

**International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 12, AFL-CIO (Columbus Association for the Performing Arts) and John Gardner.** Case 9-CB-8861

July 31, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND  
TRUESDALE

On February 23, 1995, Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 12, AFL-CIO, Columbus, Ohio, its officers, agents, and representatives, shall take the action set forth in the Order.

*James Horner, Esq.*, for the General Counsel.  
*Stewart R. Jaffy, Esq.*, for the Respondent Union.  
*John E. Gardner, pro se.*

DECISION

FRANK H. ITKIN, Administrative Law Judge. An unfair labor practice charge was filed in the above case on April 25, 1994, and a complaint issued on May 24, 1994. The General Counsel alleged in the complaint that Respondent Union and the Employer, Columbus Association for the Performing Arts, have maintained at all times material to this proceeding a practice and agreement requiring the Union to be the exclusive source of referrals of employees for employment to the Employer; that since about February 14, 1994, the Union has failed and refused to refer Charging Party employee John E. Gardner for employment with the Employer because he failed to pay his union quarterly service fees for the second quarter of 1993; that the Union in fact had failed to notify employee Gardner of his obligation to pay his

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

union quarterly service fees for the second quarter of 1993; that the Union, in addition, has maintained a policy of forbidding reinstatement to its hiring hall procedures for any member or service fee paying employee who fails to make timely payments of their quarterly union dues or service fees, thus refusing to refer those employees for employment; and that the Union thereby caused the Employer to discriminate against employee Gardner by denying him employment, in violation of Section 8(b)(1)(A) and (2) of the Act. Respondent Union denies violating the Act as alleged.

A hearing was held on the issues raised in Columbus, Ohio, on December 8, 1994, and on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

The Union is admittedly a labor organization and the Employer is admittedly engaged in commerce, as alleged. It is undisputed that the Union and the Employer have maintained at all times material to this proceeding a practice and agreement requiring the Union to be the exclusive source of referrals of employees in an appropriate unit for employment with the Employer, and that since about February 14, 1994, the Union has failed and refused to refer Charging Party unit employee John E. Gardner for employment with the Employer pursuant to its practice and agreement because he failed to pay his union quarterly service fees for the second quarter of 1993. The sole question raised here is whether or not the Union had failed to sufficiently notify employee Gardner of his obligation to pay his quarterly services fees for the second quarter of 1993. The pertinent evidence is summarized below.

Employee Gardner testified that he first obtained work through the Union during 1985 as a stagehand; that he thereafter participated in the Union's "apprenticeship program" from 1986 to 1989; that he later applied for "full admission into the Union" and his application was "denied"; that he filed an unfair labor practice charge against the Union during early 1992 "protesting" the Union's conduct; that his "charge" was "dismissed"; that he nevertheless worked his way up the Union's "various referral lists" to its "A-list," which is the "highest" "list" of "full time" referral employees; and that since 1992 he has paid his "regular service fees" required by the Union.

Gardner noted that the Union charges a "regular service fee" for referrals, and "on most shows . . . five percent is deducted" by the Employer and sent directly to the Union. There are also "some shows that do not deduct the Union dues or service fees directly out of the employee's paycheck." The employee, in such circumstances, would have to remit such dues or fees to the Union. Gardner further noted that he lived with his sister at 3717 Palm Street, Whitehall, Ohio, "for about a year, until she died on January 28, 1994," that during 1993 the Union "would contact [him] to assign [him] work" or to bill him for his "service fees" "at [his] sister's home at 3717 Palm Street"; and that on her death he moved back to his current address "106A Woodcliff, Whitehall." Gardner testified that on January 28, when his sister died, he filed with the United States Post Office a "change of address" form (G.C. Exh. 3), noting the above information.

Gardner next related the chronology culminating in his loss of employment. Shortly prior to January 20, 1994, Union Business Agent Richard Tisdale "called" Gardner at his sister's 3717 Palm Street home for a "job." The "job" "ran" until about February 5, 1994. On this "job," the Employer deducted Gardner's "service fees" or "dues." Meanwhile, on January 29, while working on this "job," Gardner told Union Secretary-Treasurer Larry Tisdale, brother of Business Agent Richard Tisdale, that he "had moved back to [his] old address at 106 Woodcliff," and Larry Tisdale responded, "Okay." Larry Tisdale, in addition to being a union officer, worked on this same "job" with Gardner, and never said "anything to [Gardner] about [his] service fees or Union dues or anything of that nature."

Gardner admittedly had received "notices" from the Union in 1993 "regarding [his] service fees." (See R. Exhs. 1 and 2.) And, on or about November 3, 1993, after having received periodic statements indicating his "current obligation," he was notified in writing by Union Secretary-Treasurer Larry Tisdale that his "current obligation" for the first quarter of 1993 "was \$173.30 plus \$25 in fines" and that in accordance with the Union's constitution he would be "automatically . . . expelled from" the Union's "work list" "if payment" were not "received" by 2 p.m. on Friday, November 12, 1993. Gardner promptly paid Larry Tisdale this amount on November 6, 1993. *Ibid.* He thereafter continued to receive periodic statements indicating his "current obligation" for the second quarter of 1993.<sup>1</sup>

As noted, the "job" that Gardner had started working during January 1994 ended about February 5, 1994. On or about February 5 or 6, 1994, Union President Doug Boggs telephoned Gardner at his 106A Woodcliff address and "asked" if Gardner wanted another "job." Gardner accepted the "job." Gardner's telephone number at 106A Woodcliff was not the same number that he had used at his deceased sister's home. This new "job" lasted until Sunday February 13, 1994. Gardner also worked there with Union Secretary-Treasurer Larry Tisdale, and again nothing was "said" about his "service fees." In fact, on February 13, Larry Tisdale "asked" Gardner if he wanted to work another particular "job." Gardner declined this offer indicating that he would rather "work the auto show" and "make more money" on that "job." Gardner was told that he would "have to see Doug Boggs . . . because Boggs . . . was also going to be the steward on the auto show [and] would take the list of names and assign the work assignments."

Later that same evening of Sunday, February 13, Gardner spoke with Union Business Agent Richard Tisdale, noting that he wanted to "work the auto show." Richard Tisdale, in response, "smiled" and said, "[Y]ou're fired . . . see Larry Tisdale." Gardner spoke with Larry Tisdale who confirmed that he had been "fired." Gardner asked, "[W]hy," and Larry Tisdale replied, "I [Gardner] had not paid my dues." Larry Tisdale showed Gardner (G.C. Exh. 4) a letter from Larry Tisdale addressed to Gardner at "3717 Palm Street" dated January 31, 1994, apprising Gardner that his "current obligation" for his second quarter 1993 "dues"

was "\$188.88 plus \$25 in fines" and that "if payment is not received in full by 2 p.m. on Thursday February 10, 1994, [he would be] automatically expelled from the [Union's] work list." Gardner protested to Larry Tisdale that he had "never received this letter because he had moved." Gardner offered to "pay him." Larry Tisdale replied, "Our hands our tied . . . I sent the letter . . . that's all he was required to do."

It is undisputed that Gardner in fact had not received the Union's January 31 letter. See Respondent's Exhibit 3, containing the Union's copy that indicates that this letter was returned to the Union marked "unclaimed." See also the testimony of United States Postal Branch Manager Donald Alexander (Tr. pp. 71 to 89) reluctantly acknowledging the "possibility" that the postal service failed to timely record Gardner's January 28 "change of address" notification. (Cf. G.C. Exh. 6.)

Gardner thereafter attempted, without success, to appeal the Local Union's determination. He was told by Union President Boggs that "it would do no good to write a letter of appeal because no one had the power to reinstate" him. Gardner nevertheless wrote and mailed a "letter of appeal." (See G.C. Exh. 5.) He obtained and showed to the Union's officers during his "appeal," *inter alia*, a "statement" from Postal Manager Alexander indicating that Gardner's January 28 "change of address" form was "never enter[ed]." Gardner asked the Local's union officials "to appeal to the International," and they "refused."

Larry Tisdale, secretary-treasurer for the Union, generally explained the notice procedures used by the Union to collect the "service fees" or "dues" from those employees working "jobs" where these moneys were not automatically withheld. He claimed that these procedures were and are applied without exception. (See Tr. pp. 90 to 91.) He acknowledged:

[He has] expelled those persons after they have received the certified letter that says [the employee] shall automatically stand expelled from the work list . . .

He admittedly, however, had received on February 17 or 18 the Union's "certified letter" sent to Gardner on or about January 31, 1994, marked "unclaimed." He was also aware of the "death" of Gardner's "sister." He initially claimed that he "did not know until May 5, 1994 that [Gardner] had moved" and there "was no discussion of his address" during their "February 13 conversation." Later, he claimed that he "knew" that Gardner had "moved" during March 1994.

I credit the testimony of John E. Gardner as detailed above. His testimony is substantiated in part by uncontroverted documentary evidence and the testimony of Donald Alexander. He impressed me as a credible and trustworthy witness. On the other hand, I do not credit the testimony of Larry Tisdale insofar as his testimony conflicts with Gardner's testimony. Tisdale's testimony was at times incomplete, vague, and contradictory. He did not impress me as a reliable or trustworthy witness.

#### Discussion

As restated in *Oklahoma Fixture Co.*, 308 NLRB 335, 337-338 (1992),

<sup>1</sup>Gardner explained that the Union's "five percent" "service fees" are deducted by most employers and, in those cases when they are not, "no one that I know of keeps track of all their hours and the [calculation of] five percent of each check."

[A] union seeking to enforce a union security clause against an employee has a fiduciary duty to deal fairly with that employee. This requires that before a union may seek the discharge of an employee for the failure to tender owed dues and fees, it must at a minimum give the employee reasonable notice of the delinquency, including a statement of the precise amount and months for which dues are owed and of the method used to compute this amount, tell the employee when to make the required payments, and explain to the employee that failure to pay will result in discharge.

[T]he discharge of [the union's] fiduciary responsibility demands that where receipt is denied, [the union] be obligated to provide some sort of direct evidence to establish that notice was sent and received. Where loss of employment is involved, that precaution is little enough to require. [Citations omitted.]

In *Oklahoma Fixture Co.*, the "union's notice" was "mailed to the wrong address" and the record provided "no credible explanation or justification for this mistake." The Board thus found the 8(b)(1)(A) and (2) violation as alleged.

In the instant case, the Union's "notice" was also mailed to the wrong address and admittedly not received by employee Gardner. The credible evidence of record shows that Gardner had in fact apprised Union Secretary-Treasurer Larry Tisdale that he had "moved" from his prior address on his sister's death and, indeed, Union President Boggs had in fact telephoned Gardner at this new telephone number at his new address. Gardner's later repeated efforts to explain, with documentation, all of this to the Union were summarily dismissed by union officials, claiming, inter alia, "Our hands are tied . . . [we] sent the letter . . . that's all [we are] required to do" and "it would do no good to write a letter of appeal because no one had the power to reinstate" him. The Union, by this conduct, failed to fulfill its fiduciary obligation and thus violated Section 8(b)(1)(A) and (2) of the Act as alleged.

#### CONCLUSIONS OF LAW

1. Respondent Union is a labor organization and the Employer is engaged in commerce as alleged.
2. The Union violated Section 8(b)(1)(A) and (2) of the Act by attempting to cause and causing the Employer to discharge employee John E. Gardner for nonpayment of "service fees" or "dues" in a manner that did not satisfy its fiduciary obligation to the employee.
3. The unfair labor practices found above affect commerce as alleged.

#### THE REMEDY

Respondent Union will be directed to cease and desist from engaging in the conduct found unlawful above and like or related conduct and to post the attached notice. Respondent Union will be directed to sign additional notices for posting by the Employer if it so desires. Respondent Union will further be directed to notify the Employer and employee Gardner in writing that it withdraws and rescinds any requests to discharge the employee; that it has no objection to his reinstatement without any loss of seniority or other rights and privileges previously enjoyed by him; and that it re-

quests that the Employer reinstate employee Gardner. Respondent Union will also be directed to make employee Gardner whole for all losses of wages and benefits suffered by him as a result of the Union's discrimination until he is either reinstated by the Employer to his former or substantially equivalent position or until he obtains substantially equivalent employment elsewhere, less net earnings during this period (see *Oklahoma Fixture Co.*, supra). The loss of earnings shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent Union, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 12, AFL-CIO, Columbus, Ohio, its officers, agents, and representatives, shall

##### 1. Cease and desist from

(a) Attempting to cause or causing the Employer, Columbus Association for the Performing Arts, to discharge employee John E. Gardner for nonpayment of his "service fees" or "dues" or without adequately and sufficiently advising him of his obligations.

(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. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Employer and employee Gardner in writing that it withdraws and rescinds any requests to discharge the employee; that it has no objection to his reinstatement without any loss of seniority or other rights and privileges previously enjoyed by him; and that it requests that the Employer reinstate employee Gardner.

(b) Make employee Gardner whole for all losses of wages and benefits suffered by him as a result of the Union's discrimination, with interest, as provided in the Board's decision.

(c) Post at its union office or hiring hall copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be

<sup>2</sup>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.

<sup>3</sup>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."

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by the Employer, if willing, at all places where notices to employees are customarily posted.

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

#### APPENDIX

NOTICE TO EMPLOYEES AND 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 attempt to cause or cause the Employer, Columbus Association for the Performing Arts, to discharge

employee John E. Gardner for nonpayment of his "service fees" or "dues" or without adequately and sufficiently advising him of his obligations.

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 notify the Employer and employee Gardner in writing that we withdraw and rescind any requests to discharge the employee; that we have no objection to his reinstatement without any loss of seniority or other rights and privileges previously enjoyed by him; and that we request that the Employer reinstate employee Gardner.

WE WILL make employee Gardner whole for all losses of wages and benefits suffered by him as a result of our discrimination, with interest, as provided in the Board's decision.

INTERNATIONAL ALLIANCE OF THEATRICAL  
STAGE EMPLOYEES AND MOVING PICTURE  
MACHINE OPERATORS OF THE UNITED  
STATES AND CANADA, LOCAL 12, AFL-CIO