Between
McPherson Playhouse Foundation (the "Employer"), and International Alliance of Theatrical Stage Employees and Motion Picture Machine Operations of the United States and Canada, Local No. 118 (the "Union")

See appeal C165/87

[1987] B.C.L.R.B.D. No. 165

No. 165/87

British Columbia Labour Relations Board

Heard: February 13, 1987
Judgment: May 25, 1987

Panel: Richard S. Longpre, Vice-Chairman
Peter Richardson, Member
John Donaldson, Member

Counsel: Bob Higinbotham, for the Employer Katharine Young, for the Union

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I

This matter involves an application for certification by the Union. The Employer challenged a number of individuals who cast ballots in the representation vote. A hearing was held into the matter and on February 13, 1987, this Panel issued its conclusions:

> "The Panel, having considered the submissions of the parties, concluded that the Employer's position should succeed. We did not find that the individuals in question were contractors. However, the employment history of the casual employees did not demonstrate a reasonable expectation of employment nor a community of interest with the regular employees. Accordingly, we direct that all challenged ballots be destroyed except for the ballot of Mike Zair. The ballots of Zair, A. Wilkinson and R. Stebih are to be counted.
>
> Full reasons will follow in due course."

These are the reasons for our decision.

II

The Employer is an incorporated organization. It assists in the staging and marketing of various performances and groups at the Bastion and Royal Theatres in Victoria. In most cases the client interested in booking one of the facilities will contact the Employer and inquire as to available dates. Larry Eastick, the Employer's Technical Director, will then contact the client to determine whether it has the capabilities to stage the particular show. When the McPherson Theatre is rented, one technician is included into the rental fee of the theatre. Other skills that are required

in order to stage the performance are arranged by Eastick.

The issue before this Panel concerns two basic groups of employees. The first is comprised of three employees; A. Wilkinson, R. Stebih and M. Zair. These three are on the Employer's payroll and are eligible for health and welfare benefits. Wilkinson and Stebih have worked for the Employer since late 1984. They are the first to be assigned to a show. They are paid hourly and receive overtime rates in accordance with the Employment Standards Act. Zair was the third person on the call list. He worked when Wilkinson and Stebih were not available or when an extra person was required. In the period December 1, 1985 to December 12, 1986, Wilkinson worked 1,661 hours, Stebih worked 1,382.5 hours and Zair worked 581.25 hours. For Wilkinson and Stebih, these hours were supplemented with certain maintenance work which they did on a contract basis. The Employer challenged the right of Zair to vote on the grounds that he had taken a full time position with the Bastion Theatre.

The second group is comprised of approximately 45 individuals who worked on an "on call" basis. The Employer challenged the right of all the employees on this list to vote. As noted, when a client books into the Royal or Bastion Theatres, Eastick contacts them to ensure the necessary skills are made available to stage the production. The individuals in this group provide the broad range of skills upon which Eastick draws. The individuals in this group work very few hours in a year. The most number of shifts worked by anyone in this group was 24 shifts in the December 1, 1985 to December 12, 1986 period. Only three individuals worked more than 20 shifts. Thirty-four individuals worked less than 10 shifts in this period. Twenty-two individuals in this group worked in December, however, this was due to the first time performance of "Cinderella" which was the largest production ever held at the Royal Theatre. A large majority of the individuals in this group did not work in June, July, August, September or October, 1986.

The Panel heard evidence regarding some of the individuals in this second group. Each person has a certain area of expertise. It appears that many have regular jobs outside the theatre, some run their own business, some are students and others simply work where ever and whenever they can. Once a show is confirmed, Eastick will contact those he thinks are available and suitable for the work required. Normally, a show schedule is set out three months in advance. When an individual agrees to work, he or she is covered by Workers' Compensation Benefits but collect no other benefits. They are paid an hourly rate or paid a contract price for the project. Most work independently and have their own tools, although Eastick does make his personal tools available to them if necessary. Eastick acknowledged that he attempts to keep a pool of people from which he can draw the necessary skills. A nucleus of those are called in first.

The Employer challenged one other employee, A. Skinner. Skinner worked primarily as an usher although he had some hours, approximately 47 in the 12 1/2 month period, as an employee in the second group.

II

Counsel for the Employer rested his argument on two grounds. The second group of employees, which he referred to as contractors, demonstrated no employment history with the Employer. The second ground was that there was no community of interest between the two groups. In support of its first position, counsel for the Employer noted the following points. Individuals in the second group are paid as contractors with no benefits deducted. They work very few hours in the year. They are under no obligation to the Employer and many work regularly somewhere else. Finally, they are not a cost to the Employer as their wages are paid by the client.

In support of its second ground of appeal, counsel referred the Panel to Edco Healey Technical Products Ltd., BCLRB No. 81/79, [1980] 1 Can LRBR 570:

> "Instead, it is necessary to examine the facts of each case to determine whether there is sufficient community of interest between regular, full-time employees and

> others tO warrant the latter's inclusion in the same bargaining unit. In such examinations, an important factor will be the relative permanence of employment of the category of employees. Employees in casual or temporary positions which carry little or no likelihood of continuing employment will have very different bargaining objectives from full-time employees. They will also be more likely to favour acceptance of modest gains at the bargaining table where the alternative may be a strike with concomitant loss of wages during what would be a substantial portion of those employees' expected terms of employment.
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> Another factor will be the proportion of such employees in the total work force since their impact on the bargaining structure will vary accordingly. The nature and organization of the employer's business may also be a factor as the Ontario Board has discovered in dealing will this issue in connection with franchise fast food outlets (see also Paris Poultry Products, [1978] OLRB Rep. 453). In many cases, the Board may be faced with the task of choosing between reduced bargaining unit viability on the one hand and the effective denial of collective bargaining rights to another group of employees on the other. To determine the relative importance of each of these competing interests in any given case will require a careful examination of the facts." (at 576)

Counsel argued that the inclusion of the contractors into the bargaining unit would dominate the collective bargaining process. Furthermore, there was no community of interest between the full time employees and those individuals who worked such infrequent hours.

With respect to Skinner and Zair, counsel argued that Skinner's duties as an employee on the payroll were outside the scope of the unit sought by the Union. With respect to zair, counsel noted that he had become an employee of Bastion Theatre.

Counsel for the Union disagreed with the Employer's characterization that the second group were contractors. On the evidence, she argued that they operated under the general direction and control of the Employer, that their tools were supplied by the Employer and that they were engaged to work without any chance of a profit or loss. They were simply paid by the hour or for a specific contract price for services rendered. Counsel further argued that there was rio distinction between the work performed by Wilkinson and Stebih and these other employees. The only distinction was that Wilkinson and Stebih worked more hours and they were on the Employer's payroll.

With respect to the community of interest, counsel argued that most of the employees on the list had a reasonable expectation of continued employment. All but three had been called back to work after the application for certification was filed. Counsel noted Eastick's evidence that most of the individuals try to make themselves available to work when asked. Counsel argued that the Employer was unable to show any conflict of interest between the full time and part time employees. They both did the same kind of work. Counsel noted that in Vancouver, the Union's collective agreement covers both full time and part time employees.

III

In the Panel's letter decision of February 13, 1987, we concluded that the employees in this second group "did not demonstrate a reasonable expectation of employment nor a community of interest with the regular employees". We will review each of these conclusions in turn.

At the outset, we accept the Union's argument that the individuals in the second group were not contractors. The fact that the cost of their wages was paid by the client or that they were not paid an hourly wage is not determinative. Their relationship to the Employer, in the context of this industry, resembles more closely an employment relationship. They are hired individually for set periods of time. They work with considerable independence but the Panel is satisfied that it was

under the overall direction of Eastick.

The Board has dealt with the notion of casual employees inclusion into bargaining units on several occasions. In Britco Structures Ltd. (1984) 6 CLRBR (NS) 352, the Board stated:

> "...only in very exceptional circumstances, will an individual who has previously worked for an employer but who has been laid off, be found to be an employee for the purposes of an application to represent unorganized employees who are not covered by a collective agreement. Such exceptional circumstances might occur where it can be established that there really does exist a continuing, tangible felt relationship between the individual and the employer. That relationship must be established at the date of the lay-off and it must be shown to be a continuing one during the period of the lay-off."

(at 364)

In Ratcliffe & Sons Construction Company Ltd., BCLRB No. 456/84, (1985), 8 CLRBR (NS) 343, the Board stated:

> "On the other hand, the fact that the laid off individuals do not have any enforceable rights of recall will not prevent the Board from finding that such individuals have a sufficient, continuing interest in the unit to be treated as employees for the purposes of an application for certification or decertification. In all the circumstances of the particular case, the Board may find that a reasonable expectation of recall exists such that they should be treated as employees. See Glen River Industries (Delta) Ltd., supra, and Britco Structures Ltd., supra. However, the reconsideration panel in Britco Structures Ltd. (1984), 5 CLRBR (NS) 352 at 364, BCLRB No. 62/84, emphasized that it would treat such laid off individuals as employees 'only in very exceptional circumstances'." (at 350)

Thus the Board has stated that where, in exceptional circumstances, the individual's employment history establishes a "continuing tangible felt relationship" and there is a reasonable expectation of recall, that the individual will be treated as an employee.

The evidence presented at the hearing did not suggest that these individuals had a reasonable expectation of recall. Certain performances regularly 'return to the Victoria area but this did not result in a pattern of regular employment. Individuals went months without working any hours. While Eastick attempts to keep a "call list" of people from which he can draw, depending on the skills required, there was no formal method of recall. Employees who were available when needed, were called in. Their expectation of future employment was minimal, at best. However, regardless of any expectation of future employment, none of the employees in this category had a "continuing tangible felt relationship." They worked irregularly and infrequently throughout the year. Many went months without working a shift. The Board has continually rejected arguments from employers to include individuals in a bargaining unit for the purposes of an application for certification who demonstrate a much stronger employment relationship.

The Panel also found that there was no community of interest between the casual employees and the regular employees. A full time employee shares little in common with an employee who works but a few shifts a year. It made little sense to the Panel to include into a unit individuals who bear such faint relationship to the Employer. The principles expressed in Edco Healey, supra, are applicable in this case. If the employees in the second group were included in the unit,

collective bargaining would be dominated by casual employees who work a handful of shifts per year. This is not to say that the collective agreement will not contain provisions for casual employees. It was our conclusion, however, that the proper way to proceed was to establish a bargaining relationship with the full time employees and leave it to the parties to negotiate the use of casual employees.

With respect to the other challenges, Skinner fell within the second group and accordingly his ballot was not included. Although zair has taken employment elsewhere, he continued to work for the Employer. The Panel did not hear evidence from Zair and on the evidence before us, we were not prepared to exclude him from the bargaining unit. His ballot was included in the vote.

RICHARD S. LONGPRE
VICE-CHAIRMAN

PETER RICHARDSON
MEMBER

JOHN DONALDSON
MEMBER