United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 29, 2008

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Professional Musicians, Local 47, American Federation of Musicians, AFL-CIO
Cases 31-CB-11023; 31-CB-12264; 31-CB-12278; and 31-CB-12281

536-2576-0000-0000
536-2578-0000-0000
536-2581-6767-5000
548-4001-5000-0000
548-4020-4000-0000
548-6075-0000-0000

These cases were submitted for advice as to whether the Union violated Section 8(b)(1)(A) or 8(b)(2) of the Act by restricting to members only the use of rehearsal property it owns, when the facility is rented by employers bound by a union security clause with the Union or its sister locals. We conclude that the Union did not violate the Act by including the members-only provision because the rental agreements were commercial transactions in which the Union was acting as a lessor and not in its capacity as a collective-bargaining representative.

FACTS

Since the 1950's, Local 47 of the American Federation of Musicians, AFL-CIO (the Union) has owned and operated a two-story building on Vine Street in Hollywood, California that contains an auditorium. Pursuant to a written rental agreement, the Union rents the auditorium to musical ensembles as a rehearsal facility. Appended to each rental agreement is a document entitled "[Union] Rehearsals - Auditorium Rules and Regulations" which states in pertinent part:

> 2. All instrumental musicians participating in rehearsals must be members of the American Federation of Musicians or have applications on file.

The Union provides each prospective tenant with a copy of these rules before they enter into an agreement to rent the auditorium. The rental agreement is not incorporated or referenced in any way in any collective-bargaining agreement the Union or its sister locals maintain with any employer.

Until recently, all employers that rented the auditorium employed only employees who were members of the Union or another local of the American Federation of Musicians (AFM). During the summer 2007, several employees employed by New West Symphony (New West), which is not a signatory to Local 47's Master Agreement,[1] and Symphony in the Glen (SIG), which is a signatory to the Master Agreement, resigned their union membership and became Beck objectors. Subsequently, when New West and SIG (hereafter collectively "the Employers") rented the Union's auditorium for rehearsals, they provided the Union with rosters of the musicians scheduled to rehearse at the auditorium. From those rosters, the Union identified the Beck objectors as non-AFM members and notified the Employers that the Beck objectors could not practice at the facility, and if they did, it would consider that a breach of the rental agreement.

As a result of the Union's enforcement of its rental policy, one Beck objector scheduled to attend a New West rehearsal decided not to attend and another was told by New West after arriving at the rehearsal that he had to leave, which he did. SIG initially told the Beck objectors scheduled to attend its rehearsal that they could not attend, but after receiving notice from the Union that it was permissible, they were allowed to rehearse without incident. Following that rehearsal, SIG announced that it had moved the next rehearsal to a different facility.

The Union has decided that it would no longer rent the facility to New West and SIG because of their difficulty complying with the members-only provision. There is no evidence that any of the Beck objectors suffered economical harm, received any disciplinary action, or had their employment affected because of the Union's enforcement of its members-only rental policy.

None of the individual Charging Parties has filed a charge against either employer. Additionally, the Region has determined that there is insufficient evidence to establish that the Union did not uniformly enforce the policy with respect to all renters of the facility.

ACTION

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[1] New West is not a signatory to the Master Agreement because it is outside of Local 47's geographic jurisdiction. It does have a collective bargaining agreement with Local 581 of the AFM.

We conclude that the Union did not violate the Act by including the members-only provision in its rental agreements because the transactions between the Union and the Employers were strictly commercial transactions in which the Union was acting as a lessor and not in its capacity as a collective-bargaining representative. And, the Union did not otherwise restrain or coerce the Charging Parties in the exercise of their Section 7 rights.

Violations of Section 8(b)(1)(A) involve either a breach of a union's duty of fair representation or restraint or coercion of employees because of their exercise of Section 7 rights.[2]

We found no case that directly addresses a union's right to maintain a members-only restriction on property it owns and rents to employers.[3] Nevertheless, we conclude that the Union's maintenance of the members-only clause did not violate Section 8(b)(1)(A) of the Act, because it was acting strictly as a property owner and not in its capacity as a Section 9(a) representative. First, there is nothing in any collective-bargaining agreement that requires signatory employers to rent the Union's rehearsal facility. The Union's Master Agreement does not require signatory employers to rent the auditorium from the Union. Likewise, there is no provision in the collective-bargaining agreement New West signed with a sister local that requires it to use or rent the Union's auditorium. In addition, the rental agreements between the Union and each of the Employers are separate documents from the collective bargaining agreements and the terms and restrictions therein only apply to the rental property. Therefore, even when the tenant is a signatory to the Union's Master Agreement, like SIG, or is a party to a collective bargaining agreement with another local, like New West, the rental agreement is not in any way connected to the Union's performance of its Section 9(a) responsibilities of

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[2] See UAW Local 2333 (B.F. Goodrich Co.), 339 NLRB 105, 113 (2003).

[3] Teamsters Cannery Local 670 (Stayton Canning Co.), 275 NLRB 911 (1985), where the Board found the union violated Section 8(b)(1)(A) by denying its financial core members access to its pharmacy and dental and eye clinics, is inapposite. In that case, the Board specifically found the violation on the narrow ground that the union's actions were in violation of a strike settlement agreement. 273 NLRB at 911, n.2.

administering the applicable collective bargaining agreements.

Second, the discretion to accept and comply with the terms of the rental agreement remains with the Employers, independent of their collective-bargaining relationship with the Union or any of its sister locals. The Union provided each employer with the rules regarding use of the auditorium before they entered into the rental agreement. If they did not agree with the terms, the Employers were free to seek rehearsal space elsewhere.[4] Indeed, the Employers' freedom to rent other space is demonstrated by SIG's decision to relocate a scheduled rehearsal to another facility because of the incidents surrounding the Beck objectors; and there is no evidence that doing so affected its bargaining relationship with the Union. Thus, the Employers here were free to exercise their discretion to accept or reject the Union's terms, and the Union had no authority or could take no action to force either employer to rent the facility.

For this reason, we reject the argument that the rental agreements were Union unlawful attempts to coerce the Beck objectors to become union members. To the extent that any of the charging parties might reconsider their decision to resign from the Union and become Beck objectors, any such impact on their Section 7 rights is not the result of the Union's conduct but the Employers' managerial decision to enter into the rental agreement containing the members-only rule.[5] The rule also does not implicate the Union's duty of fair representation because the Union is not acting in its capacity as the Beck objectors' 9(a) representative in dealing with the Employers.

Finally, we conclude that the Union's policy does not violate Section 8(b)(2). Although there is no evidence

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[4] Cf. NLRB v. Servette, 377 U.S. 46, 51 (1964)(where union asked neutral employer not to handle the goods of an employer with whom the union had a primary dispute, Court found no 8(b)(4) violation because the employer's decision to cease handling the goods of another employer was "a managerial decision . . . within their authority to make.").

[5] The rule also can not be analyzed under Scofield v. NLRB, 394 U.S. 423 (1969), because it is not an internal union rule subjecting members to union fines or penalties.

that any employee has suffered any harm in these cases, we realize that the Union's policy could affect employment if an employer refrains from hiring nonmembers to enable it to use the Union's rehearsal facility. However, even in that event, we would find no grounds to support the 8(b)(2) allegation because the employer's decision would be discretionary and free of union influence.[6] If anything, this case most closely resembles the scenario in Local No. 447, Plumbers (Malbaff Landscape Construction),[7] where a union caused an employer to terminate its subcontract with an employer employing nonunion employees. The Board first held that an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer even if that cessation causes employees to lose employment opportunities. It further held that, if the employer did not violate Section 8(a)(3), then the union's conduct to achieve the same result could not violate Section 8(b)(2).[8] Similarly, to the extent the Union's rule here would have any impact on any employees, it would be an indirect result from the Union's rule, but a more direct result of a decision made by the Employers.[9]

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[6] See, e.g. Associated Musicians of Greater N.Y., Local 802, 176 NLRB 365, 367 (1969)(regardless of detrimental impact union rule may have on employer's hiring policies, no 8(b)(2) violation where union made no direct approach to employer to cause him to change his hiring policies).

[7] 172 NLRB 128 (1968).

[8] Id. at 129.

[9] Since no employee has lost employment opportunities as a result of the Union's members-only rule, and no 8(a)(3) charges have been filed, this case does not implicate whether an employer would violate Section 8(a)(3) by refusing to hire an objecting nonmember to comply with the Union's members-only rental rule.

Accordingly, the Region should dismiss the charge, absent withdrawal, because the Union did not violate the Act by including the members-only provision in its rental agreement with employers.

B.J.K