

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

UNITED ASSOCIATION OF JOURNEYMEN AND  
APPRENTICES OF THE PLUMBING AND PIPE  
FITTING INDUSTRY OF THE UNITED STATES  
AND CANADA, AFL-CIO (PPF), LOCAL 502  
(Ward Engineering Co., Inc.)

and

Case 09-CB-205891

JOE WYSSBROD, AN INDIVIDUAL

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF**  
**TO THE**  
**ADMINISTRATIVE LAW JUDGE**

**I. INTRODUCTION**

This matter is before Administrative Law Judge Melissa M. Olivero upon the General Counsel's April 30, 2018 Complaint and August 1, 2018 Amendment to Complaint alleging that on about April 1, 2017, Respondent removed Joe Wyssbrod from its job-referral list without apprising him of his current obligations under the union-security clause and without disclosing to him that as a nonmember, he could be reinstated to the job referral list by paying a hiring hall fee, and since that date failing and refusing to reinstate Wyssbrod to its job referral list or refer him to employment in violation of Section 8(b)(1)(A) of the Act. The case was heard on August 1, 2018 in Cincinnati, Ohio. As set forth in more detail herein, the record evidence convincingly supports the General Counsel's case.

**II. THE FACTS**

**A. Respondent Operates an Exclusive Hiring Hall**

The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, (PPF), Local 502 (Respondent) is a party to

a collective-bargaining agreement with the Mechanical Contractors Association of Kentucky, Inc. (Tr. 29; GC. Ex. 4 pp. 6-75) It operates an exclusive hiring hall out of its facility in Louisville, KY, which is established in Article 41 of the collective-bargaining agreement. <sup>1/</sup> (G.C. Ex. 4, pp 23-24, 58-59, 106, 124-125, 140, 150-151) Article 41 of the collective-bargaining agreement provides, in relevant part:

#### **ARTICLE 41 - Hiring and Use of Employees**

142. For the purpose of this Agreement the words "Home Local Union" shall mean the local union having jurisdiction in the area of the Employer's place of business, and therefore, is the local union which referred the employee to the Employer.

143. The Employer will first request the home local union for qualified personnel. The local union, upon such request, agrees to furnish at all times to the Employer duly qualified Mechanical Equipment Service Journeymen, Servicemen, Service Apprentices and Tradesmen, including Journeymen with special skills, where applicable, in a sufficient number, as determined by the Employer to properly execute all work covered by this Agreement.

144. In the event the local union having jurisdiction is unable to supply the requested number of qualified and competent Service Journeymen, Servicemen, Service Apprentices or Tradesmen and other employees as herein described, the Union, upon request by the local union, agrees to notify its other local unions of the availability of work and will request these local unions to refer such qualified employees to the Employer.

145. If neither the local union nor the Union is able to supply competent and skilled Employees satisfactory to the Employer within forty-eight (48) hours, the Employer may hire such persons wherever available, subject to the provisions of Article 11 and train such persons to perform the work required. It is understood that consideration for such employment and training shall be given to Employees with previous experience in the plumbing and pipefitting industry and/or the mechanical equipment service and maintenance industry.

146. The Employer shall retain the right to reject any applicant referred by the union. The Employer shall retain the right to terminate any employee for just cause providing Employer so states in a termination notice.

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<sup>1/</sup> References to the transcript will be designated as (Tr. \_\_\_\_); references to General Counsel's Exhibits will be designated as (G.C. Ex. \_\_\_\_); references to Joint Exhibits will be designated as (Jt. Ex. \_\_\_\_); and references to Respondent's Exhibits will be designated as (R. Ex. \_\_\_\_).

147. The selection of applicants for referral to jobs shall be on a nondiscriminatory basis, and shall not be based on, or in any way affected by union membership, bylaws, rules, regulations, constitutional provision, or by any other aspect or obligation of union membership, policy or requirement; no distinction in treatment should be made based on religion, color, age, national origin, sex, handicap status, Vietnam era, or disabled Veteran's status, or on any other basis prohibited by law. (G.C. Ex. 4, pp 23-24).

To the extent Respondent argues that its dispatching rules allow it to run a non-exclusive hiring hall, the dispatching rules pre-date the current collective-bargaining agreement so the collective-bargaining agreement that establishes an exclusive hiring hall controls. (Tr. 189-190) The most recent collective-bargaining agreement between Respondent and the Mechanical Contractors Association of Kentucky, Inc. was valid from August 1, 2012 to July 31, 2017. (G.C. Ex. 4, p. 6) The collective-bargaining agreement contained a union-security clause. (G.C. Ex. 4 pp 9-10) Kentucky's "right-to-work" law banning union-security agreements, effective January 9, 2017, became applicable to the Union upon the expiration of that contract. KY. REV. STAT. ANN. § 336.130(3), and § 336.132(5) (West 2017) (GC. Ex. 3; R Ex. 28)

Joe Wyssbrod was a member of the Union from September 2, 1986 until he was expelled from membership for non-payment of dues on April 1, 2017. (Tr. 27) He was fully reinstated on about June 20, 2018. (Tr. 28)

**B. Following his termination from a job, Respondent ignores Wyssbrod's calls**

Prior to being removed from membership, Wyssbrod was most recently employed through the Union for Ward Engineering at the Ford Kentucky Truck Plant from about December 27, 2016 until about December 30, 2016. (Tr. 32) He was discharged from Ward Engineering for alleged insubordination. (Tr. 34) Following his termination from Ward Engineering, Wyssbrod asked the Union for assistance in getting his job back. (Tr. 34-37, 207) Union Business Agent Erik Elzy reneged on his promise to investigate the matter further and then call Wyssbrod back. (Tr. 37)

After his discharge, Wyssbrod called the Union hall every day for 3 weeks or so, and then once a week after that for a total of 3 to 4 months, and his calls were not returned. (Tr. 38-39) Wyssbrod called both Elzy's cell phone and the Union landline. (Tr. 38) In about the spring of 2017, Wyssbrod also visited the Union Hall in person. (Tr. 47-48) He spoke to the Union's secretary and asked to speak with Union Business Manager Danny DeSpain. (Tr. 48) Wyssbrod was told DeSpain would be in a meeting until lunch. (Tr. 48) Wyssbrod asked to have DeSpain call him. (Tr. 48) DeSpain did not call Wyssbrod. (Tr. 48) Wyssbrod also attempted to contact the Union through its website, asking that they call or email him. (Tr. 48) In about September 2017, Wyssbrod called the United Association (the International Union) regarding his expulsion from the Union. (Tr. 49-50) Respondent was aware it could contact Wyssbrod through his Facebook page. (Tr. 202) Because Respondent ignored his calls, Wyssbrod was unable to place himself on the Union referral list and was therefore unable to get work through the hiring hall. (Tr. 37-40)

**C. Respondent removes Wyssbrod from membership without apprising him of his obligations under the union-security clause or disclosing to him that, as a nonmember, he could be reinstated to the job referral list by paying a hiring hall fee.**

At the end of December 2016, Wyssbrod was suspended from union membership for a 3 month dues arrearage. (G.C. Ex. 4, pp. 108-121) Nonetheless, and even though he was not called or referred during this time, his name still appeared on the hiring-hall referral list. (G.C. Ex. 4, pp. 116-121) Under the Union's constitution, referrals only cease on the 6 month of nonpayment of dues or agency fees. (G.C. Ex. 4, pp. 98) On April 1, 2017, following 6 months of dues arrearages, Wyssbrod was expelled from union membership and his name was removed from the hiring-hall referral list. (G.C. Ex. 4, pp. 114-115) Although Kentucky passed a right-to-work law in January 2017, it exempted employers who were under an extant collective-

bargaining agreement containing a union-security clause until the expiration of that agreement.  
KY. REV. STAT. ANN. § 336.132(5). (G.C. Ex. 3; R. Ex. 28)

Wyssbord learned that he had been removed from the referral list and expelled from the Union for non-payment of dues from a fellow Union member, Todd Crider, in about June or July 2017. (Tr. 41) Crider does not hold any Union position. (Tr. 40-41) Crider called because he had recently been told he would be facing expulsion and was told by Business Agent Scott Elzy that Wyssbord had recently been expelled. (Tr. 41) At no time did the Union inform Wyssbord that he was removed from its referral list. (Tr. 46-47) At no time did the Union contact Wyssbord to inform him that he was delinquent on his dues. (Tr. 43; G.C. Ex. 5) At no time before he was expelled did the Union call Wyssbord to inform him that he was expelled from the Union. (Tr. 43; G.C. Ex. 5) During this time, Wyssbord remained interested in obtaining work through the Union. (Tr. 47)

In about July 2017, after he spoke with Crider, Wyssbord contacted the Union again. (Tr. 43-44) He was told to talk to Business Manager Danny DeSpain. (Tr. 44) Wyssbord attempted to call DeSpain from his cell phone, but the call was not answered. (Tr. 45) He then called from a friend's landline and DeSpain did answer. (Tr. 44-45, 65) Wyssbord asked DeSpain what's going on and what he has to do to pay to be reinstated. (Tr. 46) Wyssbord was told DeSpain would return his call on Monday. (Tr. 46) DeSpain did not return his call. (Tr. 46)

Also in about July 2017, retired Union member Ronald Hicks asked Business Manager Danny DeSpain to find out how much it would cost to get Wyssbord reinstated because he was going to loan Wyssbord money in order to allow him to do so. (Tr. 81) DeSpain told Hicks that he had to get back with him on that. (Tr. 81) DeSpain did not return Hicks' call. (Tr. 81) Later on that month, Hicks attended a Union meeting and after the meeting he asked DeSpain the same question. (Tr. 81-82) DeSpain told Hicks he didn't think the Union wanted Wyssbord back.

(Tr. 82) He did not give Hicks an amount that Wyssbrod could pay to be reinstated to the out-of-work list. (Tr. 82)

In about September 2017, Wyssbrod was finally able to reach Business Agent Scott Lewis regarding his expulsion. (Tr. 51) In the course of the conversation, Lewis refused to accept Wyssbrod's money, said the Union was done with him, and told him there was no price he could pay to be reinstated. (Tr. 52, 191-192)

At no time did the Union apprise Wyssbrod that he could be on the Union's out-of-work list without being a member of the Union. (Tr. 53, 193; G.C. Ex. 5) At the time he was expelled and removed from the out-of-work list, the Union had not even calculated the fee that a nonmember would have to pay to be added to the out-of-work referral list. (Tr. 193; G.C. Ex. 4, pp. 122-128) Even after the fee was calculated, the Union did not apprise Wyssbrod as to the amount of the fee. (Tr. 193; G.C. Ex. 5)

On about June 20, 2018, Wyssbrod was reinstated to the Union by paying \$238. (Tr. 28, 194) It was only then that he was told how much he could pay to be reinstated, and that he could be reinstated. (Tr. 28; G.C. Ex. 5)

### **III. LEGAL ANALYSIS**

#### **A. Respondent operates an exclusive hiring hall**

An exclusive hiring hall, whether created by contractual agreement, oral understanding or past practice, is one where the union is the first and primary source of employees for the employer. *Plumbers Local 198 (Stone & Webster)*, 319 NLRB 609 (1995). It is well settled that a hiring hall is deemed to be exclusive where the union retains exclusive authority for referrals for some specified period of time, such as 24 or 48 hours, before an employer can hire on its own. *Carpenters Local 608 (Various Employers)*, 279 NLRB 747 (1986)(finding that an exclusive hiring hall existed even given testimony that a majority of respondent's members do

not use the hiring hall at all and obtain jobs on their own); (*Mountain Pacific Chapter AGC*, 119 NLRB 883 (1957); *Boilermakers Local 587 (Stone & Webster)*, 233 NLRB 612, 614 (1977); *Carpenters Local 78 (Murray Walter)*, 223 NLRB 733, 734-735 (1976). Thus to the extent that that union retains such exclusive authority during this period, it operates an exclusive hiring hall.

In the present case, the collective-bargaining agreement provides that an employer “will first” request the home local union for qualified personnel. This language is unequivocal about employers’ responsibilities regarding acquiring employees. The collective-bargaining agreement then goes through the procedures for the Union supplying employees and contingencies for not supplying such employees within a 48 hour period. Nowhere in the collective-bargaining agreement does the agreement allow the operation of a non-exclusive hiring hall, and any evidence that Respondent has been lax in enforcing any breaches of the collective-bargaining agreement should be disregarded given the plain language of the collective-bargaining agreement. *See Carpenters Local 608, supra*. The plain language of the controlling collective-bargaining agreement creates an exclusive hiring hall.

**B. Respondent violated Section 8(b)(1)(A) of the Act by removing Wyssbrod from its job referral list on April 1, 2017 without first apprising him of his current obligations under the union-security clause.**

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 hiring-hall users its power over their livelihoods. *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1, 2 (2000), rev’d on other grounds, 333 F.3d 927 (9th Cir. 2003); *Operating Engineers Local 18 (Ohio Contractors Ass’n)*, 204 NLRB 681, 681 (1973), enforcement denied on other grounds and remanded per curiam, 496 F.2d 1308 (6th Cir. 1974), reaff’d, 220 NLRB 147 (1975), enforcement denied, 555 F.2d 552 (6th Cir. 1977). 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. *Id.* Where, however, the union has a lawful union-security agreement and an employee's dues arrearage would justify discharge or non-referral, "it [i]s incumbent upon [the union] to advise [the employee] in explicit terms exactly what his current obligation [is] under the union-security contract to qualify for registry on its out-of-work list and referral from its hiring hall." *Asbestos Workers Local 5 (Insulation Specialties Corp.)*, 191 NLRB 220, 221 (1971), enforced, 464 F.2d 1394 (9th Cir. 1972). This principle is similar to the requirement that a union provide an employee with a precise amount of dues owed, the time period in question, the method of computation, and a reasonable opportunity to meet the dues obligation before seeking the employee's discharge under a union-security clause. *See Philadelphia Sheraton Corp.*, 136 NLRB 888, 896 (1962), enforced, 320 F.2d 254 (3d Cir. 1963); *Western Publishing Co.*, 263 NLRB 1110, 1111-1112 (1982).

Moreover, the Board has consistently found that unions operating hiring halls are responsible for keeping job applicants informed about hiring-hall procedures and other matters critical to their employment status, whether or not there is a union-security clause. *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50, 51 (1982) (change in hiring hall rules), enforced per curiam, 701 F.2d 504, 510 (5th Cir. 1983); *Electrical Workers IBEW Local 11 (Los Angeles NECA)*, 270 NLRB 424, 426 (1984) (qualifications for group I referrals), enforced, 772 F.2d 571, 576 (9th Cir. 1985); *Boilermakers Local 667 (Union Boiler Co.)*, 242 NLRB 1153, 1155 (1979) (referral rule with regard to quitting construction jobs).

In *Asbestos Workers Local 5 (Insulation Specialties Corp.)*, *supra*, the respondent union refused to place an employee on its out-of-work list because of his past failure to join the union as required by the union-security clause. The Board found that the respondent union violated

Section 8(b)(1)(A) and 8(b)(2) of the Act by discriminatorily refusing to register the employee on its out-of-work list and thereby denying him referral from its exclusive hiring hall specifically because it acted without advising the employee of what he was required to do in order to qualify for registration on the out-of-work list. Similarly, in the instant case, it was unlawful for Respondent to remove Wyssbrod's name from the hiring-hall referral list in April 2017, despite his dues arrearage and the presence of a valid union-security clause, because Respondent did not inform him of his current obligations under the union-security clause. *Asbestos Workers Local 5 (Insulation Specialties Corp.)*, 191 NLRB at 221.

**C. After it removed Wyssbrod from its job referral list on April 1, 2017, Respondent violated Section 8(b)(1)(A) of the Act by failing to disclose to Wyssbrod that, as a nonmember, he could be reinstated to the job referral list by paying a hiring hall fee.**

Respondent subsequently violated the Act by failing to apprise Wyssbrod of his right, as a nonmember, to be reinstated to the referral list upon paying a hiring hall fee. Any argument by Respondent that Wyssbrod's question about the price to get back in the Union was solely about union membership and not about reinstatement to the referral list should be rejected. Even if Wyssbrod did not precisely frame his request as seeking placement on the referral list, that was clearly at least one of his goals, particularly considering his many years of prior referrals through the hall. Moreover, even without Wyssbrod's request, Respondent had an affirmative obligation to disclose information that was critical to his employment status, such as the appropriate fee for nonmembers to use the hiring hall either before or after the contract expired and Kentucky's "right-to-work" law went into effect. *See id.; Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB at 51. Additionally, although Respondent is expected to argue that Wyssbrod had a history of misconduct on jobs to which he had been referred, which damaged the Union's relationship with employers, Respondent nevertheless reinstated Wyssbrod

to its referral list in about May 2018. Your honor should therefore reject an argument that Respondent's actions were justified based solely on any past record of misconduct by Wyssbrod.

## V. CONCLUSION

Based on the record as a whole, and for the reasons discussed above, Counsel for the General Counsel respectfully requests that the Administrative Law Judge find that Respondent violated Section 8(b)(1)(A) of the Act as alleged in the complaint. The recommended conclusions of law are set forth below:

1. Respondent violated Section 8(b)(1)(A) of the Act by removing Joe Wyssbrod from its hiring-hall job-referral list because of a dues arrearage without notifying him of his current liability under the union security-clause.
2. Respondent violated Section 8(b)(1)(A) of the Act by failing to apprise Joe Wyssbrod of his ability to be referred from the hiring hall as a nonmember by paying a hiring hall fee and thereafter failing to place him on the referral list as a nonmember.

Attached hereto as Attachments A is a proposed Notice to Employees for your consideration.

Dated at Cincinnati, Ohio this 5<sup>th</sup> day of September 2018.

Respectfully submitted,

*/s/ Zuzana Murarova*

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Attachment: Attachment A

## Attachment A

(To be printed and posted on official Board notice form)

### **FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** fail to notify you of your current liability (i.e., dues arrearages and any fees required for reinstatement) under the union security-clause.

**WE WILL NOT** remove you from our hiring-hall job-referral list because of a dues arrearage before apprising you of your current obligations under the union-security clause.

**WE WILL NOT** fail to disclose to you that you can be referred from the hiring hall as a nonmember by paying a hiring hall fee.

**WE WILL NOT** fail to reinstate Joe Wyssbrod to the job-referral list.

**WE WILL NOT** in any like or related manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

**WE WILL** tell employees who have been removed from our hiring-hall job-referral list for nonpayment of dues what their current liability (i.e., dues arrearages and any fees required for reinstatement) is under the union security-clause.

**WE WILL** tell employees who have been removed from our hiring-hall job-referral list for nonpayment of dues that they can be referred from the hiring hall as non-members by paying a hiring hall fee, which at this time is \$\_\_\_\_\_ (to be determined in compliance).

**WE WILL** pay Joe Wyssbrod for the wages and other benefits he lost by non-referral because we removed him from our hiring-hall job-referral list before apprising him of his current obligations under the union security-clause, including dues arrearages and any reinstatement fees, and before disclosing to him that he can be referred from the hiring hall as a non-member by paying a hiring hall fee, and the amount of such fee.

**WE WILL** reinstate Joe Wyssbrod to the job-referral list.

CERTIFICATE OF SERVICE

September 5, 2018

I hereby certify that I served the attached Counsel for the General Counsel's Brief to the Administrative Law Judge on all parties by mailing true copies thereof by electronic mail today to the following at the addresses listed below:

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