SAG–AFTRA New York (Various Employers) *and* Benjamin Scott Hauck. Case 02–CB–242132

August 31, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On April 22, 2020, Administrative Law Judge Lauren Esposito issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. In addition, the Respondent filed cross-exceptions with supporting argument, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

For the reasons explained below, we disagree with the judge's conclusion that the General Counsel met his burden to establish Board jurisdiction in this case. Accordingly, we dismiss the complaint, and we do not reach the issue of whether the judge correctly found that the Respondent did not violate Section 8(b)(1)(A) of the Act when it refused to allow Charging Party Benjamin Hauck to attend a Wages and Working Conditions meeting on May 8, 2019.

I. BACKGROUND

The Respondent is the New York local of the national union Screen Actors Guild–American Federation of Radio and Television Artists (SAG–AFTRA), which represents approximately 160,000 professional actors, singers, dancers, and recording artists nationwide who perform in television and film productions. SAG–AFTRA negotiates collective-bargaining agreements on behalf of those it represents with the Alliance of Motion Picture and Television Producers (AMPTP), a multiemployer association comprised of approximately 350 employers. Picrow Streaming (Picrow) is an employer-member of the AMPTP and has authorized the AMPTP to represent it in negotiating and administering collective-bargaining agreements. Charging Party Benjamin Scott Hauck had recently performed work for, and been paid by, Picrow.

II. THE JUDGE'S DECISION

Before the administrative law judge, the Respondent argued that the General Counsel had failed to establish that Picrow satisfied the Board's interstate commerce jurisdictional requirements. The General Counsel's evidence that Picrow met these requirements consisted of a completed commerce questionnaire, dated February 4, 2019, that Picrow had submitted in connection with an earlier charge. Although the questionnaire indicated that Picrow's business activity satisfied the Board's interstate commerce jurisdictional threshold,[1] the questionnaire did not provide the time frame within which such activity took place. Specifically, Picrow had not responded to the question asking whether the commerce information was for the calendar year, fiscal year, or preceding 12 months.

The judge found merit in the Respondent's argument, reasoning that the "business volume information contained in the commerce questionnaire completed by Picrow does not provide an unambiguous basis for the assertion of jurisdiction." Accordingly, the judge determined that the General Counsel had failed to meet his burden to establish jurisdiction over Picrow based on its operations.

Despite this finding, however, the judge concluded that the General Counsel had met his jurisdictional burden with regard to Picrow because Picrow was a member of the AMPTP.[2] The Respondent has cross-excepted to this finding. We disagree with the judge and agree with the Respondent that the General Counsel has failed to show that jurisdiction may be asserted based upon Picrow's membership in the AMPTP.

III. ANALYSIS

The Board has chosen, as a discretionary matter, to limit the exercise of its statutory jurisdiction to cases having a substantial impact on interstate commerce. *Electrical Workers Local 48* (*Kingston Constructors*), 332 NLRB 1492, 1507 (2000), supplemented 333 NLRB 963 (2001), enfd. 345 F.3d 1049 (9th Cir. 2003). Where, as here, a labor organization is alleged to have violated Section 8(b)(1)(A) of the Act, the jurisdictional inquiry focuses on the employer or employers whose operations are allegedly

[1] Picrow is a California corporation with a principal place of business in Los Angeles. The commerce questionnaire indicated that Picrow provided services valued in excess of $50,000 directly to customers located outside of California, purchased and received goods valued in excess of $50,000 from directly outside of California, and purchased and received goods valued in excess of $50,000 from enterprises who received those goods directly from points outside of California.

[2] The General Counsel does not except to the judge's findings in this regard. In its exceptions brief, the General Counsel agrees with the judge's conclusion that the Board has jurisdiction over Picrow through its membership in the AMPTP.

affected by the union's unlawful conduct. Id. Further, where, as here, the employer is engaged in a nonretail business, the Board's standard for asserting jurisdiction is an annual outflow or inflow, direct or indirect, across state lines of goods or services worth at least $50,000. *Siemons Mailing Service*, 122 NLRB 81, 85 (1958). The Board asserts jurisdiction using the most recent calendar or fiscal year preceding the unfair labor practice, or the 12-month period immediately preceding the hearing before the Board. See, e.g., *Reliable Roofing Co*., 246 NLRB 716, 716 fn. 1 (1979). The burden to establish Board jurisdiction rests on the General Counsel. *Laborers Local 1177 (Qualicare-Walsh, Inc.)*, 269 NLRB 746, 746 (1984).

The Board has recognized that jurisdiction over a member of a multiemployer association may be determined based upon the business activities of the association's membership in the aggregate. See *Carpenters Local 102* (*Millwright Employers Assn*.), 317 NLRB 1099, 1101 (1995) (finding that the union's contractual relationship with a multiemployer association made the union's hiring hall one that has an impact on interstate commerce because the aggregated out-of-state purchases of the association's members were sufficient to satisfy the "impact on commerce" test necessary for jurisdiction); *Bufco Corp*., 291 NLRB 1015, 1016 (1988) (jurisdiction was asserted over one of the two entities alleged to be an alter ego of the other based on its membership in a multiemployer group whose combined operations met the "impact on commerce" test), enfd. 899 F.2d 608 (7th Cir. 1990).[3]

Applying this precedent, we agree with the Respondent that the judge erred in finding that jurisdiction over Picrow was established based upon its membership in the AMPTP. To begin, the General Counsel neither pleaded, nor argued to the judge, that Picrow's membership in the AMPTP could serve as a basis for jurisdiction. Moreover, there is no evidence in the record before us of the business activities of AMPTP's membership in the aggregate. The judge *presumed* that the employers in the AMPTP met the commerce requirement because the AMPTP has a significant number of members. But jurisdiction cannot be presumed. Where it is not admitted, it must be proven; the General Counsel bears the burden of proof; and the record is simply devoid of evidence necessary to base jurisdiction on the combined volume of business of AMPTP's members.[4] In sum, the evidence fails to show that the General Counsel met his burden to establish jurisdiction over Picrow in this matter. Accordingly, we dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 31, 2020

John F. Ring,	Chairman
Marvin E. Kaplan,	Member
William J. Emanuel,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Nicole Oliver, Esq., for the General Counsel.
Evan Hudson-Plush, Esq. and *Kelly L. Malloy, Esq. (Cohen, Weiss and Simon, LLP),* of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, ADMINISTRATIVE LAW JUDGE. This case was tried before me in New York, New York, on January 21, 2020. On May 20, 2019, Benjamin Scott Hauck filed a charge in Case No. 02–CB–242132, against SAG–AFTRA New York[1] (SAG NY or the Union). On November 5, 2019, the Regional Director, Region 2, issued a complaint and notice of hearing alleging that on or about May 3, 2019, SAG NY breached its duty of fair representation by refusing to allow Hauck to attend meetings to prepare for collective-bargaining negotiations because Hauck was a financial core nonmember, in violation of Section 8(b)(1)(A) of the Act. SAG NY filed an answer on November 18, 2019, denying the complaint's material allegations.

On the entire record, including my observation of the

[3] See also *Marble Polishers, Machine Operators and Helpers, Local No. 121, AFL–CIO* (*Miami Marble & Tile Company*), 132 NLRB 844, 845 fn. 1 (1961) (asserting jurisdiction over employer that was a member of a multiemployer association, where the evidence established that the association met the Board's jurisdictional requirements); *Federal Stores Division of Spiegel, Inc.*, 91 NLRB 647, 647–648, 659–660 (1950) (asserting jurisdiction based on proof of a qualifying total of business of association members collectively, without requiring proof as to the individual member), enfd. sub nom. *Katz v. NLRB*, 196 F.2d 411 (9th Cir. 1952).

[4] The General Counsel requests that the Board take notice of decisions in which the Board asserted jurisdiction over AMPTP's members, but there is no evidence the employers in the cited decisions remain AMPTP members. The most recent decision finding jurisdiction based on AMPTP's aggregate economic activity is from 1989.

[1] The Respondent Union's full name is Screen Actors Guild–American Federation of Television and Radio Artists New York. (Tr. 35; Jt. Exh. 3(a), p. 1.)

demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel (General Counsel) and SAG NY, I make the following

FINDINGS OF FACT

I. JURISDICTION

General Counsel and SAG NY have stipulated and I find that at all material times Picrow Streaming (Picrow), a California corporation with a principal place of business in Los Angeles and an office and place of business located in Brooklyn, New York, has been engaged in the production of film and television programming. (Jt. Exh. 1.) SAG NY denied knowledge or information sufficient to form a belief as to the complaint's allegation that during the preceding 12 months Picrow provided services valued in excess of $50,000 directly to customers outside of the State of New York. SAG NY also denied that at all material times Picrow has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(c, e).)

General Counsel and SAG NY have further stipulated that Picrow is a member of the Alliance of Motion Picture and Television Producers (AMPTP), an organization comprised of motion picture and television producers operating in various states, which represents its members in negotiating and administering collective-bargaining agreements with labor unions, including SAG NY. (Jt. Exh. 1.) Charging Party Benjamin Scott Hauck testified at the hearing that he had recently performed work for and been paid by Picrow. (Tr. 15.)

General Counsel and SAG NY have stipulated and I find that at all material times, SAG NY has been a labor organization within the meaning of Section 2(5) of the Act. (Jt. Exh. 1.)

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

Screen Actors Guild–American Federation of Radio and Television Artists (SAG) represents 160,000 professional actors, singers, dancers, and recording artists nationwide who perform in television and film productions. (Tr. 35–36.) SAG negotiates collective-bargaining agreements on its members' behalf with the AMPTP, an employer association comprised of approximately 350 employers. (Tr. 36–37.) The collective-bargaining agreement between SAG and the AMPTP is referred to as the TV/Theatrical Basic Agreement. (Tr. 37.) The most recent TV/Theatrical Basic Agreement took effect in 2017 and expires on June 30, 2020. (Tr. 22, 38–39.) SAG's highest governing body is the National Board, which consists of 80 members selected in a biannual election. (Tr. 37.) SAG has approximately 25 locals throughout the country; the instant case involves SAG's New York local. (Tr. 44.)

Charging Party Benjamin Scott Hauck is an actor and was a full member of SAG from 2000 until July 2015, when he resigned and became a financial core member who pays an agency fee. (Tr. 14–16; Jt. Exh. 2; R. Exh. 1.) General Counsel called Hauck as a witness at the hearing. Justin Touretz, SAG's Associate General Counsel, testified on behalf of the Union. (Tr. 35–36.)

B. The Collective Bargaining Process and SAG's Preparation for Contract Negotiations

SAG conducts collective bargaining with respect to multi-employer, national agreements such as the TV/Theatrical Basic Agreement pursuant to Article XI of its Constitution. (Tr. 38–39; Jt. Exh. 3(a), p. 37.) For the negotiation of such agreements, SAG's National Board appoints two committees—a Wages and Working Conditions[2] Committee to develop bargaining proposals, and a Negotiations Committee to conduct negotiations. (Jt. Exh. 3(a), p. 37.) The National Board determines policies and procedures for conducting negotiations, and approves proposals developed by the W&W Committee. Id. SAG locals conduct independent local meetings and provide proposals they have approved to the W&W Committee, which then submits a package of selected proposals to the National Board. (Tr. 40–41, 45.) The National Board then makes the final determination as to which proposals will be pursued in collective bargaining. (Tr. 41.)

As discussed above, the most recent TV/Theatrical Basic Agreement is set to expire on June 30, 2020. On April 13, 2019, the National Board appointed a W&W Committee consisting of 17 members to develop proposals for a successor TV/Theatrical Basic Agreement. (Jt. Exh. 6; Tr. 39–40.) The National Board further established a W&W process in order to address current and anticipated industry trends and solicit potential bargaining proposals. (Jt. Exh. 6, p. 8; Tr. 39–40.) Touretz described the components of the W&W process during his testimony, which are generally undisputed. The process begins with a meeting and presentation by SAG's chief economist to discuss general trends in the film and television industry and the market, their potential impact on production, and the subsequent effect on performer earnings. (Tr. 40–42.) Specific bargaining proposals are not solicited. (Tr. 42.) SAG–NY conducted this meeting, entitled "Outlook for Scripted Dramatic Live Action Entertainment," on May 8, 2019. (Tr. 42; Jt. Exh. 5, p. 1–2.) The next week, SAG NY held a number of New York W&W Committee meetings, during which members could discuss topics and potential proposals with Union staff. (Tr. 43; Jt. Exh. 5, p. 3–4.) SAG also held meetings by caucus for performers focused on certain specific types of work, such as background, stunt work, singing, and dancing. (Tr. 43–44; Jt. Exh. 5, p. 4–5.) During these two sets of meetings, anyone in attendance may suggest a bargaining proposal, and the attendees vote on the proposals raised; proposals selected by vote are added to a report which is forwarded to the National W&W Committee. (Tr. 44.)

Touretz testified that only SAG members, as defined in SAG's Constitution, are permitted to attend SAG NY W&W process meetings. (Tr. 42–43, 53–54; see also R. Exh. 3; Jt. Exh. 3(a), p. 3–5.) In order to establish their membership to attend a meeting, individuals must present a membership card or use the SAG–AFTRA app on their phones. (Tr. 53–54.)

Touretz testified without contradiction that during the 2019

[2] "Wages and Working Conditions" will subsequently be referred to as "W&W"

W&W process, 147 proposals were submitted by SAG's locals to the National W&W Committee, 23 of which originated with SAG NY. (Tr. 45.) Twenty of the 147 proposals submitted were recommended by the National W&W Committee to the National Board, four of which originated with SAG NY. (Tr. 45.) The National Board voted to approve the package of 20 proposals recommended, with a minor change to only 1, and the proposals were provided to the National Negotiating Committee to be presented in collective bargaining. (Tr. 46.) At the time of the hearing in the instant case, negotiations had not yet begun. (Tr. 46.)

Touretz also testified regarding the Union's efforts to ensure that its priorities in bargaining and potential proposals are not disclosed to employers prior to the inception of bargaining itself. The appendix to SAG's Constitution listing membership rules includes a rule stating that Union officers presiding at meetings are

> empowered to invoke a rule of confidentiality with regard to any subject to be discussed which is deemed to be of a confidential nature, on which outside discussion might be detrimental to the best interests of the members of the Union.

(Tr. 46–47; Jt. Exh. 3(a), p. 50, ¶ 10.) Touretz testified that members who participate in any aspect of the W&W process are therefore required to sign a Confidentiality Agreement requiring that they refrain from disclosing information obtained in connection with the Union's W&W process to individuals other than members of the Negotiating Committee, SAG officers, or necessary staff. (Tr. 47–48; R. Exh. 2.) The Confidentiality Agreement further provides that violations could result in the imposition of internal union discipline. (Tr. 49; R. Exh. 2.) Touretz testified that nonmembers are not subject to the confidentiality provision of the membership rules contained in SAG's Constitution. (Tr. 49.) As a result, if nonmembers were permitted to attend W&W process meetings, the only method available to the Union to ensure that nonmembers kept the W&W process confidential would be to enter into nondisclosure agreements enforceable only in court. (Tr. 49–50.) Touretz testified that enforcement of nondisclosure agreements in court would be a more cumbersome and difficult process than the internal Union disciplinary procedures applicable to members. (Tr. 49–50, 56.)

The evidence establishes that nonmembers, as well as members, may submit bargaining proposals through an e-mail address the Union establishes specifically for that purpose. (Tr. 50; R. Exh. 3.) Hauck testified that he submitted approximately 23 e-mails regarding proposals during the W&W process preceding negotiations for the 2017–2020 TV/Theatrical Basic Agreement. (Tr. 21.) The SAG NY public website also contained an e-mail address for both members and nonmembers to "submit proposal recommendations" in connection with the 2019 W&W process, with a deadline for doing so. (Tr. 50–52; R. Exh. 3; Jt. Exh. 5, p. 5.) Touretz testified that he had participated in meetings where proposals submitted via the e-mail address were considered. (Tr. 50.) Touretz stated that the Union does not acknowledge receipt of proposals submitted by e-mail with a confirmation, nor does it notify the individual submitting the proposal by e-mail when their proposal is discussed during the W&W process. (Tr. 54; see also Tr. 22.) While the individual submitting a proposal may include arguments in their e-mail submission for pursuing the proposal in negotiations, if they are not permitted to attend W&W process meetings the e-mail submission is their only opportunity to advocate for the proposal. (Tr. 22, 54.)

C. SAG's Interactions with Hauck in Connection with Preparations for Contract Negotiations

Hauck testified that in April 2019, he saw information on the SAG or SAG NY website announcing the W&W process for upcoming collective-bargaining negotiations with the AMPTP, beginning with a meeting on May 8, 2019, for members in good standing. (Tr. 23–25; GC Exh. 3(a–b).) On May 3, 2019, Hauck sent a letter to SAG NY stating that he was a member of the TV/Theatrical Basic Agreement bargaining unit and wished to attend the May 8, 2019 W&W process meeting. (Tr. 27; Jt. Exh. 4.) Hauck stated that although he was a "member of the Union in good standing" pursuant to the TV/Theatrical Basic Agreement, he was an agency fee payer, and therefore did not have a SAG–AFTRA card and was not permitted to use the SAG–AFTRA app to enter the meeting. (Tr. 27; Jt. Exh. 4.) Hauck asked that he be permitted to attend the meeting without the card or the app. Hauck further asked that the Union provide its rationale for excluding him in the event that he was not permitted to attend. (Jt. Exh. 4.)

Later that day, Jeffrey Bennett, SAG NY's chief deputy general counsel and executive director,[3] responded to Hauck by e-mail, stating, "You are actually a fee paying non-member, and not a member in good standing. Only members may attend our W&W meetings. If you would like to become a member, please let us know." (Jt. Exh. 4.) Two hours later, Hauck wrote to Bennett asking that he reconsider, stating that while he did not meet the criteria for membership pursuant to the Union Constitution, he was a "member in good standing" pursuant to the TV/Theatrical Basic Agreement. (Tr. 28–29; Jt. Exh. 4.) Soon after, Bennett sent Hauck another e-mail stating, "You will not be permitted to attend." (Tr. 29; Jt. Exh. 4.) Touretz testified that Hauck's request to attend the May 8, 2019 meeting was denied because Hauck was not a member of the Union as defined in the SAG Constitution. (Tr. 42–43.)

Hauck testified that although he subsequently became aware of additional W&W process meetings in May and June 2019, via the SAG website, he did not ask to attend them because Bennett had told him that they were limited to members in good standing. (Tr. 30–31.) Hauck also testified that although he had bargaining proposals he wanted to submit to the Union, he did not do so because he did not receive any response to the e-mails he had submitted in connection with the 2017 W&W process. (Tr. 31–32.) In addition, Hauck testified that in May and June 2019, he was not aware of any e-mail address for the submission of proposals for upcoming negotiations with the AMPTP; the e-mail address he had at the time contained the year "2017," so he assumed that it would no longer be effective.[4] (Tr. 32.)

[3] General Counsel and SAG NY stipulated that Bennett is an agent of the Union pursuant to Sec. 2(13) of the Act. (Jt. Exh. 1.)

[4] As discussed above, the SAG website materials regarding the 2019 W&W process meetings contained an e-mail address for the submission of proposal recommendations. (R. Exh. 3; Jt. Exh. 5, p. 5.)

III. DECISION AND ANALYSIS

A. Jurisdiction

The Board's jurisdiction to hear and decide cases arising under the National Labor Relations Act is engendered by an underlying labor dispute which burdens or obstructs interstate commerce. See, e.g., *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492, 1507 (2000), citing *NLRB v. Fainblatt*, 306 U.S. 601 (1939). Although this standard is "extremely broad," the Board as a discretionary matter has limited its jurisdiction to disputes which have a "substantial" impact on interstate commerce by establishing minimum interstate "inflow" and "outflow" volumes which vary with the nature of the business involved. See generally, *Siemons Mailing Service*, 122 NLRB 81 (1959). Where a labor organization is alleged to have violated Section 8(b)(1)(A) of the Act, the Board's jurisdiction is contingent upon application of the discretionary jurisdictional standards to the employer or employers whose operations are allegedly affected by the Union's unlawful conduct. *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB at 1507; see also *Carpenters Local 102 (Millwright Employers Assn.)*, 317 NLRB 1099, 1101 (1995). When the employer is engaged in a nonretail business, the employer's activities must involve an "inflow" or "outflow" of goods or services worth more than $50,000 across state lines, either "directly" or "indirectly." *Siemons Mailing Service*, 122 NLRB at 85. The $50,000 figure is "expressed in annual terms," based upon "the most recent calendar or fiscal year or on the figures of the immediately preceding 12-month period." Outline of Law and Procedure in Representation Cases, § 1–606; see also *Siemons Mailing Service*, 122 NLRB at 85–86; *Acme Equipment Co.*, 102 NLRB 153, 161–162 (1953). General Counsel bears the burden to establish the agency's jurisdiction. See, e.g., *Construction and General Laborers Local 1177 (Qualicare-Walsh, Inc.)*, 269 NLRB 746 (1984).

SAG NY contends that General Counsel has not established jurisdiction in this matter. In particular, SAG NY asserts that General Counsel's evidence for establishing that Picrow meets the discretionary standard for establishing jurisdiction is inadequate. General Counsel and SAG NY stipulated to the authenticity and admissibility of a commerce questionnaire submitted by Picrow in a previous case, dated February 4, 2019, and stipulated to the truth of the assertions the commerce questionnaire contains. (Jt. Exh. 1, Exh. A.) The commerce questionnaire states that Picrow provided services valued in excess of $50,000 directly to customers located outside of California, purchased and received goods valued in excess of $50,00 from directly outside of California, and purchased and received goods valued in excess of $50,000 from enterprises who received those goods directly from points outside of California. (Jt. Exh. 1, Exh. A.) However, SAG NY contends that because the questionnaire is dated February 4, 2019, it does not cover the 12 months prior to issuance of the complaint in this case on November 5, 2019. In addition, SAG NY points out that when completing the commerce questionnaire, Picrow did not respond to Item No. 9, regarding whether the commerce information provided pertains to the "most recent" calendar year, 12-month period, or fiscal year. As a result, SAG NY argues that the questionnaire does not provide adequate proof that Picrow's business activities satisfied the discretionary standard during the time period relevant for establishing jurisdiction.[5]

The business volume information contained in the commerce questionnaire completed by Picrow does not provide an unambiguous basis for the assertion of jurisdiction. The Board has stated that "the jurisdictional criteria expressed in terms of annual dollar volume of business do not literally require evidentiary data respecting any certain 12-month period of operation." *Composite Energy Management Systems, Inc.*, 332 NLRB 420, 421 (2000); see also *J & S Drywall*, 303 NLRB 24, 24 fn. 2, 29 (1991), aff'd. in relevant part, 974 F.2d 1000, 1002 (8th Cir. 1992); *Reliable Roofing Co., Inc.*, 246 NLRB 716 fn. 1 (1979), stayed on other grounds 250 NLRB 456 (1980). Thus, the Board has found that jurisdiction may be asserted based upon the fiscal year, calendar year, or 12-month period preceding the unfair labor practices alleged, "as well as the most recent calendar year preceding the year of trial and decision." *Composite Energy Management Systems, Inc.*, 332 NLRB at 421; see also *J & S Drywall*, 303 NLRB at 29 and 974 F.2d at 1002; *Reliable Roofing Co., Inc.*, 246 NLRB at 716 fn. 1. However, in such cases the Board has been able to identify a specific basis—whether fiscal year, calendar year, or 12-month period—for which the evidence involving the relevant volume of business is applicable. See, e.g., *J & S Drywall*, 303 NLRB at 29–30 (using 12-month period); *Reliable Roofing Co., Inc.*, 246 NLRB at 716 fn. 1 (using fiscal year). Here, the only evidence submitted by General Counsel to establish the volume of business performed by Picrow is the February 4, 2019 commerce questionnaire, which contains no information regarding the specific time frame for the volume of business indicated.[6] As a result, while the record establishes a volume of business sufficient to assert jurisdiction had a relevant annual basis been identified, there was no evidence introduced at the hearing to establish an annual basis upon which to evaluate the volume of business.

However, I find that jurisdiction over Picrow may also be established based upon the its membership in the AMPTP, a multiemployer association which bargains with SAG NY and other entertainment industry unions on its members' behalf. In the commerce questionnaire, Picrow states that it is a member of the AMPTP, and in their stipulation entered into evidence at the hearing, General Counsel and SAG NY agreed that Picrow "is a member of the AMPTP and has authorized the AMPTP to represent it in negotiating and administering collective-bargaining agreements." (Jt. Exh. 1, Exh. A and at ¶ 3; see also GC Exh.

[5] General Counsel states in her posthearing brief that Picrow "provides services valued in excess of $50,000 *each year* to customers directly outside the State of New York" (emphasis added), but does not address the issue further. (Posthearing brief at p. 2, fn. 4.)

[6] SAG-NY also objects to General Counsel's relying upon the commerce questionnaire on the grounds that it was submitted in connection with a different charge. However, the Board has relied upon materials which originated in connection with an earlier case to establish jurisdiction, so long as they are admitted into the record in the case before it. See *Midland Rubbish Removal Co.*, 298 NLRB 991 (1990).

1(c), ¶ 2(d).) The Board has long held that jurisdiction over a member of a multi-employer association may be evaluated based upon the business activities of the association's membership in the aggregate. See *Carpenters Local 102 (Millwright Employers Ass'n.)*, 317 NLRB at 1101; see also *Stack Electric*, 290 NLRB 575, 576–577 (1988); *Federal Stores Division of Spiegel, Inc.*, 91 NLRB 647, 647–648, 659–660 (1950), enf'd. 196 F.2d 411 (9th Cir. 1952) (asserting jurisdiction over a Respondent based on "the fact that its labor relations were carried on with respect to an appropriate bargaining unit consisting of the employees of a *number* of…enterprises, including at least one…which is clearly of a type and size over which the Board customarily exercises jurisdiction" (emphasis in original)). The Board has stated that employers in such cases, "[b]y throwing in their lot with the multiemployer association, at least for the purposes of negotiating a collective bargaining agreement…joined forces with a group in an activity that has an indisputable impact on commerce so far as the Act. . . is concerned." *Stack Electric*, 290 NLRB at 577. Here, Touretz testified that the AMPTP is a multi-employer association comprised of approximately 350 members, with which SAG bargains in order to establish terms and conditions of employment for the Union's 160,000 members who work in the television and motion picture industries. Hauck, for example, testified that in addition to Picrow, he had worked for Universal Television and Jay Squared Productions pursuant to the TV/Theatrical Basic Agreement between the AMPTP and SAG. Tr. 15, 20. The evidence overall therefore establishes that the AMPTP "has an indisputable impact on commerce" pursuant to the applicable caselaw discussed above. As a result, jurisdiction may be asserted here based upon Picrow's membership in the AMPTP. See *Federal Stores*, 91 NLRB at 660.

B. SAG NY's Refusal to Permit Hauck to Attend the May 8, 2019 W&W Process Meeting

A collective-bargaining representative is required "to represent all members of the bargaining unit, irrespective of their membership in the union." *American Postal Workers (Postal Service)*, 300 NLRB 34 (1990), citing *Machinists Local 697 (Canfield Rubber)*, 223 NLRB 832, 834 (1976). Therefore, Section 8(b)(1)(A) of the Act prohibits as "discriminatory" union conduct which "effectively den[ies] to unit members fundamental rights of union representation," including "access to grievance procedures and exclusive union hiring halls." *American Postal Workers (Postal Service)*, 300 NLRB at 34. In the context of collective-bargaining negotiations, the Board has held that nonmembers may be excluded from contract ratification votes and procedures, as ratification is "an internal union matter properly determinable by union members alone." *Branch 600, National Assn. of Letter Carriers*, 232 NLRB 263 (1977), enf'd. 595 F.2d 808 (D.C. Cir. 1979). So long as the union does not delegate to its membership the overall responsibility "as exclusive bargaining agent to formulate the employees' position on terms and conditions of employment," exclusion of nonmembers from the process does not violate Section 8(b)(a)(1)(A). *Branch 6000, National Assn. of Letter Carriers v. NLRB*, 595 F.2d at 812.

Thus, the Board has held that a union may generally exclude nonmembers from meetings to formulate the union's position with respect to its dealings with an employer regarding terms and conditions of employment for bargaining unit employees. See *American Postal Workers (Postal Service)*, 300 NLRB at 34–35; see also *Branch 6000, National Assn. of Letter Carriers v. NLRB*, 595 F.2d at 812. In *American Postal Workers (Postal Service)*, the union excluded nonmembers from a meeting to discuss the employer's "planned changes" in "special delivery routing," including the possible elimination of delivery routes and bargaining unit work, and the union's response. 300 NLRB at 34, 38–39. The union excluded two nonmembers from the meeting based upon a policy that the union did not conduct meetings on union property with nonmembers in attendance. Id. at 34, 39. The ALJ found that the exclusion of nonmembers from the meeting violated Section 8(b)(1)(A), but the Board reversed. Id. at 34–35. Noting that no grievance was filed a result of the meeting, the Board held that the union's "exclusion of nonmember unit employees from meetings at which possible reactions to job issues are discussed" did not implicate any "right fundamental to union representation." Id. at 34.

In doing so, the Board distinguished *Boilermakers Local 302 (Henders Boiler)*, 300 NLRB 28 (1990), and *Branch 600, National Assn. of Letter Carriers*, 232 NLRB 263 (1977), enf'd. 595 F.2d 808 (D.C. Cir. 1979). *American Postal Workers (Postal Service)*, 300 NLRB at 34 fn. 3. In *Boilermakers Local 302 (Henders Boiler)* and *Branch 600, National Assn. of Letter Carriers*, the Board found that the union violated Section 8(b)(1)(A) by excluding nonmembers from polls taken to select among explicitly articulated options involving a specific term and condition of employment affecting all of the employees in the bargaining unit. See *Boilermakers Local 302 (Henders Boiler)*, 300 NLRB at 28, 29–30, 32 (union conducted a poll of members only when selecting Good Friday for its yearly floating holiday); *Branch 600, National Assn. of Letter Carriers*, 232 NLRB at 263 (union excluded nonmembers from an election to determine whether bargaining unit members would have fixed or rotating days off). The Board reasoned that because the selection process involved specifically enumerated terms and conditions of employment, the poll and election "became a substitute for negotiations," eliminating "the union representation element, and with it the propriety of limiting to union members a voice in the choice." *Branch 600, National Assn. of Letter Carriers*, 232 NLRB at 263 fn. 1; see also *Boilermakers Local 302 (Henders Boiler)*, 300 NLRB at 28 fn. 1; *American Postal Workers (Postal Service)*, 300 NLRB at 34 fn. 3.

The parties do not dispute that the instant case is controlled by the Board's decisions in *American Postal Workers (Postal Service)*, *Boilermakers Local 302 (Henders Boiler)*, and *Branch 600, National Assn. of Letter Carriers*. As General Counsel admits, these precedents require dismissal of the instant charge. (Posthearing brief at 8.) 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'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. No vote regarding any specifically enumerated term or condition of employment was contemplated at or occurred during the May 8, 2019

W&W process meeting, such that the events of the meeting constituted "a substitute for negotiations." See *Branch 6000, National Assn. of Letter Carriers v. NLRB*, 595 F.2d at 812 (distinguishing election to select among two specific options for days off in that case from "a poll of the union membership to ascertain its views prior to formulation of the negotiating posture for the bargaining unit"). Indeed, no specific bargaining proposals were solicited or discussed at all. As a result, pursuant to *American Postal Workers (Postal Service)*, SAG NY 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.

General Counsel proceeds in her posthearing brief at pages 8 through17 to offer various arguments for the Board's overruling *American Postal Workers (Postal Service)* and the related cases discussed above.[7] However, as an administrative law judge, I am required to apply existing Board precedent that has not been overruled by the Board itself or by the Supreme Court. See *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Here that precedent requires that the complaint be dismissed.

CONCLUSIONS OF LAW

1. SAG–AFTRA New York is a labor organization within the meaning of Section 2(5) of the Act.

2. SAG–AFTRA New York has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended

ORDER[8]

The complaint is dismissed.

Dated, Washington, D.C. April 22, 2020

[7] The charge in this case was initially dismissed by the Regional Director on August 27, 2019. (Jt. Exh. 7(a).) On September 7, 2019, Hauck appealed, and on September 27, 2019, the Regional Director revoked his dismissal and stated that certain issues involved must be submitted to the Division of Advice for guidance. (Jt. Exh. 7(b).) Subsequently, on November 5, 2019, the complaint issued.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.