

**The Big Brass Band, LLC and Actors' Equity Association, AFL-CIO, Petitioner.** Case 2-RC-22544

August 11, 2003

ORDER DENYING REVIEW

BY CHAIRMAN BATTISTA AND MEMBERS  
LIEBMAN AND SCHAUMBER

The National Labor Relations Board, by a three-member panel, has carefully considered the Petitioner's request for review of the Acting Regional Director's Supplemental Decision and Certification of Results of Election (pertinent portions of which are attached as an appendix). The request for review is denied as it raises no substantial issues warranting review.

The Petitioner contends that the Acting Regional Director erred in finding (1) that the Employer threatened employees with discharge by advertising for nonunion replacements, and (2) that the Employer required employees to sign contracts effectively waiving their rights to join a union.<sup>1</sup>

In agreement with the Acting Regional Director, we find that the Employer's advertisement for replacements did not threaten its employees with discharge. As the Acting Regional Director found, it is common for touring shows to advertise for replacement actors even when there are no roles to be filled. We find no merit in our dissenting colleague's speculation that employees might have objectively interpreted the advertisement as a threat to their continued employment should they select the Union to represent them. As the Acting Regional Director noted, the Employer merely informed employees that it placed the advertisement because it had the right to hire replacements if the employees decided to strike and assured employees that they could not be fired. Further, it is well-settled that an employer may seek prospective replacements to prepare for a possible strike. See *Southland Cork Co.*, 146 NLRB 906, 908 (1964).<sup>2</sup>

Our dissenting colleague also places reliance on the fact that the advertisement referred to the hiring of "non-

Equity" replacement performers. As the Acting Regional Director explained, however, that designation simply indicates that the show is not under a union contract. Such a designation is common in the industry. In the journal in which the advertisement ran, a perusal of other advertisements shows that all casting calls indicate whether shows are union or nonunion. In fact, the journal requires each employer, when ordering a casting-call advertisement, to indicate whether the show is union or nonunion. This industrywide designation is not evidence of union animus, but rather is a result of the fact that some unions—including Actors' Equity—prohibit their members from working in nonunion productions.

We also find, in agreement with the Acting Regional Director, that the work contracts that the Employer required its employees to sign did not interfere with employees' freedom to choose a bargaining representative.<sup>3</sup> The plain language of the contracts does not require employees to waive their rights to join a union. The contracts explicitly state that the Employer is not conducting an inquiry concerning employees' rights to join, or refrain from joining, any labor organization. The representation that employees are required to make—that they will not enter any agreements that would prevent them from working for the Employer—does not restrict employees from engaging in union activity. As noted above, the Union, and not the Employer, prohibits members of the Union from working in nonunion productions. This prohibition should not be used against the Employer, which has a legitimate business interest to ensure that its employees do not enter commitments that will prevent them from continuing their employment.

Finally, our dissenting colleague attempts to analogize this case to *Contractor Services*, 324 NLRB 1254 (1997), a case arising out of the construction industry. In *Contractor Services*, three union members submitted employment applications to the employer. In response, the employer required applicants to indicate whether they were members of the union, and whether they were being subsidized by the union. In this case, in contrast, applicants do not need to disclose any information regarding union membership or support.<sup>4</sup>

<sup>1</sup> The Petitioner also argues that the Acting Regional Director erred in finding that the Employer did not taint the election by paying for roundtrip air travel for an employee to vote in the election. We do not pass on whether the Employer's action was objectionable. Instead, we would find that, because the Union lost the election by a 20-vote margin and the Union provided no evidence of dissemination of the Employer's conduct, the conduct of the Employer is insufficient to affect the outcome of the election.

<sup>2</sup> Our colleague's criticism of our reliance on *Southland Cork* is misplaced. To the extent that it can be argued that *Southland Cork* supports the proposition that "a line may be crossed" by an employer in preparing for a strike, it also clearly holds that merely soliciting applications for replacement workers in preparation for a strike does not cross that line.

<sup>3</sup> In denying review of the Acting Regional Director's overruling of this objection, we do not rely on the existence of a severability clause in the Employer's contract.

<sup>4</sup> The dissent's disagreement with our distinction of *Contractor Services* from the instant case is unavailing. By describing the Employer here and the one in *Contractor Services* as both requiring assurances from employees that "would tend to disclose employees' union association," our colleague understates the extent of disclosure required in *Contractor Services* and overstates that required here. In *Contractor Services*, the employer required an affirmative statement of union membership—not simply a disclosure that would "tend" to reveal union

Accordingly, we deny the Petitioner's request for review.

MEMBER LIEBMAN, dissenting.

I would grant review in this case because it raises unusual and, indeed, troubling issues arising during a union election campaign in the "nonunion" theatrical stage industry, that is, a union representation election among employees in a so-called "Non-Equity" production.

The Employer is a non-Equity producer of the nationally touring stage show of "The Music Man." When hiring performers for the show, the Employer requires employees to acknowledge that employees in the production are not currently represented by a labor organization. The employee must also acknowledge that he/she is not restricted from performing services by virtue of any prior agreement with a labor organization and thereafter "will not undertake" any such agreement that will or might conflict with their contractual obligations with the Employer.

A few days before the election in this case, and on the date of the election itself, the Employer ran an advertisement in the trade publication "Backstage." The advertisement stated that the Employer "is casting all roles for replacements" of the national tour of "The Music Man" and directed the casting call to "Non-Equity Performers."

In dismissing objections to the election filed by Actors' Equity, the Acting Regional Director found that it is common for touring shows to cast for replacement actors so that performers will be available to perform in the event the original actor falls ill or decides to leave the show. However, according to the Acting Regional Director, the explanation given to employees for the timing of the advertisement on the date of the election was not linked to those apparently legitimate concerns. Rather, the explanation was directed to the election itself and to the hiring of "Non-Equity" replacement performers in the event of a strike. Put another way, while the term "replacements" may be a term of art in the stage industry for the hiring of an available stand-in in the event of illness or to replace a departing performer, the meaning imparted by the Employer to employees about to vote in a Board election had an altogether different meaning having nothing to do with the ordinary course of business in the industry. Instead, it pertained to the election, unionization, and what might happen in the event of a strike. Under either interpretation, employees may well have

association. Conversely, here, the disclosure required by the Employer did not explicitly address union membership. Moreover, to the extent that it would tend to reveal union association it was only because of the Union's decision to prohibit its members from working nonunion jobs.

objectively construed the advertisement for their "replacements" as linked to the outcome of the election and feared for their jobs. However legitimate the advertisements may be in the normal course of business, the request for review raises the issue whether on the eve of an NLRB election—unusual in this industry—the message conveyed by the ads—particularly as explained by the Employer—is one that would likely interfere with employees' free choice. Without deciding the issue, I believe the majority errs in summarily affirming the Acting Regional Director's analysis.<sup>1</sup>

Likewise, in the context of the union election campaign and the election day advertisement for "replacements," I also find troubling the contractual requirement imposed on employees during the critical period that they effectively must acknowledge the current nonunion status of the Employer and, as a condition of employment, must pledge not to undertake obligations that might impair their employment obligations.

In my view, such a contractual undertaking would raise serious issues in any other industry—and perhaps should do so in the theatrical stage industry as well. As with the Equity/Non-Equity dichotomy in the stage industry, the construction industry presents another form of separation between union and nonunion sectors in an industry. And, in *Contractor Services*, 324 NLRB 1254 (1997), the Board considered a requirement by a construction industry employer that an employee must acknowledge that he or she could work for a nonunion contractor without impairment. The Respondent in that case made a similar argument as does the Employer in the present case: that it was legitimately concerned with an employee abandoning his or her job with a nonunion

<sup>1</sup> The majority relies on *Southland Cork Co.*, 146 NLRB 906, 908 (1964), for the proposition that the Employer had the right to seek strike replacements to prepare for a possible strike. In *Southland Cork*, an unfair labor practice case, the Board noted that there was nothing "unlawful per se" about an employer preparing for a possible strike. It found, however, that this principle did not privilege the employer to conduct touring applicants through the plant in the presence of its employees, even though employees already had authorized a strike. Accordingly, *Southland Cork* stands for the principle that there ought not to be a "per se" rule regarding an employer's strike preparation but that a line may be crossed in appropriate circumstances, even in an unfair labor practice context. In the present case, a representation matter, there is no evidence of an impending strike threat and, as the Acting Regional Director found, the advertisements were placed "in the event the Petitioner won the election" and bargaining followed which might eventually lead to a strike. It is notable that aside from citing a meritorious unfair labor practice case, the majority cites no case in which the Board, in an election context, has approved or considered the propriety of an employer's placement of job advertisements for strike replacements on the eve of an election, coupled with informing employees that the advertisements are linked to the election. I would grant review to consider that issue.

contractor because of obligations flowing from unionization. The Board found this defense to be unpersuasive because it was directed to union considerations and it found the provision to be unlawful as a restriction on access to employment, among other infirmities. 324 NLRB 1254 at fn. 2. It did so even though, as in the present case, the Respondent there also assured employees that it was unconcerned whether employees were union members or nonunion.<sup>2</sup>

In my view, it is appropriate to grant review to ascertain whether the stage industry is so unique in its union/nonunion dichotomy that established principles for the protection of union and protected concerted activities are inapplicable to this industry, at least in the context of this election. A grant of review is particularly appropriate given the “hot button” industrywide implications of this case<sup>3</sup> and the purported special nature of the manner in which ongoing “replacements” are sought in the stage industry, even during an election period. In sum, on both counts—the election day advertisement and the employment contracts—I would grant review.

#### APPENDIX

#### SUPPLEMENTAL DECISION AND CERTIFICATION OF RESULTS OF ELECTION

##### PROCEDURAL BACKGROUND

Pursuant to a Decision and Direction of Election, issued by the Acting Regional Director on June 11, 2002,<sup>1</sup> an election in this matter was conducted on November 1, in the following unit of employees:

Included: All full-time and regular part-time actors employed by the Employer in the North American tour of Meredith Willson’s *The Music Man*.

<sup>2</sup> The majority distinguishes *Contractor Services*, on the basis that the employer there required applicants to disclose their union membership or ties to the union while employees here supposedly do not need to disclose any information regarding union membership or support. I disagree. In the present case, employees must “warrant” that they are free from union obligations restricting their ability to perform services and will not undertake to do so in the future. In *Contractor Services*, employees also were required to assure the employer that they could perform services free from union obligations against performing services. In both cases, the assurances sought would tend to disclose employees’ union associations. Further, in both cases, the employers singled out employees’ union obligations to the exclusion of other possible reasons that might conflict with the ability to perform services. 324 NLRB at 1255. And, both cases arise in industries in which “established” union and nonunion sectors exist side by side, thereby raising similar concerns.

<sup>3</sup> See “*Rising Costs Alter Rules For Shows On Tour*,” The New York Times, February 10, 2003 (discussing “new economic reality on the road” and the non-Equity tour of “*The Music Man*,” a production that was “tens of thousands of dollars cheaper to book than any Equity tour”).

<sup>1</sup> All dates hereafter are in 2002, unless noted otherwise.

Excluded: All other employees, and guards, professional employees and supervisors as defined in the Act.

The tally of ballots, which was made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters	39
Void ballots	1
Votes cast for Petitioner.	8
Votes cast against participating labor organization	28
Valid votes counted.	36
Challenged ballots	2
Valid votes counted plus challenged ballots.	38

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has not been cast for Petitioner.

On November 7, the Petitioner filed timely objections to the election. The objections, verbatim, are as follows:

1. During the critical period, the Employer threatened employees with discharge because of their union and other concerted protected activities and to discourage support for Actors’ Equity Association by, among other things, advertising in *Backstage* that it was “casting all roles for replacements in the North American tour of ‘The Music Man’ for the 2002–03 touring season,” and limiting employment opportunities to “non-Equity performers.”

....

4. The Employer paid to transport Albert Parker, a non-supporter of Actors’ Equity Association, to the election.

....

6. The Employer required its employees to sign yellow dog employment contracts wherein employees “warrant” they are not represented by a labor organization and promise not to undertake any agreements that might conflict with the contract.

Pursuant to Section 102.69 of the Board’s Rules and Regulations, an administrative investigation of the objections was conducted. During the investigation, the parties were afforded a full opportunity to submit evidence bearing upon the issues. The results of the investigation are discussed below.

##### OBJECTION 1: CASTING REPLACEMENT ROLES & LIMITING EMPLOYMENT OPPORTUNITIES

In this objection the Petitioner contends that the Employer threatened employees with discharge by placing a casting notice for all roles in *Backstage* theater publication and by limiting those roles to nonunion performers. The Petitioner contends that the Employer placed this notice a few days prior to the election in order to intimidate employees into thinking they would lose their jobs if the Petitioner won the election.

The investigation revealed that it is common for touring shows to cast for replacement actors even when there are no roles to be filled, so that replacement actors will be available to perform in the event the original actor falls ill or decides to leave the show. In *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989), the Board “made it clear that employers cannot tell

employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement.” In the instant case, the Employer did not tell employees that they would lose their jobs. Rather, the Employer told employees that it had the right to hire replacements, if the employees went out on strike. In *Southland Cork Co.*, 146 NLRB 906 (1964), the Board held that, “[T]here was nothing unlawful per se about Respondent’s conduct in seeking to protect its plant operations by having a ready supply of help available in the event of a strike.” The employer notified employees that it placed its notice in *Backstage* in the context of it asserting its rights to hire replacement workers in the event the petitioner won the election and the parties could not reach an agreement, thereby causing the employees to go out on strike. It informed employees that they could not be fired, but that they could be replaced. Thus, the evidence fails to show that the employer threatened to discharge employees if they voted for the petitioner.

Further, petitioner asserts that the employer discriminated against supporters of the petitioner by including at the end of its casting notice a designation of “non-Equity Performers.” This allegation was the subject, inter alia, of the charge filed by petitioner in Case 2–CA–34678. As I noted in my dismissal of this charge, a designation of union or nonunion does not preclude employees from attending auditions, but rather indicates whether or not a show is covered by a union contract and thus needs to have a separate audition for union members. Moreover, the petitioner has failed to produce any evidence, in either investigation, to establish that any union member was denied employment by the employer based on his or her union membership. Petitioner filed an appeal to my decision in Case 2–CA–34678, which was denied by the General Counsel’s Office of Appeals on January 13, 2003.

Based upon a consideration of all of the foregoing evidence, I conclude that such conduct, by itself, is insufficient to warrant setting aside the election. Accordingly, I find this objection to be without merit and it is hereby overruled.

....

#### **OBJECTION 4: TRANSPORT OF ALBERT PARKER**

In this objection, the Petitioner asserts that the Employer paid for the transportation of Albert Parker, an employee who did not support the Petitioner, to the election for the purposes of influencing his vote. Petitioner asserts this was done in order to interfere with the results of the election. Although the investigation revealed that the Employer purchased the airline ticket that enabled its employee, Albert Parker, to travel to and from the election, it also appears that the Employer purchased the airline tickets for each employee on the tour, and in the same manner, whenever the production moved from one location to another.

Under Board law, it is not objectionable for an employer to pay the transportation costs for its employees to vote in a representation election. In *Sunrise Hospital*, 320 NLRB 212 (1995), the Board held that, “monetary payments that are offered to employees as a reward for coming to a Board election and that exceed reimbursement for actual transportation expenses . . .

constitute objectionable conduct.” The investigation revealed that the Employer purchased an airline ticket for Parker, as it had done for all of its other employees, and that Parker was not afforded any additional benefit. Thus, as there as been no evidence proffered or adduced to establish that Parker, or any other employee, was reimbursed beyond the actual costs associated with transportation, I do not find the Employer’s transport of its employee, Albert Parker, to be objectionable conduct. Even assuming that it were objectionable conduct, the vote of this one individual is insufficient to affect the outcome of the election.

Accordingly, I find this objection to be without merit and it is hereby overruled.

....

#### **OBJECTION 6: YELLOW DOG CONTRACT**

In this objection, the Petitioner asserts that the Employer required its employees to sign yellow dog contracts wherein employees “warrant” they are not represented by a labor organization and promise not to undertake any agreements that might interfere with their ability to perform their contractual obligations. This allegation was also the subject of the charge filed in Case 2–CA–34678. In this charge, the Petitioner asserted that the Employer required employees to sign a contract containing language which amounted to a waiver of the employees’ rights to join a union.

The investigation revealed that the contract stated that the Employer would not inquire into employee’s rights to join a labor organization, and that in regard to any provision which may be interpreted as posing a restriction on employees’ exercise of their rights under Section 7 of the Act, the contract also contains a severability clause which states that the provision in the contract are enforceable only to the extent permitted by law. Thus, I was unable to conclude that the contract prohibited employees from joining a union, or makes their continued employment conditioned upon their refraining from engaging in concerted activities or joining a union. As noted previously, Petitioner’s appeal of this decision was denied by the General Counsel’s Office of Appeals on January 13, 2003.

Inasmuch as I could not conclude that the language in this contract interfered with the free choice of the voters, I accordingly find this objection to be without merit and it is hereby overruled.

#### **Conclusions**

Having found the Petitioner’s objections to be without merit, they are hereby overruled.<sup>2</sup>

WHEREFORE, IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast for the Petitioner in the unit of employees described above.

<sup>2</sup> No hearing is warranted with respect to the objections, inasmuch as no substantial or material factual issues have been raised thereby. Further, even assuming the evidence proffered by the Union in support of its objections to be true, no hearing is warranted, in my opinion, and the election will not be set aside based thereupon.