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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

GARY ELIAS,

Intervenor,

v.

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

Respondent.

No. 16-72174

Board No. 28-CB-131044

MEMORANDUM*

On Petition for Review of an Order of the
National Labor Relations Board

Argued and Submitted November 17, 2017
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: CLIFTON and FRIEDLAND, Circuit Judges, and GLEASON,** District Judge.

The National Labor Relations Board (the “Board”) petitioned this court for enforcement of an order, requiring Local 720 (the “Union”) to provide referral information to Union member Gary Elias. Pursuant to 29 U.S.C. § 160(e), this court has jurisdiction to review a final order of the Board. “We will uphold decisions of the Board if its findings of fact are supported by substantial evidence and if it correctly applied the law.” *N.L.R.B. v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995). The Board’s chosen remedy will “only [be] set aside by this court for ‘clear abuse of discretion.’” *Int’l Bhd. of Elec. Workers, Local 21 AFL-CIO v. N.L.R.B.*, 563 F.3d 418, 423 (9th Cir. 2009) (quoting *Cal. Pac. Med. Ctr. v. N.L.R.B.*, 87 F.3d 304, 311 (9th Cir. 1996)).

The Union first asserts that the Board did not have jurisdiction to hear this dispute because it was required to have, but did not establish, jurisdiction over each employer to which the Union refers workers. However, the Board was not required to have jurisdiction over each individual employer because the sole remedy sought by Mr. Elias was an order requiring the Union to provide its own referral

** The Honorable Sharon L. Gleason, United States District Judge for the District of Alaska, sitting by designation.

information.¹ It is undisputed that the National Labor Relations Act (the “Act”) applies to the Union. Accordingly, the Board had jurisdiction.

The Union next objects to the Board’s finding that it operates an exclusive hiring hall. The record includes agreements that the Union had with various employers that require the employers to first use the Union’s referral service. Therefore, substantial evidence supports the Board’s finding that the Union operated an exclusive hiring hall.

The Union next maintains that Mr. Elias’s claim is barred by the applicable statute of limitations. Under Section 10(b) of the Act, complaints cannot be filed more than six months after the “unfair labor practice.” 29 U.S.C. § 160(b). In this case, the unfair labor practice occurred when the Union did not provide all of the requested referral information to Mr. Elias in early 2014. It is undisputed that Mr. Elias filed his complaint within six months of those events. Therefore, the statute of limitations does not bar Mr. Elias’s complaint.

The Union next asserts that it should not be required to turn over addresses and phone numbers because Union members have a First Amendment right to

¹ The Union relies on *Fisher Theatre* to support its claim. However, in *Fisher Theatre* the remedy sought and obtained by the union member required both the employer theater as well as the union to stop discriminating in referring union members for employment. 240 NLRB 678, 696 (1979). Here, the remedy is directed solely at the Union.

privacy and the Union has a duty to fairly protect the privacy rights of its members.² The Union is mistaken. In *N.L.R.B. v. Local Union 497, International Brotherhood of Electrical Workers, AFL-CIO*, 795 F.2d 836, 839 (9th Cir. 1986), this court held that “disclosure of the names and addresses of all members using the hiring hall does not threaten the union or the associational rights of union members.”³ Moreover, substantial evidence in the record supports the Board’s finding that the Union did not have a confidentiality policy that was meant to protect the privacy of its members. Therefore, the Union is not precluded from providing the requested information to Mr. Elias.

Tina Elias was not a party to the complaint; nonetheless, the Board did not err in requiring the Union to provide the referral information as relevant to her. In *International Brotherhood of Electrical Workers, Local 24 (Mona Electric)*, 356 NLRB 581, 581–82 (2011), the Board found that a non-party to a complaint who was a witness in support of the allegations in the complaint and who was cross-examined at the Board hearing was active enough in the case to allow him to review the hiring hall records. In this case, Ms. Elias was similarly active in Mr.

² The Union does not assert that there are First Amendment or other privacy interests at stake with Union members’ priority rating for referrals.

³ This reasoning logically extends to phone numbers; as the Union acknowledges, “telephone numbers . . . are analogous to addresses.”

Elias's case. She was named in the second letter sent by Mr. Elias; she testified as a witness at the administrative hearing; and she was cross-examined by the Union. Therefore, the Board acted within its authority to accord the relief requested as to Ms. Elias.

Finally, the Union asserts that it is unclear from the Board's decision what referral information must be provided.⁴ The Board ordered the Union to provide the referral information requested in Mr. Elias's two letters. Even if the April 24th letter was not entirely clear as to what Mr. Elias was requesting, the Board adopted the findings of the administrative law judge, which provided detailed clarification of what needed to be disclosed. Accordingly, the Board's order is sufficiently clear and will be enforced.

ENFORCEMENT GRANTED.

⁴ The Union also asserts that Mr. Elias was not registered and eligible for referrals during the periods in question. But the Union ignores Mr. Elias's credited testimony. Credibility findings are entitled to special deference and may only be rejected when a clear preponderance of the evidence shows that they are incorrect. *See Healthcare Emps. Union, Local 399, Affiliated With Serv. Emps. Int'l Union, AFL-CIO v. N.L.R.B.*, 463 F.3d 909, 914 n.8 (9th Cir. 2006). The Union points to nothing that rebuts Mr. Elias's testimony. Thus, substantial evidence supports the Board's decision.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
Answering Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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Other**	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk