

Ben Hauck

(917) 860-6861 · ben.hauck@yahoo.com

400 Central Park West #19J

New York, NY 10025

benhauck.com

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Office of Appeals
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Dear Sir/Madam:

With respect to Case 02-CB-242132, the Board's decision dated 31 August 2020¹ ordered dismissal of the complaint because the General Counsel did not establish jurisdiction. The Charging Party herein respectfully requests reconsideration of the Board's dismissal for the following reasons, demonstrative of material errors of fact.

I. BACKGROUND

In dismissing the complaint, the three-member panel whose authority was delegated by the Board cited that the administrative law judge wrongfully made a presumption about jurisdiction in the instant case, in determining the membership of employer Picrow in the multi-employer association AMPTP served as an appropriate basis for jurisdiction. The decision explains (emphasis in the original):

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.²

¹ Cf. *SAG-AFTRA New York* 370 NLRB No. 14.

² *Ibid.* p. 2.

II. THE JUDGE DID NOT, AS DECIDED BY THE PANEL, PRESUME THAT THE AMPTP MET THE COMMERCE REQUIREMENT SIMPLY BECAUSE THE AMPTP HAS A SIGNIFICANT NUMBER OF MEMBERS

With respect to the material facts around the administrative law judge's determinations, the panel grossly simplified the basis of the judge's determination of jurisdiction, overlooking the careful consideration and wording of the judge in her determination of jurisdiction.

The judge does not determine that the AMPTP met the commerce requirement simply because the AMPTP has a significant number of members. Instead, the judge explains clearly, "The evidence overall therefore establishes that the AMPTP 'has an indisputable impact on commerce' pursuant to the applicable caselaw [...]"³ That is, the judge consulted the evidence in the record "overall," as well as caselaw, to establish that the AMPTP had an impact on commerce meaningful to the assertion of jurisdiction. In no place does the judge assert that merely because the AMPTP has a "significant" number of members, thereby jurisdiction is asserted.

Furthermore, the judge explains that "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."⁴ The judge's consideration of jurisdiction, as evidenced in this passage, was not so myopic as to consider only the number of employer-members of the AMPTP. In addition to the employer-membership size of the AMPTP in considering jurisdiction, the judge also considered AMPTP membership's aggregate business activities, which were evident in part a) by the stipulation that the AMPTP negotiates and administers collective bargaining agreements for its employer-members situated in several States⁵, b) by the magnitude of SAG-AFTRA's bargaining unit, and c) by the "national scope" of the AMPTP's TV/Theatrical Agreements with SAG-AFTRA. The appreciable aggregate business activities of the AMPTP are established in the record by Touretz's assertions that the AMPTP

³ *Ibid.* p. 6.

⁴ *Ibid.* p. 6.

⁵ The stipulation in the complaint to which the Respondent admits, 2(a), exactly reads, "At all material times, Alliance of Motion and Television Producers ("the AMTP" [sic]) has 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."

and SAG-AFTRA negotiate contracts that are “national in scope,”⁶ and that SAG-AFTRA represents “160,000 members nationwide.”⁷

In determining jurisdiction, the judge considered the size of the AMPTP’s employer-membership *in tandem with* the size of SAG-AFTRA’s bargaining unit, not merely the size of AMPTP’s employer-membership alone.⁸ The judge also considered that the Charging Party testified to working for other employers within AMPTP’s employer-membership, not simply employer-member Picrow.⁹ Under all such considerations, the judge arrived at her correct *perception* – not a presumption – of Board jurisdiction.

One could not reasonably conclude as the three-member panel did that, based on the overall recorded evidence and based on caselaw, the AMPTP did not meet the commerce requirement to establish jurisdiction. Nor could one reasonably conclude as the three-member panel did that the judge merely “presumed” the AMPTP met the commerce requirement only because the AMPTP has a significant number of members. The judge did not presume. *The evidence established jurisdiction, not the judge.* Repeating the judge’s statement, “The evidence overall therefore establishes that the AMPTP ‘has an indisputable impact on commerce’ [...]”

III. JOINING FORCES WITH OTHER EMPLOYERS IN A MULTI-EMPLOYER ASSOCIATION MEETS THE “IMPACT” STANDARD FOR JURISDICTION

That said, the Board does not require evidence on the record of the business activities of multi-employer associations in order to find jurisdiction. Instead, more generally, the Board needs *evidence of an indisputable impact on commerce* by the employer or its multi-employer association in order to determine jurisdiction. Such evidence is in the instant case.

It is the joining of employer forces within the multi-employer association, as Picrow has done with other employer-members in the AMPTP, that creates the “indisputable impact on commerce” and thereby jurisdiction as decided by the Board in *Stack Electric*, 290 NLRB 575 (1988)¹⁰. The judge in *Carpenters Local 102*¹¹, a case cited by the administrative law judge in the instant case, writes, referencing *Stack Electric*:

⁶ Cf. Transcript from the hearing, p. 39, lines 1-2.

⁷ Cf. Transcript from the hearing, p. 35, line 23.

⁸ Cf. *SAG-AFTRA New York* 370 NLRB No. 14. p. 6.

⁹ *Ibid.* p. 6.

¹⁰ NB. In *Stack Electric*, the Board explains: “By throwing in their lot with the multiemployer association, at least for purposes of negotiating a collective-bargaining agreement, the Respondents joined forces with a group in an activity that has an indisputable impact on commerce so far as the Act we administer is concerned.”

¹¹ Cf. *Carpenters Local 102 (Millwright Employers Assn.)* 317 NLRB 1099.

But for purposes of a jurisdictional analysis, the Board has more recently held that the combined operations of employers who have assigned their bargaining rights to a multiemployer association will justify asserting jurisdiction over a single employer who has delegated bargaining rights to the association, without regard to whether or not the employees of the employer-members of the association comprise an appropriate multiemployer unit, and even when the single employer targeted by the complaint does not itself satisfy the “impact” test.

The judge in *Carpenters Local 102* plainly states how even one employer-member of the association could fail to satisfy the impact test but still incite Board jurisdiction. Extending this reasoning, all employer-members may solely fail themselves individually to satisfy the impact test, but by virtue of joining forces with other employers within a multi-employer association, the impact test is satisfied.

In the instant case, that Picrow’s questionnaire failed to disclose the time period for its commerce information, and that by such failing there is no jurisdiction, does not mean that the instant case fails a test for Board jurisdiction. Instead, other valid considerations – namely, that Picrow had joined with other employers under the AMPTP and by that joining indisputably had an impact upon commerce – establish jurisdiction and overcome the failing of Picrow to properly disclose information in its questionnaire.

IV. CONCLUSION

The Charging Party appreciates your reconsideration of the decision in the instant case to find that the facts and caselaw established jurisdiction, not the administrative law judge, contrary to the grossly simplified characterizations of the judge’s actions by the three-member panel. By such reconsideration, the Board may then be able to decide on the unfair labor practices alleged against SAG-AFTRA New York for failing to permit the Charging Party, a nonmember, to attend wages and working condition meetings.

Sincerely,

Ben Hauck