

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

# Advice Memorandum

DATE: November 5, 2018

TO: John J. Walsh, Jr., Regional Director  
Region 2

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: SAG-AFTRA (Stu Segall Productions Inc.) 530-5728  
Case 02-CB-215527 530-5770-3784  
SAG-AFTRA (Stalwart Films) 554-5600  
Case 02-CB-215528 554-8450

These cases were submitted for advice as to whether the Union violated Section 8(b)(3) of the Act by refusing to allow the Charging Parties to sign a successor collective-bargaining agreement negotiated between the Union and a multi-employer association when the Charging Parties had been signatories to the prior agreement and had signed authorization forms requesting to be party to the successor agreement. We conclude that the Union did not violate Section 8(b)(3) because it fulfilled its bargaining obligation by bargaining in good faith with the multi-employer association, during which the parties negotiated a contract that excluded the Charging Parties by mutual assent.

## FACTS

### Background

For decades, the Screen Actors Guild/American Federation of Television and Radio Artists (the Union)<sup>1</sup> has negotiated a set of collective bargaining agreements—the Codified Basic Agreement and the Television Agreement (collectively, the Agreement)—with the Alliance of Motion Picture and Television Producers (the Association), which is a membership association of large producers in the movie and television production industries. These producers are dues-paying members of the Association. After the Union and the Association reach an agreement, the producers

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<sup>1</sup> The Screen Actors Guild and the American Federation of Television and Radio Artists merged in 2012. Prior to the merger, the Screen Actors Guild negotiated with the Association for the Agreement.

that are members of the Association become direct signatories of the collective bargaining agreement negotiated on their behalf.

In addition, many non-member producers execute authorization forms granting the Association the right to act on their behalf when negotiating with the Union. The Association provides the Union with a list of the producers seeking to be party to the negotiated Agreement. The Union reviews the list to determine whether it agrees that each of the companies is eligible to be a signatory to the Agreement. Once the Union and the Association (the two parties) are satisfied that all the companies remaining on the list should sign the Agreement, they execute an MOU incorporating the terms of the Agreement and naming the companies on the final list (“Authorization List”), which includes member-signatories with the additional signatory companies. It is not unusual for the parties to continue discussing the composition of the Authorization List and adding or deleting companies while they engage in substantive bargaining.<sup>2</sup> Both Stu Segal and Stalwart (Charging Parties) were included on the Authorization List for the 2014-2017 Agreement.<sup>3</sup>

Smaller production companies and single-film production companies that are not signatories to the agreements negotiated between the Association and the Union negotiate independent producer agreements with the Union. These agreements integrate some of the terms of the agreement reached between the Association and the Union, but the terms are generally less favorable to the independent producers.

The 2014-2017 Agreement expired on June 30, 2017 but by its terms was to remain in effect until terminated by either party on at least sixty days written notice. The Agreement did not include any language binding signatories to or guaranteeing inclusion in any successor Agreement reached by the parties.

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<sup>2</sup> The Union provided documents reflecting past bargaining where the parties continued to discuss/bargain over the Authorizer List after they began bargaining terms for a successor Agreement and continued to add and delete employers from the list even after reaching agreement on terms for the new Agreement.

<sup>3</sup> Although Stalwart first became a signatory to the Agreement in 2014, Stu Segal has been a signatory to the Agreement since 2009.

Bargaining For the 2017 Agreement

At some point prior to sixty days before the expiration of the Agreement, the Union requested bargaining for a new Agreement. On April 7, 2017,<sup>4</sup> by letter, the Association notified the signatories to the 2014-2017 Agreement that if they wished to be represented by the Association in the upcoming negotiations with the Union, they needed to indicate it by returning an authorization form. The letter stated in pertinent part:

As your Company has either been signatory to one or more of the Agreements in the past or produces motion pictures which fall under the ambit of one or more of those Agreements, we are writing to inquire whether you wish to be represented by the [Association] in those negotiations. If so, you must return an executed copy of the enclosed authorization form to this office no later than May 5, 2017. By signing this authorization, *you are seeking to become signatory* to the same Agreements as negotiated by the [Association] (emphasis added).

On April 18, the Charging Parties forwarded completed authorization forms to the Association. The form stated:

The undersigned firm hereby authorizes the [Association] to act as the undersigned's exclusive bargaining representative in the upcoming negotiations with the [Union].

On or about May 10, the Union presented its initial written proposal to the Association. On May 31, during the first in-person negotiation session, the Association proffered a draft Authorization list that included the Charging Parties. After receiving the draft list, the Union notified the Association that it needed to review and research each entity in order to determine whether it agreed that each producer on the list should be part of the multiemployer unit, or whether it objected on the grounds that a company was an independent producer with which the Union would negotiate a separate agreement.<sup>5</sup> The parties, however, continued to meet and discuss bargaining proposals.

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<sup>4</sup> All dates hereafter 2017 unless otherwise noted.

<sup>5</sup> This was due in part to the high number of producers deleted from and added to the 2017 Authorizer List compared to the 2014 Authorizer List.

By email dated June 27, the Union returned an edited copy of the May 31 Authorization List and informed the Association that it had done a substantial amount of clean-up to the lists because it was interested in removing from the list companies that were not bona fide producers and with whom the Union had encountered problems on productions.<sup>6</sup> On the revised list that the Union returned to the Association, the Charging Parties were crossed out and labeled as “indie company /producer for hire.”

On June 29, the Association and the Union exchanged emails regarding the composition of the Authorization List. The Association asserted that the Charging Parties and other similar entities should be included. In response, the Union accepted some of the companies but rejected others, providing specific reasons for those it rejected. Regarding the Charging Parties, it continued to request their removal from the Authorization List, specifically labeling them as one-person signatory fronts acting as producers for hire and indicating that the Directors Guild of America had already removed the Charging Parties from its Authorization list.<sup>7</sup>

On June 30, the Association sent companies seeking to become a signatory to the Agreement an email stating in pertinent part:

“NOTICE TO ENTITIES THAT SEEK TO BE INCLUDED ON THE [AUTHORIZATION] LIST FOR 2017 [AGREEMENT].” . . . Please see the Union response to the inclusion of certain entities on the Authorization Lists . . . For those companies that are mentioned on the list and for which further action is

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<sup>6</sup> According to the Union, the list included "producers for hire," which are shell companies that do not own the intellectual property rights to the work they produce. The Union asserts that these companies have few assets and often try to evade contractual obligations after their production is finished, particularly regarding additional compensation for residuals because the amount is calculated based on future airings. The Union signs producers for hire to independent producer agreements, and often requires additional financial assurances to protect the members' residuals and other additional compensation obligations. Therefore, the independent produce-for-hire contracts state “[the Union] may, in its sole discretion, require financial assurances with the respect to each Picture including, but are not limited to a bond, cash deposit, collection account agreement, security agreement, and/or other forms of financial assurances deemed necessary by the [Union]. . . .”

<sup>7</sup> The Directors Guild is a separate union representing a different group of employees that also negotiates with the Association. Many of the employers covered by the Agreement are also signatories to the Association’s collective-bargaining agreement with the Directors Guild.

necessary, I urge you to follow up with the [Union] . . . Failure to secure [the Union's] approval will mean that your entity will be deleted from the [Authorization] List.

That same day, by email, the Charging Parties responded to the Union's objection to including them on the Authorization List, stating that they had been in business for over 30 years and had produced more than 1,000 hours of television programming. The email also disputed the Union's characterization of the companies as producers for hire. The email urged the Union to reconsider its position and requested that a call be scheduled to discuss the matter or to provide additional information in support of its position. Over the weekend of July 1<sup>st</sup>, the Charging Parties' and Union's representatives discussed the Union's objections to including the Charging Parties on the Authorization List.

On or about July 4 or 5, the Association and the Union reached agreement on all substantive terms for the successor Agreement, which the Union's membership ratified on August 7. On August 8, the Association announced the ratified Agreement and disclosed to companies that the Union was still objecting to the inclusion of some companies on the Authorization Lists.

Between July and October, the Union withdrew its objections with respect to at least 30 companies but continued to object to the inclusion of others. At some point during the negotiations over the Authorization List, the Union indicated that it has had problems with the Charging Parties not complying with previous agreements and noted this as an additional reason for its objection to the Charging Parties' inclusion.<sup>8</sup> During this same period, the Charging Parties continued to communicate with the Union in an effort to convince the Union to change its position. It is unclear whether the Charging Parties also communicated with the Association to attempt to secure its support.

By letter dated August 31, the Association agreed to certain proposed revisions of a final MOU provided that the Authorization List include specific contested companies "with the exception of [specific] companies that we agree to remove from the Authorization List(s) in response to your objections." The Charging Parties were among the companies the Association agreed to exclude from the final Authorization List. The Charging Parties' names were crossed out and labeled as PFH (producer for

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<sup>8</sup> For example, the Union alleges that the Charging Parties failed to pay performers on a portal-to-portal basis as required by the expired Agreement, which triggered penalties for rest period, meal period, and overtime violations. The Union has filed for arbitration over this dispute.

hire)/bad payor. On October 6, the Association and the Union executed an MOU incorporating the new Agreement for 2017 and the final Authorization List. Neither Charging Party appeared on the final Authorization List.

The Charging Parties Petition the Union for Inclusion

On October 13, the Charging Parties emailed the Union to protest its decision to exclude them from the Authorization Lists. The email stated that the Union's designations of the Charging Parties as either bad payors, producers for hire and/or single purpose vehicles were unsubstantiated. The Charging Parties requested reinstatement as Association-represented companies and retroactive signatory status. On October 20, the Charging Parties sent the Union another email stating they were following up because one of the Charging Parties had a project that needed to be cleared. That same day, one of the Charging Parties signed an independent producer agreement with the Union to avoid a work stoppage by the Union and its members.

On October 23, by email, the Union responded to the Charging Parties' October 13 email. The email stated that the Association and the Union had discussed exhaustively the inclusion of entities on the Authorization Lists and the Union was not willing to reopen the issue. It also indicated that the Charging Parties were implicated in several claim matters pending with its legal department. Additionally, since the Union and one of the Charging Parties had negotiated and signed a producer agreement, there was no need to include that Charging Party on the Authorization List. The email also advised the other Charging Party to sign an independent producer agreement soon, since its production was resuming and Union members could not render services on a non-signatory production. On November 14, the other Charging Party signed an independent producer agreement with the Union.

On February 22, 2018, the Charging Parties filed charges in the instant cases, alleging that the Union had failed to bargain in good faith by refusing to execute the 2017 Agreement with them, which had been negotiated by their designated bargaining representative. The Charging Parties note that they were both part of the multiemployer unit continuously from 2014 and that both timely re-confirmed their designation of the Association as their bargaining agent during the negotiations for the 2017 Agreements negotiations. They argue that bargaining for the 2017 Agreements commenced no later than May 10, when the Union presented its initial bargaining proposals, but the Union did not raise any objection to their continuation in the multi-employer unit until late June, which they contend was too late to be legally effective. They further allege that the Union's bad faith is evidenced by its insistence that the Charging Parties sign independent agreements that contain less favorable terms than the Association contract and its threat to strike if the Charging Parties refused.

**ACTION**

We conclude that the Union did not violate Section 8(b)(3) of the Act because it fulfilled its bargaining obligation by negotiating in good faith with the Association, during the course of which the parties negotiated a contract that excluded the Charging Parties by mutual assent.

A union has the same right to withdraw from multi-employer bargaining as an employer because bargaining in a multi-employer context depends on the “continuing consent” of all parties.<sup>9</sup> In *Pacific Coast Association*, the Board upheld the union’s right to withdraw from multi-employer bargaining as to a single employer, and to continue multi-employer bargaining with the remaining employers.<sup>10</sup> In that case, the union claimed that there were special problems with the single employer that were not receiving proper attention in multi-employer negotiations.<sup>11</sup> The Board held that because it permits individual employers to withdraw from multi-employer units, there should be “a correlative union right” to withdraw only as to an individual employer.<sup>12</sup> So long as the union gives timely and unequivocal notice of withdrawal, the Board will give effect to that notice.<sup>13</sup>

A withdrawal from multi-employer bargaining is timely if it occurs before negotiations start or before the time set by the expiring collective bargaining

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<sup>9</sup> *Pacific Coast Association*, 163 NLRB 892, 895 (1967). See also *The Evening News Association, Etc.*, 154 NLRB 1494, 1496-97 (1965) (union gave timely and unequivocal notice of its desire to conduct negotiations for new contracts on an individual employer basis, thus employer violated Section 8(a)(5) by refusing to bargain on individual basis), *enforced* 372 F.2d 569 (6th Cir. 1967); *Plumbers Local 669 (Lexington Fire Protection Group)*, 318 NLRB 347, 347-48 (1995) (employer timely and unequivocally withdrew from multi-employer bargaining and union violated Section 8(b)(3) by refusing to bargain with employer on an individual basis).

<sup>10</sup> 163 NLRB at 894.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 894-95.

<sup>13</sup> *Id.* at 895-96. *Accord Belleville News Democrat, Inc.*, 185 NLRB 1000, 1001 (1970) (finding local union lawfully withdrew from multi-employer bargaining as to a single employer).

agreement for modification.<sup>14</sup> The Board has explained that allowing a party to multi-employer bargaining to withdraw unilaterally during the course of negotiations would have an impermissibly destabilizing effect on the established bargaining relationship.<sup>15</sup> Thus, absent unusual circumstances, a party to multi-employer bargaining can only withdraw during the course of bargaining upon mutual consent.<sup>16</sup>

Here, the Charging Parties contend that the Union's refusal to include them as signatories was untimely under *Retail Associates* because the parties had already begun substantive negotiations for the successor agreement when the Union objected to their inclusion. However, this rule applies to a party's *unilateral* withdrawal from multi-employer bargaining, and the Union did not act unilaterally. The Charging Parties designated the Association as their collective-bargaining representative and agreed to be bound as to all terms reached in the ensuing negotiations; the composition of the Authorization List was one of the terms the parties bargained. The Union and the Association engaged in extensive negotiations over the list of non-member companies that would be permitted to sign the successor agreement. Ultimately, the parties agreed to exclude the Charging Parties from the final Authorization List as part of the give-and-take of good-faith bargaining. As the Board implied in *Retail Associates*, any concerns of destabilization to the established multi-employer bargaining unit were vitiated by the fact that both parties agreed to the Charging Parties' exclusion.<sup>17</sup>

Moreover, the Charging Parties have not demonstrated the requisite Union consent to their participation in the multi-employer bargaining. "The essence of multi-employer bargaining is the consensual tripartite relationship between the union, the multi-employer bargaining association, and the individual employer-member of the association."<sup>18</sup> The Charging Parties acknowledge that they are not members of the Association and that they have been signatories to past Agreements only by virtue of appearing on the relevant Authorization Lists. The Charging Parties have not identified any language in the predecessor collective-bargaining agreement indicating that non-member employer signatories are presumptively included in

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<sup>14</sup> *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958).

<sup>15</sup> *Id.* at 393.

<sup>16</sup> *Id.* at 395.

<sup>17</sup> *Id.*

<sup>18</sup> *Joseph J. Callier*, 243 NLRB 1114, 1117 n.8 (1979).

future bargaining units. Additionally, the Association communicated to the Charging Parties that their ability to sign the successor agreement was contingent on securing the Union's consent. The Association's authorization form indicated "[b]y signing this authorization, *you are seeking to become signatory* to the same Agreements as negotiated by the [Association]" (emphasis added). The Association also informed the prospective signatories, including the Charging Parties, that "[f]ailure to secure [the Union's] approval will mean that your entity will be deleted from the [Authorization] List." Thus, there is insufficient evidence that the Union consented to the Charging Parties' ongoing inclusion in the multi-employer bargaining unit.

Finally, the parties' bargaining history reflects a longstanding practice of periodic culling of the Authorization List.<sup>19</sup> For example, the Union provided bargaining documents from the parties' 1995 negotiations that reflect a similar process to the instant negotiations. The documents show that in the 1995 negotiations, the Union received the draft Authorization Lists several weeks after the start of substantive negotiations. The documents also show that throughout the course of bargaining, the parties continued to add and remove companies, and the Union sought information about companies to determine whether it would agree to add them to the Authorization List. Most importantly, the documents show that it was the practice of the Association to seek the Union's consent as to whether it was willing to include a particular company on the Authorization List.<sup>20</sup>

Accordingly, absent withdrawal, the Region should dismiss the charges.

/s/  
J.L.S.

H:ADV.02-CB-215527.Response. SAG-AFTRA (Stu Segall). (b) (6), (b)

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<sup>19</sup> Cf. *Independent Motion Picture Producers Ass'n, Inc.*, 123 NLRB 1942, 1948-49 (1959) (where the Board considered bargaining history in determining unit scope involving multi-employer bargaining).

<sup>20</sup> We note that this practice of "cleaning up" the list of eligible signatories appears to be an industry-wide practice. According to the Union, the Directors Guild of America had done a similar "cleaning up" during its recent round of contract negotiations with the Association, which also resulted in the Charging Parties being removed from its authorizer list.