

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

S.A.M.

DATE: January 4, 2019

TO: David Cohen, Regional Director
Region 12

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

SUBJECT: Union de Trabajadores de Muelles, Local 1740, 536-2545-1200
ILA, AFL-CIO (SSA San Juan) 536-2581-3314
Case 12-CB-217876 536-2581-3360
548-6030-6725-5000

This case was submitted for advice as to whether the Union unlawfully suspended an employee from its exclusive hiring hall for one year after ^{(b) (6), (b) (7)(C)} punched ^{(b) (6)} ~~(b) (6), (b) (7)(C)~~ responsible for selecting employees for referral. We conclude that, under current Board law, the Union acted arbitrarily and therefore violated its duty of fair representation by imposing this penalty because it had previously suspended the Union ~~(b) (6), (b) (7)(C)~~ ~~(b) (6), (b) (7)(C)~~ for only one or two weeks for arguably more egregious misconduct. In addition, the Region should argue that the Board should adopt a heightened duty-of-fair-representation standard for a union operating an exclusive hiring hall, which would require the union to apply written or otherwise clearly-conveyed objective criteria when denying hiring hall users employment through the hall due to misconduct, and that the one-year suspension here was unlawful because it was not guided by readily-discernable objective criteria.

FACTS

SSA San Juan, Inc. (“the Employer” or “SSA”) is a corporation with an office and place of business in San Juan, Puerto Rico. The Employer provides terminal management and stevedoring services to Puerto Rico Terminals (PRT), including the handling, loading and unloading of cargo at Puerto Nuevo, San Juan, Puerto Rico. The Union de Trabajadores de Muelles, Local 1740 ILA, AFL-CIO (“Local 1740” or “the Union”) entered into an agreement with the Employer on June 28, 2016, whereby the Employer recognized the Union as the exclusive collective-bargaining representative of its stevedoring and other terminal employees.

The Union operates an exclusive hiring hall. The Employer has no say on the selection of personnel; the Union is solely responsible for selecting which employees will work on the scheduled vessels. In practice, the Union’s daily selection of employees for referral is generally conducted in the following manner:

1. Employees interested in working on a particular ship or vessel report for the Union's "shape-up" to a parking lot in front of the Port of San Juan, which is right outside the area where the Employer performs stevedoring work on vessels.
2. At the parking lot, the boss foreman blows a whistle, and employees align ("shape-up") in their respective gangs. There are set gangs, based on seniority, who are assigned to work on vessels.
3. Once employees are aligned, the hatchtender for each gang counts the employees for that gang, and if any employees other than regular gang members are needed, the hatchtender assigns available substitutes from a seniority list. If there are no substitutes from the list available, then the hatchtender is free to choose anyone from among the other persons available.

Once employees are selected, they hand their card to the paymaster and proceed to work at the directed time.

The Charging Party Punches (b) (6), (b) (7)(C)

The Charging Party has been a Union member for over (b) (6), (b) (7)(C) years and has been working for the Employer since (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) holds the positions of (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) and works in the (b) (6), (b) (7)(C) gang. In about (b) (6), (b) (7)(C) the Charging Party's (b) (6), (b) (7)(C) became a Union member and started working for the Employer, although (b) (6), (b) (7)(C) did not belong to any permanent gang. On or about February 24, 2018, (b) (6), (b) (7)(C) failed to select the Charging Party's (b) (6), (b) (7)(C) to work, even though (b) (6), (b) (7)(C) was present at the shape-up and there were not enough regular employees.¹ The Charging Party got mad at (b) (6), (b) (7)(C) and called (b) (6), (b) (7)(C) to question (b) (6), (b) (7)(C) decision. (b) (6), (b) (7)(C) told the Charging Party that (b) (6), (b) (7)(C) needed to stop trying to force (b) (6), (b) (7)(C) to select (b) (6), (b) (7)(C), and they argued. After this incident, (b) (6), (b) (7)(C) started "badmouthing" the Charging Party and (b) (6), (b) (7)(C) on social media, including by posting something on the Charging Party's (b) (6), (b) (7)(C) account that suggested that the Charging Party's (b) (6), (b) (7)(C) should "wait (b) (6), (b) (7)(C) turn" for referrals.

¹ There is no allegation that (b) (6), (b) (7)(C) failure to select the Charging Party's (b) (6), (b) (7)(C) for referral to work was unlawful.

On (b) (6), (b) (7)(C) 2018, the Charging Party attended a shape-up conducted by the Union at the usual place in the parking lot at the Port of San Juan, seeking work as (b) (6), (b) (7)(C). There were several others present, waiting for the boss foreman to blow the whistle, signifying the start of the shape-up. (b) (6), (b) (7)(C) was scheduled for the Charging Party's gang that day. The Charging Party approached (b) (6), (b) (7)(C) and asked (b) (6), (b) (7)(C) to stop badmouthing (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C). The two parties argued, and the Charging Party got mad and punched (b) (6), (b) (7)(C) in the face. Immediately thereafter, (b) (6), (b) (7)(C) who was in the area, instructed both to go home and told them that they would not be allowed to work that day.

The Union Suspends the Charging Party from the Hiring Hall for One Year.

On (b) (6), (b) (7)(C) 2018, the Charging Party received a letter from the Union's Disciplinary Committee,² summoning (b) (6), (b) (7)(C) to appear at the Union offices about (b) (6), (b) (7)(C) assault on (b) (6), (b) (7)(C) and advising (b) (6), (b) (7)(C) to bring any witnesses or evidence related to the incident. The letter cited to Article IX, Section E2 of the collective-bargaining agreement:

The Union may, with just cause, suspend from work any of the workers included in the bargaining unit. Just cause can be, without it being understood as a limitation: improper or disorderly conduct, using or being under the influence of alcohol or controlled substances during working hours, disobeying orders and/or disrespecting the Union and/or Employer representatives at the work area and/or for not using the safety equipment required by the Employer according to the requirements established by OSHA or any other valid law, or for violating the health and security rules established by the Employer and/or the applicable health and security rules.

On (b) (6), (b) (7)(C) 2018, the Charging Party attended the disciplinary meeting at the Union's office, as directed.³ At the end of the meeting, (b) (6), (b) (7)(C) of the Disciplinary Committee spoke privately with the Charging Party and told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) was going to be suspended for a year. The Committee (b) (6), (b) (7)(C) also told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) could appeal the determination but that the Union members were the only ones who could remove the punishment.

² According to the Union, its Disciplinary Committee is a separate body in charge of processing and adjudicating referrals of misconduct made by Union members.

³ (b) (6), (b) (7)(C) was asked to write (b) (6), (b) (7)(C) version of events at this meeting; in (b) (6), (b) (7)(C) written statement, (b) (6), (b) (7)(C) did not seek discipline against the Charging Party.

On (b) (6), (b) (7)(C) 2018, the Disciplinary Committee (b) (6), (b) (7)(C) gave the Charging Party the Union's official notice of (b) (6), (b) (7)(C) suspension. The letter states:

Resolution

During the hearing held on (b) (6), (b) (7)(C) 2018, the Disciplinary Committee made the following determinations of fact:

1. The Local constitution establishes the rules that regulate the conduct of all its members, as well as the disciplinary procedures to be effectuated when one of them violates its dispositions.
2. On (b) (6), (b) (7)(C) 2018, there was a "shape up" to select the personnel who would work for SSA on the Tote Marine ship.
3. During that calling, [name deleted] was (b) (6), (b) (7)(C) who selected the personnel of the (b) (6), (b) (7)(C) Gang.
4. That is the Gang in which you work.
5. During this calling you hurt (b) (6), (b) (7)(C) hitting (b) (6), (b) (7)(C) on the mouth.
6. Your actions affect the image and work environment within the Union.

Conclusion

The above described actions constitute a punishable violation, which denotes an act of indiscipline on your part, violating the security rules, and affecting the healthy work environment, as well as the respect and cordiality among all. As such, this committee, as a collegiate body, has determined to suspend you immediately, with retroactive effect to the date of the events. This suspension will be for one year.

Effective until (b) (6), (b) (7)(C) 2019.

Relevant Portions of the Union's Bylaws

Article XI- Offenses and Penalties

...

Section 2. The following acts constitute offenses that, with proof of their commission, will result in the expulsion of a member, suspension for a period of no more than two (2) years of the rights and privileges as a member, or a fine of no more than \$100.00, or both:

- (a) Malicious or undue use or appropriation of the Union's property
- (b) Unauthorized use of property, records, seals, or other similar documents of the Union.
- (c) Intentional misuse of any position, elected or not, within the Union; or the refusal or intentional omission of duties within said position or gross negligence or abuse in the execution of his duties or functions
- (d) Unauthorized voting, or unauthorized handing of ballots or election related material of any sort
- (e) Willing and unauthorized intervention with the execution of the duties of any position within the Union
- (f) Giving or receiving bribes, for example from any employer with which the Union has a contract.
- (g) Signing any collective-bargaining agreement, escrow contract, or service contract without first submitting it to the members.

Although the Disciplinary Committee (b) (6), (b) (7)(C) states that the Charging Party was suspended pursuant to the collective-bargaining agreement and the Union's "disciplinary rules," the Region's investigation shows that the Union's only disciplinary rules are those stated in the collective-bargaining agreement and the Union's bylaws.

Evidence of Disparate Treatment

Other violent incidents involving hiring hall users have resulted in less severe suspensions from the hall. For example, on (b) (6), (b) (7)(C) 2015, before the shape-up, the Union (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) fought with another unit employee with whom (b) (6), (b) (7)(C) had previously exchanged insults.⁴ According to the unit employee, the Union (b) (6), (b) (7)(C) kept walking towards (b) (6), (b) (7)(C) and the unit employee told (b) (6), (b) (7)(C) that if (b) (6), (b) (7)(C) got any closer, the unit employee would hit (b) (6), (b) (7)(C). After seeing (b) (6), (b) (7)(C) trying to get something out of (b) (6), (b) (7)(C) pocket, and thinking that (b) (6), (b) (7)(C) was reaching for a gun, the unit employee hit (b) (6), (b) (7)(C) in the face. (b) (6), (b) (7)(C) took a gun out and hit the unit employee with it on the back of (b) (6), (b) (7)(C) head, causing the gun to go off. Nobody was hit by the bullet. The unit employee ran for cover and hid behind a car. While hidden, (b) (6), (b) (7)(C) saw (b) (6), (b) (7)(C) picking up the gun and walking towards (b) (6), (b) (7)(C) again. The unit employee asked (b) (6), (b) (7)(C) not to kill (b) (6), (b) (7)(C). Then (b) (6), (b) (7)(C) told the unit employee to get out and fight with (b) (6), (b) (7)(C). The unit employee replied that if (b) (6), (b) (7)(C) put away the gun, (b) (6), (b) (7)(C) would fight (b) (6), (b) (7)(C). At that moment, (b) (6), (b) (7)(C) put the gun in (b) (6), (b) (7)(C) pocket and got in (b) (6), (b) (7)(C) car. While driving past the uni (b) (6), (b) (7)(C) told (b) (6), (b) (7)(C) “You will learn to respect the Union one way or the other.”

(b) (6), (b) (7)(C) was suspended from the hiring hall for one or two weeks after the incident.⁵ The suspension letter to (b) (6), (b) (7)(C) did not reference any specific bylaw, contract rule, or other reason for the discipline. The unit employee filed criminal charges, as well as internal union charges against (b) (6), (b) (7)(C). The file in Case 12-CB-160265 reflects that (b) (6), (b) (7)(C) pled guilty to the charge of aggression and was sentenced by the Court to a \$50.00 fine. The Union did not take any further disciplinary action against either party.⁶

⁴ This incident was the subject of an unfair labor practice charge in Case 12-CB-120265.

⁵ (b) (6), (b) (7)(C) asserts that the suspension was for one week, while (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) of the Disciplinary committee assert that it was for two weeks.

⁶ Another violent incident involving (b) (6), (b) (7)(C) occurred about three years before the Charging Party punched (b) (6), (b) (7)(C). A coworker hit (b) (6), (b) (7)(C) in the head with a helmet while they were at one of the Employer’s vessels. This occurred while (b) (6), (b) (7)(C) was working as (b) (6), (b) (7)(C) not as (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) states that the Union Disciplinary Committee wanted to discipline the employee who hit (b) (6), (b) (7)(C) but did not do so because, as here, (b) (6), (b) (7)(C) did not seek discipline against (b) (6), (b) (7)(C) co-worker.

ACTION

We conclude that, under current Board law, the Union's one-year suspension of the Charging Party from the hiring hall was arbitrary given the considerably lesser punishment imposed on the Local (b) (6), (b) (7)(C) for arguably more egregious misconduct. We further conclude that the Region should argue that the Board should adopt a heightened duty-of-fair-representation standard for a union operating an exclusive hiring hall, which would require the union to apply written or otherwise clearly-conveyed objective criteria when denying hiring hall users employment through the hall due to misconduct, and that the one-year suspension here was unlawful because it was not guided by readily-discernable objective criteria.

A. The Union's One-Year Suspension of the Charging Party Violated the Duty of Fair Representation Under Extant Board Law.

A union owes a duty of fair representation to all applicants using its exclusive hiring hall⁷ and may not operate it in an arbitrary, discriminatory, or unfair manner.⁸ A union acts arbitrarily "if, in light of the factual and legal landscape at the time, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational."⁹ Arbitrariness can be shown by a union's disparate treatment of one worker compared to others who are similarly situated.¹⁰

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

⁷ See *Breining v. Sheet Metal Workers Local 6*, 493 U.S. 67, 87-88 (1989). The duty of fair representation does not apply to non-exclusive hiring halls. See *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174, 174 (2000) (citing *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 441, 442 (1991)). Therefore, when we refer to union hiring halls in this memorandum, we are referring to exclusive hiring halls only.

⁸ See *Miranda Fuel Co.*, 140 NLRB 181, 184 (1962).

⁹ *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).

¹⁰ See, e.g., *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1170 (2006) (finding disparate treatment of a worker undermined union's argument that it refused to refer him due to poor performance, because it referred workers whose performance was even worse), *enforced*, 315 F. App'x 318 (2d Cir. 2009).

the union's action is to unlawfully encourage union membership because the union has displayed to all users of the hiring hall its power over their livelihoods.¹¹ This presumption may be rebutted where the union's action was necessary to the effective performance of its representative function,¹² e.g., where the employee's conduct interfered with the mechanics of the referral process;¹³ the employee's conduct harmed the union's reputation and relationship with employers to which it supplied labor;¹⁴ or the employee's conduct was of a nature that continued referrals could endanger employees or union agents or expose the union to liability for future misconduct. In these circumstances, the Board has found that the union's action would not unlawfully encourage union membership.¹⁵

¹¹ *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1, 2 (2000), *rev'd on other grounds sub nom. Lucas v. NLRB*, 333 F.3d 927 (9th Cir. 2003); *Stage Employees IATSE Local 412 (Various Employers)*, 312 NLRB 123, 127 (1993); *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 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).

¹² *Id.* See, e.g., *IATSE Local 838 (Freeman Decorating)*, 364 NLRB No. 81, slip op. at 4-5 (Aug. 23, 2016) (a union can rebut the presumption if its actions were "reasonably designed to preserve the integrity of contractually prescribed referral practices, even though those actions bring changes in job status to individual employees" quoting *Painters Local 487 (American Coatings, Inc.)*, 226 NLRB 299, 301 (1976)).

¹³ *Carpenters Local 522 (Caudle-Hyatt)*, 269 NLRB 574, 576 (1984) (union lawfully caused discharge of employees who had circumvented hiring hall and obtained work directly from employer); *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432, 433 (1983) (union lawfully denied employee referral after employee had circumvented hiring hall by applying for work directly from employer).

¹⁴ *Stage Employees IATSE Local 150 (Mann Theatres)*, 268 NLRB 1292, 1295-96 (1984) (union lawfully refused to refer employee with history of misconduct and incompetence on various jobs to which he had been referred); *Longshoremen ILA Local 341 (West Gulf Maritime Assn.)*, 254 NLRB 334, 337 (1981) (union lawfully refused to refer employee who had engaged in wildcat strike in violation of contractual no-strike clause).

¹⁵ See *Philadelphia Typographical Union No. 2 (Triangle Publications)*, 189 NLRB 829, 830 (1971) (union lawfully caused employee's layoff because employee, while serving as union treasurer, embezzled substantial union funds, threatening the union's financial survival; in these circumstances, union's actions would not be "construed as having a foreseeable consequence of encouraging union membership.").

In the instant case, we conclude that the Union violated its duty of fair representation by suspending the Charging Party from the hiring hall for a year. While the Union may legitimately police its hiring hall against violent attacks on its hiring hall users and officials, it could not justify imposing this lengthy suspension on the Charging Party after imposing a much lighter suspension on the Union (b) (6), (b) (7)(C) for comparable violent misconduct.¹⁶ In both situations, hiring hall users physically assaulted others either during or prior to the shape-up, and both assaults were witnessed by hiring hall users and Union officials.

The Union contends that its decision to suspend the Charging Party from the hiring hall for a year does not constitute disparate treatment when compared to the one- or two-week suspension it gave to the Union (b) (6), (b) (7)(C) in 2015. Specifically, the Union asserts that the individuals were not similarly situated because the prior incident did not relate to the Union's legitimate need to operate the hiring hall since the shape-up had already occurred when (b) (6), (b) (7)(C) gun went off and, as a result, there were no Union agents present as witnesses and the incident did not cause a security problem for the hiring hall. It further argues that the criminal charges were dismissed and, unlike here, no one was hurt. However, most of the Union's factual assertions are contradicted by the Region's findings in Case 12-CB-160265. Moreover, the fact that the Union (b) (6), (b) (7)(C) was a Union (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) who attacked a hiring hall user, and the Charging Party was a hiring hall (b) (6), (b) (7)(C) attacked a Union (b) (6), (b) (7)(C) (b) (6), (b) (7)(C), clearly is not the kind of distinction that would warrant such dramatically different outcomes. Indeed, the assault by the Union (b) (6), (b) (7)(C) arguably was a more serious case of misconduct, as (b) (6), (b) (7)(C) discharged a firearm and pled guilty to criminal charges. When compared with the one- or two-week suspension of the Union (b) (6), (b) (7)(C) we find the one-year suspension of the Charging Party for comparable conduct was an arbitrary implementation of discipline under the collective-bargaining agreement.¹⁷

¹⁶ Our conclusion here does not run afoul of the holding in *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB at 433, that once the Board decides that a union acted "for legitimate, nondiscriminatory reasons, [it] will not scrutinize the harshness of the penalty," because the issue here is not whether the penalty for legitimately-imposed discipline was overly harsh but whether the penalty imposed on the Charging Party was unlawfully arbitrary given the considerably lesser penalty imposed on the Union (b) (6), (b) (7)(C).

¹⁷ Regarding the earlier assault on the same (b) (6), (b) (7)(C) when (b) (6), (b) (7)(C) was working as (b) (6), (b) (7)(C) at one of the Employer's vessels, as opposed to this attack on (b) (6), (b) (7)(C) as a (b) (6), (b) (7)(C) it should be noted that in this prior incident, as here, (b) (6), (b) (7)(C) did not seek that the matter be prosecuted by the Union.

Accordingly, under extant Board law, complaint should issue, absent settlement.

B. The Board Should Adopt a Heightened Duty of Fair Representation Standard for Union Actions that Affect a User’s Employment Through an Exclusive Hiring Hall.

The Supreme Court first established the duty of fair representation in a Railway Labor Act case.¹⁸ There, the Court found that a union’s obligation “to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them,” was implicit in the RLA’s grant of exclusive representation.¹⁹ In another case that issued the same day, the Court endorsed the concept of a duty of fair representation under the NLRA.²⁰ Shortly after the passage of the 1947 Taft-Hartley amendments, the Supreme Court twice held that the NLRA imposed a duty of fair representation on unions and that federal courts retained jurisdiction to adjudicate such claims.²¹ In 1962, the Board itself recognized that a breach of the duty of fair representation is an unfair labor practice in *Miranda Fuel Co.*,²² a hiring hall case. The Supreme Court later elaborated on the nature of the

¹⁸ *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944).

¹⁹ *Id.* at 198-204 (holding that black firemen, who union had affirmatively excluded from the craft because of race, had right of action against union based on union’s duty of fair representation).

²⁰ *Wallace Corp. v. NLRB*, 323 U.S. 248, 255-56 (1944) (stating that, “[b]y its selection as [exclusive] bargaining representative, [a union] has become the agent of all [unit] employees, charged with the responsibility of representing their interests fairly and impartially”).

²¹ See *Ford Motor Co. v. Huffman*, 345 U.S. at 337 (finding duty of fair representation under the NLRA but concluding the union had not breached it by negotiating special seniority protections for veterans); *Syres v. Oil Workers Local 23*, 350 U.S. 892, 892 (1955) (per curiam) (reversing circuit court’s holding that federal courts did not retain jurisdiction over fair representation actions).

²² 140 NLRB 181, 184 (1962). Previously, the Board had held that exclusive hiring halls were per se unlawful, absent certain safeguards, because they “inherently” encouraged union membership. See *Mountain Pacific Chapter of Associated General Contractors, Inc.*, 119 NLRB 883, 896-97 (1958) (finding that union operating

duty of fair representation in the context of two non-hiring hall cases concerning grievance processing and contract negotiation, respectively, *Vaca v. Sipes*²³ and *Airline Pilots v. O’Neill*.²⁴ In *Vaca v. Sipes*, the Court held that “a breach of the statutory duty of fair representation occurs only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.”²⁵ In *Airline Pilots v. O’Neill*, the Court, in holding that the duty of fair representation applies to *all* union activity, including contract negotiation, stated that a union’s actions are arbitrary “only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness . . . as to be irrational.’”²⁶

The Supreme Court has also observed, however, that a union operating an exclusive hiring hall should be subject to a heightened duty of fair representation. Thus, in *Breininger v. Sheet Workers Int’l Ass’n Local Union No. 6*,²⁷ the Court rejected a union’s assertion that the duty of fair representation should not apply in the hiring hall context. The Court noted that, outside the hiring hall setting, where management alone makes work assignments, arbitrary conduct is “apt to provoke a strong reaction through the grievance mechanism.”²⁸ In the hiring hall setting, where the union has “assumed the mantle of employer, then the individual employee stands alone against a single entity: the joint union/employer.”²⁹ This leaves employees open to abuses similar to those of a closed shop, including discrimination.³⁰

exclusive hiring hall violated Act by maintaining retention-of-seniority provision without appropriate safeguards), *enforcement denied*, 270 F.2d 425 (9th Cir. 1959).

²³ 386 U.S. 171 (1967).

²⁴ 499 U.S. 65 (1991).

²⁵ *Id.* at 190-95 (finding that while a union may not arbitrarily ignore meritorious grievances or process them perfunctorily, a union may lawfully refuse to arbitrate frivolous grievances or non-frivolous grievances that it determines in good faith do not merit arbitration).

²⁶ 499 U.S. at 67 (citing *Ford Motor Co. v. Huffman*, 345 U.S. at 338).

²⁷ 493 U.S. at 89.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

Accordingly, the Court observed, by assuming the employer's role in operating an exclusive hiring hall, a union's "responsibility to exercise that power fairly *increases* rather than *decreases*."³¹

Consistent with the Supreme Court's observations in *Breining*, two circuit courts of appeals have held that a union owes a "heightened" duty of fair representation toward employees in the hiring hall context that requires the union to act by reference to "objective criteria."³² The Ninth Circuit in *Lucas v. NLRB*³³ applied this heightened duty to a union's failure to readmit a hiring hall user who it had suspended from its hall for misconduct despite the employee's providing the union with a doctor's letter attesting to his psychological well-being and ability to work productively. The court distinguished *O'Neill*, in which the Supreme Court had articulated the more deferential "wide range of reasonableness" standard for arbitrary conduct, because *O'Neill* involved contract negotiations and public policy "discouraged 'judicial second-guessing' of [the contents of] negotiated labor agreements."³⁴ By contrast, the court stated, "operation of a hiring hall is easily distinguishable from other activities where the union does not assume the role of employer" due to the "union's tremendous authority" in a hiring hall and the "workers' utter dependence [on the union]."³⁵ The court held that the heightened duty of fair representation in the hiring hall context requires the union to "operate by 'reference to objective

³¹ *Id.*

³² See *Lucas v. NLRB*, 333 F.3d 927, 934-935 (9th Cir. 2003), *rev'g and remanding Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1 (2000); *Jacoby v. NLRB*, 233 F.3d 611, 615-617 (D.C. Cir. 2000), *rev'g and remanding Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999); *Plumbers & Pipefitters Local 32 v. NLRB*, 50 F.3d 29, 32-34 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 974 (1995).

³³ 333 F.3d at 937.

³⁴ *Id.* (quoting *Plumbers & Pipe Fitters*, 50 F.3d at 33); see also *Jacoby v. NLRB*, 233 F.3d at 616 (stating that *O'Neill's* focus on "negotiation[s]" revealed a critical difference in context that did not account for the union's potential for coercing union membership through its operation of a hiring hall); cf. *O'Neill*, 499 U.S. at 74 (rejecting union's argument that duty of fair representation does not apply to a union in its negotiating capacity and finding that "all union activity, including contract negotiation," is subject to duty of fair representation).

³⁵ *Lucas v. NLRB*, 333 F.3d at 933 (quoting *Plumbers & Pipe Fitters*, 50 F.3d at 32-34).

criteria.”³⁶ The court reversed the Board’s order dismissing the complaint against the union, finding that the Board had committed error by, inter alia, applying the deferential *O’Neill* definition for arbitrary union conduct rather than the heightened standard requiring application of objective criteria.³⁷

On remand, the Board accepted the court’s decision as the law of the case,³⁸ but the Board has not, as yet, adopted the “heightened duty” standard.³⁹ We note that, in other contexts, the Board has consistently found that unions operating hiring halls are responsible for keeping hiring hall users informed about hiring hall procedures and other matters critical to their employment status, whether or not there is a union-security clause.⁴⁰ In addition, the Board and several courts have described the

³⁶ *Id.* at 935 (citing *Plumbers & Pipe Fitters*, 50 F.3d at 32, and *Jacoby*, 233 F.3d at 616-17).

³⁷ *Id.* at 936-37. The cases in which the D.C. Circuit subjected unions to a heightened duty of fair representation in the hiring hall context concerned hiring hall referral practices rather than discipline. *See Plumbers & Pipe Fitters*, 50 F.3d at 32-34 (under heightened duty of fair representation standard, union unlawfully referred workers through hall without objective standards); *Jacoby*, 233 F.3d at 616-17 (finding that heightened duty of fair representation standard applies to unions in context of hiring halls, and instructing Board to consider on remand whether union’s negligent failure to adhere to its existing referral standards was unlawful under this standard). But the same analysis should apply where disciplinary suspension/expulsion from the hiring hall is at issue.

³⁸ *Stage Employees IATSE Local 720 (AVW Audio Visuals)*, 341 NLRB 1267, 1267 (2004). *See also Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549, 550 (2001) (accepting court’s decision as law of the case and finding that union’s inadvertent mistake in departing from referral procedures not unlawful even under heightened duty of fair representation), *on remand from Jacoby*, 233 F.3d at 617, 619.

³⁹ *See, e.g., Teamsters Local 631 (Vosburg Equipment)*, 340 NLRB 881, 881 n.4 (2003) (clarifying that the Board has only applied the “heightened duty” standard when applying the law of the case on remand but that the “Board itself has [not] adopted the ‘heightened duty’ standard” and “[w]e do not adopt that standard here”).

⁴⁰ *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).

duty of fair representation as a fiduciary duty,⁴¹ or akin to a fiduciary duty.⁴² And several types of fiduciary relationships have disclosure requirements.⁴³

We conclude that the Board should adopt a heightened duty of fair representation standard for unions operating hiring halls where, as here, union disciplinary action affects a hiring hall user's employment. As explained by the Ninth Circuit in *Lucas*, this approach takes into consideration the unique power dynamic in the hiring hall context. Therefore, it is more consistent with *Breining*'s observations regarding arbitrary conduct in hiring halls than the Board's current approach applying *O'Neill*'s more deferential standard, which arose in the very different context of contract negotiation. Additionally, the Board's view that *O'Neill* requires a unitary analysis for all union conduct—including in hiring halls—is inconsistent with its own precedent. Indeed, the Board has long applied the duty of fair representation differently in hiring hall cases by presuming that when a union prevents an employee from being hired or causes an employee's discharge, the union must overcome the presumption that the effect of the union's action was to unlawfully encourage union membership. Unions face no such burden outside the hiring-hall context. Lastly, it is telling that the Supreme Court, which could have definitively declared a unitary standard for arbitrary conduct applicable "to all union activity" by

⁴¹ See, e.g., *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985) (when a union "acts as the exclusive agent of users of a hiring hall . . . the users must place such dependence on the union that there necessarily arises a fiduciary duty on the part of the union not to conduct itself in an arbitrary . . . manner").

⁴² See, e.g., *Airline Pilots v. O'Neill*, 499 U.S. at 74 (observing that "[t]he duty of fair representation is . . . akin to the duty owed by other fiduciaries to their beneficiaries," such as trustees to trust beneficiaries, attorneys to clients, and corporate officers and directors to shareholders); *Miranda Fuel Co.*, 140 NLRB at 189 ("The requirement of fair dealing between a union and its members is in a sense fiduciary in nature" (quoting *International Union of Electrical, Radio & Machine Workers, Local 801 v. NLRB*, 307 F.2d 679, 683 (D.C. Cir. 1962))).

⁴³ See, e.g., Restatement (Second) of Trusts § 173 (1959) (trustee required to give complete and accurate information to beneficiary upon request); Restatement (Second) of Agency § 381 (1958) (agent under duty to give principal information which is relevant to affairs entrusted to agent); Restatement (Second) of Torts § 551 (1977) ("One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he failed to disclose.").

accepting certiorari in *Plumbers v. Pipe Fitters Local Union No. 32 v. NLRB*, *supra* (in which the D.C. Circuit distinguished *O'Neill* and held that a heightened duty of fair representation applies in hiring hall cases), instead denied certiorari in that case.

The courts that have applied a heightened duty of fair representation standard in the hiring hall context have not specified precisely what constitutes the “objective criteria” necessary to satisfy that standard. Although the Supreme Court has held that the Board may not dictate *specific* procedures and rules that a union must adopt,⁴⁴ we conclude that, in the context of union discipline that affects hiring hall users’ employment status, the union must maintain rules that satisfy the following broad parameters:

1. rules must be in writing;
2. rules must be communicated to all users, such as by a posting in a prominent area so that all users will necessarily see them, or by providing them to users personally;
3. rules must sufficiently put users on notice so that they may conform their conduct to avoid discipline and know the consequences of violating the rules; although the rules need not cover every conceivable violation, sanctions should be in accordance with the severity of the conduct;
4. rules must distinguish between requirements that merely affect union membership status and those that affect access to the hiring hall and employment opportunities;
5. rules must treat all users equally.

The Region should urge the Board to adopt this heightened standard and definition of objective criteria and, applying these principles, find that the Union’s year-long suspension of the Charging Party was unlawful because it was not done pursuant to objective criteria. The Union has not produced any hiring hall rules that address misconduct by a hiring hall user and the consequences of such misconduct. The contractual provision relied on by the Union to suspend the Charging Party conveys only that the Union can suspend employees for “improper or disorderly conduct” or for “disobeying orders and/or disrespecting the Union”; it does not

⁴⁴ *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 676 (1961).

distinguish between types or levels of misconduct and is devoid of any reference to the type or length of any penalty for misconduct. Although the Union's bylaws list multiple "Offenses and Penalties," they mostly address internal Union disciplinary matters rather than misconduct by hiring hall users and hiring hall-related penalties. Thus, the listed offenses include, inter alia, "[i]ntentional misuse of any position, elected or not, within the Union" and "[s]igning any collective-bargaining agreement . . . without first submitting it to the members." The only penalties listed are "*expulsion of a member*," "suspension . . . of the rights and privileges as a *member*," and fines (emphasis added).⁴⁵

The Union clearly operates with unlimited discretion and authority to determine on an *ad hoc* basis what conduct warrants suspension from the hiring hall and for how long. This absence of objective criteria creates a significant threat of a selective-enforcement regime where an employee's source of livelihood can be arbitrarily threatened and deprived. Indeed, the greatly disparate penalties meted out to the Charging Party and the Union (b) (6), (b) (7)(C) for comparable misconduct well illustrate the dangers of such a standardless disciplinary system. The Charging Party's one-year suspension, issued without reference to objective criteria, clearly violated the Union's duty of fair representation under a heightened standard.

Accordingly, the Region should argue to the Board that unions must comply with a heightened duty of fair representation standard, by reference to objective criteria, when their actions affect a hiring hall user's employment. Applying that standard, the Board should find that the Union unlawfully disciplined the Charging Party here because it did not maintain and adhere to objective criteria.

/s/
J.L.S

ADV.12-CB-217876.Response.Trabajadores (b) (6), (b) (7)

⁴⁵ Such internal union rules are free from Board review under *Scofield v. NLRB*, 394 U.S. 423, 428-29 (1969), so long as they do not affect a member's employment status or "invade or frustrate an overriding policy of labor laws . . ." If the Union applies these types of internal membership rules to affect employees' access to the hall and job opportunities, that conduct would be independently violative of the Act.