

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 15**

BIG MOOSE, LLC

and

HUMBERTO RECIO

CASE NO. 15-CA-19735

and

**INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES, LOCAL 478**

CASE NO. 15-CB-5998

and

HUMBERTO RECIO

**RESPONDENT INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES,
LOCAL 478'S ANSWERING BRIEF TO COUNSEL FOR ACTING GENERAL COUNSEL'S
CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Respondent Union International Alliance of Theatrical Stage Employees (IATSE), Local 478 (hereinafter referred to as "the Union" and "Local 478") submits its Answering Brief to the Counsel for the Acting General Counsel's Cross-Exceptions.

STATEMENT OF THE CASE

The case was heard on April 4 and 5, 2011 in New Orleans, Louisiana regarding the charges filed by Humberto Recio against his employer, Big Moose, LLC (Case No. 15-CA-19735) and Union, IATSE Local 478 (Case No. 15-CB-5998). The Board ordered these cases consolidated. Recio's complaint charges Local 478 in violation of Section 8(b)(2) of the Act by allegedly coercing and causing Big Moose to fire Recio on March 11, and again on April 28,

2010. Recio also charged Local 478 in violation of Section 8(b)(1)(A) for causing him to turn down several job offers after Local 478, through its Business Manager, McHugh, allegedly told Recio that he was not allowed to work in Louisiana because Recio was not a Local 478 member.

Respondents' testimony corroborates that Recio was never fired, but rather Recio left on two occasions of his own free will. Testimony of Big Moose Local Best Boy, Earl Woods supported that Union membership is irrelevant to gaining employment with Big Moose. Moreover, Woods directly called and hired Recio because he had worked with Recio before. Also, Woods lacked authority to hire anyone (including Recio) for the full run of production, so he offered Recio employment that lasted less than five days at a time. In testimony, Woods made it clear that he only takes direction from Big Moose when hiring employees. Woods used his own resources to recruit local, Louisiana hires. As a last resort, Woods explained, he calls Local 478 to hire when the production requires numerous employees. In turn, the Union provides a roster list of IATSE members.¹ Woods denied Local 478 or namely, McHugh, having any influence on who is hired, not hired or fired.

McHugh also denied having any influence over Woods or Big Moose in any way-- including who is hired, not hired, or fired. In fact, McHugh's testimony showed no incentive to prevent Recio from working when Recio had dues deducted to Local 478 and, moreover, Recio initiated transferring his IATSE membership from his Florida Local 477 to Louisiana Local 478

¹ The fact that Local 478 does not administer an exclusive hiring hall was stipulated among parties. GC Exhibit 2a: Theatrical and Television Motion Picture Area Standards Agreement of 2009. Article 2 C 1 provides the referral procedure:

Upon request of the Employer, the Local shall expeditiously supply the Employer with a referral list of individuals who have work experience in the production of motion pictures, together with the address, contact number and skill of each such individual. The Local shall refer qualified persons in a non-discriminatory manner.

during the *Green Lantern* production. Recio's testimony, though replete with inconsistencies, established that he had worked freely in Louisiana since 2003 on numerous productions. During this time, Recio was never denied employment based on his affiliation with his Florida-based IATSE Local 477, lack of a work permit or transfer status.

On February 2, 2012, the Administrative Law Judge Michael Marcionese rendered his Decision. The Judge in part credited Recio's first account with respect to the March 11, 2010 alleged termination,² but did not credit Recio's second account. The events leading to how Recio left employment on April 28, 2010 were "murkier and more difficult to resolve."³ On February 28, 2012, Respondent Union filed Exceptions to the Decision, but did not except to the Judge's conclusion to not credit Recio's second account.⁴ In turn, the General Counsel filed its Answering Brief to the Respondent Union Exceptions, and Cross-Exceptions to the Decision on March 29, 2012. By Order dated April 9, 2012, the Board extended the time for Respondents to file Answering Briefs to April 26, 2012.

RESPONSE TO THE GENERAL COUNSEL'S EXCEPTIONS

Though Recio essentially used the exact claim and facts against the Union and Employer, regarding his second alleged termination, the Judge did not credit Recio's version of events leading to how he left employment on April 28th.⁵ The General Counsel failed in its burden to prove that the Respondent Union caused Recio to lose his job with Respondent Employer. "The only evidence General Counsel points to in support of this allegation is the coincidental timing

² ALJ p. 10, line 3.

³ ALJ p. 11, lines 2-3.

⁴ See Respondent International Alliance of Theatrical Stage Employees, Local 478's Exceptions to Decision by Administrative Law Judge. The Respondent Employer did not file Exceptions.

⁵ ALJ p. 11, lines 2-3.

between Recio's withdrawal of his transfer application and his termination."⁶ The Judge further explained:

[t]here is no other evidence in the record that would establish that this communication between McHugh and the Respondent Employer's supervisors occurred before April 28, Recio's last date of employment. There is also no evidence in the record to contradict McHugh's testimony that he called Woods and Dunbar to find out if Recio was having any problem on the job.

Despite Recio testifying to being fired on two occasions, the Judge found that he voluntarily relinquished employment on one occasion and moved back to Florida for financial reasons.⁷

The Acting Counsel for the General Counsel by Cross-Exceptions now attempts to offer its own 'only rational explanation' that is otherwise unsupported by the record and must not replace the Judge's factual evaluation regarding how Recio ended employment on April 28.

1. The ALJ Correctly Applied The Legal Standard To The Facts At Hand Regarding April 28.

The controlling Area Standards Agreement between Big Moose and Local 478 does not require the Employer to hire through the Union.⁸ In Cross-Exceptions, the General Counsel simply re-cites authority from the Decision without further case law analysis of how the Judge failed to apply the correct standard to Recio's second alleged termination.⁹ In *Kvaerner Songer, Inc.*, testimony supported that the employer spoke with a union representative who "calls the shots" to express that he did not want employees that were not dispatched from the hiring hall

⁶ ALJ p. 11, lines 11-13.

⁷ ALJ p. 11, lines 23-27.

⁸ ALJ p. 6, lines 40-42.

⁹ ALJ p. 9, lines 6-14. *Kvaerner Songer, Inc.*, 343 NLRB 1343, 1346 (2004); *Carpenters Local 2369 (Tri-State Ohbayashi)*, 287 NLRB 760 (1987); *International Alliance of Theatrical Stage Employees Local 478 (LT Productions, LLC)*, 2010 WL 561889 (JD(ATL)-3-10, Feb. 9, 2010). During the hearing and Decision, the Judge did not consider this case binding precedent. ALJ p. 9, lines 15-17.

employed.¹⁰ In *Carpenters Local 2396 (Tri-State Ohbayashi)*, testimony from the union secretary established that the union was in contact with the employer not to hire a union member from another jurisdiction.¹¹ Unlike these cases, no testimony supports that McHugh was in contact with Big Moose via Woods (or anyone from Big Moose) *before* Recio left on April 28. No testimony supported that McHugh made attempts to prevent, or prevented Recio's employment on *Green Lantern*. Corroborating testimony from Recio and McHugh, in fact, established that Recio was permitted to work.

The Judge denied the General Counsel's attempts to posture this matter to resemble the *Int'l Alliance of Theatrical Stage Employees Local 478 (Lt Productions, LLC) & Mark Weber*.¹² Because Local 478 was once found in violation in the past does not automatically impute future infractions and open the flood gate for Recio to blame Local 478 for employment troubles. Moreover, the Judge found that "in any event, there are significant factual differences between that case and the instant one."¹³ Notwithstanding the nonbinding precedent as acknowledged in the Decision, the Judge correctly surmised "there is no such contradictory testimony here with respect to the April 28th termination."¹⁴

2. The Judge Correctly Found The Record Evidence Does Not Support Finding That Respondent Union Caused Recio To End Employment On April 28.

The General Counsel attempts to build on an alleged impediment, but fails to prove how anyone prevented Recio from working, except Recio himself. Recio was encouraged to work.

¹⁰ *Kvaerner Songer, Inc.*, 343 NLRB 1343, 1344 (2004). In this matter, the union was found to have a nonexclusive hiring arrangement.

¹¹ *Id.* at 1344.

¹² *Int'l Alliance of Theatrical Stage Employees Local 478 (Lt Productions, LLC) & Mark Weber, an Individual*, 15-CB-5827, 2010 WL 561889 (N.L.R.B. Div. of Judges Feb. 9, 2010).

¹³ ALJ p. 9, lines 15-17.

¹⁴ ALJ p. 11, lines 46-47.

After the March 17th meeting, Recio, with McHugh's assistance, completed his transfer application in time for the April membership vote.¹⁵ Subsequently, Recio learned that his membership vote resulted in a tie vote. McHugh told Recio: "never in the history of the local has this happened before, but when it comes to your case, it was a 50-50 vote."¹⁶ To afford Recio a second chance, McHugh offered to submit Recio's membership vote for the next meeting, and suggested that Recio bring his friends to vote for him.¹⁷ Both McHugh and Recio testified that McHugh said to Recio: "you can go back to work."¹⁸ McHugh, as an authorized business agent for IATSE, was enforcing IATSE membership obligations under the International Constitution and Bylaws.¹⁹ Because the IATSE Constitution requires a membership vote to complete a transfer, Recio's application was pending. Also, as a membership obligation and unrelated to working on any production including *Green Lantern*, McHugh granted a verbal

¹⁵ Tr. p. 341, lines 14-25. Recio testified that he intended to transfer his membership from Florida to Louisiana because opportunities in Florida had "dried up." Though Recio admitted that he was unfamiliar with the IATSE Bylaws/Constitution, he testified that he understood that transferring membership was voluntary. Tr. p. 127, lines 24-25; Tr. p. 128, lines 1-2; 4-9.

¹⁶ ALJ p. 7, lines 40-41; Tr. p. 61, lines 22-23. The Judge noted that the tie vote resulted after one member who had roomed with Recio complained that Recio owed him money. ALJ p. 7, lines 42-43.

¹⁷ ALJ p. 7, lines 48-49.

¹⁸ ALJ p. 7, line 51; Tr. p. 61, line 25.

¹⁹ In *Scofield v. NLRB*, the Supreme Court held that unions are "free to enforce properly adopted rules which reflect a legitimate union interest. See also *Millwright & Mach. Erectors, Local Union 720, United Broth. of Carpenters & Joiners of Am. v. N.L.R.B.*, 798 F.2d 781, 784 (5th Cir. 1986), citing *Scofield v. NLRB*, 394 U.S. 423, 89 S.Ct. 1154, 1158, 22 L.Ed.2d 385 (1969). *Scofield* addressed fines and sanctions against union members for violating union rules, holding that "because it was enforced solely through internal union mechanism not affecting employment, the Court found that its enforcement 'by reasonable fines' did not constitute the restraint or coercion prohibited by section 8(b)(1)(A)." Notably, Recio amended his first charge to withdraw a claim that IATSE threatened to expel him. Tr. p. 193, lines 8-11. No discipline has been taken against Recio by the Local.

work permit so Recio would be compliant with the Union membership obligation. McHugh asked Recio to report “show to show.”²⁰

Recio understood that he could work, as shown in his confirmation email to McHugh dated April 13, 2010, that stated “this is to confirm my conversation on 4/12/10 with [M]ike [I] am allowed to return to work to report to him show to show and wait for the meeting on [J]une . . .”²¹ On April 15, 2010, Recio changed his story and complained to Dan Mahoney, Assistant Director of Motion Picture and Television Production for the International IATSE stating: “[I . . .] was told by the [Business Agent] that I was not allowed to work anymore till my paperwork was completed . . .”²² No testimony supported this allegation. According to Recio, Mahoney said that he would look into it, but also told Recio to go back to work.²³ Also, in response to Recio’s complaint, Dale Short, attorney for the International, spoke with Recio and encouraged Recio to return to work.²⁴ Recio testified when he was told by Short that he could and should go back to work, he took that to mean any job, including *Green Lantern*.²⁵

Claiming to be in need of money, on April 15, Recio withdrew his transfer application for a refund of the \$450.00.²⁶ Recio testified that he requested a refund because he could not

²⁰ ALJ p. 4, lines 46-47; Tr. p. 61, line 25; Tr. p. 62, line 1. Incidentally, Recio also testified the Business Agent has okayed Recio to go to work on jobs since 2003. Recio informs the Business Agent that he is working and the Business Agent(s) say ‘okay.’ Tr. p. 157, lines 21-25. Reporting show-to-show is a ‘verbal work permit.’ McHugh gave Recio a verbal work permit pending the membership vote on Recio’s transfer application. In the “absence of a compulsory hiring hall, the granting or withholding of clearances or work permits is an internal union matter protected by the proviso to Section 8(b)(1)(A), which preserves the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of union membership.” *Carpenters, Local 171 (United Constr. Co.)*, 169 NLRB 1 (1968) citing to *Kaiser Gypsum Co., Inc.*, 118 NLRB 1576 (1957).

²¹ ALJ p. 5, lines 2-3. General Counsel’s Exhibit 6 Email from Recio to McHugh.

²² ALJ p. 5, lines 27-34. General Counsel’s Exhibit 7 Email from Recio to Mahoney.

²³ ALJ p. 5, lines 33-34; Tr. p. 70, lines 21-25; Tr. p. 71, line 12.

²⁴ ALJ p. 6, lines 2-7; Tr. p. 180, lines 14-16.

²⁵ Tr. p.191, lines 7-11; Tr. 192, line 16. Recio testified “Mr. Short told me that I should go back to work.”

²⁶ ALJ p. 5, lines 14-17. General Counsel’s Exhibit 5: IATSE Member Refund.

afford to pay bills, and keep an apartment in New Orleans with a home in Florida.²⁷ In conflict with the General Counsel's theory of the case, *without a transfer*, Recio resumed employment on *Green Lantern* on April 22.²⁸ Woods testified that he contacted Recio after he quit on March 11, to ask Recio to come back to work.²⁹ When Recio returned on April 22, he resumed employment without incident.³⁰ But, after working four days, on April 28, Woods testified that Recio said that he could not work here anymore and he was going back to Florida to take care of his transfer.³¹ Woods asked Recio to reconsider; after all, Woods believed additional work dates would be available after April 28, though not the full run of the show as Recio alleged.³² But Recio said that he was better off going back to wrestling in Pennsylvania.³³ Woods denied firing Recio on March 11 or on April 28.³⁴ Also, Woods denied that the Union had ever instructed that Recio could not work on the production.³⁵

After Recio voluntarily left *Green Lantern*, McHugh testified that he received a call from Mahoney regarding Recio's dissatisfaction about the amount he was getting on this production.³⁶ Unaware that Recio had left the job, McHugh called Woods and Best Boy Dave

²⁷ ALJ p. 11, lines 25-28; Tr. p. 59, lines 8-10; Tr. p. 75, lines 8-14; Tr. p. 191, lines 14-16.

²⁸ ALJ p. 11, lines 25-26; Tr. p. 73. The parties stipulated that Recio returned to work on April 22 with *Green Lantern*.

²⁹ Tr. p. 266, lines 9-13.

³⁰ ALJ p. 8, lines 23-24.

³¹ ALJ p. 8, lines 26-29; Tr. p. 267, lines 7-9.

³² Tr. p. 280, lines 21-24. Woods testified that he lacked the authority to hire more than "five days or less." ALJ p. 6, lines 17-21. Also, General Counsel's Exhibit 3: Deal Memo For Union Employees expressly provides in pertinent part: "Employee is hired on a daily basis . . . There is no other guarantee of the period of service unless otherwise specified, and *nothing herein contained shall constitute a "run-of-the-show" guarantee.*" (Emphasis added).

³³ ALJ p. 8, line 30; Tr. p. 267, lines 5-10.

³⁴ ALJ p. 8, lines 32-33; Tr. p. 266, lines 4-5.

³⁵ ALJ p. 8, lines 33-34.

³⁶ ALJ p. 8, lines 3-5; Tr. p. 351, lines 3-7.

Dunbar to find out why Recio was let go.³⁷ McHugh testified that he spoke with Dunbar, who explained that Recio was an as-needed employee and not used every day.³⁸ The General Counsel failed to prove that McHugh was in contact with Big Moose before Recio left.

3. The Judge Was Correct To Not Credit Recio's Second Account.

Simply put, the complete testimony of Recio lacks credibility. Recio was untruthful, regarding many things, especially how his employment ended on *Green Lantern* on March 11 or April 28th. For the second alleged termination, the Judge correctly credited corroborative testimony and exhibits (i.e. conflicting email accounts written by Recio), and came to conclusions that the second account was “murkier.”³⁹ Based *only* on the testimony of the charging party, the Judge noted that this case rises and falls on his credibility.⁴⁰ Moreover, the General Counsel failed in its burden to show where the charging party has merit. The Judge correctly concluded: “[a]ll that the General Counsel has in this case to link Recio’s April 28 termination of employment to the Respondent Union is speculation and conjecture.”⁴¹

General Counsel’s Cross-Exceptions continue to offer more speculation and conjecture in its Cross-Exceptions. Nothing established that McHugh harbored discriminatory animus against Recio.⁴² The record shows that McHugh helped Recio with his transfer, offered to put his membership to a second vote, and advised Recio to bring his friends vote for him. Further,

³⁷ ALJ p. 8, lines 4-5.

³⁸ Tr. p. 352, lines 18-24.

³⁹ ALJ p. 11, line 2.

⁴⁰ ALJ p. 9, line 2.

⁴¹ ALJ p. 11, lines 47-49.

⁴² *Columbian Distribution Servs., Inc.*, 320 NLRB 1068 (1996) (“[a]bsent animus, the *prima facie* case falls”); *Sears Auto Ctr.*, Nos. 22-CA-2293, 2002 NLRB LEXIS 139, at *18 (NLRB, Apr. 22, 2002) (dismissing complaint where “the critical element of animus [was] absent”); *Wrangler, Inc.*, No. 10-CA-29666, 1997 NLRB LEXIS 734, at *25 (NLRB, Sept. 25, 1997) (General Counsel cannot prove a *prima facie* case where there “was no showing of animus”).

McHugh gave a verbal permit so Recio would not have to wait until the membership voted him into Local 478. When McHugh learned Recio was no longer working at *Green Lantern*, he called the Employer with concern. When Recio withdrew his membership, Recio testified that the Secretary Treasurer was “very helpful” with putting together his application papers, also processed his refund “quick as a bunny.”⁴³

The General Counsel’s Cross-Exceptions also incorrectly propose “the only rational explanation is that for the second time, McHugh had Recio discharged because [Recio] was not following McHugh’s perceived orders.”⁴⁴ The record does not support this explanation as rational. Recio’s emails showed that he perceived that he was allowed to work and was waiting the next membership vote.⁴⁵ The record is clear that McHugh, Mahoney, Short and Woods encouraged Recio to work in Louisiana. But as the Judge correctly noted, “Recio admittedly did not return to work in Louisiana, despite Short’s assurances.”⁴⁶ The only impediment was Recio, himself.

The General Counsel’s opinion that “McHugh immediately punished Recio with termination” after Recio withdrew his application is wholly unsupported by the record, and in particular, by General Counsel’s citation of the record (Tr. 75-78). This citation provides Recio’s uncorroborated account that Woods told Recio he was no longer needed and should seek other employment.⁴⁷ Woods testified that Recio quit.⁴⁸ McHugh was unaware that Recio had left *Green Lantern*. McHugh inquired *after* Recio left Green Lantern to investigate the Recio’s

⁴³ Tr. p. 166, lines 21, 25.

⁴⁴ See Counsel for the Acting General Counsel’s Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge, p. 9

⁴⁵ General Counsel Exhibit 6

⁴⁶ ALJ p. 6, lines 5-6.

⁴⁷ Tr. p. 78, lines 4-8.

⁴⁸ Tr. p. 267, lines 5-10.

complaint issued to Mahoney: “What I was trying to ascertain was, had he been fired or let go or . . . Was it on the part of Mr. Rico⁴⁹ to leave or was it on the part of the show?”⁵⁰

Based on the record, the Judge correctly found no contact between the Union and Employer was made before Recio’s alleged termination. Nor can such contact be reasonably inferred without proof that McHugh caused Recio’s second termination. Contrary to the General Counsel’s interpretation of the record, McHugh was unaware that Recio had quit; testimony supports that he called *after* Recio left because McHugh was looking into Recio’s complaint addressed to the International. The Judge was correct to conclude: “The only evidence General Counsel points to in support of this allegation is the *coincidental* timing between Recio’s withdrawal of his transfer application and his termination.”⁵¹

CONCLUSION

The burden to prove by a preponderance of the evidence that Local 478 committed unfair labor practices has not been met. Testimony failed to establish that Local 478 caused Recio to end his employment on April 28, 2010. Testimony and hearsay testimony entered by the General Counsel only supported that Recio could work. In fact, Recio did resume employment on *Green Lantern*, but soon quit (again) for financial reasons. Just as the Judge rejected General Counsel’s speculation and conjecture, the Board should also deny the General Counsel’s Cross-Exceptions as unsupported by evidence.

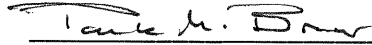
⁴⁹ Recio also used his Semi Professional Wrestling stage name, Rico Moon. Tr. p. 39, line 1.

⁵⁰ Tr. p. 351, lines 24-25; Tr. p. 352, lines 1-2.

⁵¹ ALJ p. 11, lines 11-13.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing Brief has been sent this 20th day of April to:

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