “refusal to refer for nonpayment of a fine is unlawful, at least ordinarily, regardless of why the fine was imposed.”⁴ The apparent implication of today’s decision, in contrast, is that a refusal to refer employees for nonpayment of attendance-related fines will ordinarily be permitted. This power to punish by denying employment, it seems to me, deserves stricter scrutiny than my colleagues give it. To be clear, I do not rule out finding, in specific factual circumstances, that the denial of employment based on a hiring hall user’s failure to pay a union fine imposed for attendance infractions might be lawful. But in cases where the Board has found that a union may lawfully prevent an employee from being hired, it has generally done so based on a robust assessment of the factual circumstances and the evidence adduced by the union to overcome the presumption of illegality.⁵ The record in this case—or rather the lack of it—should prevent the Board from upholding the challenged rule here.

For these reasons, I respectfully dissent.

Dated, Washington, D.C. August 23, 2016

Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD

⁴ *Fisher Theatre*, 240 NLRB 678, 691 (1979). See also *ILWU, Local 13 (Pacific Maritime Assoc.)*, 228 NLRB 1383, 1386 (1977), enfd. 581 F.2d 1321 (9th Cir. 1978), cert. denied 440 U.S. 935 (1979).

⁵ See, e.g., *Boilermakers Local 40 (Envirotech Corporation)*, 266 NLRB 432, 432–433 (1983); *Local 873, AFL–CIO*, 250 NLRB 928, 928 fn. 3 (1980).