

Section G of the Union's job referral procedure contains a no-call/no-show rule that states:

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*. Referents will be notified by regular mail of each offense and may request an appeal, in writing, before the Referral Committee within ten days of the date of the notice.

Any referent, who fails to report to work, 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. **All frequency of offenses refers to the preceding twelve month period.** Referents will be notified by regular mail of each offense and may request an appeal, in writing, before the Referral Committee within ten days of the date of the notice. All assessment [sic] must be paid before Referent is eligible for dispatch. (Emphasis in original.)

The Region has issued a Complaint alleging that the Union violated Section 8(b)(1)(A) by maintaining this rule. The Union has offered to modify its rule to comport with the following no-show rule of an affiliated local:

No-Shows. Once an employee has accepted a call, should the employee need a replacement for any legitimate reason during the call cycle, the Union's call agent must be notified by 8:00 a.m. the day before the relevant report time. Under no circumstances will any employee be permitted to replace him or herself. Employees violating this rule will be charged \$25.00 for the first offense, \$50.00 for the second offense, and \$150.00 for the third offense. Employees violating this rule more than three times will be suspended from the referral list for 30 days for the fourth offense, 60 days for the fifth offense, and one year for the sixth offense. These offenses accumulate within a one-year cycle.

ACTION

We conclude that the current rule is facially unlawful because the rule constitutes a threat not to refer employees from an exclusive hiring hall for failure to pay a fine. We further conclude that the modified version of the rule is lawful because it clarifies that any suspensions from the referral list will be a consequence of an employee's failure to show for work rather than nonpayment of the fines.

Section 8(b)(1)(A), along with other parts of the Act, form a web to prevent unions from affecting members' employment status to enforce the union's internal rules.¹ "The policy of the Act is to insulate employees' jobs from their organization rights."² However, the proviso of Section 8(b)(1)(A) guarantees a union the right "to prescribe its own rules with respect to the acquisition and retention of membership therein."³ Therefore, a union has the inherent authority to reasonably discipline members who violate rules and regulations governing membership in order to maintain solidarity and be an effective representative of its members' economic interests.⁴ Thus, a union "may freely fine a member for violation of a membership rule," however, enforcement of payment of the fine through "an employment-related sanction" violates Section 8(b)(1)(A).⁵

In general, when a union operating an exclusive hiring hall prevents an employee from being hired or causes an employee's discharge, the Board presumes that the effect of the union's action is to unlawfully encourage union membership because the union has displayed to all users of the hiring hall its power over their livelihoods.⁶ 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.⁷ Unions have successfully rebutted the

¹ *Scofield, et al. v. NLRB*, 394 U.S. 423, 429 (1969).

² *Radio Officers' Union of the Commercial Telegraphers Union, AFL v. NLRB*, 347 U.S. 17, 40 (1954). *See also NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 195 (1967) ("[T]he repeated refrain throughout the debates on 8(b)(1)(A) and other sections [was] that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.").

⁴ *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. at 181-84.

⁵ *Intl. Longshoremen's & Warehousemen's Union, Local 13 (Pacific Maritime Association)*, 228 NLRB 1383, 1385 (1977), *enforced*, 581 F.2d 1321 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

⁶ *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1, 2 (2000), *revd. on other grounds*, 333 F.3d 927 (9th Cir. 2003); *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).

⁷ *Id.*

presumption where, e.g., the employee's conduct was so egregious as to foreclose any reasonable inference that the union's action was taken to encourage union membership;⁸ the employee's conduct interfered with the mechanics of the referral process;⁹ or the employee's conduct harmed the union's reputation and relationship with employers to which it supplies labor.¹⁰

At the same time, the Board consistently has held that a union may not refuse to refer an employee for employment to enforce the collection of a fine and/or assessment.¹¹ And "a refusal to refer for nonpayment of a fine is unlawful, at least ordinarily, regardless of why the fine was imposed."¹²

⁸ *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).

⁹ *Carpenters Local 522 (Caudle-Hyatt)*, 269 NLRB 574, 576 (1984) (union lawfully caused discharge of employees who had circumvented hiring hall and obtained work directly from employer); *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432, 433 (1983) (union lawfully denied employee referral after employee had circumvented hiring hall by applying for work directly from employer).

¹⁰ *Stage Employees IATSE Local 150 (Mann Theatres)*, 268 NLRB 1292, 1295-96 (1984) (union lawfully refused to refer employee with history of misconduct and incompetence on various jobs to which he had been referred); *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 (union lawfully refused to refer employee who had been dropped from its apprenticeship program because of excessive absenteeism).

¹¹ *ILWU, Local 13*, 228 NLRB at 1385 (union violated Section 8(b)(1)(A) by refusing to dispatch member for failing to pay fines and assessments); *Fisher Theater*, 240 NLRB 678, 691-92 (1979) (union unlawfully refused to refer members for failure to pay union fines imposed for violation of union's no-bumping policy).

¹² *Fisher Theater*, 240 NLRB at 691. In *Stage Employees IATSE Local 720 (Production Support Services)*, 352 NLRB 1081, 1086 (2008), the Administrative Law Judge departed from this precedent and found that in cases where an individual is suspended from a hiring hall for nonpayment of a fine, the union's rationale for imposing the fine must be examined. However, in the absence of exceptions, the two-member Board found it unnecessary to pass on this finding. *Id.* at 1081, n.3.

Here, we agree with the Region that the Union's hiring hall provisions requiring the payment of an assessment before being referred is facially unlawful and, thus, the Union's maintenance of such provisions violates Section 8(b)(1)(A). The no-call/no-show rule addresses a legitimate concern of the Union in the effective performance of its representative function as the administrator of the hiring hall. The rule is designed to insure that the workers whom it refers show for work and show on time, so as to preserve the Union's reputation and relationship with employers to which it supplies labor. The Union uses the assessment of fines as a means of enforcing the rule. However, it also uses suspension from the referral list as a means of enforcing the fines. Thus, as written, the rule effectively denies employment to employees, not for failing to show for work on time, but rather for failing to pay an assessment or fine. And while the Union has the right to discipline its members for failing to adhere to its hiring hall rules through the imposition of a fine, it may not enforce that fine through an employment-related sanction without violating Section 8(b)(1)(A).¹³

Finally, we agree with the Region that the Union's proposed revision of its no call/no show rule is lawful under the *Ohio Contractors* test.¹⁴ The revised rule would clarify that any suspensions from the referral list are a consequence of an employee's failure to show for work rather than nonpayment of the fines imposed for such an offense. As noted above, the Union has a legitimate interest in insuring that the individuals whom it refers for employment show for work on time, and therefore a rule adopted to serve that interest, rather than to enforce fines, would not violate Section 8(b)(1)(A). And, the internal assessments would not give rise to a violation of

¹³ The Union's reliance on the Board's decision in *Allied Signal Technical Services* is misplaced. See *Steelworkers Local 9292 (Allied Signal Technical Service)*, 336 NLRB 52, 54-55 (2001) (union did not violate Section 8(b)(1)(A) by suspending charging party from membership based upon his excessive filing of internal union charges against union president who was his political rival). In that case, the Board applied the *Sandia* test for determining when a union violates Section 8(b)(1)(A) by disciplining members for wholly internal conduct, which is not the type of conduct addressed by the rule at issue here. See *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1424-25 (2000) (union sanctions in context of quarrel between rival union factions that included removal from union office and suspension or expulsion from union membership did not implicate Section 8(b)(1)(A)).

¹⁴ *Operating Engineers Local 18 (Ohio Contractors Ass'n)*, 204 NLRB at 681 (presumption that union's interference with an employee's employment unlawfully encouraged union membership may be overcome where its actions were necessary to effectively perform its representative function).

Section 8(b)(1)(A) because they would not impact the employment relationship or otherwise impair policies imbedded in the Act.¹⁵

Accordingly, absent settlement, the Region should proceed with its complaint alleging that the Union unlawfully maintained the no call/no show rule.

/s/
B.J.K.

¹⁵ See *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB at 1420.