

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Local 646 (Parker Playhouse) and Beverly Safier, Case 12-CB-2509

27 June 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 6 December 1983 Administrative Law Judge John M. Dyer issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

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,¹ and conclusions and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by refusing to refer Beverly Safier for employment from its hiring hall after February 1982 for arbitrary and invidious reasons, unrelated to any objective standards for referral.

The judge directed the Respondent to cease and desist from its refusal to refer Safier and further directed that the Respondent establish a written referral list and written standards by which its referral system is to operate. Contrary to the judge, we do not find appropriate that portion of his proposed remedy which would require that the Respondent create written referral lists and standards for the operation of its hiring hall. While the Board has stated that an exclusive hiring hall must be operated on the basis of objective criteria and standards, it is clear that the absence of written standards is not itself violative of the Act but is one factor to be considered in determining whether a hiring hall has been operated objectively. *Laborers Local 394 (Building Contractors Assn. of New Jersey)*, 247 NLRB 97 fn. 2 (1980). Under the circumstances, we shall allow the Respondent an opportunity to fashion criteria and standards which

¹ In sec. II, B of his decision, the judge, in addressing the Respondent's contention that Safier was not referred for nonpayment of assessments, stated, "There is no proof that Mrs. Safier was ever informed she owed the Respondent any fees" To the extent the judge was discussing record evidence we note that the Respondent's bookkeeper and secretary testified that the Union notified Safier on several occasions of the assessments owed by her. Nevertheless, we agree with the judge's finding that the Respondent's refusal to refer Safier was not caused by her nonpayment of fees, and we adopt the remainder of the judge's analysis on this point.

conform to the requirements of the Act and shall modify the remedy and recommended Order to require that the Respondent establish objective criteria and standards for the referral of employees without requiring that such criteria and standards be in writing.²

In addition, as part of his proposed remedy, the judge recommended that the Respondent be required to make Safier whole by paying an amount of back wages equal to the sum of referred work performed by "extra" employees from 11 March 1982 until the Respondent reinstates Safier to a legitimate referral list, divided by the number of "extra" employees who worked during such interim period. The General Counsel filed exceptions to the judge's proposed backpay formula, and we find merit in these exceptions. Thus, while the record establishes that the Respondent's president classifies employees as "regulars" or "extras" depending on whether they rely exclusively on the operation of the hiring hall for their livelihood, there is no evidence that such classifications are used in determining which employees will be referred to available work. Accordingly, we do not believe that the proposed formula can reliably be used to determine the back wages owed Safier, and we shall modify the recommended Order to provide for a determination of Safier's lost wages in the compliance stage of this proceeding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Local 646, Miami, Florida, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1.

"1. Cease and desist from

"(a) Refusing to refer Beverly Safier for employment.

"(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(a).

² Contrary to his colleagues, Member Hunter would adopt this portion of the judge's proposed remedy. In Member Hunter's view, a requirement that the Respondent establish written criteria and standards for referral is a reasonable exercise of the Board's remedial authority, where, as here, the absence of such criteria and standards is a factor supporting the Board's finding of a violation.

“(a) Establish and maintain objective criteria and standards for the referral of employees from its hiring hall.”

3. Substitute the following for paragraph 2(b).

“(b) Make Beverly Safier whole for the loss of employment suffered by her as a result of its failure to refer her for employment in a manner to be determined in the compliance stage of this proceeding.”

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL establish and maintain, on a nondiscriminatory basis, objective standards and criteria by which the referral system is to operate.

WE WILL make Beverly Safier whole for the loss of employment she suffered by our refusal to refer her for employment.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL 646

DECISION

STATEMENT OF THE CASE

JOHN M. DYER, Administrative Law Judge. Beverly Safier filed a charge on April 8, 1983, against International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Local 646 (Parker Playhouse), herein variously called Respondent, Local 646, or IATSE, on which the Regional Director for Region 12 issued a complaint on May 20, 1983, alleging that Respondent violated Section 8(b)(1)(A) and (2) of the Act. Respondent's timely answer, as later amended, admitted the commerce allegations, the status of the Union, and that Paul Robinson was Local 646's president and acted as its business agent. It was also admitted that Respondent had contracts containing exclusive referral clauses with several employers including Parker Playhouse and Sunrise Theatre. Respondent denied that it had failed to register or refer Safier for employment for irrelevant or invidious reasons and stated it debarred her from its re-

ferred service because she was guilty of serious job misconduct after which she failed to pay her assessments. The parties filed briefs in early November 1983 which were considered.

On the entire record in this case, including the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Maccabee Investments, Inc. is a Florida corporation engaged in the business of operating theatres, and has gross revenues in excess of \$500,000 and purchases products valued in excess of \$5000, directly from firms outside the State of Florida. Respondent admits and I find that Maccabee Investments, Inc., with whom Respondent has a contract with an exclusive referral clause, is an employer within the meaning of the Act. Respondent admits and I find that it is a labor organization within the meaning of the Act.

II. THE UNFAIR LABOR PRACTICES

A. Background and Facts

Local 646, located in Broward County, Florida, is a mixed local, which means it contains projectionists, stagehands, sound and lighting technicians, and wardrobe personnel. President Robinson testified there were a total of 12-14 wardrobe persons who were referred by the Union to wardrobe and dresser jobs and all but 3 or 4 were union members. Some of these persons depend on this work for their livelihood and were considered regulars. Others such as Safier, who with her family had a costume business as her principal support, were considered as extras and three or four of these extras were not union members. All persons referred through the union hall agree in writing to pay the Union 3 percent of their gross pay as a referral fee. Reports of the earnings of all referred employees are made to the Union, and its financial secretary records such information on a form for each employee and calculates the assessment amounts owed.

Robinson testified that the referral system had no written rules and that there was no written referral list. Some of the employers had permanent staff people, and when employers requested more people he would select who to refer on the basis of trying to rotate the work and equalize earnings. If persons were requested by name, he would refer them if they were available.

Robinson testified that getting the four employers in Broward County to agree to contracts with the referral clauses had been extremely difficult and it had been managed by convincing the employers that the Union would supply competent people. For that reason Robinson said he did not want to refer anyone who would not behave properly on the job and where someone was accused of misconduct he would suspend the individual until he had a chance to investigate the situation and talk to the accused person.

There was testimony that some employees had been suspended from the Union for nonpayment of their as-

assessments and union dues. Robinson testified that if any employee was 6 months in arrears in paying his assessments he was automatically removed from the referral list. He named several persons whom he said had been suspended.

Respondent's Exhibit 2 is the Union's payment record for Safier. It shows that she was first referred for work on February 26, 1980, and from then until February 6, 1981, worked on five jobs and owed assessments for that period of almost a year, totaling \$71.09. On February 5, 1981, she paid \$75 to the Union for her assessments. Thereafter she worked on three jobs through December 1981 and at that time owed the Union assessments of \$48.22. Safier was referred to a job as a dresser for a production of the King and I at the Sunrise Theatre on January 17, 1982, and worked there through February 14, 1982. On January 29, 1982, she gave the secretary and bookkeeper of the Union, Bonnie Landa, a money order for \$50 for her past due assessments.

According to Respondent's Exhibit 2, Safier owes the Union assessments totaling \$53.50 for that last employment and she denies it stating that she had made another payment. There is no dispute that Safier owed assessments for a year or so on two occasions and continued to be referred to jobs by the union.

Respondent contended that nonpayment of her assessments was one of the reasons for the Union's refusal to refer Safier to jobs in its geographical area. For reasons which will be stated later, I find that such is not true but is in the nature of an afterthought to the central reason for her debarment.

In his opening statement counsel for Respondent stated Safier had been guilty of serious misconduct on the job at two different employers in a year's time and it was for this primary reason that Union President Robinson removed Safier from the referral procedure about mid-February 1982.

Respondent offered no competent testimony about any misconduct of Safier at any location other than the Sunrise Theatre during the King and I production.

Safier testified that after her employment at the Sunrise Theatre she heard nothing from the Union concerning her work there or about owing fees and had not been called for any work. She testified that she called the Union and spoke to either Robinson or Landa several times a month between February and September and was told that work was slow and nothing was available. In September 1982 while speaking to Robinson she asked if there was any reason she was not being referred and Robinson replied that the wardrobe personnel did not want to work with her. Robinson said he did not recall talking to Safier over the phone but did not deny that this conversation occurred. I find that the conversation occurred as Safier testified. As may be noted, Robinson's testimony was not consistent with independent facts on a number of occasions.

She called Robinson some days later and asked for an executive board meeting to straighten the matter out and he said he would set it up. Robinson stated he had a number of conversations with Mike Safier, a union member, about setting up an executive board meeting for

Beverly Safier and said one was finally set around January 1983.

Robinson admitted that he never talked to Safier about her alleged misconduct at the Sunrise Theatre, despite his testimony that such was his procedure before barring someone from work. He said he talked to six or seven people who had worked at the Sunrise Theatre and at that point decided to remove Safier from his work referral list until they could have a hearing on it. He did not testify about trying to set up a hearing until being requested to do so the following September. Robinson said he told Mike Safier that his wife had been sewing in the hall and caused a crowd to congregate and it had been necessary to have the police clear the way. He also said she had not been at her proper station.

Robinson conducted the February meeting. The wardrobe personnel were there along with some members of the executive board. Safier said she wanted to know why she was not working and why the wardrobe personnel did not want to work with her. One of the dressers, who also owned a costume shop, said he heard she had made a derogatory remark about his costumes. She denied doing so. Safier said there was a lot of talk and remembered only that one of the wardrobe persons said that Safier would work at anything and Mary Soule, a permanent employee at Sunrise Theatre, saying that Safier never did her job. Safier said that Robinson stopped the meeting saying they were not resolving any problems and that the executive board would make the decision.

Robinson said that everyone had a chance to talk at the hearing but did not testify concerning what was said. None of the other respondent witnesses testified as to what occurred at the union meeting leaving Safier's testimony as the sole evidence of what occurred.

Robinson said the executive board voted to uphold the removal of Beverly Safier, but did not testify about informing her of the decision. Safier telephoned Robinson in March and asked what the executive board had decided and was told that the decision would stand and that the wardrobe people did not want to work with her. The following month she filed the charge in this case.

B. Positions, Discussion, and Conclusions

The Union claims that a second reason for not referring Safier was that she owed fees to the Union and was thus doubly barred from being referred.

Safier testified that she was never told by the Union that she owed fees and has never received any written bill and that in fact she has overpaid her fees.

Respondent's Exhibit 2 clearly establishes that there is no 6 month fees delinquency debarment rule in effect. While the exhibit would appear to show that Safier owes Respondent some fees, she claims to have paid them. Such an issue is capable of resolution between the parties by their showing one another their records.

There is no proof that Safier was ever informed she owed Respondent any fees and certainly there is no proof that Respondent informed her it was not referring her to work because of an alleged fee delinquency, particularly when she was told that the reason for debarment was the objections of other dressers. This claim is

an afterthought, of no weight and as a defense it is hereby dismissed.

The question of whether Beverly Safier engaged in misconduct at the Sunrise Theatre is the subject of conflicting testimony. There was no testimony to support Robinson's claim that police were needed to clear the passageways, the inference apparently being sought that it was because of crowds congregating to watch Safier sew or sketch. The testimony concerning passageways appears much overblown. What could be misconduct, being gone from a work station, or reading in a dressing room, was not so heinous that it called for a written warning. Safier explained that she had other duties beyond those that Soule testified about and those duties necessitated her being away from the chair in the hallway.

Taken for its essence, it is clear that Soule, Landa, and apparently a number of the other wardrobe personnel did not like Beverly Safier and did not want to work with her. The wishes of these persons prevailed on Robinson, who in February 1982 decided not to refer Safier for any more work but did not bother to tell her so.

This small Union acted like an exclusive private club by blackballing someone they did not like and refusing to work with her. Respondent made much of the fact that it did not prevent Safier from working in another jurisdiction when work was offered to her. Such action only serves to further demonstrate the club-like attitude it took in dealing with Beverly Safier.

The problem is that Respondent is not a private club, but rather is a union which, because of its particular position and contracts, has certain responsibilities it chose to ignore. Respondent had and has an exclusive hiring agreement and because of this agreement has duties and responsibilities in providing that service, and that means using objective criteria or standards for referring employees, or for not referring employees.

In this case there are no written criteria or standards for referral and not even a written referral list. The operation of the system depended, and apparently still depends, on Robinson's decisions as to who to refer or not refer. He stated what he considered in making referrals and what he did in deciding to debar a person from referrals. In the case before us, Robinson did not follow his own unwritten standards, but strung Safier along for 6 or 7 months saying there was no work until she asked why and was told the others did not want to work with her. Her requests, and apparently those of her husband, for an executive board meeting to appeal this decision were deferred for another 4 to 5 months until the February 1983 meeting.

The testimony concerning that meeting shows no objective standard being set or used in reaching a determination, but rather the meeting seems to have been a family squabble with the verdict going to those who did not like Safier and based only on the apparent fact that they did not want to work with her for whatever undisclosed personal reasons they had.

No objective criteria or standards of any sort have been shown by Respondent to exist or to have been used by it. Such an event is an abdication of the responsibil-

ities the Union has in running an exclusive hiring hall and cannot be countenanced.

Accordingly, I find that Respondent violated Section 8(b)(1)(A) and (2) of the Act in its refusal to refer Beverly Safier for employment after February 1982.

CONCLUSIONS OF LAW

1. Respondent Local 646 is a labor organization within the meaning of the Act and Maccabee Investments, Inc. is an employer engaged in commerce within the meaning of the Act.

2. Respondent, by removing Beverly Safier from its referral list and refusing to refer her for employment for irrelevant and invidious reasons, has violated its duty of fair representation in running an exclusive hiring hall and violated Section 8(b)(1)(A) and (2) of the Act.

REMEDY

Having found that Respondent committed unfair labor practices, it is necessary to order it to cease such and to take certain actions to remedy the violations and effectuate the purposes of the Act.

Respondent must cease its refusal to refer Beverly Safier for employment and make her whole for the loss of employment it caused her. Respondent must also establish and place Safier on a written referral list and establish a referral system with stated objective standards which will not discriminate against qualified persons seeking work through the referral system. The referral lists along with the standards by which the system is to be run must be made available to members and applicants.

Respondent hid from Safier the fact that it was not referring her for jobs until she persisted and got that answer from Robinson in September, and then her request for an executive board meeting to appeal that decision was stalled until February 1982 and she did not learn the decision until March. As a consequence, she did not file the charge in this case until April 8, 1983, seeking in the interim to have the Union solve the matter. It was Respondent that delayed Safier in seeking a resolution of the matter internally. Therefore, I recommend that Respondent make Safier whole for any work she lost as a result of Respondent's refusing to refer her from March 1, 1982, on in the following manner: The sum of all referred work performed by extra employees from March 11, 1982, until Respondent reinstates Safier to a legitimate referral list, divided by the number of extra employees who worked during such interim period, including Safier, would provide a proportionate share of the work she should have received if Respondent had operated a legitimate nondiscriminatory referral system. Safier's income from her costume business shall not be considered in mitigation of her loss in income, since the wardrobe work was always as an extra to her main occupation. The sums so found to be due Beverly Safier shall be computed on a quarterly basis, see *F. W. Woolworth Co.*, 90 NLRB 289 (1950), from March 1, 1982, until she is placed on a properly established and maintained referral list, plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Local 646, Miami, Florida, its officers, agents, and representatives, shall

1. Cease and desist from refusing to refer Beverly Safier for employment.

2. Take the following affirmative action.

(a) Establish and maintain on a nondiscriminatory basis, a written referral list and written standards by which the referral system is to operate and make such list and standards available to members and applicants.

(b) Place Beverly Safier on the written referral list and make her whole for the loss of employment she suffered by the method set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying its

records and reports of the earnings of wardrobe personnel and all other records necessary to the determination of the amounts due Safier under the terms of this Order.

(d) Remove from its records any reference to the asserted misconduct of Safier and its action in debarring her from its referral list.

(e) Post at its hall or facility copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Respondent's authorized representative, shall be posted by Respondent at its hall or facility immediately on receipt, at places where notices are customarily posted, and maintained for 60 consecutive days. Respondent shall take reasonable steps to ensure the posted notices are not altered, defaced, or covered by any other material. Respondent shall also, at its expense, mail copies of the signed notice to all its members and to all persons who have used its referral system since March 1, 1982.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps it has taken to comply.

¹ 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.

² If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."