

Ben Hauck

(917) 860-6861 · ben.hauck@yahoo.com

400 Central Park West #19J

New York, NY 10025

benhauck.com

September 26, 2020

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, which the Board dismissed on 31 August 2020¹, the Charging Party submitted a request (“motion”) for reconsideration on 2 September 2020, for reasons “demonstrative of material errors of fact” in the Board’s decision. The Respondent SAG-AFTRA New York filed on 23 September 2020 an opposition to the Charging Party’s motion for reconsideration. The Charging Party herein provides a reply to points in the Respondent’s opposition.

I. “EXTRAORDINARY CIRCUMSTANCES”

In challenging the Charging Party’s motion for reconsideration, the Respondent states in its opposition that the Charging Party “identifies no ‘extraordinary circumstance’ meriting a changed result,” and by such reason asserts the motion for reconsideration should be denied. The Respondent leans on Section 102.48(c)(1) of the Board’s Rules and Regulations. That subsection (c) reads:

*Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.*²

With respect to motions specifically for reconsideration, sub-subsection (1) begins:

A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on.

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

² *Ibid.* p. 2.

With respect to this Section 102.48, subsection (c) grants permission to parties to move for reconsideration in the event of extraordinary circumstances. This subsection does not make requirements of parties to make certain statements or declarations with respect to “extraordinary circumstance.” Rather, it is sub-subsection (1) that makes requirements of parties to make certain statements or declaration in their motions – namely, statements “with particularity” about material errors.

The Charging Party has followed the plain meaning of Section 102.48(c)(1) in submitting the 2 September 2020 motion for reconsideration, by submitting a request for reconsideration that is because of an extraordinary circumstance, i.e., that the Board’s decision in the instant case demonstrated material errors of fact. Had no extraordinary circumstance existed, explicit or otherwise, the Charging Party would not have been permitted by the Board to submit the motion for reconsideration. That the request for reconsideration was not explicated as an “extraordinary circumstance” is not required by subsection (c). The Board did not reject the motion for reconsideration upon the Charging Party’s submission of it; rather, the Board permitted its submission, pursuant to subsection (c). The Respondent’s opposition to the motion for consideration because it “identifies no ‘extraordinary circumstance’” has no merit.

II. IMPACT TEST FOR JURISDICTION

In its opposition, the Respondent asserts that the Charging Party in the motion for reconsideration “ignores” that “the record lacks any evidence that any employer in the AMPTP (or the employers in aggregate) have a least \$50,000 or interstate inflow or outflow.” The Respondent colors that detail as “the *only* salient fact” that the Board should mind in reconsidering the instant case. The Respondent also leans on *Stack Electric*³ and *Carpenters Local 102*⁴, contending that in those cases, the General Counsel submitted evidence of \$50,000 in inflow or outflow, so to the Respondent, those cases are supportive of a denial of the motion for reconsideration.

In the motion for consideration, the Charging Party asserted “the Board does not require evidence on the record of the business activities of multi-employer associations in order to find jurisdiction.” The Charging Party continued, “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.”

³ Cf. *Stack Electric* 290 NLRB 575 (1988).

⁴ Cf. *Carpenters Local 102 (Millwright Employers Assn.)* 317 NLRB 1099 (1995).

The Charging Party pointed to the judge in *Carpenters Local 102*, who said that the Board may assert jurisdiction over employers in a multi-employer association “even when the single employer targeted by the complaint does not itself satisfy the ‘impact’ test.” That judge referenced the judge in *Stack Electric*, who wrote of the four Respondents in that latter case: “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.” The judge in the instant case referred to these two cases in her decision, as well as to *Federal Stores Division of Spiegel, Inc.*⁵ In that case, the judge wrote:

The point made by the General Counsel is that even if the Board might have some doubt as to whether the Respondent Lee’s, viewed in isolation, is the type of business enterprise over which it would wish to assert jurisdiction, the fact that its labor relations were carried on with respect to an appropriate bargaining unit consisting of the employees of *a number* of retail enterprises, including at least one (the Respondent Federal) which is clearly of a type and size over which which [sic] the Board customarily exercises jurisdiction, should persuade the Board not to decline jurisdiction in this case over the Respondent Lee’s. I agree with the position of the General Counsel.

In these three cases, on which the judge in the instant case leans, the Board exercises jurisdiction based on facts that are different than the “*only salient fact*” on which the Respondent want to solely focus. In the event of single employers *joining* with other employers to bargain, the Board has exercised jurisdiction over single employers, independent of whether those employers themselves individually did not satisfy standards like the “impact test” as in the case of *Carpenters Local 102*. It is the employer *joining* a bargaining unit (i.e., a multi-employer association) the triggers board jurisdiction, *even when that employer might not meet the nonretail commerce requirement*.

In the instant case, that Picrow failed to submit in its questionnaire the timeframe for its inflow or outflow does not altogether invalidate the discretionary exercise of Board jurisdiction in the instant case. Other considerations, as the judge rightly considered guided by *Stack Electric*, *Carpenters Local 102*, and *Federal Stores Division of Spiegel, Inc.*, played a *more “salient”* role in determining jurisdiction than the inflow/outflow commerce information. Namely, that Picrow, as stipulated, was an employer-member of the AMPTP, a multi-employer association, was more salient information for determining jurisdiction than the information, or lack of information, on Picrow’s questionnaire. The judge saw that fact of employer-membership in the AMPTP, as

⁵ Cf. *Federal Stores Division of Spiegel, Inc.* 91 NLRB 647 (1950).

well as other facts – like the national scope of the AMPTP’s bargaining with the Respondent and the size of the Respondent’s national bargaining unit (approximately 160,000 members nationally) – and rightly saw that those facts established Board jurisdiction over Picrow in the instant case. The Respondent’s argument to deny the motion for reconsideration ignores the non-commercial exercises of Board jurisdiction, and for such reason is unpersuasive.

III. CONCLUSION

For these reasons, the Board should not oppose the Charging Party’s motion for reconsideration. By such reconsideration, the Board may then be able to decide on the unfair labor practices alleged against the Respondent SAG-AFTRA New York for failing to permit the Charging Party, a nonmember, to attend wages and working condition meetings.

Sincerely,

Ben Hauck

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September 2020, a true and correct copy of the foregoing Request of Reconsideration was served by United States First-Class Mail on:

EVAN HUDSON-PLUSH, ESQ.
COHEN, WEISS AND SIMON LLP
900 THIRD AVENUE, 21ST FLOOR
NEW YORK, NY 10022

JEFFREY BENNETT
EXECUTIVE DIRECTOR
SAG-AFTRA NEW YORK
1900 BROADWAY 5TH FLOOR
NEW YORK, NY 10023

JOHN J. WALSH, JR.
REGIONAL DIRECTOR
REGION 02, NEW YORK, NEW YORK
NATIONAL LABOR RELATIONS BOARD
26 FEDERAL PLAZA SUITE 3614
NEW YORK, NY 10278-3699

ROBERT GIANNASI
CHIEF ADMINISTRATIVE LAW JUDGE
DC - DIVISION OF JUDGES
1015 HALF STREET SE
WASHINGTON, DC 20570

Benjamin S. Hauck
Charging Party