

No. 16-72174

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

GARY ELIAS

Intervenor

v.

**INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES,
MOVING PICTURE TECHNICIANS, ARTISTS & ALLIED CRAFTS OF
THE UNITED STATES, ITS TERRITORIES & CANADA,
LOCAL 720, AFL-CIO, CLC**

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement of a Board Decision and Order

issued against the International Alliance of Theatrical Stage Employees, Local 720 (“the Union”) on March 30, 2016, and reported at 363 NLRB No. 148. The Board had jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final with respect to all parties and this Court has jurisdiction pursuant to Section 10(e) of the Act, as the underlying unfair labor practice occurred in Las Vegas, Nevada. 29 U.S.C. § 160(e). The application is timely, as the Act provides no time limit for such filings. The charging party before the Board, Gary Elias, has intervened in support of the Board.

STATEMENT OF THE ISSUES

1. Does substantial evidence support the Board’s finding that the Union violated Section 8(b)(1)(A) of the Act by arbitrarily refusing to furnish hiring hall information requested in Gary Elias’s February 20, 2014 letter, and Gary and Tina Elias’s April 24, 2014 letter, regarding the Eliases’ reasonable belief that they were being treated unfairly in connection with the Union’s exclusive hiring hall?

2. Did the Board act within its broad remedial discretion by requiring the Union to furnish the requested information?

STATUTORY ADDENDUM

Relevant statutory provisions are included in the attached addendum.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Union's Hiring Hall Procedures and Its Operation of an Exclusive Hiring Hall for Numerous Employers

The Union operates a hiring hall that refers skilled employees in five crafts to signatory employers for work on musicals and other events in Las Vegas, Nevada. (SER 3-4; SER 31-32.)¹ Approximately 2,200 employees utilize the Union's hiring hall to obtain employment. (SER 4; SER 32.) The Union is party to collective-bargaining agreements with more than 40 employers, including an agreement with Tropicana Las Vegas, Inc., that has been in effect since at least 2007. (SER 4; ER 78, SER 24, 97.) Article 4.03 of that agreement includes an exclusive-referral provision stating, in relevant part:

The Employer shall first call the dispatching office of the Union for such applicants as it may, from time to time need, and the dispatching office shall refer to the Employer in accordance with the order of preference set forth in Section 4.04 the requested number of applicants whose registration records indicate they are competent and qualified to perform the work involved in the classification to be filled.

(SER 4; ER 82, SER 101.) Article 4.04 establishes an "order of preference" for referrals based on training and accumulated hours of experience in a given

¹ "ER" references are to the excerpts of record filed by the Union. "SER" references are to the Board's supplemental excerpts of record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Union's opening brief.

classification, such that registrants on “List A” are given preference over registrants on “List B-1,” who are in turn given preference over registrants on “List B-2.” (SER 4; ER 84-86, SER 104-05.) The Union maintains the same exclusive-referral language in collective-bargaining agreements with at least eight to ten other employers. (SER 4; SER 28, 32-35.) The Union previously maintained a collective-bargaining agreement containing a similar exclusive-referral provision with LV Theatrical Group, Inc., and its successors. (SER 5; SER 59-60, 113-14, 116-17.)

Employers may request employees from the Union using two relevant methods, “open calls” and “letters of request.” First, when an employer requests some number of full-time employees in a particular skill classification, the Union’s dispatching office will “call” hiring hall users registered with valid “skill cards” in that classification. (SER 7; SER 36-38, 46, 69.) The Union will send out notice of an “open call” to registered hiring hall users based on their “list status” in the order of preference for that classification, and will provide “bid slips” so that eligible employees may request to be referred to the job in question. (SER 4, 7; ER 130, SER 29, 38, 41, 61, 66, 86.) Within a particular skill classification, List-A employees are thus given priority to bid on an open call before employees on List B-1 or List B-2. (SER 4-5; SER 28, 32, 41, 66.) Second, and in addition to the process for “open call” referrals described above, employers are sometimes

contractually permitted to submit “letters of request” to the Union in order to request particular individuals by name. (SER 4; SER 29, 38, 57.)

B. Gary Elias’s February 20 Information Request

Gary Elias (“Elias”) has been a member of the Union for at least two decades and is List-A hiring hall referent holding 23 separate skill cards. (SER 5; SER 35, 38, 49-50.) On or around September 20, 2013, Elias observed a Facebook post written by Glenn Snyder, the head carpenter for the 2012 production of “Phantom of the Opera,” stating in part: “When we took out Phantom, everyone I called was LOR. I couldn’t have had a better crew.” (SER 5; SER 55-56, 108.) Elias interpreted this post as indicating that Snyder had overseen hiring for the removal of the “Phantom of the Opera” show in early September 2012 by selecting individual employees using letters of request, which Elias believed would have been a violation of the collective-bargaining agreement. (SER 5; SER 55-57, 60.) In addition to the contract’s general procedures for referring employees, the contractual provision identified by Elias states that “Heads of Departments shall not be . . . allowed to hire or fire.” (SER 57, 60, 118.) Elias believed that such violation would have resulted in his having been improperly bypassed for work he was otherwise entitled to under the hiring hall order of preference. (SER 53, 55-56.)

On February 20, 2014, Gary Elias hand-delivered a letter to the Union's office stating the following:

In order to determine if I have been discriminated against, I hereby request inspection of and copies of the hiring hall referral records as follows:

All referrals to the removal of the show (load out) of LV Theatrical Group, its successors and assigns, (Phantom of the Opera) on or about September 2, 2012; including but not limited to the names, addresses, phone numbers, open call or letter of request and list status of those referred.

Please schedule a time when I may inspect these records and receive copies of them within 15 days of the above date of this letter or provide a reasonable date when I will be able to do so.

I agree to pay the cost of copying those records up to \$5.00. Should the cost exceed that, please notify me with the expected cost.

(SER 5; ER 74, SER 39, 51-52.)

The Union subsequently provided Elias with a list of employees who had been referred to the "Phantom of the Opera" job in September 2012, although the list did not contain the employees' addresses, telephone numbers, or "list statuses" in the order of preference. (SER 5; SER 61-62, 128-32.) On March 3, Elias sent an email to Union Business Representative Jeff Foran stating that "certain information was not present in the records provided" and specifically requesting the "list status" for those referred. (SER 5; SER 43, 62-63, 120.) Foran replied that he would "work on this tomorrow." (SER 5; SER 120.) The Union ultimately did not provide any additional information. (SER 5; SER 63, 80-81.)

C. Gary and Tina Elias's April 24 Information Request

Gary Elias's wife, Tina Elias, has also been a hiring hall referent for more than two decades, holding List-A status with several wardrobe skill cards. (SER 6-7; SER 35-36, 39, 83-84.) On March 31, 2014, Tina Elias exchanged text messages with another hiring hall referent, Karen Bauer, who indicated that she and another employee had received an open-call "blast" two weeks earlier regarding wardrobe positions for the "Jubilee" show. (SER 7; SER 87, 122-25.) Tina Elias had not received the automated message regarding the open call at the "Jubilee" show, leading her to believe that there were irregularities with the Union's hiring hall dispatch system. (SER 7; SER 85-87.) Tina Elias had previously suspected that she was not properly receiving notifications for open calls based on her failure to receive calls for the "Mamma Mia" and "Jersey Boys" shows. (SER 7; SER 75, 85-89, 126-27.) As of April 2014, Tina Elias had received just two letters of request and no open calls since finishing work on the "Phantom of the Opera" production that closed in September 2012. (SER 6; SER 90-91.) Also in early 2014, Gary Elias grew suspicious that he had not received any open calls involving the relevant classification for operating a forklift. (SER 7; SER 76-78.) Elias had taken a class and renewed his forklift "skill card" in December 2013 because he anticipated from experience that there would be a demand for referrals in that classification in early 2014. (SER 7; SER 77, 107.)

On April 24, 2014, Gary Elias hand-delivered a second letter to Union Secretary Treasurer Ron Poveromo, which was a “joint request” for information signed by both Gary and Tina Elias and which stated, in relevant part:

The following is a joint request Given our discussion now it’s a matter of not only who actually took the work but who was called for it. Therefor our request is expanded. The Local’s refusal to provide names addresses and phone numbers list status and a log of those called is unreasonable given its computer dispatch system.

In order to determine if we have been discriminated against, we hereby request Inspection of and will request copies as needed of the hiring hall referral records as follows:

All referrals for bid slips for all positions for which Gary Elias and Tina Elias hold skill cards to Mama Mia at the Tropicana on or about January 8, 2014. Including but not limited to the names, addresses, phone numbers, and list status of those referred. Please note that names, addresses, phone numbers and list status are absolutely requested.

From the date of our written letter on or about September 3, 2012, a copy of that letter. All CALLS, and referrals for which we have skill cards. Including but not limited to the names, addresses, phone numbers, open call or letter of request and list status of those CALLED. Please note that names, addresses, phone numbers and list status are absolutely requested. With regard to Gary Elias this would temporary end with his open call on October 18, 2012 with regard to open calls but would include those calls for which any bid slips were given for any referrals for bid slips to employers for which he has skill cards. Please also provide any calls for his forklift skill card from the date of my re-certification in December 2013 and January 2014. With regard to Tina Elias this would include all open and letter of request calls and bid slips for any Wardrobe card she has signed in to present, noting that she temporary signed out her Stagecraft cards.

(SER 6; ER 72-73, SER 40, 64.)

On April 28, the Eliases met with Union President Dan'l Cook and union officials Poveromo and Foran at the Union's office. (SER 7; SER 78.) Foran stated that he had compiled a more complete response to Gary Elias's February 20 information request, and Foran was prepared to pass it to Elias when Cook intercepted the document and stated that he would need to review it first. (SER 13; SER 79, 88.) Cook further stated that he had a problem with disclosing hiring hall users' addresses and telephone numbers. (SER 7; SER 48, 79.) The Union did not offer any additional justification for failing to provide the requested information, and the Union did not propose any alternative accommodations for the Eliases to receive the information they were requesting. (SER 7, 13; SER 44-45, 79-81.) The Union ultimately provided no information in response to the Eliases' April 24 letter. (SER 7; SER 81, 88.) In June 2014, Gary Elias filed an unfair-labor-practice charge with the Board giving rise to the present case. (SER 3; SER 93.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (then-Chairman Pearce and Members Miscimarra and McFerran) found that the Union violated Section 8(b)(1)(A) of the Act by refusing to furnish the hiring hall referral information requested in the February 20, 2014 and April 24, 2014 letters. (SER 2, 15.) The Board's Order requires the Union to cease and desist from the unfair labor practice found, and from, in any like or related manner, restraining or coercing employees

in the exercise of their statutory rights. (SER 2.) Affirmatively, the Board's Order requires the Union to furnish Gary Elias with the hiring hall referral information requested in his letters dated February 20, 2014, and April 24, 2014; and to post a remedial notice. (SER 2.) On June 8, 2016, the Board denied a motion for reconsideration filed by the Union. (ER 1.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding in this case that the Union violated its statutory duty of fair representation by refusing to provide hiring hall referral information. The information in question was requested by employee Gary Elias in two letters submitted to the Union—a February 20 letter on behalf of Gary Elias, and an April 24 letter on behalf of both Gary Elias and his wife Tina Elias. The Union does not contest that the letters were prompted by the Eliases' reasonable belief that they were being treated unfairly. The letters sought information regarding discrete time periods and with reference to two specific shows, all of which was reasonably directed at helping the Eliases investigate whether they had been treated unfairly. Despite the Union's duty to respond fairly to such requests, the Union provided only a partial response to the February 20 letter and no information at all in response to the April 24 letter. The Union offers no justification for its failure to provide the bulk of the requested information, and with respect to the information that the Union does address—contact information

for hiring hall users who were called or referred to certain jobs—the Union has failed to show that its refusal was necessary to vindicate legitimate union interests.

The majority of the Union’s arguments instead go to the scope of the Board’s chosen remedy. However, the Board’s Order simply requires the Union to furnish the information requested in the February 20 and April 24 letters. Contrary to the Union’s contentions, all of which the Board reasonably rejected, the Board has jurisdiction to remedy the Union’s unfair labor practices, an employee’s right to receive relevant information is not limited to six months under the Act, and an order requiring the Union to produce hiring hall users’ contact information would not infringe on the First Amendment. Requiring the Union to furnish the requested information is the Board’s standard remedy for information-request violations, and such remedy was clearly within the Board’s broad remedial discretion.

STANDARD OF REVIEW

The Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence is that which “a reasonable mind might accept as adequate to support a conclusion,” and is “more than a mere scintilla, but less than a preponderance.” *NLRB v. Int’l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1054-55 (9th Cir. 2003). Given the Board’s “special expertise” in the field of labor relations, the Court will defer to “reasonable

derivative inferences drawn by the Board from the credited evidence.” *NLRB v. Carson Cable TV*, 795 F.2d 879, 881 (9th Cir. 1986). Meanwhile, the Board’s discretion in remedying unfair labor practices is “exceedingly broad” and the Court will not overturn the Board’s chosen remedy unless it represents a “clear abuse of discretion.” *Gen. Teamsters Local No. 162, Int’l Bhd. of Teamsters v. NLRB*, 782 F.2d 839, 844 (9th Cir. 1986); *see Int’l Bhd. of Elec. Workers, Local 21 v. NLRB*, 563 F.3d 418, 423 (9th Cir. 2009).

ARGUMENT

THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY REFUSING TO PROVIDE THE REQUESTED INFORMATION

A. A Labor Organization Violates Section 8(b)(1)(A) by Arbitrarily Refusing an Employee’s Request for Information About the Operation of an Exclusive Hiring Hall

Section 7 of the Act grants employees the “right to self-organization, to form, join, or assist labor organizations, . . . [and] to refrain from any or all of such activities” 29 U.S.C. § 157. In turn, Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization “to restrain or coerce” employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(b)(1)(A). The Supreme Court has long held that a union’s exclusive authority to represent all employees in a particular bargaining unit gives rise to a statutory duty of fair representation under the Act. *See Breininger v. Sheet Metal Workers Int’l Ass’n Local Union No. 6*, 493 U.S. 67, 87-88 (1989); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The Board has

concluded that employees have a Section 7 right “to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment,” and that a union therefore violates Section 8(b)(1)(A) by treating an employee in such a manner. *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962). This is particularly true in the context of a union operating an exclusive hiring hall, where the union “takes on added responsibility because it wields a special power over workers’ livelihood,” and where there is thus a “heightened duty of fair dealing.” *Lucas v. NLRB*, 333 F.3d 927, 932, 934-35 (9th Cir. 2003).

An employee who relies on a union’s operation of an exclusive hiring hall is entitled to information that is reasonably directed at ascertaining whether he or she has been treated unfairly. *Int’l Bhd. of Boilermakers, Local 197*, 318 NLRB 205, 205 (1995). Accordingly, a union violates Section 8(b)(1)(A) of the Act by acting arbitrarily in responding to an employee’s request for such information. *Local No. 324, Int’l Union of Operating Eng’rs*, 226 NLRB 587, 587 (1976); *see, e.g., NLRB v. Teamsters Gen. Local Union No. 200*, 723 F.3d 778, 788 (7th Cir. 2013); *NLRB v. Carpenters Local 608, United Bhd. of Carpenters*, 811 F.2d 149, 152 (2d Cir. 1987). When an employee requests information pertaining to an exclusive hiring hall based on a reasonable belief that he or she has been treated unfairly, a union acts arbitrarily by denying the requested information absent a showing that such

refusal is necessary to vindicate legitimate union interests. *Boilermakers, Local 197*, 318 NLRB at 205; *see Carpenters Local 608*, 811 F.2d at 152.

B. Substantial Evidence Supports the Board's Findings that the Eliases Had a Reasonable Belief They Were Being Treated Unfairly, and that the Union Arbitrarily Refused To Provide Relevant Information Regarding the Exclusive Hiring Hall

The Board reasonably found that the Union violated Section 8(b)(1)(A) of the Act when it refused to furnish information requested in Gary Elias's February 20 letter and Gary and Tina Elias's April 24 letter, which were related to the Union's operation of an exclusive hiring hall. In doing so, the Board found that the Eliases' information requests were based on a reasonable belief that they were being treated unfairly in connection with the hiring hall, that the information requests were reasonably directed at helping the Eliases ascertain whether they had been treated unfairly, and that the Union failed to establish that its refusal to provide the requested information was necessary to vindicate any legitimate union interest. As shown below, each of those findings is supported by substantial evidence and is consistent with precedent, and the Union's arguments present no basis for disturbing the Board's findings.

The Union does not seriously dispute that it operates an exclusive hiring hall, and the record evidence amply supports the Board's finding (SER 4-5, 9-10) that the Union's hiring hall is exclusive in nature. A union's hiring hall is exclusive if the union retains exclusive authority for referrals for some specific

period of time. *Carpenters Local 608, United Bhd. of Carpenters*, 279 NLRB 747, 754 (1986), *enforced*, 811 F.2d 149 (2d Cir. 1987). Indeed, this Court has previously found that the Union operates an exclusive hiring hall. *See Lucas*, 333 F.3d at 929. As the Board noted here, the Union and the Tropicana Las Vegas, the site of the “Mamma Mia” show in January 2014, have operated under a collective-bargaining agreement containing exclusive-referral language since at least 2007 and continuing into the present. (ER 100, SER 24-27, 32, 97, 101.) The Union’s President testified that the Union maintains the same exclusive-referral language used in the Tropicana Las Vegas contract with eight to ten other employers (SER 32-35), and that the Union has collective-bargaining agreements with more than 40 employers (SER 33). The Union also maintained a collective-bargaining agreement containing exclusive-referral language with LV Theatrical Group and its successors through at least September 2012, when the Union referred employees for the removal of the “Phantom of the Opera” show. (SER 56-57, 59-60, 113-14, 128-32.)² In addition, the record is replete with unrebutted evidence that during

² The Union is incorrect to claim (Br. 14, 18) that there is no evidence that the contracts in the record were in effect during the relevant period. Although the first Tropicana Las Vegas contract listed an expiration date of 2012, the employer’s Vice President of Human Resources testified that the agreement remained in effect until a new contract was negotiated in January 2014. (SER 24.) Although the contract with LV Theatrical Group and its successors listed a tentative expiration date of 2011, it specified that it would continue “from year to year thereafter” until either party terminated it (SER 119), and Elias testified without rebuttal that it remained in effect through September 2012 (SER 59-60). Moreover, the precise

the relevant period the Union was actively referring employees to various employers and shows using the same hiring hall referral procedures (SER 68, 75, 87, 121-27), and that it has done so for many years (SER 35, 49, 82). As a result, the Union has a statutory duty to provide employees with information regarding the operation of the exclusive hiring hall. *Local No. 324, Operating Eng'rs*, 226 NLRB at 587.

The Union also does not specifically contest the Board's finding (SER 7) that the Eliases had a reasonable belief that they were being treated unfairly in connection with the hiring hall, and the Board's finding is well supported by the record evidence. Gary Elias credibly testified that he believed he may have been unfairly bypassed for work on the removal of the "Phantom of the Opera" show in September 2012 given his List-A status in the order of preference and given his reasonable belief that hiring may have been done in violation of the governing contract. (SER 57, 61-62.) Similarly, both Eliases credibly testified that they had reason to believe they were being improperly excluded from receiving bid slips or notifications for open calls that were going to other employees, despite the fact that both held List-A status with numerous skill cards. (SER 66, 70-77, 85-87.) The

identity of the employer for the "Phantom of the Opera" show in 2012 is irrelevant, because Elias's February 20 letter referenced the specific job for which he was seeking information (ER 74), and indeed the Union *provided* a partial list of referrals through its exclusive hiring hall for that job (SER 128-32).

Eliases were thus entitled to inspect relevant hiring hall records. *Boilermakers, Local 197*, 318 NLRB at 205; *see Carpenters Local 608*, 811 F.2d at 153.

Likewise, substantial evidence supports the Board’s finding (SER 11, 14) that the information encompassed by the Eliases’ two written requests was reasonably directed at their attempts to ascertain whether they were being treated unfairly. The two requests were limited to specific shows—the “Phantom of the Opera” show in September 2012 and the “Mamma Mia” show in January 2014—and discrete time periods during which the Eliases believed they may have been treated unfairly.³ The Union does not contest that the names and list statuses of hiring hall referents were directly relevant to determining whether, as employees holding List-A status in the order of preference, the Eliases were being improperly bypassed in favor of lower-ranked referents. Similarly, the contact information for other hiring hall users, including addresses and telephone numbers, is relevant and

³ The Union argues that there is no evidence Gary Elias was registered and “signed in” with the hiring hall or that he possessed skill cards during the periods encompassed by his information requests. (Br. 18-20.) However, the Eliases have been registered referents for many years (SER 35) and their unrebutted testimony indicates that they were looking for work through the hiring hall for the periods at issue in the information requests (SER 55, 61, 66, 74-75, 84, 86-87, 89-91). Indeed, the Eliases’ April 24 information request specifically *excludes* those periods during which Tina Elias had “signed out” for certain wardrobe skill cards, and during which Gary Elias did not possess a valid forklift skill card. (ER 72-73, SER 70-71, 77-78.) The Union has never claimed a good faith belief that either Gary or Tina Elias was unavailable for work in justifying its refusal to provide requested information, and the Union has produced no evidence calling into question the reasonable inference that the Eliases were registered and “signed in” for the time periods at issue. *See Carson Cable TV*, 795 F.2d at 881.

necessary for an employee to verify other information and to fully investigate whether he or she has been treated unfairly. *Carpenters Local 608*, 811 F.2d at 154 (enforcing order requiring production of addresses and telephone numbers since employees “will need this information to verify the accuracy of the hiring hall records”); *see, e.g., Int’l Bhd. of Elec. Workers, Local 24*, 356 NLRB 581, 581 (2011) (telephone numbers); *Millwrights & Mach. Erectors Union Local 102*, 317 NLRB 1099, 1099, 1106-07 (1995) (telephone numbers); *Local No. 324, Operating Eng’rs*, 226 NLRB at 587 (addresses and telephone numbers). Without the ability to contact other hiring hall users, employees who already have a reasonable belief that their union is treating them unfairly would be incapable of independently confirming the accuracy of any information provided.

Finally, substantial evidence supports the Board’s finding (SER 12-13, 15) that the Union failed to establish that its refusal to provide the requested information was necessary to vindicate legitimate union interests.⁴ The Union does not contend that complying with the information requests would be unduly burdensome, and the Union provides no explanation for its failure to furnish portions of the requests involving records of open calls, the names of hiring hall

⁴ Contrary to the Union’s argument that it need only show a “rational basis” for its refusal to provide requested information (Br. 32-35), a union must demonstrate that its refusal was “necessary to vindicate legitimate union interests.” *Boilermakers, Local 197*, 318 NLRB at 205. This is consistent with the “heightened duty of fair dealing” that attaches to a union’s operation of an exclusive hiring hall. *See Lucas*, 333 F.3d at 935.

users called or referred, or the list statuses of hiring hall users called or referred.

As a result, the Union violated Section 8(b)(1)(A) by arbitrarily refusing to provide at least some relevant hiring hall information without explanation or justification.

Furthermore, although the Union argues that it had a legitimate interest in withholding the addresses and telephone numbers of hiring hall users (Br. 31-32, 33-37), the Board has held that a union's mere assertion of confidentiality does not, standing alone, constitute a legitimate basis for denying an employee's reasonable request for information. *Teamsters Local Union No. 519*, 276 NLRB 898, 901-02 (1985) (finding assertion of confidentiality insufficient to establish "legitimate or compelling interest" justifying refusal to disclose telephone numbers), *enforced mem.*, 843 F.2d 1392 (6th Cir. 1985); *Bartenders' & Beverage Dispensers' Union, Local 165*, 261 NLRB 420, 423-24 (1982) (finding no legitimate confidentiality interest in records that "minimally show only the name and telephone number" of applicants). As the Board found here (SER 13, 15), there is no evidence that the Union maintained a prior written policy regarding the privacy of contact information, that any such policy was communicated or promised to employees, or that any employees had ever expressed privacy concerns to the Union. *See Carpenters Local 608*, 279 NLRB at 759 (finding refusal to produce addresses and telephone numbers to be arbitrary when based on individual union official's assertion of privacy policy not previously communicated to employees).

In any event, the Union's alleged privacy concerns do not present a defense to its unfair-labor-practice liability, because concerns regarding the disclosure of addresses or telephone numbers would not explain: (i) why the Union failed to provide the list statuses of referents in its partial response to the February 20 letter, despite Gary Elias emphasizing that such information was necessary for him to ascertain whether he had been unfairly bypassed; (ii) why the Union failed to provide any response whatsoever to the April 24 letter, including the dates of open calls or the names and list statuses of referents; or (iii) why the Union made no attempt to offer the Eliases alternative accommodations, as it had an obligation to do under the Act, *see Local Union No. 3, Int'l Union of Operating Eng'rs*, 324 NLRB 14, 14 n.1 (1997); *Carpenters Local 608*, 279 NLRB at 759; *Local No. 324, Operating Eng'rs*, 226 NLRB at 598 & n.33.⁵ Indeed, the failure to provide even such concededly non-confidential information further reinforces the inference that the Union's invocation of privacy interests in refusing to comply with the Eliases' requests was not legitimate. *See Carpenters Local 608*, 279 NLRB at 759.

⁵ The Union argues that Elias never specifically requested that the Union put him in contact with hiring hall users through alternative means (Br. 36), but it was the duty of the Union to raise such accommodations, not the duty of the requesting employee. (SER 13 n.16.) *Cf. Pa. Power Co.*, 301 NLRB 1104, 1105 (1991) (noting that "a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation"). Moreover, although the Board did not make an express finding of fact on this issue, Elias testified at the unfair-labor-practice hearing that he actually *did* propose alternative accommodations, and that the Union ignored his proposal. (SER 79-80.)

Substantial evidence therefore supports the Board's finding that the Union violated Section 8(b)(1)(A) by arbitrarily refusing to provide all of the information requested in Gary Elias's February 20 letter, and by arbitrarily refusing to provide any information whatsoever in response to Gary and Tina Elias's April 24 letter.⁶

C. The Board Acted Within Its Broad Remedial Discretion by Requiring the Union To Provide the Requested Information

The Board's Order requires the Union to remedy its unfair labor practice by furnishing the hiring hall information requested in the February 20, 2014 and April 24, 2014 letters (SER 2), which might include, in part, calls or referrals reaching back to September 2012 and potentially involving unnamed employers. The Union challenges the Board's Order on a number of grounds, each of which the Board reasonably considered and rejected in its decision. Thus, contrary to the Union's contentions, and as shown below, the Board has jurisdiction to remedy the Union's

⁶ The Union's argument regarding "non-party" Tina Elias (Br. 37-38) is without merit. Unfair-labor-practice charges may be filed by "any person" and the identity of the charging party places no limitations on the Board's authority to make unfair-labor-practice findings. 29 C.F.R. § 102.9 (2014); *see Cessna Aircraft Co.*, 220 NLRB 873, 875 (1975). Although, as the Union also notes (Br. 38), the Board's Order specifically refers to requests made by "Gary Elias" and requires the Union to furnish "Gary Elias" with the requested information (SER 2), the Board was merely conforming its Order to its standard remedial language in information-request cases by requiring the respondent to furnish the charging party with the requested information (SER 2 n.2). The Board did not disturb the administrative law judge's findings that both Eliases had demonstrated a reasonable belief that they were being treated unfairly so as to entitle them to the requested information (SER 7, 14-15), and in this case the April 24 letter was in fact a "joint request" delivered by Gary Elias on behalf of both Eliases (ER 72-73).

unfair labor practices, the Eliases’ right to receive information is not limited to six months under the Act, and an order requiring the Union to produce some hiring hall users’ contact information would not infringe on the First Amendment. The Board’s Order follows standard remedial language for information-request violations, and the Union has not established that the Board’s Order constitutes a “clear abuse of discretion.” *See Elec. Workers, Local 21*, 563 F.3d 418 at 423.

1. The Board Has Jurisdiction to Remedy Unfair Labor Practices Engaged In by Labor Organizations

The Union devotes a substantial portion of its brief (Br. 5-16) to arguing that the Board lacks “jurisdiction” to order the Union to provide hiring hall information relating to any employer other than Tropicana Las Vegas, but the Union’s argument is misplaced. As the Board emphasized (SER 9), the only issue in this case is whether *the Union* violated the Act. One of the statutorily-inscribed purposes of the Act, as amended, is to prohibit “certain practices by some labor organizations, their officers, and members [that] have the intent or the necessary effect of burdening or obstructing commerce” 29 U.S.C. § 151; *see id.* § 158(b). Congress has thus granted the Board broad authority “to prevent any *person* from engaging in any unfair labor practice . . . affecting commerce.” 29 U.S.C. § 160(a) (emphasis added); *id.* § 152(1) (“The term ‘person’ includes one or more individuals, [or] labor organizations”). If the Board determines that a labor organization or other “person” has engaged or is engaging in an unfair labor

practice, the Board shall issue “an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act.” 29 U.S.C. § 160(a).

Meanwhile, Section 8(b)(1)(A) establishes that it is an unfair labor practice “for a *labor organization* or its agents . . . to restrain or coerce . . . employees in the exercise of their rights.” 29 U.S.C. § 158(b)(1)(A) (emphasis added). There is no dispute in this case that the Union is a “labor organization” and that the Eliases are “employees” within the meaning of the Act. *See* 29 U.S.C. § 152(3), (5). The Union operates an exclusive hiring hall and represents thousands of employees in negotiating collective-bargaining agreements with respect to numerous employers. For purposes of the present case, the Board found, in particular, that the Union has a collective-bargaining agreement with Tropicana Las Vegas, which is a statutory employer with gross annual revenues in excess of \$500,000 and goods purchased from other states in excess of \$50,000. (SER 3.) As a result, the Union is a labor organization operating an exclusive hiring hall with a minimum effect on commerce above the Board’s discretionary thresholds for asserting jurisdiction.

Having thereby established that the Union is a “labor organization” subject to the unfair-labor-practice provisions of the Act, the Board has jurisdiction to remedy unfair labor practices engaged in by the Union regardless of the involvement of any statutory employers. *See* 29 U.S.C. § 160(a). This case

involves the Union's independent violation of its duty of fair representation by arbitrarily responding to employees' information requests and by refusing to provide relevant hiring hall information. The Board's Order does not compel any entity other than the Union to take any actions (SER 2), and the Board correctly observed that it need not establish "jurisdiction" over individual employers that are merely the passive subjects of information requests that *the Union* unlawfully refused to comply with (SER 9). As a labor organization that has engaged in an unfair labor practice, the Union is within the Board's jurisdiction. *See NLRB v. Ironworkers Local Union No. 505*, 794 F.2d 1474, 1477 (9th Cir. 1986).

The Union misconstrues the cases it cites that are allegedly to the contrary. In *Fisher Theatre*, 240 NLRB 678, 690 (1979), the Board dismissed an unfair-labor-practice allegation involving a putative violation of Section 8(b)(2), which prohibits a labor organization from causing "an employer to discriminate against an employee . . .," 29 U.S.C. § 158(b)(2) (emphasis added). The Board found that in the absence of evidence that the hiring entity was a statutory "employer," there could be no Section 8(b)(2) violation. 240 NLRB at 690; *see Millwrights Local No. 1102, United Bhd. of Carpenters*, 322 NLRB 198, 203 (1996) (dismissing Section 8(b)(2) allegations); *see also Orange Cty. Dist. Council of Carpenters*, 219 NLRB 993, 996 (1975) (dismissing complaint alleging violation of Section 8(b)(7)(C), which prohibits certain picketing against an "employer," 29 U.S.C.

§ 158(b)(7)). In contrast, the Board has long held that it possesses jurisdiction over other unlawful conduct by labor organizations even in the total absence of any statutory employer. *See, e.g., Local No. 16, Int'l Longshoremen's Union*, 176 NLRB 889, 889, 893-94 (1969) (asserting jurisdiction over unlawful secondary boycott of non-“employer” entity based on Congress’s deliberate use of the word “person” in Section 8(b)(4)(B) of the Act). The present case involves a duty-of-fair-representation violation under Section 8(b)(1)(A), which prohibits arbitrary conduct by a “labor organization” directed at “employees.” *See* 29 U.S.C. § 158(b)(1)(A).

In order to remedy the Union’s unfair labor practice, discussed previously, the Board’s Order simply requires the Union to furnish the hiring hall referral information requested in the February 20 and April 24 letters. (SER 2; ER 72-74.) The Union has waived any specific challenge based on the identity of unnamed employers to the Board’s factual finding that all of the requested information was relevant to the Eliases’ reasonable belief that they were being treated unfairly in connection with the hiring hall. (SER 1 n.1, 14-15.) Moreover, at the unfair-labor-practice hearing the Union failed to introduce any evidence weighing against such a finding or demonstrating that, for example, there are in fact entities potentially encompassed by the Eliases’ requests that are not statutory employers within the meaning of the Act (Br. 10-11). Instead, the Union has improperly framed its

argument as a question of “jurisdiction” in an attempt to place a nonexistent and impractical evidentiary burden on the Board. *Cf. Ironworkers Local Union No. 505*, 794 F.2d at 1477 (“In suggesting that the Board’s jurisdiction depends on specific factual findings relevant to the merits, the Union confuses the issue of jurisdiction with that of the merits.”).

As such, the Court should reject the Union’s argument and enforce the Board’s Order in full. In the event that the Union is incapable of producing all of the requested information or that a legitimate dispute arises as to the contours of the Board’s Order or the wording of the Eliases’ two written requests, such issues are properly deferred to subsequent compliance proceedings. *NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1339 (7th Cir. 1991) (discussing prudence of ordering parties to broadly comply with information requests, so as to place the burden in compliance on the “noncomplying party . . . to demonstrate why it is unable to reveal specific information”); *see NLRB v. Int’l Ass’n of Bridge Iron Workers, Local 433*, 600 F.2d 770, 778 (9th Cir. 1979) (endorsing practice of deferring even “complex factual issues” to compliance proceedings); *Local Union No. 3, Operating Eng’rs*, 324 NLRB at 14 n.2 (reserving for compliance stage union’s argument that it would be unduly burdensome to produce certain hiring

hall records).⁷ In any event, the Union has not shown that the Board's Order constitutes a "clear abuse of discretion." *Elec. Workers, Local 21*, 563 F.3d 418 at 423; *see George Koch Sons*, 950 F.2d at 1339.

2. The Union's Duty To Provide Relevant Information Is Not Limited to Six Months by Section 10(b) of the Act

The Union also misconstrues its duties under the Act by suggesting that that the Board's Order should be limited to records going back six months from the dates of the Eliases' information requests (Br. 21-23), based on the six-month statute of limitations for filing unfair-labor-practice charges contained in Section 10(b) of the Act, 29 U.S.C. § 160(b). However, as the Board again noted here (SER 11), the sole unfair labor practice at issue in this case is the Union's violation of its statutory duty of fair representation by acting arbitrarily in response to the Eliases' information requests, which occurred less than six months prior to the unfair-labor-practice charge being filed. The Board has never held that a union's statutory duty to provide hiring hall information is limited by the six-month Section 10(b) period in the Act. *Cf. Elec. Workers, Local 24*, 356 NLRB at 583, 585-86 (ordering union to permit employees to inspect and copy relevant hiring hall records going back as far as ten years). Rather, employees with a reasonable

⁷ Likewise, the Court should disregard the Union's unilateral and dubiously narrow interpretation of the records encompassed by the plain language of the February 20 and April 24 information requests. (Br. 38-43.) Such issues should be deferred to the compliance stage.

belief that they have been treated unfairly are entitled to information that is reasonably directed at investigating their union's operation of an exclusive hiring hall. *Boilermakers, Local 197*, 318 NLRB at 205. Employees have an independent right to ascertain whether they have been treated unfairly by their union regardless of whether the employees intend to file additional unfair-labor-practice charges with the Board. *See Local No. 324, Operating Eng'rs*, 226 NLRB at 587 (“[T]he Union’s comprehensive and exclusive power and authority in this matter . . . automatically obligate[s] it to deal fairly with [an employee’s] request for job-referral information.”).⁸

Moreover, although irrelevant to this case for the above reasons, the Union is incorrect to suggest (Br. 21) that any subsequent claims would necessarily be governed by the six-month statute of limitations contained in Section 10(b) of the Act. In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Supreme Court held that the six-month Section 10(b) period governs the filing of so-called “hybrid” claims against both an employer for breach of contract and a union for violating its duty of fair representation. *Id.* at 170-72.

However, upon investigation the Eliases might have decided, for example, that the

⁸ Of course, a union’s duty is not unlimited. An employee’s request must be based on a reasonable belief that he or she has been treated unfairly, and the request must be reasonably directed at ascertaining whether such unfair treatment occurred. In addition, a particular request may be so unduly burdensome that a union is justified in refusing to comply. *Cf. Local Union No. 3, Operating Eng'rs*, 324 NLRB at 14 n.2. The Union has made no such claim here. (SER 14 n.19.)

Union did not violate its duty of fair representation, but that an employer or the Union had separately breached the terms of a written collective-bargaining agreement in some manner. *See* 29 U.S.C. § 185; *Breining*, 493 U.S. at 84 & n.8. Such non-“hybrid” claims are governed by “the most closely analogous statute of limitations of the forum state.” *Gen. Teamsters Union Local No. 174 v. Trick & Murray, Inc.*, 828 F.2d 1418, 1423 (9th Cir. 1987); *see Pencikowski v. Aerospace Corp.*, 340 F. App’x 416, 418 (9th Cir. 2009).⁹

More to the point, however, an employee seeking reasonable hiring hall information does not need to resolve these issues to the satisfaction of the union before he or she is entitled to a non-arbitrary response to his or her information requests. *See Carpenters Local 608*, 811 F.2d at 152-53 (“In any event, a union is not permitted to refuse a request for information based on its own determination that the grievance underlying the request is non-meritorious or that the information sought is not essential.”). Nor must an employee’s reasonable information request simply be the predicate for a subsequent Section 8(b)(2) charge alleging unlawful discrimination. A union’s obligation to provide exclusive hiring hall information derives from the fact that an employee is “completely dependent on [the union] for the protection of his [or her] referral rights.” *Local No. 324, Operating Eng’rs*,

⁹ The Eliases also could have conceivably brought an action in which they litigated whether the six-month Section 10(b) period was tolled until they first received notice of possible irregularities with the hiring hall. *See Galindo v. Stody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986).

226 NLRB at 587. The only unfair labor practice at issue in this case is the Union's arbitrary refusal to provide requested information, which occurred well within six months of the charge filed with the Board and which was an independent violation of Section 8(b)(1)(A) of the Act.

3. The Board's Order Does Not Infringe on the Union's First Amendment Rights or Implicate Other Federal Statutes

Finally, the Union argues that ordering the disclosure of hiring hall users' contact information, including home addresses, would infringe on the Union's and its members' associational privacy rights under the First Amendment. (Br. 23-31.) However, this Court has already answered that question to the contrary. In *NLRB v. Local Union 497, International Brotherhood of Electrical Workers*, 795 F.2d 836 (9th Cir. 1986), the Court expressly rejected a union's argument that its First Amendment associational right to privacy would be infringed by a Board order requiring it to provide the names and home addresses of hiring hall users. *Id.* at 838-39. Although that case only involved an order to provide names and home addresses, the Union has not argued that the inclusion of telephone numbers raises any additional First Amendment considerations. Indeed, the Union concedes that "telephone numbers . . . are analogous to addresses" (Br. 24), and nowhere in its opening brief does the Union argue that the disclosure of telephone numbers somehow has a materially greater impact on associational interests than disclosing names and home addresses. *See Int'l Ass'n of Bridge Ironworkers & Riggers*,

Local No. 27, 313 NLRB 215, 218-19 (1993) (ordering union to provide telephone numbers despite asserted confidentiality interests), *enforced mem.*, 70 F.3d 119 (9th Cir. 1995) (unpublished).

As in *Local Union 497*, the Union here has “failed to point to any facts . . . suggesting that harassment is likely” if the Eliases are provided with the requested information. 795 F.2d at 839; *cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (striking down state law requiring disclosures which would entail “the likelihood of a substantial restraint upon the exercise of petitioner’s members of their right to freedom of association”). The Board found that the Eliases have demonstrated a reasonable belief that they were being treated unfairly in connection with the hiring hall and that they needed the requested information to investigate (SER 2 & n.1, 7, 14), that the two information requests “were not designed by the Eliases to harass [the Union]” (SER 12 n.15), and that the Union has not demonstrated a reasonable likelihood of harassment such that a production order might “chill union membership” (SER 12). The Union has given the Court no reason on the facts of this case to set aside those findings by the Board, which are “well within its sphere of expertise.” *Local Union 497*, 795 F.2d at 839.

Similarly, as the Board also found (SER 12), the fact that there are situations under various federal statutes where parties are not affirmatively required to produce individuals’ contact information (Br. 25-28) has no bearing on the Board’s

Order. *Cf. Carpenters Local 608*, 811 F.2d at 154 (rejecting identical Labor-Management Reporting and Disclosure Act argument and ordering union to provide hiring hall users' addresses and telephone numbers). The Board's Order does not assume that there can be no privacy interests in employees' contact information, but rather that an aggrieved employee's statutory right to review hiring hall information outweighs a union's refusal to provide that information absent a showing that such refusal is in fact "necessary to vindicate legitimate union interests." *Boilermakers, Local 197*, 318 NLRB at 205. Here, the Board found that the Union President's mere assertion of a privacy "policy"—absent any written policy or prior evidence of protections being communicated to employees—did not satisfy the Union's burden. (SER 13.) As the Supreme Court stated long ago in upholding the Board's practice of requiring the routine disclosure of home addresses during representation elections, it is the role of the Board and not the courts to weigh the rights of employees under the Act against the speculative risks associated with certain disclosures. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
March 2017

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	No. 16-72174
and)	
)	Board Case No.
GARY ELIAS)	28-CB-131044
)	
Intervenor)	
)	
v.)	
)	
INTERNATIONAL ALLIANCE OF)	
THEATRICAL STAGE EMPLOYEES, MOVING)	
PICTURE TECHNICIANS, ARTISTS & ALLIED)	
CRAFTS OF THE UNITED STATES, ITS)	
TERRITORIES & CANADA, LOCAL 720,)	
AFL-CIO, CLC)	
)	
Respondent)	

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 23rd day of March, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 8,332 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 23rd day of March, 2017

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Board certifies that it is unaware of any related cases pending in this Court.

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STATUTORY ADDENDUM

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NATIONAL LABOR RELATIONS ACT

29 U.S.C. § 151

Sec. 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 152(1), (3), (5)

Sec. 2. When used in this Act--

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code, or receivers. . . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. . . .

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 157

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 158(b)

[Sec. 8.] (b) It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) 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; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective- bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

29 U.S.C. § 160(a)

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

29 U.S.C. § 160(b)

[Sec. 10.] (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon

such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code.

29 U.S.C. § 160(e)

[Sec. 10.] (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall

be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

LABOR MANAGEMENT RELATIONS ACT

29 U.S.C. § 185

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization

maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

REGULATIONS

29 C.F.R. § 102.9

Any person may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce. The charge may be withdrawn, prior to the hearing, only with the consent of the Regional Director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to § 102.45, upon motion, with the consent of the Administrative Law Judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to § 102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon will be dismissed by the Regional Director issuing the complaint, the Administrative Law Judge designated to conduct the hearing, or the Board.