UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES,
LOCAL 16 (VARIOUS EMPLOYERS)

and

Case 20-CB-218555

DAMOND MCFARLAND, an Individual

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

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I. INTRODUCTION

The Complaint in this proceeding issued on June 29, 2018. (GC Exh 1(f)).[1] The Complaint alleges, *inter alia*, that: 1) the Board has jurisdiction over Respondent; 2) Respondent operates an exclusive hiring hall; and, 3) Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act (Act) by completely barring Charging Party Damond McFarland from using its exclusive hiring hall. Respondent denies all these allegations.

On March 28, 2018, Respondent revoked Charging Party Damond McFarland's referral privileges for allegedly violating its internal Code of Conduct prohibiting harassing, obscene, or insulting behavior toward Respondent's staff. (Tr. 37-38). Thereafter, Respondent completely refused to refer McFarland until June 21, 2018. (Tr. 40, 41, 192). As articulated in *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), the Board presumes that a union operating an exclusive hiring hall violates Section 8(b)(2) and 8(b)(1)(A) of the Act whenever it enforces its internal rules by imposing an employment-related sanction on an employee. To overcome this presumption, the union must show that the sanction was related to a failure to pay uniformly-required dues or fees, or was necessary to the union's effective performance of its function of representing its constituency. *Id.* Respondent has failed to meet this burden.

Moreover, Respondent clearly operates an exclusive hiring hall. Respondent maintains approximately 200 collective-bargaining agreements where signatory employers agreed they "shall" hire workers provided by Respondent to perform "all work" under Respondent's jurisdiction. (Tr. 166; GC Exh. 6; GC Exh. 7). Indeed, Steve Lutge, a longtime employee of Respondent and admitted agent, testified he was unaware of any instances where signatory

[1] References to the official transcript will be as follows: "(Tr ___)." References to General Counsel exhibits will be as follows: "(GC Exh _)"

employers hired someone with no affiliation with Respondent to perform work covered by the collective-bargaining agreement. (Tr. 184). Finally, the evidence adduced at hearing showed the two named employers in the Complaint, which are engaged in non-retail operations, provided services valued in excess of $50,000 across state lines. (GC Exh. 2; GC Exh. 3). Accordingly, Respondent violated Section 8(b)(2) and 8(b)(1)(A) of the Act as alleged.

II. ISSUES

The issues that must be decided with regard to this proceeding are as follows:

- Does the Board have jurisdiction over Respondent?
- Does Respondent run an exclusive hiring hall?
- Was Respondent's complete refusal to refer McFarland from March 28, 2018, to June 21, 2018 necessary for its effective performance of representing its constituency?

III. STATEMENT OF FACTS

A. JURISDICTION

The Complaint alleges during the 12-month period ending May 31, 2018, Production Support Services (PSS) engaged in commerce within the meaning of the Act. (GC Exh. 1(f)). The Complaint further alleges that during the 12-month period ending March 28, 2018, Audio Visual Services, Inc. dba PSAV (PSAV) engaged in commerce within the meaning of the Act. *Id.*

1. PSS

PSS is a Nevada corporation with an office located at 886 Spanish Ridge Avenue, Las Vegas, Nevada. (GC Exh. 2). PSS provides labor coordination and payroll services for businesses engaged in the production of special events and tradeshows. (GC Exh. 2, p. 1).

Respondent refers technicians to perform work for PSS. (Tr. 174). During the 12-month period ending May 31, 2018, PSS provided the following labor services valued at $1,208,248.04 in California:

Date	Name	Item	Amount
9/18/17	AV Masters	Labor	$1,857.24
12/04/17	AV Masters	Labor	$1,350.72
6/29/17	Condor Communications	Labor	$37,313.37
6/29/17	Condor Communications	Labor	$10,805.78
6/15/17	Core Staging, Inc.	Labor	$40,567.44
10/24/17	Digital Blue	Labor	$22,494.35
10/30/17	Digital Blue	Labor	$21,987.50
9/18/17	Envy Create	Labor	$7,216.85
8/29/17	Executive Visions, Inc.	Labor	$22,844.77
8/29/17	Executive Visions, Inc.	Labor	$5,564.80
10/25/17	Gail & Rice	Labor	$194,758.20
10/25/17	Gail & Rice	Labor	$421,599.66
6/07/17	Good to Be Frank	Labor	$4,345.50
6/07/17	Good to Be Frank	Labor	$7,297.20
6/07/17	Good to Be Frank	Labor	$21,722.25
6/07/18	Good to Be Frank	Labor	$6,872.50
10/04/17	Gravity Productions	Labor	$72,241.57
10/25/17	Hot Rod Shop, Inc.	Labor	$3,728.50
10/19/17	In Vision Communications, Inc.	Labor	$68,781.37
10/19/17	In Vision Communications, Inc.	Labor	$1,608.58
11/06/17	Jack Morton Worldwide	Labor	$27,482.91
12/12/17	Jack Morton Worldwide	Labor	$10,952.20
6/26/17	Microsoft Corporation	Labor	$125,508.96
6/26/17	Microsoft Corporation	Labor	$25,547.23
6/26/17	Microsoft Corporation	Labor	$6,424.00
12/21/17	Microsoft Corporation	Labor	$2,711.50
6/26/17	O'Keefe Communications	Labor	$86,531.38
11/20/17	SuperSonic AudioVisual Productions	Labor	$1,274.88
10/25/17	Taylor Group	Labor	$5,687.67
7/21/17	Three Phase Media	Labor	$41,169.16

(GC Exh. 2.)

Although Respondent claimed at hearing that PSS's invoice was incomplete, it provided no evidence to support its claim. (Tr. 11). Nor did Respondent present evidence, or even assert,

that PSS did not provide the $1,208,248.04 of labor services that it claims it provided in California.

2. PSAV

PSAV is a Delaware Limited Liability Company with an office located 5100 River Road, Suite 300, Schiller Park, Illinois. (GC Exh. 3). PSAV provides event technology and audiovisual services to hotels, resorts, and conference centers. (GC Exh. 3, p.1). Respondent refers technicians to perform work for PSAV. (Tr. 169). During the 12-month period ending March 27, 2018, provided the following services valued at $52,302.90 in Texas:

Dates	**Description**	**Ext. Price**
2/24/18-3/03/18	Equipment Rental	$28,500.90
2/24/18-3/03/18	Rigging Equipment Rental	$2,412.00
2/24/18-3/03/18	Operator Labor	$10,720.00
2/24/18-3/03/18	Rigging Labor	$1,200.00
2/24/18-3/03/18	Setup Charges	$9,470.00

Respondent presented no evidence to the contrary.

B. RESPONDENT'S HIRING HALL

Respondent has separate collective-bargaining agreements with each employer that uses Respondent's hiring hall to procure its workforce. (Tr. 166). For employers in the convention, trade show, and concert industries, Respondent has a standard-form "Basic-Term" and "Project Agreement." (Tr.163-64; GC Exh. 6; GC Exh. 7). Although each employer signs its own agreement, there is no variation in the terms of the standard-form agreements. Tr. 166. Approximately 200 employers, including PSS and PSAV, are signatories to a Basic-Term Agreement with Respondent. (Tr. 166; GC Exh. 8; GC Exh. 9). Both the Basic-Term and the Project Agreement provide that the signatory employer "**shall** hire workers supplied by Local 16,

regardless of venue, to perform **all work** that is by custom and practice performed by technicians under the jurisdiction of Local 16" [Emphasis added]. (GC Exh. 6; GC Exh. 7). Both agreements define the geographical jurisdiction of Local 16 as San Francisco County, Marin County, Santa Rosa, Lake County, Mendocino County, Sonoma County, Napa County, San Mateo County and Palo Alto/Stanford University. *Id.* Further, both agreements define the work that is by custom and practice performed by technicians under the jurisdiction of Local 16 as:

> [G]eneral carpentry, ground cover for arena and stadium events including terraplast, plywood, tarps or any other cover that may be developed in the future, theater maintenance, construction and assembly of scenery and stages, properties, stage lighting, room lighting and associated electrical work, generator set up and operation, power distribution, all rigging, video, ENG and studio production, sound, laser, electronic recording, graphics presentation, and projection, including slide, video and motion picture projection, and any other work described in Exhibit A. *Id.*

Exhibit A provides a detailed description of the work that is customarily performed by technicians under Local 16's jurisdiction in the areas of rigging, sound, projection, theatrical lighting, video, computers, draping, carpentry, special effects, properties, ground cover, and power distribution. *Id.* Carpentry work is defined in Exhibit A as:

> All work pertaining to that performed by traditional stage carpenters. The moving, unpacking, assembly, erection, repair, use and removal, and packing of stages, stage sets, band gear, backdrops, decor, furniture, and any theatrical or scenic elements. *Id.*

Employers can obtain workers from Respondent through a skills request, a simple request, or a must-be request. A skills request is a request for a worker with a particular skill, but not for a particular person. (Tr. 191). A simple request is a request for Respondent to refer a particular technician, if available. (Tr. 184-185, 218). Respondent maintains discretion over whether to refer a particular technician and does not always honor an employer's simple request.

(Tr. 185, 218). A must-be request denotes an arrangement made between a signatory employer and a registered user of Respondent's hiring hall whereby the employer and the registered worker agree that the worker will work on a particular project prior to informing Respondent. (Tr. 185). Employers can only make a must-be request for employees who are registered with Respondent. (Tr. 178-179). After a must-be request is submitted, Respondent follows up with the technicians to confirm they are aware of and available for the job, but otherwise makes the referral as requested. (Tr. 181, 182). Although Lutge testified that employers are not required to inform Respondent of must-be requests, Respondent's Referral Procedures and Code of Conduct hold the employer and the technician "responsible" for informing Respondent. (GC Exh. 10, p. 3). In practice, Respondent is informed of these types of requests on a daily basis. (Tr. 181). Further, if an employer fails to confirm a must-be arrangement, Respondent reserves the right to fill the position with the next qualified technician. (GC Exh. 10, p.3).

Technicians must place their name on Respondent's availability list to obtain a skills or simple referral and must be registered with Respondent to obtain a must-be referral. (Tr. 184-185, 218). Technicians can place their names on Respondent's availability list completely online through Respondent's website, but are also permitted to call the hall to place their name on the list. (Tr. 22-24; 187) Respondent informs technicians of referrals by email or phone. (Tr. 25, 188). Technicians must pay referral fees for employment obtained through skills, simple, and must-be requests. (GC Exh. 10, p.1; Tr 184). Additionally, technicians who use Respondent's hiring hall are also expected to adhere to Respondent's Code of Conduct. (GC Exh. 10). The Code of Conduct warns technicians of "educative action" and "immediate removal of work referral privileges" if they obtain work outside of the Respondent's referral system or without notifying Respondent. (GC Exh. 10 p. 2). The Code of Conduct also precludes "abusive,

threatening, obscene, insulting, or harassing activity . . . to any Local 16 office personnel." (GC Exh. 10 p. 4).

In addition to skill requests, simple requests, and must-be requests, about 10 of the 200 signatory employers to the basic-term agreement have side letters or an addendum allowing the employers to hire a very small number of workers from sources other than Respondent. (Tr. 214-216). Although only the side letter and addendum for PSAV is included in the record, Lutge testified that the nine other employers had similar agreements. *Id.* PSAV's addendum provides that it may hire "no more than 3" employees who are not represented by Respondent to perform work at any single hotel function. (G.C. Exh. 8 p. 24). PSAV's side letter also provides that it may hire 2 regular PSAV employees to work San Francisco Branch events, provided that event is not held at any facility where Respondent has a collective-bargaining agreement. (G.C. Exh. 8 p. 25).

In practice, Business Agent/Recording Secretary Steve Lutge, an admitted agent who has been employed by Respondent for 17 years, testified that he was unaware of any instances where signatory employers hired a person with no association to Respondent to perform work covered by the collective-bargaining agreement. (Tr. 8, 184). Indeed, since he started receiving referrals from Respondent, McFarland did not perform any stagehand work without a referral from Respondent. (Tr. 26, 27). Although McFarland performed around four carpentry jobs without receiving a referral from Respondent, those jobs were outside Respondent's jurisdiction. (Tr. 28). Two of those carpentry jobs were in San Francisco, and the others were in Santa Clara. (Tr. 28, 29). As noted above, Santa Clara, excluding Stanford University, is outside Respondent's geographical jurisdiction. For the jobs McFarland performed in San Francisco, he constructed booths, a task he never performed on a job that he was referred to by Respondent. (Tr. 29).

Indeed, the construction of booths is not included in the standard-form agreements' detailed description of carpentry work that is customarily performed by technicians under Respondent's jurisdiction, and there is no evidence that Respondent ever refers carpenters to construct booths. (GC Exh. 6; GC Exh. 7).

C. RESPONDENT BANS MCFARLAND FROM OBTAINING EMPLOYMENT THROUGH THE HIRING HALL.

Charging Party Damond McFarland began using Respondent's hiring hall in September 2014 to obtain stagehand and carpentry referrals. (Tr. 20, 23). On March 28, 2018, Respondent's President, James Beaumonte, called McFarland and accused him of harassing Union staff. (Tr. 30-33). After this call, McFarland called Respondent's office twice to speak with Beaumonte, but could not reach him. (Tr. 34- 37). After the second call, Beaumonte called McFarland and informed him that his services were no longer needed because he used profanity with a staff member. (Tr. 37-38). Beaumonte also referred to McFarland's alleged use of profanity as a second infraction, without indicating what the first infraction was. *Id.* McFarland admits he raised his voice during this phone call, but denies using any profanity. (Tr. 37). Contrastingly, Business Agent Patrick Murphy claims McFarland said that he wanted to talk to "fucking" Jim Beaumonte and called him a "bitch" and a "fucking bitch" during a 30-second phone call that was not on speakerphone. (Tr. 231-232, 235). Immediately after Beaumonte told McFarland his services were no longer needed, McFarland was locked out of Respondent's referral website. (Tr. 39-40). Thereafter, McFarland was not able to obtain any referrals from Respondent until June 21, 2018, when Respondent restored his access to the referral system. (Tr. 40-41; GC Exh. 5).

There is no evidence that McFarland cursed at, insulted, or threatened Union staff prior to March 28. Before his referral privileges were revoked, McFarland called and emailed Respondent's office several times a week to ask for information about Respondent's

apprenticeship program, inquire about work, file a grievance, or check the status of a sexual harassment complaint he filed. Tr. 55-57, 60-64 McFarland also occasionally visited Respondent's office. On January 2, 2018, McFarland visited Respondent's office with his mother to request a copy of his letter of intent for Respondent's apprenticeship program and paperwork related to an intra-union sexual harassment complaint he made to Respondent a year earlier. (Tr. 75-76, 79-80, 86-88). McFarland requested these items from Business Agent Joanne Desmond. *Id.* Desmond provided McFarland with an email he sent Respondent about the sexual harassment complaint, but told him that she could not find a copy of his letter of intent for the apprenticeship program. (Tr. 81-82, 84). Desmond told McFarland that he would need to speak with Beaumonte about the letter of intent. *Id.* After about five minutes, Beaumonte met McFarland at the window in Respondent's lobby. (Tr. 90-92, 94). McFarland then left his mother in the lobby and followed Beaumonte into his office. (Tr. 95-96). While McFarland was in Beaumonte's office, his mother was screaming for him to come out. (Tr. 96-97). McFarland, however, did not scream, threaten, or use profanity toward anyone during the visit. (Tr. 155). Nor did Respondent ask McFarland to refrain from visiting the Union office after this interaction. (Tr. 34).

Despite McFarland's frequent contact with Union staff, no one from Respondent raised concerns with McFarland about harassment prior to the day his referral privileges were abruptly revoked. (Tr. 33). Respondent had never asked McFarland to stop calling or emailing Union staff or visiting Respondent's office. (Tr. 33, 34). Indeed, Lutge testified that if a Union staff member had complained about McFarland, the complaint would appear in Respondent's internal records or notes of complaints regarding McFarland. (Tr. 202). Yet, during the one-year period preceding his suspension from the hall, no interactions with McFarland other than the January 2

office visit with his mother and the phone calls he made to the Union on March 28 appeared in Respondent's records. (G.C. Exh. 12).

IV. DISCUSSION

A. THE BOARD HAS JURISDICTION OVER RESPONDENT.

In cases involving a hiring hall's complete refusal to refer an applicant to employers, the Board asserts jurisdiction if any one of the employers to whom the union makes referrals is engaged in commerce within the meaning of the Act. See, e.g., *Stage Employees IATSE Local 412 (Various Employers)*, 312 NLRB 123 (1993); *Carpenters Local 17 (Building Contractors)*, 312 NLRB 82 (1993); *Electrical Workers IBEW Local 1579 (CIMCO),* 311 NLRB 26 (1993); *Stage Employees IATSE Local 412 (Asolo Center)*, 308 NLRB 1084, fn. 3, 1085 (1992); *Plumbers Local Union No. 119 (Mobile Mechanical Contractors Association, Inc.)*, 255 NLRB 1056, 1057 (1981); and *IBEW Local 82 (National Electrical Contractors Association)*, 182 NLRB 59 (1970). The non-retail standard applies where goods or services are sold to commercial enterprises, instead of directly to a purchaser to satisfy his own personal wants or those of his family or friends. *See Bussey-Williams Tire Co.*, 122 NLRB 1146, 1147 (1959) (sales to commercial establishments are wholesales, which are nonretail); *Bob's Ambulance* Service, 178 NLRB 1 (1969) (services paid for by a commercial enterprise provided to the consuming public are non-retail). It is well-established that a non-retail enterprise that furnishes goods or services valued in excess of $50,000 across state lines is engaged in commerce within the meaning of the Act. *Siemons Mailing Service,* 122 NLRB 81 (1959).

The non-retail standard applies to both PSS and PSAV, which provide goods services to commercial enterprises and not directly to purchasers to satisfy personal wants. During the time

periods alleged in the Complaint, both PSS and PSAV provided goods and services across state lines valued at $1,208,248.04 and $52,302.90, respectively, fully satisfying the $50,000 jurisdictional standard. Clearly, both PSS and PSAV are engaged in commerce within the meaning of the Act. Thus, as this case concerns Respondent's complete refusal to refer McFarland, the Board has jurisdiction over Respondent because two employers to whom Respondent makes referrals, PSS and PSAV, are engaged in commerce within the meaning of the Act.

Furthermore, it is well-established that any 12-month period may be used to assess whether an entity is engaged in commerce, so long as the period is reasonably related to the timing of the alleged violations, the unfair labor practice charge, the issuance of the complaint, or the unfair labor practice proceeding itself. *Newman Livestock-11, Inc.*, 361 NLRB 343, fn.5 (2014); *Valentine Painting and Wallcovering, Inc.*, 331 NLRB 883, fn. 1 (2000). Accordingly, the use of the 12-month period ending May 31, 2018 is proper to assess whether PSS is engaged in commerce as it reasonably relates to the June 29, 2018 date the Complaint issued. (GC Exh. 1). Similarly, the use of the 12-month period ending March 27, 2018 is proper to assess whether PSAV is engaged in commerce as it reasonably relates to March 28, 2018 date McFarland alleges Respondent violated the Act.

B. RESPONDENT OPERATES AN EXCLUSIVE HIRING HALL FOR EMPLOYERS SIGNATORY TO ITS BASIC-TERM AND PROJECT AGREEMENTS IN THE CONVENTION, TRADE SHOW, AND CONCERT INDUSTRIES.

It is well-established that an exclusive hiring hall exists where a union is the first and primary source of employees for an employer, whether by written or verbal agreement or past practice. *See Plumbers Local 198 (Stone & Webster)*, 319 NLRB 609, 612 (1995); *Teamsters Local 293 (Beverage Distributors)*, 302 NLRB 403, 404 (1991); *Hoisting and Portable*

Engineers Local 302 (West Coast Steel Works), 144 NLRB 1449, 1452 (1963); *Southwest Regional Council of Carpenters (Perry Olsen Drywall)*, 358 NLRB 1, fn. 2 (2012). In *United Brotherhood of Carpenters, Local No. 78 (Murray Walter, Inc.)*, the Board adopted the judge's finding that an agreement explicitly providing that an employer "shall" use only workers supplied by the union established that the union operated an exclusive hiring hall. 223 NLRB 733, 735 (1976) (noting further "no amount of talking by the parties in interest, sworn statements or not, can serve in the least to make disappear the written contract in effect binding [the parties] to an exclusive hiring hall."); *see also Bricklayers' and Stonemasons' International Union, Local 8 (California Conference of Mason Contractor Associations, Inc.)*, 235 NLRB 1001 (1978) (finding the word "shall" made the use of the union's hiring hall mandatory and, therefore, the nature of the hiring hall exclusive).

The Board has also routinely found exclusive hiring halls where an employer hires employees who must be cleared by the union, even if the employees are not actually referred by the union—similar to the must-be requests permitted under Respondent's collective-bargaining agreements. *See, e.g. International Brotherhood of Teamsters, Local 727*, 358 NLRB 718, 722-23 (2016) (finding an exclusive hiring hall where employer did not use union's referral book very often, but only hired workers registered with the union); *Plumbers Local Union No. 17 (FSM Mechanical Contractor, Inc.)*, 224 NLRB 1262, 1263 (1976) (finding exclusive hiring hall even though employers had sole right to determine who was hired and selected the employees from the union's list, as the employers would not employ the individuals until they were cleared by the union); *Operating Engineers, Local 513 (McFry Excavating and Demolition Co.)*, 197 NLRB 1046, 1049 (1972) (finding exclusive hiring hall even though employer selected individuals for hire, as the employer sent them to the union hall for clearance before permitting

them to work). Moreover, the right to hire a limited amount of employees from sources other than the union does not destroy the exclusive nature of a hiring hall. *Laborers Local 663 (Treuner Construction)*, 205 NLRB 455, 456 (1973) (finding an exclusive hiring hall despite employer's right to hire the greater of two men or twenty-five percent of all men employed on a job from sources other than the union).

Here, Respondent's written agreements and past practice show it is clearly the primary source of labor for signatory employers to its basic-term and project agreements in the convention, trade show and concert industries. The agreements' provisions that signatory employers "shall" hire workers supplied by Respondent to perform "all work" that is by custom and practice performed by technicians under Respondent's jurisdiction expressly precludes employers from hiring workers from sources other than Respondent. Furthermore, the language is almost identical to the contractual language found to create an exclusive arrangement in *United Brotherhood of Carpenters, Local No. 78* and *Bricklayers' Local 8*, above. Additionally, even employees hired through must-be requests are required to be cleared by Respondent through its registration process. In practice, longtime Union Agent Steve Lutge testified that he was unaware of any instances where signatory employers hired employees with no affiliation with Respondent to perform work covered by the collective-bargaining agreements. Likewise, McFarland testified that once he began using the hall, he did not obtain any work under Respondent's jurisdiction without a referral from Respondent.

The exclusive nature of Respondent's hiring hall is further highlighted by the side-agreements and addendum a small number of the signatory employers signed allowing them to hire two to three employees with no affiliation with Respondent to work particular events. These agreements would be completely unnecessary if employers were already able to directly hire

employees from sources other than Respondent. Further, as articulated in *Treuner Construction*, above, the rights created by the side agreements and addendum do not destroy the exclusive nature of the hall. Accordingly, the evidence establishes that Respondent maintains an exclusive hiring hall for signatory employers to its basic-term and project agreements in the convention, trade show and concert industries.

C. RESPONDENT'S REFUSAL TO ALLOW MCFARLAND TO OBTAIN EMPLOYMENT THROUGH THE HALL WAS UNLAWFUL BECAUSE IT WAS NOT NECESSARY FOR THE UNION'S EFFECTIVE PERFORMANCE OF REPRESENTING ITS CONSTITUENCY.

The Board presumes that a union violates Section 8(b)(2) and 8(b)(1)(A) of the Act whenever it prevents an employee from being hired or causes an employee's discharge. *See, e.g. Carpenters Local 25 (Mocon Corp.),* 270 NLRB 623, 630 (1984); *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681, 683 (1973). This is because when a union takes these actions it demonstrates its power to affect employees' livelihoods so dramatically that it encourages union membership on the part of all employees who have perceived that exercise of power. *Id.* Likewise, while a union is free to prescribe its own internal rules, it is barred from enforcing those rules by affecting an employee's employment status. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967). As the Board noted in *Operating Engineers Local 18 (Ohio Contractors Assn.)*, above, "[w]hile it might well be convenient for the Union, in enforcing its own internal rules of conduct, to have available an employment-related sanction, it can hardly be said that such severe sanctions are necessary." The only exceptions are where the union shows the employment-related sanction is related to a failure to pay uniformly-required dues or fees or

is necessary to the union's effective performance of its function of representing its constituency. *Id.*[2]

The Board has routinely found that employment-related sanctions for an employee's harassing, obscene, insulting, or abusive behavior toward union staff are not necessary for a union's effective performance in representing its constituency. In *Longshoremen's Local 1408 (Jacksonville Maritime Assn.)*, 258 NLRB 132 (1981), employee Lindsay cursed at union president Wilson after he refused his request for immediate training in order to get more and better job referrals. *Id.* at 135. Later that morning, Lindsay blocked Wilson's path and, when asked to move, threatened "I'll kill your ass." *Id.* Wilson asked Lindsay not to enter his office, but Lindsay did. Among other choice words, he called Wilson a "mother fucking liar." In response, the union's executive board decided that Lindsay could not be referred for work until he apologized to Wilson. Despite Lindsay's egregious conduct, his suspension violated Sections 8(b)(1)(A) and (2). The judge, in a decision adopted by the Board, noted that the union had internal and state court remedies available. "Once, however, it attempted to enforce discipline by denying employment to Lindsay, it crossed a forbidden boundary in violation of the Act." *Id.* at 138. Similarly, in *Millwrights Local 1931 (United Brotherhood of Carpenters)*, 281 NLRB 1068, 1070 (1986), the union excluded employee McCaffery from its out-of-work list because he shouted and cursed at a union business manager. The judge determined, and the Board upheld, that "however offensive it might have been personally" to the business manager, McCaffery's conduct was not lawful grounds to exclude him from the referral process. *Id.* at 1072.

By comparison, in *Laborer's International Union of North America, Local 872*, 359 NLRB 1076 (2013), employee Shelby visited the union hall on several occasions to address

[2] Furthermore, the General Counsel need not prove an employee actually lost work as a result of a union's refusal to refer the employee to establish a violation. *See, e.g. Pipeline Local Union 38*, 247 NLRB 1250, 1251 (1980); *Utility & Industrial Construction Co.*, 214 NLRB 1053, 1053 (1974).

concerns she had about her skills sheet. One day, Shelby attempted to update her skills by showing a transcript, despite being instructed that she needed a certification. After a dispatcher told Shelby the transcripts were not equivalent to certifications, Shelby said, "Look, bitch, I'm not going to let you disrespect me like you did last week." Shelby proceeded to yell, scream, and was eventually removed by police. Afterward, the police barred Shelby from visiting the hall without an escort. Despite Shelby's belligerent behavior and continued ability to receive referrals from the union, the Board noted that the union's failure to take affirmative steps to remove the police escort requirement was a "close issue." Ultimately, the Board found the union's failure to remove the requirement was lawful because Shelby was able to retain her place on the out-of-work list and her ability to obtain employment was not impaired in any way. In other words, the Board found the restrictions placed on Shelby were lawful precisely because they were not employment-related sanctions.

Although the Board does not find employment-related sanctions necessary to address an employee's harassing, obscene, insulting, or abusive conduct toward union staff, it has found that employment-related sanctions are necessary where an employee's conduct jeopardizes the union's relationship with employers. *See, e.g. Plasterers Local 299 (Wyoming Contractors Assn.)* , 257 NLRB 1386 (1981) (union refused to refer an individual who was not qualified to perform the job); *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432, 433 (1983) (union suspended an applicant for violating work referral rules by applying for work directly with employer); *Carpenters Local 522 (Caudle-Hyatt)*, 269 NLRB 574, 576 (1984) (union lawfully caused discharge of employees who circumvented hiring hall and obtained work directly from employer); *Stage Employees IATSE Local 150 (Mann Theaters)*, 268 NLRB 1292 (1984) (union refused to refer applicant with long history of misconduct such that the majority of employers

using the hiring hall requested the employee not be referred); *Longshoremen Local 341 (West Gulf Maritime Assn.)*, 254 NLRB 334 (1981) (union refused to refer employee who caused wildcat strike); *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1 (2000) (union refused to refer employee with 15-year history of misconduct toward fellow employees, employers, and employers' clients). The Board has also found that an employment-related sanction was necessary where an employee embezzled over $30,000 of union funds. *Philadelphia Typographical Union No. 2 (Triangle Publications)*, 189 NLRB 829, 830 (1971).

Here, Respondent has failed to show that preventing McFarland from obtaining any work through its exclusive hiring hall from March 28, 2018 to June 21, 2018 was necessary for its effective performance in representing its constituency. Respondent did not claim, nor is there any evidence, that McFarland's conduct in any way affected Respondent's relationship with employers. Nor did McFarland commit any crime or other action that threatened Respondent's financial security. Instead, Union President Beaumonte banned McFarland from obtaining work only because of his alleged harassment of union staff and purported use of profanity with Business Representative Pat Murphy, conduct which McFarland denies. However, even if true, the sum total of McFarland's allegedly harassing, obscene, insulting, and abusive conduct consisted of cursing at one Union staff member during a 30-second telephone call that was not projected on speakerphone, contacting the Union frequently to ask questions, and visiting the Union office on January 2 with his mother, who screamed at him during the visit, but where McFarland himself did not engage in any objectionable behavior. This conduct was no more egregious than McCaffery's shouting and use of profanity to a union business agent in *Millwrights Local 1931*, above, and considerably less egregious than Wilson's repeated use of profanity, physical intimidation, and threat to "kill" the Union president in *Longshoremen's*

Local 1408, above, all conduct that the Board specifically held did not warrant employment-related sanctions.

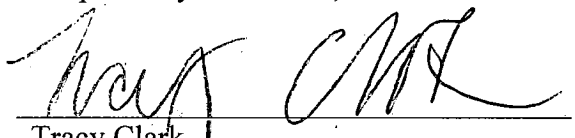
In sum, although Respondent was free to maintain a rule prohibiting harassing, obscene, insulting, or abusive conduct toward Union staff, it was not free to enforce that rule by rescinding McFarland's ability to obtain employment through its exclusive hiring hall. Respondent could have easily addressed any concerns it had with McFarland's behavior by blocking his phone number, banning him from the Union office, fining him, or requiring him to communicate with the Union solely through email. Notably, because technicians can obtain referrals completely online, none of the aforementioned alternative sanctions would have impaired McFarland's ability to obtain employment. When Respondent instead enforced its rule by denying employment to McFarland, it violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

V. CONCLUSION

Counsel for the General Counsel submits that the foregoing, and the record as a whole, establishes by a preponderance of the evidence that Respondent has violated Section 8(b)(1)(A) and 8(b)(2) of the Act as alleged. Accordingly, the General Counsel requests that the Judge make the appropriate findings of fact and conclusions of law and issue such a remedial order as will make the Charging Party whole for loss of wages or benefits suffered as a result of Respondent's unlawful actions and provide all other relief that is just and proper to remedy Respondent's unfair labor practices. Attached hereto is a proposed Order, which the General Counsel respectfully asks the Judge to issue upon finding that Respondent has violated the Act as alleged.

DATED AT San Francisco, California this 13th day of November, 2018.

Respectfully Submitted,



Tracy Clark
Counsel for the General Counsel
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

PROPOSED ORDER

The Respondent, International Alliance of Theatrical Stage Employees, Local 16, its officers, agents, and representatives, shall:

1. Cease and desist from:
    a. Barring Damond McFarland from using its exclusive hiring hall referral service for unfair and/or arbitrary reasons;
    b. Failing or refusing to refer Damond McFarland, thereby causing employers not to hire Damond McFarland, based on unfair and/or arbitrary reasons.

2. Take the following affirmative actions which are necessary to effectuate the policies of the Act:
    a. Make whole Damond McFarland for any loss of earnings and other benefits he may have suffered by reason of its refusal to refer him to work through its hiring hall referral service;
    b. Remove from its files any reference to its unlawful refusal to refer Damond McFarland to work through its hiring hall referral service and notify McFarland in writing that this has been done and that its unlawful refusal to refer him to work will not be used against him in any way.

PROPOSED NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with your employer 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 prevent you from using our exclusive hiring hall referral service to obtain employment for unfair and/or arbitrary reasons.

WE WILL NOT fail or refuse to refer you, and thereby cause employers not to hire you, for unfair and/or arbitrary reasons.

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 HAVE reinstated Damond McFarland to our hiring hall referral service, and **WE WILL** make him whole for any loss of earnings and other benefits he suffered because we refused to refer him to work through our hiring hall referral service.

WE WILL remove from our files any reference to our unlawful refusals to refer Damond McFarland to work through our hiring hall referral service, and **WE WILL** notify McFarland in writing that this has been done and that our unlawful refusals to refer him will not be used against him in any way.

International Alliance of Theatrical Stage Employees, Local 16

_____
(Labor Organization)

Dated: _____ **By:** _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400
San Francisco, CA 94103-1738

Telephone: (415)356-5130
Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.