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Crew One Productions, Inc. and International Alliance of Theatrical Stage Employees. Case 10–CA–138169

January 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by International Alliance of Theatrical Stage Employees (IATSE or the Union) on October 3, 2014, the General Counsel issued the complaint on October 23, 2014, alleging that Crew One Productions, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to recognize and bargain following the Union’s certification in Case 10–RC–124620. (Official notice is taken of the “record” in the representation proceeding as defined in the Board’s Rules and Regulations, Sections 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On November 7, 2014, the General Counsel filed a Motion for Summary Judgment. On November 12, 2014, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its position that the petitioned-for unit consists of independent contractors who are not employees within the meaning of Section 2(3) of the Act. In addition, the Respondent contends that the Regional Director and the Board erred in failing to dismiss the representation petition because the hiring hall operated by IATSE Local 927 directly competes with the Respondent as a labor provider in the Atlanta Metropolitan area and that, therefore, IATSE is barred from representing the bargaining unit due to a conflict of interest.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.¹ We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a Georgia corporation with an office and place of business located in Atlanta, Georgia, where it is engaged in provid-

¹ In its response to the Notice to Show Cause, the Respondent urges the Board to consider “new evidence” that supports the arguments it made in the representation proceeding, reconsider its decision in the representation proceeding, and deny the General Counsel’s Motion for Summary Judgment. The alleged “new evidence” that the Respondent seeks to offer includes documents that postdate both the hearing and the Board’s Order denying review of the Regional Director’s Decision and Direction of Election: (1) a letter from the Georgia Department of Labor dated September 8, 2014, in which an individual in the petitioned-for unit was found to be an independent contractor for the purposes of Georgia’s Employment Security Law; and (2) statements from IATSE Local 927’s Facebook page celebrating the results of the election. We find no merit in the Respondent’s contention. The proffered evidence is not newly discovered and previously unavailable, nor would such evidence, if adduced, establish special circumstances. Newly discovered evidence is evidence in existence at the time of the hearing which could not be discovered by reasonable diligence. *Manhattan Center Studios, Inc.*, 357 NLRB No. 139 (2011); see also *University of Rio Grande*, 325 NLRB 642, 642 (1998) (holding that a post-hearing ruling by the Internal Revenue Service that certain individuals were employees for tax purposes is not “newly discovered” evidence). In addition, in order to warrant a further hearing, the newly discovered evidence must be such that if adduced and credited it would require a different result. See Sec. 102.48(d)(1) of the Board’s Rules and Regulations. The proffered evidence concerns facts that were in existence at the time of the representation hearing, and it is offered in support of the same arguments by the Respondent that were fully litigated at the hearing and subsequently rejected. To the extent that the proffered evidence pertains to facts arising after the hearing, it does not constitute newly discovered evidence. *APL Logistics*, 341 NLRB 994, 994 fns. 1 and 2 (2004), enfd. 142 Fed.Appx. 869 (6th Cir. 2005). Further, even assuming that the proffered evidence is newly discovered, the Respondent has failed to show that it would require a different result.

² Member Miscimarra would have granted review in the underlying representation proceeding on the independent contractor issue. He agrees, however, that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

ing technical labor staffing, including stagehands for various theatrical and industrial venues.

In conducting its operations during the 12-month period preceding the filing of the charge in this proceeding, the Respondent performed services valued in excess of \$50,000 in states other than the State of Georgia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held by mail ballot and concluded on June 12, 2014, the Union was certified on September 4, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

By letters dated September 8 and 18, 2014, the Union requested that the Respondent bargain with it as the exclusive collective-bargaining representative of the unit employees and, since about September 23, 2014, the Respondent has refused to do so.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about September 23, 2014, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce with-

in the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord: *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Crew One Productions, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Alliance of Theatrical Stage Employees as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, 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) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Atlanta, Georgia, copies of the attached

notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 23, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 30, 2015

Mark Gaston Pearce,	Chairman
Philip A. Miscimarra,	Member
Kent Y. Hirozawa,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

³ 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."

APPENDIX
NOTICE TO EMPLOYEES
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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Alliance of Theatrical Stage Employees as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All stagehands, including riggers, lighting technicians, audio technicians, stage carpenters, truck loaders, property persons, wardrobe attendants, forklift operators, personnel lift operators, audiovisual technicians, camera operators, spotlight operators and others in similar positions engaged in the loading in, operation, and loading out of equipment used in connection with all live concerts and other events, who are referred for work by the Employer in the Atlanta metropolitan area, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

CREW ONE PRODUCTIONS, INC.

The Board's decision can be found at www.nlr.gov/case/10-CA-138169 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

