

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

DELTA-TURNER, LTD.
d/b/a THE DELTAPLEX

Employer

and

CASE GR-7-RC-22299

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES,
MOVING PICTURE TECHNICIANS,
ARTISTS AND ALLIED CRAFTS,
LOCAL 26, AFL-CIO

Petitioner

APPEARANCES:

Michael A. Snapper, Attorney, of Grand Rapids, Michigan, for the Employer.
Michael L. Fayette, Attorney, of Grand Rapids, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record¹ in this proceeding, the undersigned finds:

¹ Both parties filed briefs, which were carefully considered.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Petitioner seeks a unit of about 190 full-time and regular part-time building maintenance, operations, and stage employees, including carpenters, electricians, props, riggers, plumbers, custodial, truck loaders, audio/video, projectionists, painters, wardrobe employees, sound and light board operators, score and message board operators, and fork lift operators; but excluding guards and supervisors as defined in the Act. The petitioned-for unit includes employees referred by the Petitioner to work at shows staged at the Employer's facility as well as the Employer's operations staff. The Employer denies that it is the employer of the employees referred by the Petitioner. With respect to the operations staff, the Employer contends that the group of about 100 part-time employees are irregular part-time or casual employees and, therefore, not eligible to vote. The Employer further contends that the only two full-time operations employees, Carrie Nickerson and Tina Fockler, are supervisors; the Petitioner, to the contrary, contends that they are not. Lastly, the Employer maintains that the combined unit of operations employees and employees referred by Petitioner is not an appropriate unit.

I find that the operations employees and the employees referred by the Petitioner share a sufficient community of interest to warrant inclusion in a single unit because of the integration of operations, the interchange of tasks among the employees, and common overall supervision. I further find that the operations employees are regular part-time or seasonal employees eligible to vote in the election. Since I am unable to determine the supervisory status of Nickerson and Fockler based on the record evidence, they will be allowed to vote subject to challenge. Lastly, I find that the employees referred by the Petitioner are employed by the Employer. Employees in the unit will be eligible to vote if they have worked on at least two productions at the Employer's facility in the year preceding the issuance of this decision.

The Employer operates an arena facility, the DeltaPlex, which is leased to various entities to put on shows or events, running the gamut from gun and knife shows to rock concerts and basketball games. The facility is a 250,000 square foot building which consists of a large arena and a smaller space that can be divided into two areas; the West River Hall which is 24,000 square feet, and the Hillside Hall which is 18,000 square feet. The facility can accommodate three events simultaneously. The Employer's business is primarily seasonal and conforms to the school year which runs from September to June.

The general manager of the facility is Robert Harley, Jr., who reports to Owner and President Joel Langlois. Reporting to the general manager are the directors of various areas or departments, including Director of Operations Stan Sacha, also known as the operations manager or foreman. Sacha supervises the operations staff. The parties stipulated, and I find, that Sacha is a supervisor within the meaning of the Act because he hires and fires employees. Reporting to Sacha are Carrie Nickerson and Tina Fockler, who have no formal titles. They do not appear on the Employer's management organizational chart.

For all events held at the Employer's facility, other than Grand Rapids Hoops basketball games, a standard lease agreement drafted by the Employer is executed by the Employer and the promoter of the event or show. The agreement provides that the lessee shall provide all necessary event support personnel, but if the lessee fails to meet minimum requirements set by the lessor, the lessor may provide the event personnel subject to reimbursement by the lessee. Until June 2002, the Hoops team was owned by Joel Langlois and, therefore, presumably, no lease agreement was required.

The Petitioner operates a hiring hall. The Employer does not have a written agreement with the Petitioner. With respect to Hoops basketball games, the Employer requested employees from the Petitioner's hiring hall to lay down and take up the basketball floor. The Employer did not know what the arrangements and procedures would be for the 2002-2003 season in light of the change in ownership.

With respect to all other events, the Employer leases its facility to a promoter who in turn has a contract with a show or agent. The contract between the promoter and show specifies the labor needs required for the event. In some cases, a show uses its own employees or the promoter arranges for personnel through other labor sources and pays the personnel directly. In other cases, the promoter notifies the Employer of the event's personnel needs and the Employer places a labor call to the Petitioner for the necessary employees and pays the employees. Often, Marshall Yoder, an independent producer with his own

company, This Side Up, served as a promoter's representative. On other occasions, Yoder contracted directly with the Employer on a show-by-show basis to provide technical and financial assistance. In those instances where Yoder acted as the promoter's representative or a contractor of the Employer, he prepared the labor calls to the Petitioner and sent them by facsimile to the Employer to forward to the Petitioner, or directly to the Petitioner, with a copy to the Employer. Since August 2002, Yoder has been employed by Clear Channel Entertainment, a promotion company.

The Employer issues the paychecks to those employees referred by the Petitioner and also pays withholding, workers' compensation insurance, and unemployment compensation. The Employer also makes fringe benefit contributions on their behalf. The wage rates and benefit amounts are determined by the Petitioner based on area standards and the Employer has agreed to pay those amounts. The employees referred by the Petitioner earn \$14.01 an hour for a stagehand, and in excess of that for more skilled employees, as well as fringe benefit contributions. The employees referred by the Petitioner fill out new employee forms and tax forms with the Employer and are covered by the Employer's liability insurance. The Employer can refuse an employee referred by the Petitioner, although it has never done so. During the last two years, the Petitioner has referred about 90 employees to the Employer.

The labor call specifies the number of employees in each job classification needed for a particular show or event. Petitioner refers employees from its hiring hall lists as well as a steward and/or head carpenter. The types of employees referred by the Petitioner include stage, or set up, employees, riggers, props employees, truck loaders, wardrobe employees, sound and light board operators, forklift operators, carpenters, audio/video operators, projectionists, and sound and message board operators. These employees perform the load in, which involves unloading equipment from the production trucks and setting it up; servicing the performance or show; and the load out, which involves disassembling the equipment and loading it back in the production trucks. The employees wear passes distributed by the show. The steward is responsible for monitoring the hours worked by the employees, who sign in and out on a timesheet posted at the Employer's facility. The steward turns the hours in to Harley, the promoter, and the tour accountant at the end of a show to accomplish the settlement, or payment to the Employer. The hours are then given to the Employer's accounting department to process the payroll. Included in the payment by the promoter to the Employer is the labor cost and benefit payments, plus an administrative fee.

The work of the employees referred by the Petitioner is directed by the steward and the show's production manager. Either Sacha, Nickerson, or Fockler

is present for each load in. Harley, and Yoder when he is involved, are present for all performances. The ultimate supervisory authority over the referred employees rests with the Employer because the Employer must assure client satisfaction with the services provided. The Employer can remove from its premises a referred employee for inappropriate behavior, although that has not occurred.

The Employer's operations department consists of Sacha, Nickerson, Fockler and about 100 part-time employees. Nickerson and Fockler began their employment with the Employer as part-time operations employees. The operations staff performs housekeeping, custodial work, and the set up and take down before and after shows. The employees are scheduled by Sacha, primarily in conjunction with events at the facility, but they also perform housekeeping and custodial work between events. The set up, which takes place a day or two before an event, involves getting the building ready for an event, and includes cleaning and setting up chairs, tables, and barricades. The take down after an event involves removing the chairs, etc., and cleaning. Assignments to particular tasks are made by Sacha, Nickerson, or Fockler, who run crews of operations employees for particular events. The operations employees perform many of the same tasks performed by the referred employees. They sometimes put up portable stages, either owned or rented by the Employer, put out props, and operate lighting during events, as do employees referred by the Petitioner. The Employer utilized the audio/video expertise of one of the operations employees. Operations employees work at the facility on the day of a show at the same time that employees referred by the Petitioner are present working. Operations employees and employees referred by the Petitioner sometimes assist each other in placing barricades for a show and operations employees assist with the load in, if asked. Petitioner's stagehands have assisted operations employees with setting out chairs. While there is no evidence of permanent transfers between the operations staff and employees referred by the Petitioner, there is interchange between both groups of employees in that they perform some of the same tasks and assist each other.

The operations employees are hired by Sacha. They work during the Employer's season from September to June. During the summer months, a few employees may continue to work sporadically. The following season, operations employees may return, depending on their availability and the Employer's satisfaction with their performance, although the Employer has no delineated recall policy. Often a new operations manager will hire his or her own operations staff. At the end of the season this year, operations employees were told that the Employer had no work at that time. They earn from \$8.00 to \$10.00 an hour with no benefits. The record does not disclose how their work hours are recorded. The operations employees wear Employer identification tags, which display their name and photograph. Operations employees have been sent home as a disciplinary

measure by whoever is running the crew, but the Employer has not issued any written disciplines. On occasion, Sacha will no longer schedule an employee as a disciplinary measure, which essentially results in termination.

All the employees, including those referred by the Petitioner, use the same parking lot and rest rooms. A show usually arranges for catered meals for the show personnel and the employees referred by the Petitioner. Operations employees present when the meals are served are invited to partake as well. The shows that the employees referred by the Petitioner work on usually last a day or weekend at the most and the employees work one long day at a time. Other events, those which are set up and taken down by the operations employees, may continue for up to a week. The operations employees may be called in for a whole day or a few hours at a time.

Resolution of unit composition issues begins with an examination of the petitioned-for unit. If it is appropriate, the inquiry ends. *Bartlett Collins Co.*, 334 NLRB No. 76, slip op. at 1 (July 11, 2001). In determining the threshold issue of appropriateness, the Board is guided by the principle that it need endorse only an, not the most, appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 419 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1051). Moreover, it is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. See *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-423 (4th Cir. 1963) Cert. Denied 3754.5.966 (1964). Appropriateness normally depends upon community-of-interest factors such as mutuality of wages, hours, and working conditions; commonality of supervision; similarity in skills and functions; frequency of contact and interchange; and functional integration. *Ore-Ida Foods*, 313 NLRB 1016 (1994). A union's desire is always a relevant, but must not be a dispositive, consideration. *E.H. Koester Bakery & Co.*, 136 NLRB 1006 (1962). Furthermore, the extent of organization may be taken into consideration as one of the factors in unit determination, together with other factors, provided that it is not the governing factor. *Metropolitan Life Insurance Co. v. NLRB*, 380 U.S. 438(1965).

The operations employees and employees referred by the Petitioner perform many of the same tasks, work in the same area at the same time, and assist each other. They are all involved in preparing the Employer's facility to accommodate a particular show or event. They share the same parking lot and rest room facilities, and partake of the same catered meals. Although the two groups of employees receive their immediate direction from different sources, the Employer's upper level management has the authority over both groups of employees to hire, fire, and discipline. Therefore, the degree of contact,

interchange, similarity of tasks, and functional integration support a finding that the employees enjoy a sufficient community of interest to warrant inclusion in and overall bargaining unit, as sought by the Petitioner, rather than two separate units.

The operations employees are regular seasonal employees. The Employer's business is by its nature seasonal. The Employer has no year round permanent operations staff other than Sacha, Nickerson, and Fockler. While the Employer does not have an explicit recall policy, the operations staff has a reasonable expectation of reemployment in the foreseeable future based on their availability and the Employer's satisfaction with their performance. ***Kelly Brothers Nurseries***, 140 NLRB 82 (1962).

The employees referred by Petitioner are employees of the Employer. The Employer issues their paychecks and pays their withholding taxes and necessary insurance coverages. It is not necessary to determine if the Employer may be a joint employer of these employees. ***Professional Facilities Management***, 332 NLRB No. 40 (2000). Moreover, the Employer's consent would not be required to conduct an election in a unit composed of employees jointly employed by a user employer and a supplier employer, and employees employed solely by the user employer. ***M.B. Sturgis, Inc.***, 331 NLRB No. 173 (2000).

I am unable to determine the supervisory status of Nickerson and Fockler on the basis of the record evidence. They will, therefore, be allowed to vote subject to challenge.

The last issue to consider is the eligibility formula. The Board has devised eligibility formulas appropriate for the entertainment industry where crews are hired for a particular production. In ***Medion, Inc.***, 200 NLRB 1013 (1972), employees were eligible if they worked on at least two productions for a minimum of five working days during the year preceding the issuance of the decision and direction of election, and were not terminated or quit voluntarily prior to the completion of the last job for which they were employed. In ***American Zoetrope Productions***, 207 NLRB 621 (1973), the Board eliminated the five day requirement and determined employees to be eligible who had worked on at least two productions in the last year. The Board reasoned that since most jobs lasted for only one or two days, it was conceivable that an employee could work on two productions and not have worked the minimum of five days. The same is true in this case. In ***Blockbuster Pavilion***, 314 NLRB 129 (1994), which involved an employer that operated an entertainment venue, the Board applied the ***Zoetrope*** formula. I therefore determine to be eligible to vote all unit employees who were employed by the Employer on at least two productions during the year preceding this decision.

5. For the above reasons, and based on the record as a whole, the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time building maintenance, operations, and stage employees, including carpenters, electricians, props employees, riggers, plumbers, custodial employees, truck loaders, audio/video employees, projectionists, painters, wardrobe employees, sound and light board operators, score and message board operators, and fork lift operators employed by the Employer at its facility located at 2500 Turner Avenue NW, Grand Rapids, Michigan; but excluding guards and supervisors as defined in the Act.

Those eligible shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan this 1st day of October 2002.

/s/ William C. Schaub, Jr.

(SEAL)

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