

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

SAG-AFTRA NEW YORK (VARIOUS EMPLOYERS)

and

Case No. 02-CB-242132

BENJAMIN SCOTT HAUCK, An Individual

**COUNSEL FOR THE GENERAL COUNSEL'S
REPLY TO THE RESPONDENT'S ANSWERING BRIEF**

Dated at New York, New York
This 8th Day of July 2020

Nicole Oliver
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 2614
New York, New York 10278

I. THE BOARD HAS JURISDICTION OVER THE AMPTP

The Administrative Law Judge correctly found that jurisdiction over Picrow may be established based the aggregate business of the AMPTP, a multi-employer association which bargains with SAG AFTRA and other entertainment industry unions on its members behalf. ALJD at 7:29, 6:13.¹

Respondent is party to a collective bargaining agreement with the Alliance of Motion Picture and Television Producers (herein AMPTP), a multi-employer association. Tr. 37:3 (Touretz). Respondent's Answer admits that the AMPTP has at all material times been an organization composed of various motion picture and television producers operating in, among others, the States of New York and California, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with labor organizations, including Respondent. *Compare* GC Exh. 1(c) (Complaint) *with* GC Exh. 1(e) (Answer). Respondent further admits that Picrow Streaming (herein Picrow) has "at all material times" been an employer-member of the AMPTP and has authorized the AMPTP to represent it in negotiating and administering collective-bargaining agreements with Respondent. *Id.* Additionally, Respondent stipulated that Picrow has at all material times been a California corporation with a principle place of business located in Los Angeles, California, and an office

¹ Reference to the ALJD shall be "ALJD at [page number:line number]. For instance, ALJD at 5:42-45 is a reference to page 5, lines 42 to 45 of the ALJD. References to the transcript shall be "Tr. [page:line number] (witness name)." References to Counsel for the General Counsel's Exhibits shall be "GC Exh. [number], [paragraph number, where relevant]." References to Respondent's Exhibits shall be "R. Exh. [number], [paragraph number, where relevant]." References to Joint Exhibits shall be "Jt. Exh. [number], [paragraph number, where relevant]." References to the Respondent's Answering Brief shall be "R Br., [page number, where relevant]." References to the General Counsel's Memo in Support of Exceptions shall be "GC Br., [page number, where relevant]."

and place of business located in Brooklyn, New York, and engaged in the business of providing postproduction sound services for television. Jt. Exh 1. Respondent also stipulated to the authenticity, admissibility, and truthfulness of a commerce questionnaire from Picrow dated February 4, 2019---less than four months prior to the filing of the charge in this case. Id; GC Exh. 1.

The record establishes that the AMPTP is currently composed of about 350 employer-members. Jt. Exh. 1, par. 2-3; Tr. 36:14-15, 37:1-6 (Touretz). Charging Party Benjamin Hauck (“Hauck”) worked for many of them, including Picrow, Jay Squared Productions, and Universal Television. Tr. 15:9-21, 16:1-3, 20:1-6 (Hauck); 36:14-15, 37:1-10 (Touretz); Jt. Exh. 1, par. 2-3.

The Board has previously asserted jurisdiction over the AMPTP. *Writers Guild of America, West, Inc. (Alliance of Motion Picture and Television Producers)*, 297 NLRB 92, 92 (1989) (employer-members of the AMPTP annually purchase goods and services valued in excess of \$50,000 directly from firms located outside the State of California). The Board has also repeatedly found that employer-members of this association satisfy the Board’s standard for the exercise of its jurisdiction. *See Local 40, Int’l Brotherhood of Electrical Workers*, 364 NLRB No. 7, slip op. at 1 (2016); *Big Moose, LLC*, 359 NLRB 300, 303 (2012); *James Troutman & Associates*, 299 NLRB 120, 121-22, 128 (1990); *American Broadcasting Co.*, 290 NLRB 86, 91 (1988); *Stage Employees IATSE Local 659 (Paramount Pictures)*, 276 NLRB 881, 882-83 (1985); *Directors Guild of America, Inc. (Universal Studios)*, 276 NLRB 626, 626, 629 (1985). General Counsel respectfully requests that the Board take judicial notice of these Board decisions and find jurisdiction over the AMPTP and its employer-members, including Picrow. *See World SS, Inc.*, 335 NLRB 1203, fn. 3 (2001) (ALJ took judicial notice of unreported case where Board asserted jurisdiction over Respondent).

In light of Respondent's admissions that it has bargained agreements with the AMPTP, the record evidence of the large number of employer-members, and record evidence that Picrow is a member of the AMPTP, General Counsel submits that Respondent's argument in respect to jurisdiction is disingenuous. The undisputed record evidence, together with the prior findings of jurisdiction over the AMPTP and its members, establish that Picrow's membership in the AMPTP satisfies the Board's jurisdictional standard.

II. THE BOARD SHOULD OVERTURN *BRANCH 6000*, *APWU*, AND *HENDERS BOILER*

The Supreme Court's decisions in *Seattle First Bank*,² *Scofield*,³ and *Allis-Chalmers*⁴ and the Board's decision in *Sandia*,⁵ are not disrupted if the Board overturns *Branch 6000*,⁶ *APWU*,⁷ and *Henders Boiler*.⁸ Unions would still be free to govern their own affairs and control the shape and direction of the organization without giving nonmembers a voice in those matters. Under the standard urged by the General Counsel, unions could continue to exclude nonmembers from purely internal union matters such as participation on the executive board, choosing the members of the negotiating committee, and proposing and voting on amendments to the union constitution.⁹

² *NLRB v. Fin. Inst. Employees of Am. Local 1182 (Seattle-First Bank)*, 475 U.S. 192 (1986)

³ *Scofield v. NLRB*, 394 U.S. 423 (1969).

⁴ *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

⁵ *Sandia Nat'l Labs*, 331 NLRB 1417 (2000).

⁶ *Branch 6000, National Assn. of Letter Carriers (United States Postal Service)*, 232 NLRB 263 (1977), enf'd. 595 F.2d 808 (D.C.Cir. 1979).

⁷ *American Postal Workers Union (United States Postal Service)*, 300 NLRB 34 (1990) (herein *APWU*).

⁸ *Boilermakers Local 202 (Henders Boiler & Tank Co.)*, 300 NLRB 28 (1990).

⁹ The General Counsel did not *concede* that procedures relating to the adoption, ratification, or acceptance of collective bargaining agreements are exclusively within the internal domain of the union. R. Br., p. 15. Rather, the General Counsel gave an overview of the current state of the law before arguing that the Board should adopt a new standard. GC Br., pg. 10-11. General Counsel

However, once a union decides to solicit proposals regarding terms and conditions of employment for the entire unit, the Board should find that it is no longer an internal union affair and require the union to allow all bargaining unit members to participate, regardless of membership status.¹⁰

Allowing only union members to shape terms and conditions of employment that affect members and nonmembers equally is inherently discriminatory against nonmembers.¹¹ Respondent correctly notes that a union must fairly represent all bargaining unit members in good faith. R. Br., pg. 16, citing *Vaca v. Sipes*, 386 NLRB 171 (1967) . Yet, the current standard followed by the Board allows unions to listen only to the voices of its members when determining what proposals it will make at bargaining on behalf of members and nonmembers alike. Respondent asks the Board to simply assume that it takes into account all represented employees

asserted that under the proposed standard, unions would be free to decide which employees may participate in purely advisory votes on contract ratification, but nonmembers must be included in ratification votes that are a condition precedent to binding contract. *See Western Conference of Teamsters (California Cartage Co.)*, 251 NLRB 330, 338 n.30, 339-40 (1980) (applying duty of fair representation analysis to contract ratification procedure). GC Br., pg. 16, fn.11.

¹⁰ To the extent that Respondent argues that bargaining proposals were not solicited at the May 8, meeting Hauck sought to attend, the Board should hold that it would have been futile for Hauck to ask to attend each Wages & Working Conditions (herein W&W) meeting and find a violation under the GC's proposed standard. R. Br., fn. 11. The Respondent did not tell Hauck he was prohibited from attending only the May 8, meeting because he was a nonmember. Jt. Exh. 4. Rather, Respondent said, "Only members may attend our W&W meetings. If you would like to become a member, please let us know." *Id.* As the caucus meetings where bargaining proposals were solicited were also W&W meetings, Hauck had no reason to believe that he would be admitted. See Jt. Exh. 5. *See Mechanics Educational Society of America Local 56 (Revere Copper)*, 287 NLRB 935, 937 (1987) (Board does not require an employee to file a grievance when it would be futile because the union will refuse to process it).

¹¹ Section 8(b)(1)(A) of the Act states that it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed by section 7. 29 U.S.C. § 158(b)(1)(A). Section 7 states that employees have the right to form, join or assist labor organizations and "shall also have the right to refrain from any or all such activities..." 29 U.S.C. § 157. The General counsel is not arguing that any effective action of the union would encourage members to join. R. Br., pg. 21. Rather, General Counsel only argues that exclusion of nonmembers from the collective bargaining process—the most basic purpose of collective representation—coerces members into joining. GC Br., pg. 15.

because that it was the law requires them to do. R. Br., pg. 18-19. This circular logic is belied by the facts of this case. The record shows that Respondent never attempted to find out what nonmembers wanted to see in the next contract: they only solicited input from members.¹² Tr. 41-44 (Touretz); GC Exhs. 3(a), 3(b), and 4; Jt. Exhs. 4, 5. There is also no record evidence that the union has such familiarity with the working environment that the perspective of all employees could be presumed. *Branch 6000*, 595 F.2d at 813. The national organization that that bargains with the AMPTP for successor contracts has approximately 160,000 members. Tr. 35:23 (Touretz). Respondent's witness admitted that he did not even know how many nonmembers were also in the bargaining unit, so it does not stand to reason that the union would somehow know the views of those nonmembers. Tr. 56: 1-10 (Touretz). Therefore, it is the current standard, not that urged by the General Counsel that allows unions to breach their duty of fair representation.

III. CONCLUSION

For the foregoing reasons, the Board should find that as an employer member of the AMPTP, Picrow meets the Board's jurisdiction standard. Further, the Board should overturn *Branch 6000*, *Henders Boiler*, and *APWU*, *supra* and adopt a new standard to allow nonmember

¹² The record shows that email is not an effective substitute for in person meetings. First, Respondent does not make clear that nonmembers can submit bargaining proposals by email as the email advertisements with the email address are only sent to members and state "If you cannot attend a W&W meeting, please make sure your voice is heard. You may submit proposal recommendations by email at wandw2019@sagaftra.org." Jt. Exh. 4. Nonmembers would have to search the Respondent or SAG-AFTRA's website for this information, and it is not available on every advertisement: Hauck himself did not see the email address right away despite viewing the websites on multiple occasions. Tr. 32: 3-4 (Hauck); 55: 6-18 (Touretz); GC Exhs. 3(a), 3(b), and 4. Second, the facts only show that someone from Respondent (or SAG AFTRA) reads the proposals submitted via email and if that person decides the proposal is good, it will be passed along. Tr. 50: 10-12 (Touretz). The record contains no evidence that shows those proposals are given the same time and consideration as in-person proposals, and there is no opportunity for the author to argue his view to the rest of the unit if he or she is a nonmember. Tr. 54:20-24 (Touretz).

bargaining unit employees to attend union meetings where bargaining proposals are solicited. The Board should hold that Respondent violated section 8(b)(1)(A) of the Act by denying Hauck's request to attend the May 8, meeting solely because of his nonmember status.

Dated: July 8, 2020
New York, New York

Respectfully submitted,

/s/Nicole Oliver
Nicole Oliver
Counsel for the General Counsel
National Labor Relations Board
Region 2
New York, New York 10278
Tel. (212) 776-8633