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 BRIEF IN SUPPORT OF EXCEPTIONS

Respondent Union International Alliance of Theatrical Stage Employees (IATSE), Local 478 (hereinafter referred to as "the Union" and "Local 478") submits this Brief in support of its exceptions.

INTRODUCTION

IATSE Local 478 is a Labor Organization within the meaning of Section 2(5) of the Act. IATSE represents employees working in the theatrical, moving picture, entertainment, amusement and commercial or industrial show industries of the United States and Canada. Members of Local 478 work in behind-the-scene areas including, sound, grip, electrical, carpentry, painting, wardrobe, sound, props, set dressing and set medic. Local 478 is located in

New Orleans, Louisiana. Local 478's jurisdiction covers Louisiana and southern Mississippi. Since 2005, Mike McHugh has been the Business Agent. As the Business Agent, McHugh is responsible for enforcing contracts between employers and members. He is also in charge of enforcing the Local Area Standards Agreement and IATSE's International Constitution and Bylaws. The Area Standards Agreement is the governing contract between Big Moose, LLC and Local 478.[1] Local 478 does not operate an exclusive hiring hall.[2] Local 478 provides an employee-membership list, but employers are not obligated to hire exclusively from this list.

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 on 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

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[1] Exhibit GC 2a and Tr. p. 313, lines 8-10: McHugh explained the Area Standards Agreement is "negotiated between [IATSE] [I]nternational and AMPTP, which is the American Motion Picture and Television Producers Association."

[2] Tr. p. 315, lines 2-17: McHugh testified that *Green Lantern* can directly hire or use the Union's list that was provided by McHugh to Big Moose Line Producer, Herb Gaines.

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 in 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.[3] 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 IATSE membership from his Florida Local 477 to Louisiana Local 478 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,[4] lack of a work permit or transfer status.

I. GROUND FOR EXCEPTION 1: CREDIBILITY

The General Counsel relied its case-in-chief on the strenuously disputed testimony of the Charging Party. The Judge began his analysis "because the only witness called by the

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[3] 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.

[4] Recio testified that he has been a member of IATSE Local 477 in Miami, Florida for over 27 years. Tr. p. 40, lines 6-7.

General Counsel is Recio, the Charging Party, this case rises or falls on his credibility."[5] Given the Judges' opinion, this case must fall for Recio's lack of credibility and impeached testimony. In *Standard Dry Wall Products, Inc.*, the Board explained:[6]

> it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor. Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect. (emphasis added)

On review, the Board has instructed that "the Act commits to the Board itself, not to the Board's Trial Examiner, the power and responsibility of determining the facts as revealed by a preponderance of the evidence . . ."[7] The Board bases its finding on a *de novo* review of the entire record, and is not bound by the Trial Examiner's findings of fact.[8]

The Trial Examiner (now, Administrative Law Judge) is instructed to make a credibility determination by evaluating "his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole."[9] Here, the decision is absent any such evaluation. In fact, the Judge expressed doubt in considering Recio's version, but still concluded: "While *not free from doubt*, I shall credit Recio's version of the conversation because the statement he recalled, after his memory was refreshed, is consistent with the other statements McHugh admitted making during this meeting."[10] Though Recio essentially used the exact claim and facts against the Union and Employer, the Judge found Recio's second account of events leading to how he left

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5 ALJ p. 9, lines 1-3.
6 *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950).
7 *Id.* at 544-545.
8 *Valley Steel Products Co.*, 111 NLRB 1338 (1955).
9 *In Re Double D. Const. Group, Inc.*, 339 NLRB 303 (2003) citing to *Daikichi Sushi*, 335 NLRB 622, 623 (2001).
10 ALJ p. 10, lines 32-35.

employment on April 28th "murkier"[11] or less credible. A review of the testimony revealed inconsistencies that were passed over in this decision that provide doubt to the Judge's resolution of crediting only the Charging Party.[12] Recio's testimony showed numerous instances of being untruthful,[13] but the Judge failed to acknowledge the impeachment value.[14] Furthermore, the Charging Party's testimony appears "so confused to raise doubt to its accuracy."[15]

A. <u>The Judge Erred by Relying on Recio's Misunderstanding Regarding Work Permits and Transfer Application</u>

A central issue is whether a member's ability to work is dependent on a work permit or transfer card. McHugh explained that a work permit is a *membership obligation* to maintain one's membership in IATSE.[16] It has no bearing on employment. The transfer is not an obligation, but an option for members who want to move their Union membership to a new residency. The record supports that since 2003, Recio worked on several productions in

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[11] ALJ p. 11, line 11.

[12] *Valley Steel Products Co.*, 111 NLRB No. 206 (1955).

[13] Recio admitted to giving untruthful information on his Deal Memo when he claimed that he was married when, in fact, he was not married. Tr. p. 218, lines 17; Tr. p. 219, line 13; *see also* GC Ex. 3, p.2; and In violation of Louisiana state law, Recio failed to file an income tax return in Louisiana in 2009 for the income that he earned while working in the state. Tr. p. 224, line 14; Tr. p. 225, line 9. "Louisiana . . .***nonresidents with income from Louisiana sources who are required to file a federal income tax return must file a Louisiana Individual Income Tax Return.***" Available at: http://revenue.louisiana.gov/sections/individual/indincome.aspx.

[14] *Cf. Halstead Metal Products v. NLRB*, 940 F.2d 66, 72–73 (4th Cir. 1991) "Impeachment evidence is crucial in Board proceedings, because the [judge] sits as judge and jury."

[15] *Id.* Recio admitted that he was very confused, and still was confused during the hearing. Tr. p. 161, lines 1-9; Recio testified that he gave "a whole bunch of dates" incorrectly in his first ***sworn*** statement. Tr. p 160, lines 25; p. 161, line 7; Tr. p. 215, lines 9-21; Recio first testified – in conflict with his affidavit – that in late April 2010, Woods advised that Woods "couldn't use [Recio] anymore until [he] straightened things out with Mike McHugh," but later Recio changed his testimony to state that Woods only mentioned McHugh during a conversation in early March 2010. Tr. p. 167, line 18; Tr. p. 169, line 4; Tr. p. 198, lines 12-20; Recio conceded his statement to the NLRB incorrectly stated that he was only working one day a week for Big Moose rather than the two or three days he actually was working. Tr. p. 216, line 6; Tr. p. 218, line 11.

[16] Tr. p. 338, lines 10-11.

Louisiana, without incident.[17] Because Recio experienced better employment opportunity in Louisiana than Florida, he expressed an interest in transferring his membership to IATSE Local 478.[18] Recio's testimony revealed his misperception regarding *internal* union obligations related to transfers and work permits. Recio testified that he "asked McHugh what he should do to continuing working in Louisiana."[19] He offered no testimony on McHugh's response.[20] The Judge implied McHugh responded to Recio's loaded question. Recio testified that he began seeking a transfer from his Local in Florida.[21] Lacking a Union transfer or work permit, Recio continued from one production to another.[22] And in fact, Recio admittedly quit his job on the production *Earthbound* when he was hired on *Green Lantern*.[23]

B. <u>The Judge Erred In Crediting Recio's Version On Employment Duration</u>

Without giving consideration to the testimony of Woods, McHugh and the Charging Party's signed contract (Deal Memo) that supports employment at *Green Lantern* would not constitute the run-of-the-show, the decision credited only Recio's testimony that he was told by Rigging Gaffer, Kevin Lang and Local Best Boy, Woods that he was hired for the run-of-the-show.[24] Lang was not called to testify. Woods denied this allegation, and testified he lacked the authority to hire more than "five days or less."[25]

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17 ALJ p. 3, lines 4-6; Tr. p. 129, lines 4-25; Tr. p. 130, lines 1-3; Tr. p. 135.
18 ALJ p. 3, lines 12-17.
19 ALJ p. 3, line 12.
20 ALJ p. 3, line 13.
21 ALJ p. 3, line 13.
22 ALJ p. 3, lines 17-19.
23 ALJ p. 3, line 20.
24 ALJ p. 3, lines 31-45; p. 8, line 19.
25 ALJ p. 6, lines 17-21

Moreover, the Deal Memo also provided any "oral understandings of any kind are not binding."[26] The Board upholds the parole evidence rule, which precludes any reliance on Recio's purported "oral understanding" on the duration of his employment.[27] Contrary to the parole evidence rule, the Judge based his findings on an inference, speculation and conjecture that the only reason Recio left *Earthbound* before the production ended must have been Recio's expectation to work for more than 5 days.[28] The preponderance of all the evidence established that Recio was an "as-needed" daily employee, since he would report to Woods at the end of the day to get the next assignment, time and place to report to work.[29]

C. <u>The Judge Erred In Finding That Recio Did Not Quit His Job On March 11</u>

Without any consideration that Recio has quit jobs before, i.e. quitting *Earthbound* for *Green Lantern*,[30] the Judge failed to credit Woods' testimony that Recio quit on March 11 to pursue another job opportunity. According to Woods, Recio said he was leaving to wrestle.[31] Recio admitted that he traveled back and forth from Florida to Louisiana and sought work in the semi-pro wrestling arena.[32] Instead, without foundation, the Judge concluded that the call placed by McHugh to Woods caused Recio to be fired.[33]

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26 ALJ p. 3, lines 43-44.

27 *Don Lee Distributor, Inc.*, 322 NLRB 470, 484-485 (1996), *enfd.* 145 F.3d 834 (6th Cir. 1998), *cert. denied* 525 U.S. 1102 (1999) (extrinsic evidence inadmissible to vary or contradict the terms of an unambiguous agreement).

28 ALJ p. 9, lines 50-52; p. 10, lines 1. Recio offered inconsistent testimony on duration of employment with Big Moose. Recio testified that he was offered run-of-the-show when he began in March. Tr. p. 121, lines 7-10. According to Recio, Woods offered 4 to 5 weeks of employment when he returned to the production in April. Tr. p. 74, line 23.

29 Tr. p. 259, lines 11-16. Woods explained the number of employees needed for each day varied. Lang would tell Woods how many he needed. ALJ p. 3, lines 32-33.

30 ALJ p. 3, line 20.

31 ALJ p. 8, lines 21-22.

32 ALJ p. 4, lines 34-37.

33 ALJ p. 9, lines 19-25.

McHugh and Woods testified independently that McHugh did call Woods, but only to have Recio contact McHugh. Corroborated testimony from McHugh and Woods also supported that McHugh did not tell Woods what the call was about.[34] While it is likely Recio was aware he had unfinished paperwork regarding his IATSE obligations, Recio claimed that Woods relayed a message about this paperwork.[35] Though Recio was not privy to call, the Judge credited Recio's inference that it must have regarded his paperwork. Woods denied knowing the purpose of the call other than to have Recio contact McHugh.[36]

Contrary to the decision, there is a dispute that McHugh wanted to talk to Recio because McHugh had just learned that Recio was working without a valid work permit.[37] The Judge drew another erroneous conclusion and credited Recio's misunderstanding that a work permit allows employment. The decision omitted relevant testimony from McHugh who explained that a work permit is a *membership obligation* to maintain your membership in IATSE.[38] It has no bearing on employment. The Judge inferred from Recio's account that Woods' alleged reference to Recio's paperwork made shortly after Woods spoke with McHugh[39] established the causation between the Respondent Union's "demand" and the respondent Employer's action.[40] But, under cross examination, Recio could not recall precisely when Woods allegedly mentioned paperwork; it could have been when he left on March 11 or when he left

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34 Tr. p. 265, lines 14-19.
35 ALJ p. 9, lines 25-26.
36 Tr. p. 265, lines 14-19.
37 ALJ p. 9, lines 24-25.
38 Tr. p. 338, lines 10-11.
39 ALJ p. 10, lines 3-5
40 ALJ p. 10, lines 7-8

on April 28.[41] In conflict, Recio's supplemental affidavit stated otherwise: "I don't think I ever spoke with Earl Woods about my transfer. I think all my conversations about my transfer were between Mike McHugh."[42] Despite Recio disputing his own testimony regarding the paperwork statement, the Judge credited Recio.

The Judge further erred in crediting Recio's testimony that Woods also stated that McHugh could make Woods' life difficult."[43] Corroborated testimony from McHugh and Woods denied this allegation.[44] Though the Judge passed over the Respondents' account as undisputed, there was a dispute that McHugh placed a demand, had incentive or discriminatory animus[45] against Recio to place a demand, or that McHugh would have the ability to influence the Employer (via Woods) with such a demand.

Furthermore, Recio's testimony is completely nonsensical given the relationship between the Union and Employer. Neither McHugh nor the Union has the ability to make life "difficult" for Woods under the Area Standards Agreement. The Judge failed to recognize the significance of the Area Standards Agreement establishing that the Big Moose was free to hire employees for *Green Lantern* directly off the street.[46] Under this Agreement, Big Moose is not contractually bound to hire Union members. Big Moose has to notify the Union if it had production within the Union's jurisdiction. The decision to request a referral list of Union

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41 Tr. p. 169, lines 8-9: "Well, at one point of my letting go, either number one or number two, Mr. Woods did say that I had to straight things out with Mr. McHugh."

42 Tr. p. 168, lines 24-25.

43 ALJ p. 6, lines 7-9.

44 McHugh denies having the power to make Woods' life difficult. Tr. p. 335, lines 10-125; Tr. p. 353, line 25, Tr. p. 354, lines 1-4. Woods testified about McHugh's call to have Recio contact him. Tr. p. 265, lines 14-25.

45 *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").

46 ALJ p. 2, lines 37-44.

members is at Big Moose's sole discretion. Moreover, Woods testified that he usually does not go through the Union to find employees and calls people he knows from having worked with them.[47] In fact, Recio was hired not from a roster list, but from a previous working relationship with Woods.[48] It is undisputed that Woods would only contact the Union for a roster list as a "last resort."[49] Hence, based on the Agreement and Woods' hiring practices, it is clear that rather than making life "difficult" for Woods or Big Moose, the Union has every incentive to do just the opposite to promote its members' roster list to be requested by Big Moose.

D. The Judge Erred In Crediting Only Recio's Account Of Rejecting Duplantier's Job Offer

Under cross examination, Recio's testimony changed from numerous offers to only one offer by alleged employer representative, Ferdinand Duplantier, who did not testify.[50] The Judge found that Recio's uncorroborated testimony "established" that there was only one offer from Duplantier. Although Recio stated under direct testimony and sworn affidavit that he had received numerous offers, Recio changed his testimony under cross examination that there was only one alleged job offer from Duplantier.[51] The Judge also failed to provide any reason why Recio's inconsistent testimony should not be entirely discredited. The Judge further erred in not making an adverse inference in the General Counsel's failure to subpoena Duplantier to support this "one" job offer.

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47 ALJ p. 8, lines 12-13.

48 ALJ p. 8, lines 16-17: Woods testified that he has known Recio since they worked together on another movie in 2003.

49 ALJ p. 8, lines 13-15.

50 ALJ p. 4, lines 37-41; p. 10, line 47. Tr. p. 171, lines 1-2: "I know I said – I know it [the first affidavit] says job offers, but I only spoke to Mr. Duplantier." In conflict with Recio's testimony, his original affidavit states: "I had job offers to work in Shreveport, Louisiana . . .because when Mr. Duplantier called me about going to work, I told him I was not allowed to work. . . I had job offers in Shreveport during March 31 and April 21. . ." Tr. p. 170, lines 8-14.

51 ALJ p. 10, lines 43-47.

Recio initially could not remember when he was called, but he testified that he told Duplantier that he could not work until his paperwork was "straight."[52] Since Recio gave inconsistent dates,[53] the Judge made an inference on an inference. The Judge first inferred that this call from Duplantier occurred near March 17, when Recio met with McHugh.[54] The second inference was based on Recio's only reason for not taking the job in Shreveport[55] because Recio believed that he could not work in Louisiana.[56] The Judge credited Recio's recollection that McHugh allegedly told Recio that he would not be able to return to work until his [transfer] application was complete.[57] At this meeting, Recio testified that McHugh helped him finish the transfer application that Recio voluntarily initiated, and McHugh also gave him a verbal work permit.[58] McHugh helped Recio be compliant under the IATSE membership obligations.

Even if this job offer existed, the Judge failed to apply his own conclusion: "[A]ny loss of work after Recio's April 12 conversation with McHugh was not caused by the Union,"[59] because McHugh gave Recio verbal permission to continue working in Louisiana. Hence, using the Judge's timeline, if Recio rejected job offer(s), including Duplantier's offer after April 12, the Union would not have violated the Act.[60] Despite noting that Recio "could not recall the date he

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52 ALJ p. 4, lines 37-41, the fact that Duplantier was not cross examined is not in the decision. Circumstances where a witness could not be "adequately cross-examined" by the Respondents has been excluded testimony. *Carpenters (Afl-Cio) Local 224 (Peter Kiewit Sons Co.)*, 132 NLRB 295 (1961).

53 Tr. p. 173, line 22: Recio testified Duplantier offered him a job in August. Tr. p. 180, lines 1-4: Affidavit shows "I had job offers in Shreveport during the March 31 and April 21 . . .That's your testimony. Correct? Yes, sir." Tr. p.179, lines 1-11: According to Recio's email dated April 12, Duplantier called Recio to return to work, but he said he was not allowed to work by McHugh.

54 ALJ p. 10, line 52.

55 Shreveport, LA is approximately 330 miles from New Orleans, LA.

56 ALJ p. 4, lines 38-39

57 ALJ p. 4, lines 25-28.

58 ALJ p. 4, lines 20-28.

59 ALJ p. 11, lines 37-39.

60 ALJ p. 11, lines 31-34.

received his job offer"[61] and the General Counsel's failure to produce any other evidence that this job offer occurred before April 12, the Judge arbitrarily inferred that Duplantier's offer must have occurred *before* April 12, and therefore, the Union had coerced Recio into rejecting the alleged job offer.

Incidentally, the Judge crediting only Recio's unsubstantiated testimony grants Recio a "double dip" to the detriment of the Union.[62] Along with backpay owed from the alleged "first termination on March 11," the Union is solely "ordered to make whole for any wages and benefits [Recio] would have earned had he accepted the offer to work on [Duplantier's] *Drive Angry* . . ."[63] The unjust remedy against the Union is based on hearsay and unsubstantiated testimony.

Further, the Judge erred in making this finding in isolation of other factors. The Judge noted, but failed to give importance to the fact that Recio had worked on seven prior films without work permits or transfer.[64] Before working on the *Green Lantern* production, Recio had worked on another production in Louisiana without a work permit or transfer card.[65] In fact, Recio had worked with Duplantier on a previous production without a work permit![66] Recio's previous work in Louisiana spanning six years and seven productions without the Local's permission is glaring evidence that negates Recio's belief that he could not work in Louisiana without a work permit.

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61 ALJ p. 10, lines 47-48.

62 ALJ p. 12, lines 34-38: The Judge held the Employer and Union "jointly and severally liable to make him whole for any loss of earnings and benefits resulting from his unlawful termination on March 11, 2010. Because I found that the Respondents did not commit any unfair practice in connection with Recio's termination of employment on April 28, the backpay period shall be tolled effective April 22. . . ."

63 ALJ p. 12, lines 43-47.

64 ALJ p. 3, line 4.

65 ALJ p. 3, line 10.

66 ALJ p. 4, footnote 6.

E. The Judge Failed to Evaluate All Evidence That Was Insufficient For Recio's First And Second Account

Claiming to be in need of money, on April 15, Recio withdrew his transfer application for a refund of the $450.00.[67] But, in direct conflict with the General Counsel's theory of the case, as relied on by the Judge, *without a transfer*, Recio resumed employment on *Green Lantern* on April 22.[68] Recio used a similar account for the reason he was "discharged" again on April 28, but the Judge found events leading to the second termination "murkier"[69] or less credible to show causation between the Union and the Employer. The decision cited to Recio's inconsistent testimony: on April 15, Recio complained by email to the Assistant Director of Motion Picture and Television Production for the International Union that: "[the Union] would not let him work even though he had completed the paperwork required [to transfer] membership. Recio's complaint in the e-mail appears to conflict with his testimony that McHugh told him on April 12 that he could return to work . . ."[70] For the second instance, the Judge correctly concluded, based on a lack of evidence, that Recio voluntarily relinquished employment on April 28, and moved back to Florida.[71]

In contrast to Recio's testimony, McHugh's and Woods' testimony was consistent. Woods' testimony was straightforward and corroborated by McHugh's testimony that Recio left on his own accord on March 11 from the production *Green Lantern*, just as he had done with his former employment with the production *Earthbound*. Nothing in the record, not even Recio's self-serving testimony, proved that McHugh influenced Recio's employment or

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67 ALJ p. 25, lines 11-12.General Counsel's Exhibit 5: IATSE Member Refund.
68 ALJ p. 11, lines 25-26.
69 ALJ p. 11, line 1.
70 ALJ p. 5, lines 27-30.
71 ALJ p. 11, lines 23-25.

employment opportunities. The work permit, as an IATSE membership obligation, has no bearing on employment. The transfer is not an obligation, but an option for members who want to move their Union membership to a new residency. The Judge only credited one side of this story—Recio's account— without disclosing specific inconsistencies and recollection defects, and thus, failed in the evaluation that requires a view of *all* the relevant evidence. For this reason, the Board should overrule the decision.

II. GROUNDS FOR EXCEPTION 2: UNFOUNDED INFERENCES

To credit Recio's version required the Judge to fill in large gaps and make leaping inferences. Other plausible reasons, as supported by testimony, were not considered in this decision. The Board has dismissed the complaint upon finding a circular reasoning, where each finding is based upon the other, and an absence of supporting testimony requires "pure speculation" in concluding, on the basis of "inference piled upon inference."[72] That is what this decision amounts to.

A. Impermissible Inferences Regarding Recio's Alleged March 11th Termination

The Judge erroneously found with respect to March 11 that Recio was terminated.[73] The Board has long held that "inferences must be founded on substantial evidence upon the record as a whole."[74] Here, the Judge's circular analysis rejected the corroborative testimony of McHugh and Woods, and focused solely on Recio's inconsistent account on Woods' alleged statements regarding paperwork and the content of the phone call between McHugh and

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[72] *Valley Steel Products Co.*, 111 NLRB 1338 (1955).

[73] ALJ p. 10, lines 18-24.

[74] *Steel-Tex Manufacturing Corp.*, 206 NLRB 461, 463 (1973); *Diagnostic Center Hospital Corp.*, 228 NLRB 1215, 1216 (1977).

Woods. The Judge buttressed two impermissible inferences to prove causation.[75] The first impermissible inference was that McHugh voiced concerns to Woods regarding Recio's lack of a work permit.[76] Notwithstanding that McHugh and Woods denied having any such conversation regarding Recio's paperwork, this call by itself is insufficient evidence to prove causation of termination based on a telephone call between a Union representative and employer. The second impermissible inference that builds on the alleged content of the call between McHugh and Recio was an indirect request, demand or threat for Woods to terminate Recio. Only McHugh and Woods know the content of this telephone conversation and it was simply to request that Recio contact McHugh; nothing further on the record supports otherwise.

B. Impermissible Inferences Regarding the March 17th Meeting

The Judge found that the issue raised by McHugh that Recio worked on three productions since they met without obtaining permission "clearly establishes McHugh's belief that, in order to work in Louisiana, Recio needed the Respondent Union's approval."[77] First, this misstates the testimony because McHugh spoke of a "work permit" and not *permission* in this context.[78] Second, McHugh's testimony does not "clearly establish" his belief regarding employment in Louisiana, but rather it shows his understanding of what members are supposed to do *under the Constitution*: i.e. seek a work permit when traveling through other IATSE jurisdictions or elect to transfer membership if a member decides to move to another state. And last, McHugh's testimony contradicts the Judge's "unequivocal" finding because

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[75] ALJ p. 10, lines 4-7.
[76] ALJ p. 10, lines 12-14.
[77] ALJ p. 9, lines 35-40.
[78] Tr. p. 338, lines 19-20.

McHugh's remark, "why are you here for the third time in a row without asking for permits,"[79] was not meant to be deemed an admission or employment requirement, because McHugh agreed work permits are a membership obligation to maintain membership in IATSE.[80] It is a reasonable inference that if Recio intended to transfer his membership to Louisiana, he might not want to lose his membership with IATSE. McHugh was instrumental in helping Recio with the transfer application that Recio voluntarily initiated, and McHugh granted a verbal work permit.

III. GROUNDS FOR EXCEPTION 3: INTERNAL UNION RULES

The Board has held 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."[81] In *Scofield v. NLRB,* the Supreme Court held that unions are "free to enforce properly adopted rules which reflect a legitimate union interest."[82] The General Counsel is unable to fulfill the burden to prove a Section 8(b)(1)(A) violation because Local 478 can enforce IATSE internal rules, none of which affected or affect Recio's employability. In *NLRB v. Allis-Chalmers Manufacturing Co.*, the Court determined that "Congress did not propose any limitations with respect to the internal affairs

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79 Tr. p. 338, lines 19-20.

80 Tr. p. 338, lines 4-13.

81 *Carpenters, Local 171 (United Constr. Co.)*, 169 NLRB 1 (1968) citing to *Kaiser Gypsum Co., Inc.*, 118 NLRB 1576 (1957).

82 *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. 193. No discipline has been taken against Recio by the Local.

of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status."[83] Whether a Union's internal regulations affect a member's employment status hinges on evidence showing the employer has agreed to be bound by the Union's internal rules.[84]

The Board dismisses complaints when evidence is insufficient to show an illegal arrangement or practice between the employer and Union.[85] In *Ohio Valley Carpenters Dist. Council (E. M. Redington Co.)*, the complaint was dismissed because the Charging Party's version that the Business Agent "did nothing more than remind . . .[the Charging Party] and the others of their union obligations and thereafter they *voluntarily quit working.*"(emphasis provided by the Board).[86] The Charging Party also testified that the Business Agent allegedly remarked to a member, "if they do get cleared in here, I'll see to it that they don't get any jobs." The Board found this remark was not coercion, but rather "nothing more than a prediction to a third party of events to transpire."[87] The Board also noted, "in view of [the Charging Party's] testimony that he has continued to work in the area since becoming a member of the Respondent Local it was not even an accurate prediction."[88]

Similarly here, at the March 17th meeting between Recio and McHugh, McHugh did nothing more than remind Recio to finish his transfer application. The remarks that suggested Recio had not gone through the "proper channels"[89] to get a work permit was relayed only to

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83 *N. L. R. B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195, 87 S. Ct. 2001, 2014, 18 L. Ed. 2d 1123 (1967).

84 *Ohio Valley Carpenters Dist. Council (E. M. Redington Co.)*, 131 NLRB 1130 (1961).

85 *Ohio Valley Carpenters Dist. Council (E. M. Redington Co.)*, 131 NLRB 1130 (1961); *Carpenters, Local 171 (United Constr. Co.)*, 169 NLRB 1 (1968); *Carpenters, Local 171 (United Constr. Co.)*, 169 NLRB 1 (1968).

86 *Ohio Valley Carpenters Dist. Council (E. M. Redington Co.)*, 131 NLRB 1130 (1961).

87 *Id.*

88 *Id.*

89 Tr. p. 361, lines 1-2.

Recio and not to the employer or Woods. According to Woods, Recio mentioned his transfer application,[90] but Woods denied asking Recio or any employee for a "transfer card."[91]

The Judge opined somewhat unclearly whether the allegation that McHugh told Woods he would make Woods' life difficult "would establish the unlawful motive behind Recio's first termination."[92] Though McHugh denied making such statements to Woods, in *arguendo,* if Recio's testimony were true, (and that was doubtful), this statement without more did not establish that the Union coerced or caused Recio's alleged termination. In *Carpenters, Local 171 (United Construction Co.)*, the Board adopted the Trial Examiner's findings that the Union did not cause a member's termination in facts similarly alleged in this instant case.[93] The Union did not operate an exclusive hiring arrangement with the employer, yet the superintendent refused to allow a member employment until his work permit and paperwork was straightened out with the Union.[94] The Business Agent declined to give a work permit until he was cleared by union vote by the next month.[95] The Charging Party filed a charge against the Union for denying a permit and violating the Act. The Board declined to credit unsubstantiated testimony from the charging party, who claimed to see a memorandum between the Union Steward and Employer regarding his work permit status. The Board dismissed the charges against the Union because a review of the evidence did not support the Union coerced or caused the member not to be hired by the employer:

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90 Tr. p. 267, lines 5-10.

91 Tr. p. 277, lines 6-10. Recio and General Counsel often referred to transfer card [application] and work permit as meaning the same thing. McHugh explained that a transfer card pertains to membership, and the permit pertains to working in the IATSE jurisdiction, both of which are internal Union matters. Tr. p. 367, lines 10-11; Tr. p. 368, lines 4-9.

92 ALJ p. 9, lines 27-28.

93 *Carpenters, Local 171 (United Constr. Co.)*, 169 NLRB 1 (1968).

94 *Id.*

95 *Id.*

> There [was] no showing that the Respondent Union called upon [the superintendent] to enforce the [union's] constitution in this regard or called upon him specifically to refuse to hire Encinas because he had not cleared through the Union . . .There is no evidence that [the union business agent] took any action with regard to [the member's] employment other than to refuse to issue him a work permit. The only evidence of any contact between the Employer and the Union herein was [the member's] testimony that [the superintendent] promised to call the union, and that testimony has no probative value as evidence that [superintendent] did so.

Woods' alleged statement that Recio could not work until his paperwork was "straightened out" is not substantial evidence that Woods acted from any indirect coercion by McHugh. Similarly, Woods' other two alleged statements that McHugh could make his life difficult and that he could no longer use Recio "as per Mike McHugh" do not clearly indicate that McHugh called upon Woods to terminate Recio for lack of a work permit. Here, the only contact between the Local and Big Moose that the Judge relied on is a quick phone call between McHugh and Recio, about which both testified that McHugh only asked to speak to Recio. The Board should dismiss the unsubstantiated testimony that the phone call represented more based on Recio's speculation.

In *Carpenters (Afl-Cio) Local 224 (Peter Kiewit Sons Co.)*, the Board disagreed with the Trial Examiner's inferences unsupported by the record that failed to establish an "illegal agreement" between the union, employer and employee.[96] Though the Union had internal rules requiring work permits for members traveling into its jurisdiction, the Union imposed no obligation upon employers to hire union members or have work permits. Nothing established

[96] *Carpenters (Afl-Cio) Local 224 (Peter Kiewit Sons Co.)*, 132 NLRB 295 (1961).

that the Company agreed to be bound by internal rules and regulations of the Union, or that the Company sought union approval or clearance of anyone it hired.[97]

Here again, nothing on the record established that Big Moose agreed to be bound by internal rules of seeking work permits or compelling employees to transfer membership to Local 478. The Area Standards Agreement is also devoid of any obligation requiring employers, like Big Moose, to hire, not hire or fire based on an employee's work permits or transfer status of union-membership status.[98] There is no testimony on the record that Woods, Big Moose or any employer for that matter, ever asked Recio for a work permit, or conditioned employment on a work permit. According to Recio, he believed this all was a personal issue between him and McHugh.[99]

However, this was not a personal issue, but rather McHugh, authorized as a business agent for IATSE, was enforcing IATSE membership obligations under the International Constitution and Bylaws. Only noted in the decision, McHugh explained the procedure: "that a member must confine his work to his geographical jurisdiction. If he wishes to go elsewhere, he must request permission from the jurisdiction where he wants to go. He must request permission in advance of going there and receive that in writing."[100] The result of not following the Union's Constitution and Bylaws can result in losing IATSE membership, but not employment. McHugh testified, without contradiction, he has no authority under the contract to separate an employee from employment.[101] But the Judge deviated from McHugh's intention underlying his testimony finding: "clear intent of the meeting, which McHugh claims

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[97] *Carpenters (Afl-Cio) Local 224 (Peter Kiewit Sons Co.)*, 132 NLRB 295 (1961).
[98] GC 2(a) Area Standards Agreement of 2009.
[99] Tr. p. 200, lines 12-21.
[100] Tr. p. 338, lines 4-10.
[101] ALJ p. 7, lines 23-25; Tr. p. 339, lines 3-16.

he requested, was to ensure Recio either obtained his permission to work in Louisiana, or completed the transfer of his membership to the Respondent Union."[102]

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 pressured or could have pressured Big Moose to fire Recio. Woods' and McHugh's corroborative testimony shows neither Local 478 nor McHugh has any influence on Big Moose or Woods in hiring, not hiring or firing employees. Further, testimony did not show McHugh coerced or restrained *Green Lantern* employees, preventing Recio from working in Louisiana, or required a transfer card. Based upon the foregoing, the Union's Exceptions should be granted, thereby dismissing this complaint in its entirety.

Respectfully submitted,

ROBEIN, URANN,
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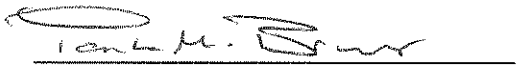

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[102] ALJ p. 10, lines 10-38.

CERTIFICATE OF SERVICE

A copy of the foregoing Respondent International Alliance of Theatrical Stage Employees, Local 478's Exceptions to Decision by Administrative Law Judge has been sent by March 1, 2012 to:

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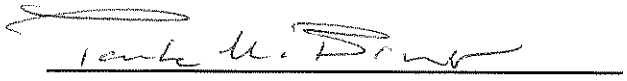

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