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PRELIMINARY STATEMENT

Respondent Screen Actors Guild - American Federation of Television and Radio Artists New York (“SAG-AFTRA” or the “Union”) submits this answering brief to the General Counsel’s May 20, 2020 exceptions to the April 22, 2020 decision (“ALJ Dec.”) of Administrative Law Judge Lauren Esposito dismissing the complaint in this matter.¹

Under long-established governing law concerning Section 8(b)(1)(A) and the duty of fair representation (“DFR”), a union may exclude non-members from meetings discussing terms and conditions of employment so long as the union does not delegate its discretionary bargaining authority to the members at that meeting. *E.g.*, *APWU*, 300 NLRB 34 (1990); *Letter Carriers Branch 6000*, 232 NLRB 263 (1977), *enfd* 595 F.2d 808 (D.C. Cir. 1979). As the ALJ found, and as the General Counsel concedes, based on this precedent the complaint here alleging that a nonmember was excluded from a member-only bargaining-proposal solicitation meeting must be dismissed. ALJ Dec. at 9-10. But, through this case, the General Counsel seeks to overturn more than four decades of Board precedent that has ably provided guidance to unions and employees. The Board should not do so.

First, as we explain in Part I below and also in our concurrently filed cross exception, the Board lacks jurisdiction over this matter because the General Counsel failed to enter *any* evidence that any employer engaged in commerce within the meaning of the Act within any specified period of time. For this reason alone, this is a particularly ill-suited case in which to reverse precedent.

¹ The General Counsel’s brief in support of the exceptions is cited as “GC Br.” References to the January 21, 2020 Hearing Transcript in this matter are referred to as “Hr’g Tr.” Joint Exhibits are referred to as “Jt. Ex.”; General Counsel Exhibits as “GC Ex.”; and Respondent Exhibits as “Resp. Ex.” Concurrently with this filing, SAG-AFTRA is also filing a cross-exception to the ALJ’s jurisdictional determination.

Second, as we explain in Part II, the Supreme Court has held that Section 8(b)(1)(A) has no application to internal union affairs and that nonmembers have “no voice in the affairs of the union,” *NLRB v. Fin. Inst. Employees of Am. Local 1182 (Seattle-First Bank)*, 475 U.S. 192, 205 (1986); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191 (1967), and the procedures relating to the development of proposals for the adoption and ratification of collective bargaining agreements are matters “exclusively within the internal domain of the Union.” *Longshoremen ILA Local 1575 (Navieras, NPR)*, 332 NLRB 1336, 1336 (2000) (citing *Houchens Mkt. of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967)). With respect to bargaining proposal solicitation meetings, in this context, current Board law is consistent with fundamental principles of the duty of fair representation permitting a union to exclude nonmembers from such meetings so long as the union retains the ultimate discretion with regard to those proposals *and* considers the interests of all bargaining unit employees when making its final decision. *See, e.g., Branch 6000*, 595 F.2d at 813. A change in the law *requiring* a union to include non-members in its proposal solicitation meetings would, as we demonstrate below, be inconsistent with DFR doctrine.

Finally, in Part III we show, as the ALJ found and the General Counsel concedes, that the complaint fails under current law because the Union did not delegate its discretionary authority to bargaining unit employees and the meetings did not entail a “substitute for negotiation.” And the complaint also fails even under the General Counsel’s *proposed* standard (that nonmembers be permitted to attend meetings used “to solicit input about upcoming contract negotiations,” GC Br. at 16) because a May 8, 2019 “landscape” meeting is the only one the Charging Party sought to attend, and that meeting involved only a presentation about the state of

the entertainment industry at which no proposals were discussed, solicited, or voted upon. ALJ Dec. at 9-10.

For these reasons, the Board should affirm the ALJ's dismissal of the complaint.

STATEMENT OF THE CASE

The Parties

SAG-AFTRA is a labor organization that represents more than 160,000 actors, singers, dancers, recording artists and performers. Hr'g Tr. at 10, 35. It consists of its National union and approximately 25 constituent Local unions throughout the country, including in New York (SAG-AFTRA New York). *See* Hr'g Tr. at 11; Jt. Ex. 3(a) Art. X (SAG-AFTRA National Constitution, referred to hereafter as "Const."); ALJ Dec. at 2.

Hauck, who resigned his Union membership in 2015, Hr'g Tr. at 16, 34; Resp. Ex. 1, is a fee-paying non-member of the SAG-AFTRA bargaining unit of performers that work on television and film productions. Hr'g Tr. at 16, 20; ALJ Dec. at 2. Such work is covered by SAG-AFTRA's Basic Agreement and Television Agreement (the "TV/Theatrical CBA" or "CBA"), which is set to expire on June 30, 2020. Hr'g Tr. at 37, 39. SAG-AFTRA negotiates the CBA with the Alliance of Motion Picture and Television Producers ("AMPTP"), which is a multi-employer bargaining representative. Hr'g Tr. at 36-37; ALJ Dec. at 2.

SAG-AFTRA's Collective Bargaining Process

SAG-AFTRA is governed by an elected 80-member National Board. Hr'g Tr. at 37; Const. Art. V; ALJ Dec. at 2. With respect to multi-employer national collective bargaining agreements like the TV/Theatrical CBA, Hr'g Tr. at 38-39, the Constitution provides that the National Board "shall appoint a Wages and Working [or "W&W"] Conditions Committee to develop proposals" for the negotiations. Const. Art. XI(A)(1); *see* Hr'g Tr. at 38. It also appoints a Negotiations Committee to conduct the negotiations, Const. Art. XI(A)(1), and

develops “policies and procedures” to govern the negotiation process. *Id.* The Constitution further spells out, however, that it is the National Board that “shall approve all proposals developed by the Wages and Working Conditions Committee.” *Id.* Art. XI(A)(2). This proposal development process is known as the “W&W Process.” *See* ALJ Dec. at 3.

The 2019 TV/Theatrical W&W Meetings

On April 13, 2019, the National Board adopted a resolution setting forth the policies and procedures that would govern the W&W Process used to develop proposals for the upcoming bargaining with the AMPTP concerning the TV/Theatrical CBA. Hr’g Tr. at 39; Jt. Ex. 6. The Resolution established a 17-member National W&W Committee, Jt. Ex. 6 § 2(a), to be “charged with developing a recommended set of proposals for consideration by the National Board at its July 2019 plenary meeting.” Jt. Ex. 6 § 2(g).

The Resolution sets forth that the process would commence on April 29, 2019 and continue through to a “Plenary” meeting on July 13-14, 2019. Jt. Ex. 6 § 1(a). The process would consist of four elements: (1) “kick-off meetings/media landscape presentation”; (2) member caucus meetings; (3) a series of national meetings; and (4) one week of W&W meetings in the Locals “for the purpose of obtaining input relevant” to the negotiations, and which input would be reported to the National W&W Committee. Jt. Ex. 6 § 1(b). These meetings are open only to Union members. Jt. Ex. 5.

The first element was to hold kick-off / landscape meetings. Hr’g Tr. at 41. These are meetings held by SAG-AFTRA’s chief economic officer that discuss market trends. *Id.* They provide a landscape of the TV/Theatrical industry that has developed over the past several years and provide a report on trends and how those trends will impact production and might affect performer earnings. *Id.* at 41-42. The May 8, 2019 landscape meeting held in New York was titled “Outlook for Scripted Dramatic Live Action Entertainment.” Hr’g Tr. at 42; Jt.

Ex. 5 ¶1 (“This presentation helps membership understand the current state of the industry under which SAG-AFTRA will be negotiating the TV/Theatrical Agreements.”). No proposals were solicited at this meeting (or at any landscape presentation meeting), nor were any votes taken at the meeting. Hr’g Tr. at 42; *see* ALJ Dec. at 9-10 (finding that “no specific bargaining proposals were solicited or discussed at all” at the meeting, and “no vote” was taken).

After the May 8 kick-off meeting, each Local throughout the country held its own Local W&W meetings. Hr’g Tr. at 43-44. In New York, from May 13 to May 17,² there were a series of general meetings held during the day in which members could discuss any topic, Hr’g Tr. at 43; Jt. Ex. 5 ¶2, as well as “caucus” meetings held in the evenings that were focused on particular areas of work (such as background work), Hr’g Tr. at 43, Jt. Ex. 5 ¶3. At these meetings, members could ask questions of the staff, and then after the question period members could put forth proposals or ideas about what should be achieved in bargaining. Hr’g Tr. at 44. When a member puts forth a proposal, it is discussed, and the members in attendance vote on whether to provide the proposal to the National W&W Committee. *Id.* If it is voted up, staff place it on a master list, a spreadsheet, that is transmitted as a “report” back to the National W&W Committee from each Local. *Id.*

Once all Locals transmit the proposals to the National W&W Committee, the National W&W Committee creates a report and has a “plenary” meeting in which it reviews all of the proposals from Locals throughout the country, synthesizes and analyzes them, and determines which proposals or combination of proposals to recommend to the National Board for approval and use in bargaining. *Id.* at 45. For example, this year, the Locals transmitted 147 proposals to the National W&W Committee, which in turn recommended 20 to the National

² Additional W&W meetings were held in New York in June. *See* GC Ex. 4.

Board. *Id.* Of the 147 proposals, 23 originated in the New York Local, and four of those were recommended to the National Board. *Id.*

Then, on July 20, 2019, the National Board voted to approve, with minor changes (the Board retains discretion to make changes), the package recommended by the National W&W Committee. *Id.* at 46; ALJ Dec. at 2-3. That package would be used by the National Negotiating Committee in bargaining with the AMPTP. Hr’g Tr. at 46.

W&W Confidentiality

As indicated above, the W&W meetings are only open to members of the Union. Jt. Ex. 5. This is due in part to the critical importance of confidentiality regarding these meetings. Hr’g Tr. at 47. The W&W meetings are confidential due to the importance of keeping the Union’s proposals and priorities strictly confidential from the AMPTP and employers so that the employers do not gain an advantage in bargaining. *Id.* To maintain that confidentiality, members must sign a Confidentiality Agreement in which they agree not discuss or to disclose any information from the W&W meetings. Resp. Ex. 2. The members recognize that a violation of the agreement would subject them to discipline under SAG-AFTRA’s Constitution. *Id.*; *see* Const. Art. XIV (discipline); *see also* Const. p. 50, Membership Rule 10 (confidentiality). If non-members attended this meeting, they would not be subject to the internal discipline processes of the Union. Hr’g Tr. at 49. To enforce confidentiality, then, the “only method available” to the Union would be to “enter into nondisclosure agreements enforceable only in court,” which would be a more “cumbersome and difficult” process than internal charges. ALJ Dec. at 4.

Hauck’s Request to Attend the May 8 Landscape Meeting

On May 3, 2019, Hauck requested permission to attend the May 8, 2019 W&W landscape meeting in New York (at which no proposals were solicited or discussed). Jt. Ex. 4.

The Union denied his request because he was not a member in good standing of the Union, as required by Union rules. *Id.*; Hr’g Tr. at 43 (explaining that the definition of member in good standing for this purpose is governed by the Union’s Constitution). Hauck did not request to attend any other W&W meeting other than the May 8 meeting. Hr’g Tr. at 31.

He could have submitted proposals -- and arguments in support thereof -- for consideration at the other W&W meetings, as he did in 2017, Hr’g Tr. at 21, but did not do so purportedly because he did not believe they would be considered and he could not find the address to send an email proposal. Hr’g Tr. at 21-22. That address, however, was available on the Union’s public website about the W&W process. Resp. Ex. 3 (“[i]f you cannot attend a W&W meeting . . . [y]ou may submit proposal recommendations by email at wandw2019@sagaftra.org.”); Hr’g Tr. at 50-51; *see* ALJ Dec. at 4 (the “evidence established that nonmembers, as well as members, may submit bargaining proposals through an e-mail address the Union establishes specifically for that purpose”).

Procedural History

Hauck filed his charge on May 23, 2019, alleging that the Union’s decision not to permit him to attend the May 8 meeting breached the Union’s duty of fair representation. Formal Papers Ex. A. On August 27, 2019, the Regional Director dismissed the charge. Jt. Ex. 7a. In his decision, he explained that the “Board has declined to find a violation where a union denied non-members the opportunity to attend meetings where terms and conditions of employment are discussed, but no referendum was held.” *Id.* at 1. He concluded that “because the Board has established that a union may exclude non-members from meetings if the meeting is not a substitute for negotiation and such exclusion does not deny the non-member union representation, and there is no evidence that the W&W meeting fell under either of these two exclusions, I am dismissing your charge.” *Id.* at 2.

Hauck appealed and, apparently after the General Counsel through the Division of Advice informed the Regional Director that the General Counsel would seek to change the law, the Regional Director revoked his dismissal of the charge. Jt. Ex. 7b; Hr'g Tr. at 7. The General Counsel issued its complaint on November 5, 2019. Formal Papers Ex. C; Compl., Remedy Section. The ALJ held a hearing on January 21, 2020. Hr'g Tr. at 1.

On April 22, 2020, the ALJ dismissed the complaint. With respect to jurisdiction, the ALJ agreed with SAG-AFTRA's argument that the General Counsel failed in its burden to demonstrate jurisdiction based on the commerce questionnaire from a different case for Picrow Streaming Inc. ALJ Dec. at 6-7. That was because such questionnaire failed to indicate in any way what time frame the commerce information was based upon, and thus "there was no evidence introduced at the hearing to establish an annual basis upon which to evaluate the volume of business." ALJ Dec. at 7.

Nevertheless, the ALJ found, even though it was not argued by the General Counsel and no evidence had been introduced with respect to it, that jurisdiction could be "established based upon" Picrow's "membership in the AMPTP, a multi-employer association." *Id.* In her conclusions of the law, however, the ALJ failed to conclude that Picrow or the AMPTP were engaged in commerce under the Act. *Id.* at 10.

On the merits, the Judge held that SAG-AFTRA did "not violate Section 8(b)(1)(A) by refusing to permit Hauck to attend the May 8, 2019 W&W process meeting because he was not a member of the Union." *Id.* at 10. Judge Esposito explained that no votes were taken at that meeting nor were any bargaining proposals solicited. *Id.* at 9-10. Under binding law, then, she was required to dismiss the complaint. *Id.* at 10.

QUESTION PRESENTED

1. Whether SAG-AFTRA violated Section 8(b)(1)(A) of the Act by excluding Hauck from attending the May 8, 2019 W&W landscape meeting?

ARGUMENT

The ALJ's decision to dismiss the complaint should be upheld for two reasons. First, the General Counsel has failed to establish jurisdiction in this matter. Second, under established precedent dating back four decades, because the Union's national governing body at all times held authority to determine what proposals would be offered to the AMPTP at the bargaining table, the Union did not violate Section 8(b)(1)(A) by excluding Hauck from the May 8 W&W meeting -- at which in any event no proposals were solicited or discussed. And there is no reason for the Board in this case to revise more than forty years of law that, in all that time, has adequately guided unions and employees and in which the Board has never once held, or even suggested, that non-members must as a matter of law be included in proposal solicitation meetings.

I. THE GENERAL COUNSEL FAILED TO ESTABLISH JURISDICTION³

For the NLRB to possess jurisdiction of this matter, the General Counsel must show that it involves a substantial impact on interstate commerce. *IBEW Local 48*, 332 NLRB 1492, 1507 (2000). Even in a Section 8(b)(1)(A) case against a labor organization, jurisdiction turns on whether the employer was engaged in interstate commerce. *Id.* Paragraphs 2(c) and 3 of the complaint -- which SAG-AFTRA did not admit, *see* Formal Papers Ex. E; Resp. Ans. ¶¶2(c), 3 -- allege that “[d]uring the preceding twelve months, Picrow, in conducting its business

³ SAG-AFTRA lays out these arguments herein because if the NLRB lacks jurisdiction, SAG-AFTRA as a matter of law did not violate Section 8(b)(1)(A). It also sets forth these arguments in its concurrently filed cross-exception to the ALJ's jurisdictional determination.

operations . . . provided services in excess of \$50,000 directly to customers outside” of New York, and therefore “has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.” Formal Papers Ex. C; Compl. ¶¶2(c), 3. There are no similar allegations with respect to any other employer in the AMPTP.

The only evidence the General Counsel presented in support of commerce is a Picrow Streaming Inc. questionnaire from a different charge involving a different union. Jt. 2 Ex. A. That questionnaire, dated February 4, 2019, does *not* cover the period “during the preceding 12 months” before the complaint -- as alleged in Paragraph 2(c) -- as the complaint was not filed until November 5, 2019 (and the hearing not held until 2020). Even more importantly, although the form indicated that Picrow provided services in excess of \$50,000 out of state, Jt. 2 Ex. A ¶9(F), it leaves blank the question of what time period this commerce information covers. *See id.* ¶9 (not checking any box to confirm that the data submitted was for the “most recent” calendar year, 12 months, or fiscal year).

In these unique circumstances, where the General Counsel introduced no commerce facts and is relying solely on a questionnaire from a case involving a time period not alleged in the complaint and in which the questionnaire was not properly filled in so that it is impossible to know what time period it covers, the General Counsel has not met its affirmative burden to establish jurisdiction. *See Constr. & Gen. Laborers Local 1177 (Qualicare-Walsh, Inc)*, 269 NLRB 746, 746 (1984) (the “burden of proof regarding jurisdiction, as with all other elements of a prima facie case, is on the General Counsel”); *Stage Employees IATSE Local 127*, No. 16-CB-219221, 2019 WL 2514911 (Div. of Judges June 18, 2019), *adopted by* 2019 WL 3493977 (NLRB July 30, 2019) (dismissing for failure to submit record evidence of employer’s place in commerce and no evidence of same with respect to any other employer); *Mono-Trade*

Co. Inc., No. E 18-CA-14991, 1999 WL 33452826, at 2 (Div. of Judges May 21, 1999) (refusing to find jurisdiction based on 1997 commerce questionnaire where General Counsel’s complaint pled jurisdiction based on the 1998 calendar year, but finding jurisdiction on alternative grounds).

The ALJ agreed with this logic. She too found that the “business volume information contained in the commerce questionnaire completed by Picrow does not provide an unambiguous basis for the assertion of jurisdiction.” ALJ Dec. at 7. This was true in particular because the General Counsel was unable to “identify a specific basis -- whether fiscal year, calendar year, or 12-month period” for which to base jurisdiction, and because the commerce questionnaire was silent on its period, and thus the General Counsel failed to meet its burden. *Id.* (the commerce questionnaire “contains no information regarding the specific time frame for the volume of business”).

Nevertheless, the ALJ held that “jurisdiction over Picrow may also be established based upon [its] membership in the AMPTP.” *Id.* The General Counsel, however, did not plead this as a basis for jurisdiction, nor did it (nor does it now) make any argument that Picrow’s membership in the AMPTP could serve as a basis for jurisdiction. *See* Compl. ¶¶ 2(c) and 3. Although the ALJ is correct when stating that the Board may assert “jurisdiction over a member of a multi-employer association . . . based upon the business activities of the association’s membership in the aggregate,” ALJ Dec. at 7 (citing cases), she overlooks a dispositive factor: that the General Counsel still must introduce *evidence* that at least one employer in the multi-employer association is engaged in commerce. *See IBEW Local 48*, 332 NLRB at 1498 (finding jurisdiction where although one employer did not meet threshold, another employer in multi-employer group was involved in commerce, but only where record evidence of commerce for

that other employer existed); *Millwrights & Mach. Erectors Union Local 102*, 317 NLRB 1099, 1101, 1101 n.7 (1995) (same where the pleadings “establish that the combined out-of-state purchases of the employer-members of MEA are enough” for a jurisdictional basis).

Here, the only commerce evidence that the General Counsel introduced involved the Picrow questionnaire. It did not introduce any evidence with respect to any other employer in the multi-employer association, and for the reasons explained above, the evidence with respect to Picrow is insufficient because there is no basis to determine which time period the commerce questionnaire covers. Given the essential importance of establishing jurisdiction and the fact that it is the General Counsel’s burden to do so, *see Constr. & Gen. Laborers Local 1177.*, 269 NLRB at 746, the Board cannot, as the ALJ did, simply *presume* that the employers in the multi-employer unit (the AMPTP) meet the commerce requirement because the AMPTP has a significant number of members. *See id.* at 746 (complaint dismissed where General Counsel chose not to supplement the complaint’s allegations at the hearing); *IBEW Local 48*, 332 NLRB at 1498 (finding jurisdiction in similar circumstances but only where record evidence existed of jurisdiction based on another employer within the multi-employer association).

Accordingly, this case should be dismissed for lack of jurisdiction as the General Counsel has not introduced evidence establishing that any employer -- Picrow or any other employer in the AMPTP -- was involved in commerce in any specific time period prior to the issuance of the complaint.

II. SAG-AFTRA DID NOT VIOLATE THE ACT

A. Section 8(b)(1)(A) Does Not Prohibit Member-Only Meetings

Section 8(b)(1)(A) provides that it is an unfair labor practice for a union to “restrain or coerce” employees in the exercise of their Section 7 rights. The proviso to Section 8(b)(1)(A) states that “this paragraph shall not impair the right of a labor organization to

prescribe its own rules with respect to the acquisition or retention of membership therein.” 29 U.S.C. § 158(b)(1)(A). As a matter of law, Section 8(b)(1)(A) does not govern internal union affairs, *Scofield v. NLRB*, 394 U.S. 423, 428 (1969); *Sandia Nat’l Labs*, 331 NLRB 1417, 1422 (2000), and although a Union may not discriminate against non-members, *APWU*, 300 NLRB 34, 34 (1990), non-members may be excluded from matters that involve internal union affairs: the “Act allows union members to control the shape and direction of their organization, and [n]on-union employees have no voice in the affairs of the union.” *Seattle First-Bank*, 475 U.S. at 205 (citation omitted).

With respect to collective bargaining and ratification, for example, the Board has held that procedures relating to the adoption, ratification, or acceptance of collective bargaining agreements do not sufficiently impact terms and conditions of employment but are “matter[s] . . . exclusively within the internal domain of the Union.” *Navieras, NPR*, 332 NLRB at 1336 (stating that this principle has “long been recognized”) (citation omitted). Thus, non-members may be excluded from a ratification vote and the meetings and processes leading up to that vote in which a collective bargaining agreement is negotiated. *E.g.*, *APWU*, 300 NLRB at 34 (no right to attend meetings); *Seattle-First Bank*, 475 U.S. at 205; *Kennecott Minerals Co.*, Case No. 27-CB-1927, Advice Memo, 1983 WL 29407 (July 22, 1983) (no right to participate in ratification vote); *Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1318 (5th Cir. 1988), *enforcing* 285 NLRB 285 (1987) (same).

Under current governing law, there are only two narrow exceptions to the rule that non-members may be excluded from meetings discussing the CBA. First, if the union expressly delegates its discretionary bargaining authority (as a “substitute for negotiation”) to bargaining unit employees to determine a particular issue, then non-members must be permitted to vote on

that issue. *APWU*, 300 NLRB at 35 (citing *Letter Carriers Branch 6000*, 232 NLRB 263 (1977), *enf'd* 595 F.2d 808 (D.C. Cir. 1979)). For example, in *Branch 6000*, the union had expressly delegated to unit employees the task of determining by majority vote whether a provision in the CBA should provide days off on a fixed or rotating basis. In that circumstance, because the union delegated its bargaining discretion directly to the unit, non-members could not be excluded from the vote. *Branch 6000*, 232 NLRB at 264 n.1; *APWU*, 300 NLRB at 35 (explaining *Branch 6000*).⁴ The other exception is if exclusion from a meeting would effectively deny a fundamental right of union representation -- and the Board has only ever identified two such rights -- those of “access to grievance procedures and exclusive union hiring halls.” *APWU*, 300 NLRB at 34. On the other hand, exclusion from a member-only meeting discussing terms and conditions of employment is lawful. *Id.* at 34-35.

B. There is No Reason to Overturn More than 40 Years of NLRB Precedent

1. The Duty of Fair Representation Requires Only that the Union Act in a Representative Capacity for All Unit Employees

Despite the clear and workable standard that has sufficiently guided employees and unions through Republican and Democratic administrations for more than 40 years, the General Counsel urges the Board not to apply it, but instead to revisit and overrule it because permitting nonmembers’ exclusion from “bargaining strategy meetings” purportedly “reflects a cramped” view of their Section 7 rights. GC Br. at 13-14. The General Counsel asserts that prevailing law “coerces nonmembers into joining the union and discriminates against nonmembers.” GC Br. at 19. But the current precedent, as also reflected in the Supreme Court

⁴ See also *Boilermakers Local 202 (Henders Boiler)*, 300 NLRB 28, 28 n.1 (1990) (finding a violation where union failed to allow non-members to vote in a binding vote to determine a “floating” holiday, because the union had established a procedure where non-members were denied access to a “substitute for negotiation”).

and D.C. Circuit decisions discussed below, strikes the appropriate balance between nonmembers' Section 7 rights and the equally important principle of permitting a union to govern its own internal affairs.

We start from the bedrock proposition that Section 8(b)(1)(A) does not and was not intended to govern internal union affairs. *Scofield*, 394 U.S. at 428; *Allis-Chalmers*, 388 U.S. at 191; *Sandia*, 331 NLRB at 1422. The Supreme Court has explained (as noted above) that the NLRA “allows union members to control the shape and direction of their organization, and [n]on-union employees have no voice in the affairs of the union.” *Seattle-First Bank*, 475 U.S. at 205. The “fact that a union makes many decisions that ‘affect’ its representation of nonmember employees,” such as calling a strike, electing union officers, or “ratify[ing] a collective-bargaining agreement,” does not mean that those non-members must be included in those decisions (even though not including them necessarily “encourages” them to want to join). *Id.* And, as also noted above, and as conceded by the General Counsel, GC Br. at 10-11, 16, the procedures relating to the adoption, ratification, or acceptance of collective bargaining agreements are “exclusively within the internal domain of the Union.” *Navieras*, 332 NLRB at 1336.

Nevertheless, with respect to terms and conditions of employment, the NLRA grants the majority representative union the power to act as the exclusive bargaining representative for all employees in the unit. 29 U.S.C. §159(a); *Allis-Chalmers*, 388 U.S. at 180 (national labor policy “extinguishes the individual employee’s power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees”). Derivative of this exclusive power is the duty of fair representation imposed on unions under Section 8(b)(1)(A) -- that a union must represent fairly all bargaining unit

members in good faith, without invidious discrimination, and without arbitrariness. *E.g.*, *Vaca v. Sipes*, 386 U.S. 171, 177-78 (1967); *Miranda Fuel Co.*, 140 NLRB 181 (1962). Of course, the “complete satisfaction of all who are represented is hardly to be expected” and unions are permitted a “wide range of reasonableness” in serving the unit. *Allis-Chalmers*, 388 U.S. at 180.

Against this statutory landscape, this case concerns where to draw the appropriate line with respect to non-union members and exclusion from certain union meetings, and whether such exclusion is “discrimination” against those non-members as that term has been defined for purposes of the duty of fair representation. The General Counsel concedes that it would be lawful to exclude non-members from (a) “pre-negotiation meetings to discuss bargaining proposals and select bargaining committee members,” GC Br. at 16 n.12, (b) participating in “advisory votes on contract ratification,” *id.* at 16, and (c) electing union officers, *id.* The General Counsel admits, as it should, that these all are internal union affairs. And under current law, as the General Counsel also recognizes, the Union may exclude non-members from pre-bargaining meetings so long as the meeting is not a “substitute for negotiation.” *APWU*, 300 NLRB at 35.

Yet, the General Counsel would now have this Board redraw the decades-old line to say that it breaches the duty of fair representation to exclude non-members from “bargaining strategy meetings” used to “solicit input about upcoming contract negotiations.” GC Br. at 14, 16. As the D.C. Circuit in *Branch 6000* has most carefully explained, this represents a view of the duty of fair representation that is at odds with its structure and purpose.

Under the DFR, a union, “as exclusive bargaining agent,” must formulate the bargaining unit’s position on terms and conditions of employment. *Branch 6000*, 595 F.2d at 811. But it does so in a “representative capacity,” with the understanding -- absent evidence

otherwise -- that it takes into account all represented employees. *Id.*; *Allis-Chalmers*, 388 U.S. at 181. The union may delegate this responsibility, and such “delegation is an internal union procedure from which non-union employees properly may be excluded.” *Branch 6000*, 595 F.2d at 811. When there is such a delegation, however, the delegatee must function as a representative for all employees and not be motivated solely by self-interest (for if it does, it no longer is acting in a representative capacity). *Id.* at 812. If the delegatee does *not* function in a representative capacity but the decision is instead delegated to a group of employees for each to vote their own interest, that would breach the DFR. *Id.* at 812.

However, without a delegation of the union’s decision-making authority (and there was none in this case), so long as the union’s decisions take the whole bargaining unit into account, it is not a violation of the DFR to exclude non-members from the process leading to the union’s decision. *Id.* at 811-12. Thus, for example, the D.C. Circuit Court of Appeals has stated that it would be permissible for the union to take a “poll of union membership [that excludes non-members] to ascertain its views prior to formulation of the negotiating posture for the bargaining unit.” *Id.* at 812. That is so because, in that circumstance, “the bargaining responsibility remains with an individual or committee charged with the obligation of fair representation, requiring some consideration of the interest of all employees.” *Id.*; *see also APWU*, 300 NLRB at 34-35 (further explaining this reasoning). Moreover, in “most cases a general familiarity with the working environment may allow a representative of some experience to appreciate adequately the perspective of all employees.” *Branch 6000*, 595 F.2d at 813.

With this understanding of the DFR (and it is a binding understanding derived from Supreme Court precedent), the line drawn for the last 40 plus years by the Board and courts is the correct one. The test of when a nonmember must be admitted to an internal union meeting

is when the union has delegated its decision-making authority to the bargaining unit employees. Absent such a delegation, the union decision-making process is a representative one and it is an internal union affair. *Seattle-First Bank*, 475 U.S. at 205. Or, as stated by the Board, the “decisive element” is when the meeting has become a “substitute for negotiations.” *APWU*, 300 NLRB at 35. Only in that circumstance has the union “turned over” its discretionary “decision-making power as the representative of all unit employees” under the DFR thus requiring non-members to participate in the actual decision-making. *Id.*

2. The General Counsel’s Arguments For Why the Board Should Modify Long-Standing Precedent Cannot Withstand Scrutiny

The General Counsel’s arguments for why the Board has incorrectly drawn this line for forty-three years are unpersuasive. First, the General Counsel contends that *APWU* “and other cases” rest on the “faulty premise” that unions will consider nonmembers’ views even if they are not included in “bargaining strategy meetings.” GC Br. at 14. This is simply wrong. As a matter of DFR law, the Union as representative *must* take the views of the whole unit into account. *How* it determines to do so is an internal union affair. If it does not do so, and acts “solely” on behalf of its members, then the union has violated the DFR. *Branch 6000*, 595 F.2d at 811-12 (union has bargaining responsibility requiring “some consideration” of interest of all employees; evidence showing no consideration would establish breach). So this is not a faulty premise, but a statement of black letter DFR law.

And as the facts *here* show, nonmembers explicitly were permitted to email their proposals and thoughts to the Union for consideration. ALJ Dec. at 4 (the “evidence establishes that nonmembers, as well as members, may submit bargaining proposals through an email address” for that purpose). And, as the ALJ noted, those emails have been discussed at W&W

meetings. *Id.* (citing testimony).⁵ The Charging Party has even utilized this method in the past to submit proposals. *Id.* So the GC's proposition that a union will not consider the views of nonmembers unless they attend all bargaining strategy meetings is wrong both a matter of law and as applied to this case.

Nor do the facts of *APWU* "clearly refute" the premise that unions will consider non-member interests even if they are excluded from bargaining strategy meetings. GC Br. at 14. Although the union there admittedly asked nonmembers to leave the relevant meeting (which was *not* a "bargaining strategy" meeting but related to an upcoming labor management committee meeting regarding a specific term in the CBA), the Board found that there was no evidence in the record that the union "ignored their interests," simply because they were not at the meeting. *APWU*, 300 NLRB at 35 n.6. In other words, the union is entitled to the presumption that it is familiar with the views of the entire unit and *did* take them into account, unless there is affirmative evidence that it did not. *Branch 6000*, 595 F.2d at 813. No such evidence existed in *APWU*, and the Board specifically found, for instance, that there was "no showing here that nonmembers could not have communicated their views to the" union "after the meeting." *APWU*, 300 NLRB at 35 n.6.⁶

⁵ Contrary to the General Counsel's arguments, GC Br. at 18-19, the fact that the Union does not acknowledge receipt of the proposal does not prove that the proposals were *not* considered and therefore were an "inadequate" means by which the union could consider nonmember views. Under the DFR, there is no "adequacy" test on the means by which a union need consider the needs of a particular segment of the bargaining unit. It need only show that the "interests of nonmembers have [not] been ignored." *Branch 6000*, 595 F.2d at 813.

⁶ The General Counsel attempts to refute these findings of the Board by pointing to a portion of the ALJ decision -- which was not adopted -- in which the union president said that nonmembers had "no voice in the formation of bargaining policies." GC Br. at 14. But the *APWU* case did *not involve* the "formation of bargaining policies" but only the position that the union would take with respect to an interpretation of the collective bargaining agreement. *APWU*, 300 NLRB at 35.

Second, the General Counsel contends that “participation in discussions about a union’s role as bargaining representative” should be viewed as a “fundamental right” if a union opts to receive any input from its members. GC Br. at 15. He provides no cite for this proposition.⁷ Nor is SAG-AFTRA aware of any Board precedent which would allow participation in such discussions as a “fundamental right.”⁸ Such a statement is antithetical to the long-established principal that “allows union members to control the shape and direction of their organization” and that non-members have no such voice, *Seattle-First Bank*, 475 U.S. at 205 (quoting *Allis-Chalmers*, 388 U.S. at 191), and that the Board (and courts) should avoid unnecessary interference with a union’s internal affairs, *e.g. Allis-Chalmers*, 388 U.S. at 187-95 (recognizing that in enacting Section 8(b)(1)(A) Congress expressly disclaimed “any intention to interfere with union self-government or to regulate a union’s internal affairs”); *NLRB v. Boeing Co.*, 412 U.S. 67, 74 (1973) (finding Board interference with union rule unjustified where it would “necessarily lead the Board to a substantial involvement in strictly internal union affairs”). Under the DFR, nonmembers have the right to have their interests considered by their union representative, but they do not have the right to attend “bargaining strategy,” GC Br. at 14, meetings. *Supra* pp. 14-18.

⁷ The General Counsel (at GC Br. at 15) does cite *Teamsters Local 671 (Airborne Freight Corp.)*, 199 NLRB 994 (1972) (which involves part-time employees, not nonmembers) for the proposition that discussion at bargaining strategy meetings will have a direct effect on what employment terms the union will eventually seek in bargaining. But that case is completely inapposite to the situation here. In that case, the “exclusion of part-time employees from meetings was but one element in a course of discriminatory conduct that culminated in the discharge, at the union’s behest, of the part-time employees.” *See APWU*, 300 NLRB at 35 n.6 (explaining why *Local 671* “differs markedly”).

⁸ The Board has noted only two such “fundamental” nonmember rights in these circumstances: access to grievance procedures and exclusive hiring halls. *E.g., APWU*, 300 NLRB at 34.

Similarly, the General Counsel argues that by denying nonmembers access to bargaining strategy meetings, a “union necessarily encourages them to become full members, which violates Section 8(b)(1)(A).” GC Br. at 14. But the “encourage” language of the statute is not applicable to 8(b)(1)(A) -- it is in Section 8(a)(3) (prohibiting *employer* by discrimination to “encourage or discourage membership in any labor organization”), as applicable to unions through 8(b)(2) when it causes an employer to discriminate in violation of 8(a)(3). In any event, the logic here goes too far -- any and every effective action of a union will “encourage” a nonmember to join. All such conduct cannot possibly violate Section 8(b)(1)(A). *E.g.*, *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 675 (1961). Rather, such conduct only violates the duty of fair representation under Section 8(b)(1)(A) when either the final terms of an agreement actually discriminate against nonmembers, or those members are not taken into account in the process. *Branch 6000*, 595 F.2d at 812-13.⁹

The General Counsel also says that, “significantly,” there would be no “undue burden” on the Union to require inclusion of nonmembers in meetings where bargaining proposals are discussed. But this ignores the record of this case and the finding of the ALJ which shows that SAG-AFTRA has legitimate confidentiality concerns with admitting nonmembers to these meetings. It is critically important in bargaining that the Union’s potential proposals are not made public and known to the AMPTP in advance of negotiations, as that

⁹ Similarly, a denial of attendance to a bargaining strategy meeting does not “coerce” a nonmember to become a member, nor does an invitation to join (as occurred here, Jt. Ex. 4 at 3) coerce the nonmember. *Cf. Unite-Here! Local 11*, No. 21-CB-14893, 2010 WL 5101084, at 5-6 (2010) (questioning coercive only if “there has been additional conduct by the union that made” it coercive); *E. Heating & Cooling, Inc.*, No. 3-CB-8443, Advice Memo, 2006 WL 6828178 (Mar. 28, 2006) (requests/speech without conduct is not coercive within meaning of Section 8(b)(1)(A)).

would provide the AMPTP a crucial strategic edge in the negotiations. Hr’g Tr. at 47. With members, this duty is relatively simple and inexpensive to maintain and enforce because members are subject to internal union charges if they violate their membership duty of confidentiality. Resp. Ex. 2; Const. Art. XIV (discipline); *see also* Const. p. 50, Membership Rule 10 (confidentiality). If non-members attended this meeting, they would not be subject to the internal discipline processes of the Union. Hr’g Tr. at 49. To enforce confidentiality, then, the “only method available” to the Union would be to “enter into nondisclosure agreements enforceable only in court,” which would be a far more “cumbersome and difficult” -- not to mention significantly more expensive -- process than internal charges. ALJ Dec. at 4.¹⁰

Finally, while the General Counsel also posits that SAG-AFTRA can simply “choose to allow committee members to work on bargaining proposals, rather than seeking input from the entire membership/unit,” GC Br. at 19, *see id.* at 16, what the General Counsel is suggesting is that the union must rework its internal union governance practices that have been in existence for decades. These are matters left for the *union*, not the government, to decide, and this Board should not countenance the General Counsel seeking to insert itself in a union’s internal affairs. It would be an abandonment of the “well-established federal policy of avoiding unnecessary interference in the internal affairs of unions.” *Motion Picture & Videotape Editors Guild Local 776 v. Int’l Sound Technicians*, 800 F.2d 973, 975 (9th Cir. 1986); *see Allis-*

¹⁰ The General Counsel contends that the importance of confidentiality issues is merely a “*post facto*” justification because it makes “no reference” to confidentiality in its email to members about the meeting. GC Br. at 19. This statement simply ignores the record of this case, in which both the ALJ determined that members are required to sign confidentiality agreements before they may attend the meeting, ALJ Dec. at 4; *see* Hr’g Tr. at 47-49, as well as the exhibit showing the exact confidentiality document that they must sign *prior* to participating, Resp. Ex. 2, thus indicating that SAG-AFTRA made abundantly clear to its members the importance of confidentiality prior to their participation in the meeting.

Chalmers, 388 U.S. at 187-95 (applying same principle to Section 8(b)(1)(A)); *Seattle-First Nat. Bank v. NLRB*, 752 F.2d 356, 363 (9th Cir. 1984), *aff'd* 475 U.S. 192 (1986) (this “non-interference policy extends to interference by the Board”).

C. **The Union Permissibly Restricted Hauck’s Access to the May 8 W&W Landscape Meeting in Which No Proposals were Discussed**

Here, the Union’s internal rules permit only members to attend W&W meetings. Hauck is not a member of SAG-AFTRA, but requested permission to attend the May 8 landscape meeting discussing the state of the industry. As the ALJ stated, there “is no dispute that the May 8, 2019 W&W process meeting Hauck sought to attend, entitled “Outlook for Scripted Dramatic Live Action Entertainment,” consisted of a presentation by SAG-AFTRA’s chief economist regarding general trends in the industry and the market, the possible impact of these trends on upcoming film and television production, and the potential consequences for performer earnings.” ALJ Dec. at 9. He was not permitted to attend the meeting because he is not a member. *Jt. Ex. 4*. At the May 8 meeting, the Union did not solicit any proposals. *Hr’g Tr. at 42*; ALJ Dec. at 10 (“no specific bargaining proposals were solicited or discussed at all”). Nor did the Union contemplate or take any “vote regarding any specifically enumerated term or condition of employment.” ALJ Dec. at 10. All that occurred was a presentation on trends in the industry. *Hr’g Tr. at 41-42*.

These facts demonstrate two critical points. First, there obviously was and could not be any violation under current law because -- as no proposals were solicited or voted on -- this meeting was clearly not a “substitute for negotiation.” ALJ Dec. at 9-10; *APWU*, 300 NLRB at 34-35 (non-members may be excluded from meetings in which terms and conditions of employment are discussed but which are not the substitute for negotiation). Second, and just as importantly, they also show that there is no need for this Board to proceed any further to, as the

General Counsel contends, revisit current Board law that would govern *if* proposals had been solicited at the meeting. GC Br. at 16. As the General Counsel contends, it is “only when a union schedules a meeting to solicit input about upcoming contract negotiations and restricts access to full members that it should be found to have breached its duty of fair representation.” *Id.* As Hauck did not seek to attend such a meeting, Hr’g Tr. at 31, not only would the General Counsel’s claim fail even under its proposed standard, but it shows why the more prudent course here would be for the Board to more narrowly decide this case without the need to revisit current Board precedent. No proposals were solicited on May 8, so Hauck’s claim fails under any standard.¹¹

With respect to the other W&W meetings (that Hauck did *not* request to attend) at which proposals were discussed, the General Counsel concedes, as the ALJ found, that under the current governing standard it was permissible for SAG-AFTRA to exclude nonmembers from these meetings. ALJ Dec. at 9 (as “General Counsel admits, these precedents require dismissal of the instant charge”); GC Br. at 1-2. This inevitably follows from the core fact of this case -- SAG-AFTRA did not delegate any discretionary bargaining authority to the members at that

¹¹ The General Counsel contends that the Board should reach the question of whether, if Hauck *had* requested to attend the other W&W meetings and was excluded, that would have been a violation of the Act because it was “futile” for him to have asked permission. GC Br. at 17. But this ignores the crucial fact that he did not seek to attend the meetings, and thus an unfair labor practice cannot and should not be premised on a hypothetical that did not occur. *Can-Am Plumbing, Inc.*, 350 NLRB 947, 948 (2007) (recognizing that “the Board only decides issues that are presented and litigated by the parties”). It also is inconsistent with General Counsel’s pleading in this case, which name only the failure to permit Hauck to attend the “May 8” meeting. Compl. ¶5. (The General Counsel then contradicts *its own proposed* standard when arguing that in any event exclusion from the May 8 meeting would violate the Act under its new standard even if no proposals were discussed because the meeting was “the foundation” for the follow up meetings.).

meeting since its National Board retained that discretion at all times. ALJ Dec. at 3 (the National Board “makes the final determination” about which proposals are pursued in bargaining).

Thus, as explained above, proposals are solicited at Local W&W meetings and any proposals selected are then transmitted to the National W&W for consideration. *Supra* pp. 5-6. The purpose of these meetings was to “obtain[] input relevant” to the negotiations ultimately handled by the National W&W Committee and the National Board. Jt. Ex. 6 ¶1(b)(iv). The meetings did not in any way constrain the Union’s bargaining authority. They were merely a mechanism for the National W&W and National Board to obtain “input” on the process. Jt. Ex. 6 ¶1(b)(iv). The decision of what proposals to make in AMPTP bargaining was not delegated to the members. That authority remained vested in the Union; ultimately, bargaining authority rested with the Union’s National Board after receiving recommendations from the National W&W Committee, which exerted its own discretion in determining what proposals were worthy of the National Board’s consideration. Const. Art. XI(A)(1), (2).

In this circumstance, under current law, as outlined above and as found by the ALJ, SAG-AFTRA permissibly prohibited nonmembers from attending Local W&W meetings. *APWU*, 300 NLRB at 34, 35 n.5 (because the union “retained its power to act as the representative of unit employees” on the issue, there was no Section 8(b)(1)(A) violation in excluding non-members from meeting about discussion of terms and conditions of employment); *Branch 6000*, 595 F.2d at 813 (a union may permissibly exclude non-members from a “poll of

the union membership to ascertain its views prior to formulation of the negotiating posture for the bargaining unit”).¹²

For all these reasons, the Union did not violate Section 8(b)(1)(A) when it enforced its internal union membership rule and excluded Hauck from the May 8, 2019 W&W meeting.

CONCLUSION

For the foregoing reasons, the NLRB should dismiss the Complaint for failure of the General Counsel to establish jurisdiction, or, alternatively, affirm the rulings, findings, and conclusions of the ALJ and adopt her Order dismissing the Complaint.

Dated: New York, New York
June 24, 2020

Respectfully submitted,

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¹² Though not termed a “poll,” that is precisely what occurred here. Jt. Ex. 6 ¶1(b)(iv) (Local W&W meetings intended to provide “input” into bargaining process). Moreover, non-members even had the ability to submit proposals for consideration by email, Resp. Ex. 3, and Hauck has taken advantage of that opportunity in prior years, ALJ Dec. at 4; Hr’g Tr. at 21.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2020, I caused a true and correct copy of the foregoing Answering Brief to be served by electronic mail on:

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