Cited as:
Universal Concerts Canada

International Alliance of Theatrical Stage Employees, Local 471, Applicant v. Universal Concerts Canada, Concert Productions International, Ogden Entertainment Services, Responding Parties v. NASCO Services Inc., Intervenor

[1997] O.L.R.D. No. 2188

File No. 0637-96-R

Ontario Labour Relations Board

BEFORE: S. Liang, Vice-Chair, and Board Members J.A. Rundle and R.R. Montague

July 2, 1997

Decision of S. Liang, Vice-Chair
and Board Member R.R. Montague

1 The name of the responding party MCA Concerts Canada is amended to: Universal Concerts Canada.

2 Terry Basset Presents is no longer a responding party, upon request of the applicant.

3 This is an application made pursuant to the provisions of sections 69 and 1(4) of the LABOUR RELATIONS ACT, 1995. In this application, the International Alliance of Theatrical Stage Employees, Local 471 ("IATSE"), alleges that there has been a sale of business from Concert Productions International ("CPI") to MCA Concerts Canada (now called Universal Concerts Canada). Further, IATSE alleges that MCA and Ogden Entertainment Services are related employers within the meaning of the Act.

4 Since the name "Universal Concerts Canada" only came into use partway through these proceedings and the parties used "MCA Concerts Canada" throughout to describe the entity which is the responding party, the Board will use "MCA" to describe this entity in this decision.

5 In a previous decision, the Board recorded the agreement of the parties to have the Board hear and determine the issue of whether bargaining rights exist as between MCA, CPI, Donald K. Donald Productions, or any of them, and IATSE, as a preliminary matter. At the hearing, the parties present (MCA and IATSE) confirmed this agreement. By correspondence, the Board was advised by counsel for Ogden that it did not intend to participate in the hearing at this stage, and accordingly, no one appeared for Ogden at the hearing. The Board proceeded to hear the evidence and argument of MCA and IATSE on the preliminary matter.

6 Before turning to this issue, the Board notes that Ogden requested the Board's indulgence in permitting the presence at the hearing of a reporter for the purpose of providing it with a transcript of the proceedings at which it was not to be present. The Board, over the opposition of IATSE, granted the request in an oral ruling, taking note of the written submission by counsel for Ogden that such transcript would not be held out as being an official record of the Board's proceedings.

7 The Board also notes the acknowledgment by counsel for MCA that MCA has purchased CPI and Donald K. Donald Productions. This transaction was completed in early August, 1996. MCA takes the position, however, that it did not become bound to any bargaining rights with IATSE as a result.

INTRODUCTION

8 The issue of bargaining rights as between MCA and IATSE arises in relation to the application before us, as well as apart from it. IATSE asserts that it has bargaining rights with MCA alternatively through MCA's purchase of CPI, or through an independent collective agreement with MCA.

9 In August, 1993, IATSE filed a certification application (Board File No. 1793-93-R) naming MCA as the employer of stagehands performing work at the Central Canada Exhibition in Ottawa. In its response, MCA took the position, among other things, that it was not the employer of the stagehands. These proceedings were adjourned so that the parties could explore settlement of the issues between them. The application remains unresolved as of this date.

10 The parties engaged in extensive negotiations between about March of 1994 and May of 1996. IATSE asserts that these negotiations resulted in a collective agreement, or at the least, a voluntary recognition by MCA of IATSE as the bargaining agent for stagehands employed by MCA. MCA asserts that these negotiations never reached fruition; that there was never final agreement.

11 Further, between about May 1994 and October 1995, CPI was also engaged in negotiations with IATSE. IATSE asserts that CPI agreed to voluntary recognize IATSE as the bargaining agent of stagehands in May of 1994. Further, whether or not this is so, IATSE asserts that the result of these negotiations was a collective agreement between it and CPI, executed in October of 1995. MCA denies that there was any voluntary recognition in June of 1994. MCA also takes the position that however one may characterize the written agreement between CPI and IATSE, it was not a collective agreement. It was not a collective agreement because at the time they entered into it, the parties disagreed as to whether CPI was the employer of stagehands. The parties did not resolve this issue, instead agreeing for the purposes of the written agreement to "put the issue aside." At the time they entered into the agreement, therefore, CPI had not been found or agreed to be an employer. The LABOUR RELATIONS ACT, 1995 defines a collective agreement as an agreement between a

union and an employer, and where there is no "employer" (it is argued) there can be no collective agreement.

12 Further, MCA takes the position that even if the Board finds TODAY that CPI is an employer for the purposes of the Act and the agreement between it and IATSE is a collective agreement, this finding cannot act to bind MCA to the collective agreement as of August, 1995, the time of the sale. At the time of the sale, there was no collective agreement. Only upon the Board's determination that CPI is an employer can the agreement be treated as a collective agreement.

13 To the extent that it is relevant to the determination of any of the above issues, MCA takes the position that neither it nor CPI are employers of stagehands.

14 Before turning to the legal issues, we find it useful to introduce the various entities referred to in this decision. IATSE, Local 471 is a union that represents stagehands in the Eastern Ontario region. Apart from the dealings between these parties, IATSE had collective agreements during this period with the National Arts Centre and the Centrepoint Theatre in Ottawa, the Grand Theatre in Kingston and the Canadian Broadcasting Corporation with respect to the National Arts Centre.

15 CPI is a company in the business of promoting and producing musical events. Generally speaking, it arranges for a site for an event, arranges for an artist to perform at that site, and promotes and sells tickets to the event. CPI operates throughout Canada. Donald K. Donald Productions ("DKD")and Bass Clef Entertainments Ltd. ("Bass Clef") appear to have been partners in CPI, acting as local promoters on behalf of CPI in the Montreal and Ottawa areas, respectively.

16 MCA is also a company in the business of promoting and producing musical events. Prior to the sale of CPI (and DKD) to MCA, MCA and CPI were competitors.

17 The Board will deal relatively briefly with the union's positions that it reached a voluntary recognition agreement with CPI in May of 1994, and that it reached either a voluntary recognition agreement or a collective agreement with MCA.

18 On our review of the facts and submissions of the parties, we are satisfied that the agreement between IATSE and CPI in May of 1994 did not constitute a voluntary recognition agreement.

19 The facts briefly are that on or about May 30, 1994, representatives of CPI, DKD and Bass Clef met with the executive of IATSE, Local 471, as a result of a dispute over the use of stagehands at upcoming concerts at the Central Canada Exhibition. At this meeting, the company representatives agreed to recognize IATSE as the representative of stagehands. The parties agreed to negotiate a collective agreement, and also agreed on certain interim terms and conditions for stagehands pending a complete collective agreement. In their discussions, the parties had reference to a document produced by IATSE titled "Working Conditions and Rates of Pay" (Exhibit 3). This document is a single sheet of paper bearing IATSE letterhead which sets out certain basic working conditions and a chart with rates of pay for six classifications of employees. The parties agreed that this document would be the starting point for negotiations towards a collective agreement.

20 At the conclusion of the meeting, the parties agreed that IATSE would arrange the drafting of a voluntary recognition agreement reflecting the understandings reached at the meeting. IATSE instructed its counsel accordingly, and a draft "Voluntary Recognition Agreement" was produced. It appears that once this document was produced, the companies balked at signing it. The position taken was generally that there was no need to sign anything, that the final collective agreement

would deal with all issues between the parties, and that the companies intended to abide by the agreement in any event.

21 With the exception of a dispute which arose during the fall of 1994 over certain shows produced at the Congress Centre in Ottawa, which was resolved eventually, all shows produced by CPI, DKD and Bass Clef in the Ottawa area from this date onwards complied with the terms of the arrangement between the parties. IATSE provided stagehands, standard rates and working conditions were applied, or special rates and conditions negotiated for specific venues. Although the parties agreed only to enter certain sample documents as evidence, it is not disputed that each show generated a certain amount of documentation, including timetables, crew lists, summaries of time sheets, summaries of total wages and benefits due and cheques from the promoter to IATSE. Because IATSE performed the function of receiving and distributing funds for wages and benefits, it provided the promoters with the summary of amounts owing, and the promoters made out cheques to IATSE. This system will be elaborated upon later in this decision, in the section dealing with the employer of the stagehands.

22 Counsel for IATSE submits that the conclusion that the Board should reach with respect to the above is that CPI, DKD and Bass Clef entered into a voluntary recognition agreement with IATSE on May 30, 1994. Counsel acknowledges that voluntary recognition agreements and collective agreements must be in writing. However, it is submitted that arbitrators and the Board have found that agreements can be established on the basis of a series of documents. It is not necessary to have a single executed document titled "Voluntary Recognition Agreement" or "Collective Agreement." It is submitted that the documents which relate to shows produced by CPI, DKD and Bass Clef following the oral agreement reached on June 1994 are sufficient to meet the requirement, along with Exhibit 3.

23 The Board was referred to the decisions in PAMELA BLAIS v. SHOPPERS DRUG MART, [1994] OLRB Rep. October 1419, GRAPHIC CENTRE (ONTARIO) INC., [1976] OLRB Rep. May 221, and UNIFIN DIVISION OF KEENRITE PRODUCTS LIMITED, [1977] OLRB Rep. August 545.

24 "Voluntary recognition agreement" is not a defined term in the LABOUR RELATIONS ACT, 1995, although section 16 establishes the right of a union to commence collective bargaining based on a voluntary recognition:

> 16. Following certification or the voluntary recognition by the employer of the trade union as bargaining agent for the employees in the bargaining unit, the trade union shall give the employer written notice of its desire to bargain with a view to making a collective agreement.

25 On the other hand, there are several references in the Act to an "agreement" whereby the employer recognizes the trade union as the bargaining agent of employees, and the effect of that agreement. For instance, the Act provides:

> 7. (3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties and the parties have not entered into a collective agreement and the Board has not

> made a declaration under section 66, another trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the recognition agreement only after the expiration of one year from the date that the recognition agreement was entered into.
>
> 18. (3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

26 It was not suggested by the parties that the type of agreement referred to in sections 7(3) and 18(3) is anything different from the voluntary recognition referred to in section 16, and indeed, the Board's cases (see for instance, the cases in the construction industry) generally adopt the requirements set out in sections 7(3) and 18(3) in determining whether parties are bound to a voluntary recognition.

27 Having regard to the above we accept that an agreement which establishes bargaining rights enforceable through the Act must be in writing and must signify the recognition by an employer of a trade union as the exclusive bargaining agent of a unit of its employees.

28 We also agree that it is not required that an "agreement in writing" be a single document signed by all parties. However, in the case before us, we find the documents relied upon by the union to fall short of what is required. It is axiomatic that once it is accepted that a written agreement is required, an oral understanding is not enforceable. Subsequent compliance with that oral understanding does not change the nature of the agreement from an oral one to a written one. There is nothing in the cheques and other documents which relate to the supply and remuneration of stagehands for shows produced by the companies that refers to recognition of a bargaining agent, to a defined bargaining unit, or to the issue of representation at all. In this case, there is simply no written agreement on the subject of bargaining rights, although there is documentation of compliance with an oral agreement.

29 We now turn to IATSE's assertion that it has an independent collective agreement or bargaining relationship with MCA. The union's argument in this regard is also based on an assertion that an exchange of correspondence between counsel, reaching fruition in January of 1996, constituted agreement on the terms of a collective agreement. Without conceding that the parties were negotiating towards a COLLECTIVE AGREEMENT (since MCA does not concede that it is an employer of stagehands), the position of MCA is that the parties did not reach agreement at all. The exchange of correspondence shows the parties inching closer to an agreement; however, due to the inability to resolve a major difficulty, they did not conclude their negotiations.

30 If indeed the parties reached agreement on the terms of a collective agreement, then it appears to the Board that section 44 of the Act becomes applicable, as follows:

> 44. (1) A proposed collective agreement that is entered into or memorandum of settlement that is concluded on or after the day on which this section comes into force has no effect until it is ratified as described in subsection (3).

(2) Subsection (1) does not apply with respect to a collective agreement,

(a) imposed by order of the Board or settled by arbitration;
(b) that reflects an offer accepted by a vote held under section 41 or subsection 42(1); or
(c) that applies to employees in the construction industry.

(3) A proposed collective agreement or memorandum of settlement is ratified if a vote is taken in accordance with subsections 79(7) to (9) and more than 50 per cent of those voting vote in favour of ratifying the agreement or memorandum.

31 It is for this reason that counsel for the union took the alternative position in his submissions that if there is no collective agreement in effect, the agreement at a minimum still established IATSE's bargaining rights by way of voluntary recognition.

32 However, it is unnecessary to determine the effect of section 44, if any, on these issues, since the Board is satisfied that no agreement was reached, whether a voluntary recognition agreement or a collective agreement.

33 We need not set out the facts in great detail. In 1993, the issue of the right of IATSE to supply stagehands to shows produced by MCA arose. IATSE filed a certification application in August of 1993 with respect to stagehands which it asserted were employed by MCA. MCA denied that it was the employer of stagehands. Over the next approximately two and half years, the parties engaged in negotiations, principally through counsel, to resolve the issues between them. The framework of a resolution was in place by the fall of 1995. However, there were certain outstanding issues. On January 9, 1996, counsel for IATSE wrote to counsel for MCA stating: "At this time I do not believe the parties are that far apart but we are still awaiting your final position on a number of matters ... "

34 On January 23, 1996, counsel for MCA wrote: "The "Agreement" document is agreed, at least in principle, and subject only to the following two items ... " The first item was a final review by MCA. The second item required "clarification" of an issue regarding the requirements of the agreement and their applicability to shows produced at the Palladium (now called the Corel Centre), a large new venue in Ottawa. The letter concluded by stating: "As far as any amendments to the Agreement may be concerned, the best that MCA Concerts Canada could do would be a "best intentions" kind of clause. MCA Concerts is not prepared to execute an Agreement which would limit its opportunities at the Palladium." The parties never resolved the Palladium issue, and MCA never altered its position on this, despite further attempts at resolution. Despite the disagreement over the Palladium, IATSE asserts that the parties reached agreement on all the essential terms of a collective agreement, as of January 23, 1996.

35 The Board has in the past found a collective agreement to be in effect despite the failure to execute a final document. Even in these cases, though, the Board requires evidence that negotiations have been COMPLETED: see, for instance, SEARS CANADA INC., [1986] OLRB August 1159, and the cases cited therein. Leaving open the prospect of further bargaining would appear to be incompatible with the notion of a settlement of the agreement. This does not exclude the possibility that parties may believe that they have completed bargaining and yet find disputes arising when it

comes time to incorporate all their agreements into a single formal document. But regardless of whether these disputes may give rise to arguments as to the state of completion of bargaining, this is quite different from the case before us. On the facts of this case, it cannot even be said that the parties themselves considered bargaining to be at an end.

36 It is clear that the emergence of the dispute over the Palladium came as a shock to the union, and certainly, the timing was unfortunate. It does appear that the union had felt that matters were on the verge of completion. In any event, this issue became the stumbling block to a final agreement. Further correspondence was exchanged between January and May of 1996, when this application was filed. None of this correspondence suggests that the parties ever found a way to put this issue aside.

37 We are satisfied on the facts before us, therefore, that the negotiations between MCA and IATSE towards an agreement, however characterized, never reached completion. For this reason we cannot conclude either that there is a voluntary recognition agreement or a collective agreement between MCA (in its own right) and IATSE.

38 We now turn to the issue of whether an agreement entered into between IATSE and CPI, DKD and Bass Clef in May of 1995 constitutes a collective agreement.

39 An underlying issue here is whether CPI is an employer of stagehands. It is the position of MCA that the agreement entered into cannot be a collective agreement because CPI is not an employer of stagehands. To the extent that at the end of the day, our conclusions on some of these issues also require us to determine whether MCA is an employer of stagehands, we find it convenient to deal with this question as it relates to both MCA and CPI at this stage. It is the position of IATSE that when stagehands are required to work on the production of a show, they are employed by the producer. It is the position of MCA that the producer is not the employer; rather, it is the "venue" or the union.

40 The evidence as to the relationship between MCA and stagehands, and between CPI and stagehands, is in most respects the same. The context of this evidence is the presentation of live music shows. The evidence is that are often a number of parties involved in the presentation of a live music show. MCA and CPI both act as producers or promoters (the parties used these terms interchangeably). In this capacity, they enter into contracts with the owners (or lessees) of a suitable venue to produce a show at that venue. They also enter into contracts with the artists (who are usually from out of town) that they engage to perform at the show. Local stagehands are engaged for the purpose of fulfilling the stage requirements for the presentation of the show (the term "stagehands" is used here to refer generically to the persons hired for this purpose, and includes among others stagehands, carpenters, riggers and fork-lift drivers).

41 All of the evidence the Board heard related to the use of stagehands who are members of IATSE and who were dispatched by the IATSE hiring hall. Although the existence of IATSE's bargaining rights with respect to MCA and CPI are at issue in these proceedings, IATSE members have been generally used to perform work on shows produced by these two companies in the Ottawa area. The focus of the evidence was therefore the relationship between IATSE members and the producers and the various other parties involved in the production of a show.

42 To illustrate the relationships involved in the production of a show, the Central Canada Exhibition is a yearly entertainment event running over the course of a few weeks every summer in the City of Ottawa. The Exhibition is held at Lansdowne Park, which is a large complex owned by the

City of Ottawa. Lansdowne park includes a hockey arena, a grandstand, and various other facilities. The City grants a lease to the Exhibition Association for the purpose of holding the Exhibition. The Exhibition in turn contracts with producers to present shows at the Grandstand, one of the facilities at Lansdowne Park. Over the years, MCA and CPI have competed for the right to produce the live music shows at the Exhibition in a given year. In 1993, MCA was the producer. In 1994, it was CPI.

43 In the contract between MCA and the Exhibition for 1991, 1992 and 1993, the parties agree that MCA will produce a minimum number of shows per year. MCA agrees to submit a list of proposed performers to the Exhibition for approval, such approval not to be unreasonably withheld. In turn, the Exhibition agrees to allow MCA the use of Lansdowne Park for the shows. MCA is responsible for providing the stage and in general is responsible for all costs involved in the staging of the shows. For the right to produce the shows, MCA agrees to pay the Exhibition a fixed sum plus a portion of ticket proceeds. Finally, the contract provides that MCA will comply with all of the "requirements and requests made of it by the Ottawa-Hull Federation of Musicians and the International Alliance of Theatrical Stage Employees."

44 MCA and CPI also enter into contracts with the performers engaged for a production. These contracts cover a variety of topics, among them the performer's requirements for the staging of the show. Stage requirements are usually found in the portion of the contract referred to as the "rider." Several riders were entered as exhibits as examples of the industry practice. Among the matters dealt with in these riders are stage size, risers, sound and light mixing platforms, barricades, spotlights, dressing rooms, power requirements and security.

45 The riders also deal with stagehand requirements. For instance, in the rider between CPI and the Tragically Hip with respect to a performance by the rock band at the Ottawa Civic Centre, it is specified that the stagehand requirements are:

a) FIRST CALL - RIGGING/LIGHTS:
 * four (4) truckloaders
 * ten (10) stagehands
 * three (3) climbing riggers
 * one (1) ground rigger
 * one (1) house electrician

b) SECOND CALL - IN ADDITION TO ABOVE:
 * six (6) stagehands

c) SHOWCALL - THIRTY MINUTES PRIOR TO SHOW:
 * four (4) followspot operators
 * six (6) stagehands
 * one (1) house electrician
 * one (1) house lights man

d) LOAD OUT:

* four (4) truckloaders
* twenty (20) stagehands
* three (3) climbing riggers
* one (1) ground rigger
* one (1) house electrician

46 All the riders entered into evidence contained similar lists; it is not the invariable practice, however, for an artist to be specific about numbers and classifications. The producers can and do make modifications to the crew requirements.

47 As the stagehand requirements in the rider suggest, labour is required in certain steps during the course of presenting a show. There is a "first call" or "set up call", sometimes a "second call", a "show call", and a "tear down" or "load out" call. Each of these steps has slightly different labour requirements because of the nature of the work involved at that step. Some stagehands work for the duration of the day, and others may only be needed for one call.

48 Although these riders contain the basic physical requirements which determine the number and type of IATSE members required for a show, factors apart from the riders may also have a bearing on the labour used. For instance, MCA used a single rented stage for all of the shows produced at the Exhibition. This stage thus had to be erected in a generic way at the beginning of the Exhibition, plus modified for each show. MCA set its own requirements for the stagehand work required for these purposes.

49 Typically, the producers appoint a person known as the "promoter representative" or "promoter rep" to take responsibility for the production of a show, including its staging. It is part of the promoter rep's functions to set the work schedule for a show, including time of calls and manpower requirements, based on the riders and other conditions. On the shows about which we heard evidence, the promoter reps then contact IATSE's call steward and provide him with that schedule. The call steward determines how to fulfill the labour requirements from the individuals on its referral list. He bases this determination on seniority and classification.

50 Rates of pay are negotiated between IATSE and the producer. These are usually based on a one-page document which contains IATSE's standard rates and basic working conditions, although variations can be requested. At the completion of a show, the IATSE steward provides the promoter rep with a summary of the amounts owing for the labour. The summaries are based on timesheets which have been approved by the artist's stage manager (or in the case of CPI, the promoter rep). The summaries do not contain the names of individual stagehands, but are based on classifications and the' number of hours worked at each stage of a show, at straight pay and overtime pay within those classifications. After the summaries are approved by the promoter rep, IATSE sends an "invoice" to the producer reflecting the total amounts owing for that show. Added to the basic rates in this invoice are vacation pay, pension fund contribution, contributions for unemployment insurance, Canada Pension Plan, Workers' Compensation, employer health tax and GST.

51 The producers pay IATSE with one cheque for all the labour costs associated with a show. IATSE sends the remittances to the appropriate funds, and sends its members their paycheques. Members are paid weekly. Each year, IATSE also produces T4 slips for its members. IATSE in this respect is responsible for the administration of the payroll on the shows for which its members work. This is a common manner of operating for this Local. The evidence was that IATSE has undertaken these functions because of the large number of itinerant companies in the industry, to ensure both that members are paid and that statutory obligations with respect to their pay are met. IATSE receives no pay for fulfilling this function. An elected official of IATSE, called the paymaster, is responsible for this work. This member is usually "compensated" by being dispatched to work for the shows for which he performs these duties. Where this is not possible, he receives an honorarium of $100 every three months.

52 The Board heard evidence about the manner in which stagehand work is directed and performed. As noted above, the producer of a concert appoints a "promoter rep" who has responsibility for the production of a specific show. This person stays on site for the duration of the work required to produce the show, and often has a site trailer. As well, the artists generally have a travelling crew of key stage personnel, such as the sound operator, lighting operator, head rigger, production manager and stage manager. The promoter rep and the artists' crew work closely with local stagehands in the production of a show. There was no evidence as to the role of personnel from the "venue" in the production of a show. The only evidence in this connection was that at the Exhibition, there were no representatives of either the Exhibition or the City of Ottawa on site daily. IATSE usually has a steward on site, who also acts as a working foreman. In addition, there may be persons designated as head electrician, head carpenter and head sound person.

53 General direction comes from the promoter rep. The promoter rep usually meets with the crew at the start of a call to ensure that all personnel are present, and from there proceeds to direct the work required in the production and dismantling of a show. Usually, the promoter rep communicates with the steward who in turn conveys directions to the heads of departments. There may also be direct instruction from the promoter to a head person. If a member of the crew has to leave during a work day for illness or another reason, it is up to the promoter rep to decide whether or not to replace him or her. If the promoter rep wishes to have another stagehand called in, the steward will decide who to contact based on the referral list. Promoter reps authorize changes to the schedule, overtime hours and meal penalties. Sometimes, the promoter rep will contact the IATSE business agent to try and negotiate variations to the terms and conditions of work on an ad hoc basis. For instance, the promoter rep may ask the union for some flexibility in invoking a meal penalty on a given day.

54 Although there were no specific examples, the general understanding is that if a crew member turns out to be unfit for work, the promoter rep has the right to insist that the person be removed from the site. Further, it is also understood that the IATSE steward may decide that a person should be removed from the site, and make that decision, subsequently informing the promoter rep. The promoter rep in any event makes the decision about whether or not to replace that person.

55 IATSE has the ability through its internal processes to control who may become members and placed on its referral list. Members must complete an onerous apprenticeship program. IATSE also has the ability to remove a person from membership and therefore the referral list by taking internal disciplinary action.

56 The union argued that the producer of live music shows, whether it be CPI or MCA, is the employer of the stagehands engaged to work on the shows. The producer is the party which receives the benefit of the work of the stagehands. On the evidence, the "venue" has no involvement in the actual production of a show after selling the rights to a producer to produce the show on its premises.

57 Counsel submits that the Board's cases support a finding that the producer is the employer in this industry. THEATRECORP, [1992] OLRB Rep. March 388 gives a clear indication of this. Although in that case, there was no specific finding that the producer was the employer of the stagehands in question, because the producer was not a party to the proceedings, the Board found that the venue was not the employer and strongly suggested that it must be the producer.

58 Further, although it is not the union's position that the venue can never be the employer, it is submitted that there are more compelling reasons in the case of live music shows to find the producers to be the employers, than in the case of theatre productions. While it is arguable that the venue in the case of theatre productions exerts more control over the employment of stagehands, because there are fixed venues, this is simply not the case with live music shows. Producers mount live music shows at a variety of locations, which can include hockey arenas, stadiums and even open fields. It is all the more appropriate in this situation to follow the direction of THEATRECORP in treating the producer as the employer.

59 Counsel referred to the indicia of who is an employer discussed in YORK CONDOMINIUM, [1977] OLRB Rep. Oct. 645. Counsel warned against placing too much emphasis on the factor of the intention to create an employment relationship. In this industry, it is submitted, NO ONE seems to want to call themselves the employer, although there are some parties who are happy to take the benefits of the labour. Further decisions of the Board have also suggested that this is not a trustworthy factor in making the determination of who is an employer: see SUTTON PLACE HOTEL, [1980] OLRB Rep. October 1538 and K Mart Canada Limited, [1983] OLRB Rep. May 649.

60 The other indicia referred to in YORK CONDOMINIUM do, however, point to CPI and MCA as the employers of stagehands.

61 Counsel for MCA urged the Board to find that the venue is the employer of stagehands. Contrary to the assertions of the union, it is submitted, the venues turn out to have a significant degree of control over the use of labour. For instance, the evidence established that IATSE members were used to perform stagehand work at the Exhibition precisely because of the contractual provisions between MCA and the Exhibition. Further, another indication of the control by the venue over labour issues is the situation at the Palladium. The reason that the negotiations between MCA and IATSE broke down was because of the insistence of the owner of the Palladium on the right to use a non-union subcontractor. From a sound policy standpoint, therefore, the house ought to be the party with which a union for stagehands bargains.

62 Counsel for MCA also urged the Board to have regard to the factors considered in YORK CONDOMINIUM, and submitted that they do not support a conclusion that the producers are the employers.

63 Although counsel stated that MCA took the position that the union could be found to be the employer of the stagehands, no specific submissions were directed in support of this assertion.

64 After consideration of the evidence and submissions, the Board is satisfied that MCA and CPI are the employers of stagehands working on live music shows for which they are the producers.

65 A few general observations may be made. It is clear that the context of the employment is, for the purposes of determining who is the employer, a far cry from the traditional workplace. First, there are a number of parties who have some involvement each in the production of a live music show. There are thus a number of parties who might shape some aspect of the terms and conditions of employment for stagehands. Second, the length of time during which a stagehand is employed for a specific production may be extremely short, often no more than one day's duration. The relationship between a stagehand and any entity other than his or her union is thus fleeting. Third, we note that the parties accepted that the stagehands are "employees" when they work on live music shows, and that there IS an employer. They simply disagree about the identity of that employer.

66 Against this background, we turn to a consideration of the question of "who is the employer." In YORK CONDOMINIUM, SUPRA, at p. 648, the Board considered the following factors as helpful in this determination:

1. The party exercising direction and control over the employees performing the work.
2. The party bearing the burden of remuneration.
3. The party imposing the discipline.
4. The party hiring the employees.
5. The party with the authority to dismiss the employees.
6. The party who is perceived to be the employer by the employees.
7. The existence of an intention to create the relationship of employer and employee.

67 In SUTTON PLACE HOTEL, SUPRA, the Board discussed the difficulty of assigning a priority to these factors:

> 43. The weight to be accorded the various indicia of employer status set out in YORK CONDOMINIUM cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may concluded that they accurately identify the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.
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> 44. A particularly important question answerable through an evaluation of all of the factors set out in YORK CONDOMINIUM is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases day-to-day supervision may suggest fundamental control, in others it may not. Similarly with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in YORK CONDOMINIUM inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the set of fundamental control is generally to find the employer for the purposes of THE LABOUR RELATIONS ACT.

68 Turning to the first factor, the evidence establishes that the promoter representative employed by the producer is responsible for ensuring that all the physical requirements of a show are in place so that it can be performed. This includes ensuring that the work of stagehands is completed, and on time. Apart from a general responsibility, the evidence establishes that the promoter rep takes an active role on site in directing the work of the stage crew from first call to take-out. The union's working foremen and the artists' key personnel also have some role in providing direction to

stagehands. The evidence was sketchy as to the precise relationship between the promoter rep and the artists' personnel, but it does appear that the promoter rep is the person to whom working foremen report, and who is ultimately responsible for the work of the stagehands.

69 The producers bear the burden of remunerating stagehands, in the sense that they are financially responsible for their pay. IATSE performs a payroll function for its members, so it has some responsibility in this area as well. The funds which are used to pay wages come directly from the funds received from a producer for that purpose. The remittances which are made by IATSE to government authorities likewise come directly from money paid by a producer for that purpose. We find that although IATSE has an ADMINISTRATIVE obligation to ensure that its members are paid, the producers bear the SUBSTANTIVE burden for wages and benefits.

70 There is little evidence going to the issue of which party imposes discipline on stagehands, or would be responsible for decisions about discharge. It appears likely that the promoter rep, artists' crew and IATSE steward might all play a role if such matters arose, but that such matters arise infrequently.

71 With respect to the hiring of employees, the producer decides on the size, composition, and timing of the crews needed and conveys this to the union. The union then decides which members to refer to the show from its referral list. The venues sometimes have indirect control in this area, not with respect to individual hiring decisions, but with respect to whether union members will be hired.

72 There was no evidence in this case as to the party perceived by the stagehands to be their employer.

73 As to the intention to create an employment relationship, we agree with union counsel's submission that no party has shown an intention to create the relationship of employer and employee with stagehands.

74 Against a consideration of the above factors, we turn to the issue of who holds fundamental control over the stagehands when they perform work on live music shows. As we have suggested and as is apparent from the above, many of the above factors involve more than one entity, and do not clearly point to one or another as the employer of stagehands. Because of this, the inquiry in this case is in some ways a process of elimination. We have considered whether the involvement of an entity in one or more of the above factors causes us to conclude that it holds fundamental control over the employment of the stagehands. Our conclusion is that ultimately only one entity, the producer, meets this test.

75 We reject the argument that the venues involved in the shows about which we heard evidence can be found to be the employer of stagehands because of their ability to compel a producer to use unionized, or non-unionized labour. There are many situations where one party to a contract may, through its economic clout, impose requirements on the other party which affect employment matters. In BASS CLEF, [1993] OLRB Rep. Oct. 923, the Board described some examples of commercial arrangements between separate employers which may affect employment opportunities, for instance, by channeling work to unionized labour. In that case, the City of Ottawa imposed conditions on producers of entertainment events wishing to use City premises which resulted in members of IATSE being given work in preference to members of a competing union. Likewise, in a decision discussed in BASS CLEF, METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION, [1978] OLRB Rep. No. 1022, a group of contractors agreed that work performed

on projects that they controlled would only be subcontracted to companies with collective agreements with a stipulated union. Through these commercial arrangements, entities other than the actual employer have an ability to affect the work opportunities available. There is no question in these cases however that EMPLOYMENT relationships are a separate matter from these commercial arrangements between employers, and that the ability to affect work opportunities through a commercial arrangement does not in itself give rise to an employment relationship.

76 In the absence of any direct dealings with the employees in such matters as the hiring, direction and control, remuneration, or performance of the work, the ability to influence the work opportunities available to union members through its commercial relationship with a producer falls short of establishing an employment relationship between a venue and the stagehands performing work at that venue. There is no evidence that the venue has any part whatsoever in establishing and administering the terms and conditions of employment for the stagehands. We are satisfied that the venues were not, with respect to the shows about which we heard evidence, the employers of the stagehands.

77 In THEATRECORP, SUPRA, the Board discussed the competing policy considerations which alternatively favour either a finding that a producer is the employer of stagehands, or a finding that a venue is the employer of stagehands:

> 60. From the applicant's perspective it is extremely onerous to require it to seek to be certified for each theatrical production which may be produced or presented at the complex. Theatrical products may last for periods of time which range from hours or days to months or even years. From the evidence before us with respect to Theatrecorp's and Theatremark's own past history it is apparent that legal ownership and make-up of production companies may itself undergo several different transformation as new partnerships and entities are created to produce or present different theatrical productions. In these circumstances granting bargaining rights to the applicant union with respect to employees of a particular "producer" appears somewhat illusory and meaningless. The producer certified today may be gone tomorrow - never to return to the venue or perhaps to return in some other legal form. As a result, it is argued that within the industry only the venue, "the house", is an enduring permanent factor. A constant which is easily identifiable within an industry in which both "producers" and those who work in relation to their productions are essentially transitory.
>
> 61. The labour relations policy considerations which mitigate finding "the house as employer" but favour a finding of "producer as employer" are equally sound. The Board does not certify unions for physical locations. It certifies unions to represent employees employed by an EMPLOYER. In that context it makes little sense to find an entity which does not impact upon the employment or conditions of employment of a group of employees accountable for labour relations matters pertaining to that group of employees. To certify an entity which does not in fact for example exercise direction or control over the employees performing the work, or which does not discipline, dismiss or pay employees is equally illusory and meaningless. In bargaining IATSE would be required to negotiate with an entity which does not hire, discipline, or direct employees or which does not

> control the purse strings about those very conditions of employment. From a labour relations perspective there can be little merit to granting such certification.

78 Although there are some differences between the presentation of theatrical productions under consideration in the above passage and the production of live music shows, the issues identified in the above case are still relevant and important to the parties before us. Counsel for MCA urged the Board to be guided by these considerations in making its determinations. In our view, however, these policy considerations may be of more significance in a case where the facts are evenly balanced as between a finding that a producer is the employer and a finding that the venue is the employer. In THEATRECORP, for example, the involvement of the venue in employment matters was greater than in the case before us. In the case before us, we have found little to support a finding that the employer was the venue with respect to any of the shows about which we heard evidence. In any event, as the Board suggested in THEATRECORP, there are policy considerations in favour of both alternative findings and it is not clear to us in which direction they would ultimately point in this case.

79 It is worth noting that some of the policy considerations outlined by the Board in THEATRECORP may well be relevant to a determination of whether two or more entities should be treated as a common employer for the purposes of the Act, regardless of which is the "actual" employer. In finding that the venues identified in the evidence before us were not the employers of stagehands for the purposes of the live music shows produced by MCA and CPI, we make no comment on whether section 1(4) is applicable to the commercial realities of these parties. This issue remains to be litigated.

80 The other party which MCA suggests may be found to be the employer is the union. To the extent that the union determines which members are sent in response to the producers' crew calls, the Board does not view the administration of a hiring hall by a union as indicating an employment relationship between it and its members. We agree with the views of the Board in THEATRECORP, SUPRA on this issue, where it stated:

> ... in this case counsel for the respondents and some of the witnesses suggested that the union itself was or should be considered the employer of the stagehands. It acts as the provider of labour services to all users of the complex through its hiring hall. We reject such a suggestion. Hiring halls such as the one run by this applicant can provide an equitable and efficient means of distributing employment opportunities in an industry where positions are temporary and personnel needs fluctuate. In JOE PORTISS, [1983] OLRB Rep. July 1160 the Board made the following observations about the hiring hall system within the construction industry. We view the comments as equally applicable to the IATSE hiring hall.
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> 7. The hiring hall offers advantages to both employees and employers. It saves the employee from the need to canvass numbers of employers in an often fruitless search for work, acting as a clearing house in which available jobs and available workers can be matched. Particularly in periods of high unemployment it also provides the worker with a rational and objective system for the more equitable distribution of work among all employees rather than to the privileged few. The employer gains to the extent that the hiring hall relieves him of the need

> to screen and recruit employees with adequate qualifications for short term jobs. The employer avoids the administrative cost he would otherwise bear as well as incidental costs which he might have to incur to retain a crew of workers through slow periods to insure available manpower in busier times. A well run hiring hall give the employer a ready pool of labour from which he can draw on short notice with little or no administrative cost. Moreover, to the extent that the hiring hall dispatches the same members to different kinds of jobs for different employers, as is notably the case for labourers, it may engender a work force with greater experience and sophistication, which will also benefit the employer.
>
> Hiring halls in an industry organized among craft lines can't be compared to and should not be equated with mere temporary employment agencies.

81 We also find these considerations applicable to the union's role in administering an apprenticeship program. As to the union's role as administrator of the payroll for its members, in THEATRECORP, SUPRA, and other cases, the Board has found that "mere administrative paymaster arrangements are not indicative of the true employer." Rather, what is more important is which party has the burden of the labour costs. In this case, IATSE does not act as anything more than a "mere paymaster." Its functions as a paymaster do not reflect either that it receives the benefit of the product of the labour, or has undertaken the burden of the labour costs.

82 We conclude that the role played by the union in administering the hiring hall and the payroll for its members does not place it in a position of "fundamental control" over stagehands such that it can be considered their employer.

83 We conclude that MCA and CPI are the only parties involved in the presentation of the live music shows about which we heard evidence which possess the degree of fundamental control over stagehands sufficient to characterize them as employers. There is an element of "default" about this conclusion, in that we have found that there is no other entity involved with these productions that can be considered the employer. We are satisfied, however, that on an application of the indicia of YORK CONDOMINIUM, SUPRA, the locus of fundamental control over the employment of stagehands on these live music shows rests with the producers.

84 To begin with, responsibility for the successful completion of the work by the stagehands rests with the producers. It is the producer of the live music show that has undertaken the obligation to perform the work for which stagehands are engaged. Within the web of relationships that intersect in order to mount a live music show, the producer's role is, not surprisingly, to "produce" the show. In addition to the promotional and organizational work involved, the production of the show requires the physical assembly of the stage and associated apparatus. Stagehands supply the labour necessary for the producer to fulfill its obligations in-his regard and the producer in turn pays for their wages and benefits. If the stagehands do not perform their work well, it is the producer that is ultimately responsible. If they perform their work well, it is the producer that profits from that. To the extent that stagehands provide "value for the money", it is to the producers that this value is provided.

85 Following from this, it is not surprising therefore that the producer maintains control over the manner in which stagehands are employed. Through the promoter rep, the producer's representative on the show, the producer sets the general terms of the work, such as the time of crew calls and the qualifications and size of crews needed, and negotiates with the union about the wages and

terms and conditions of work. On site, the promoter rep plays an active role in directing the immediate work required, communicating with working foremen, authorizing overtime, making revisions to the schedule as needed, and authorizing additional labour.

86 In short, we are satisfied that MCA and CPI are the parties exercising direction and control over the stagehands on these shows, and are the parties bearing the burden of remuneration. While some of the other indicia do not clearly point towards the producers (and it is more accurate to say that some of them do not point clearly in any direction at all), we find in this case that these first two are sufficient to demonstrate that the producers hold fundamental control. We conclude that on the live music shows about which we heard evidence and for which MCA and CPI are the producers, MCA and CPI are the employers of stagehands.

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87 We now turn to the issue of the agreement between CPI and IATSE, and whether it is a collective agreement. Although more accurately stated, the agreement is between IATSE and CPI, Bass Clef and Donald K. Donald, for ease of reference in this section, we shall simply use "CPI."

88 As described above, from May of 1994 to October of 1995, CPI engaged in negotiations with IATSE which resulted in an agreement. These negotiations were punctuated by a certification application filed by IATSE with respect to stagehands employed by CPI at a concert by the "Tragically Hip", filed in February of 1995. IATSE states that this application was filed in an effort to "expedite" the negotiations. In response to this application, CPI took the position, among other things, that it was not the employer of stagehands engaged with respect to concerts it produced. Although other objections to the application were raised, the issue of the identity of the employer became the only substantive one remaining after discussions between the parties.

89 The issue of the identity of the employer remained outstanding by the time the final agreement was reached, in May of 1995, as is apparent from the terms of that agreement. The agreement takes the form of two documents. The main document is titled the "Agreement", and states that its general purpose is "to set forth the terms of engagement, the rates of pay and hours of work that both parties have agreed to, and to provide a procedure for the prompt and fair settlement of grievances." Throughout the document, the two parties are referred to as "the Producer" and "the Union." Article 2.01 provides:

> 2.01 The Producer recognises the Union as the exclusive bargaining agent for all stagehands engaged by the Producer for the take in, set up, presentation, tear down and load out of any live concerts or theatrical performances presented by the Producer at the following venues in the Regional Municipality of Ottawa Carleton or the Municipality of Hull, namely:
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> * The Ottawa Civic Centre
> * The Ottawa Congress Centre
> * The Palladium
> * The Robert Guertin Arena
> * The Frank Clair Stadium
> * The Aberdeen Pavilion
> * Capital City Speedway

In the event that a new venue is developed in the Regional Municipality of Ottawa Carleton, with a seating capacity of 1800 or greater, then the parties agree to negotiate in good faith acceptable terms and conditions with respect to that venue.

90 Article 3.03, under the heading of "Union Security" provides:

3.01 Except where the union is unable to supply stagehands as required, the Producer agrees to engage no one but members in good standing in the Union, or persons in possession of a valid work permit issued by the Union, to perform the work within the jurisdiction of the bargaining unit. All persons so engaged shall remain members in good standing, or shall continue to hold a valid work permit, as a condition of engagement.

91 Article 4.01, under the heading of "Management Rights," states:

4.01 Subject only to those specific limitations expressly containing in this Agreement, all rights and prerogatives of the producer are retained by the Producer and are exclusively within the powers of the Producer and its representatives. Without limiting the generality of the foregoing, the rights of the Producer shall include, but shall not be limited to:

(a) the right: to maintain order, discipline and efficiency; to make, alter and enforce reasonable rules and regulations, policies and practices, to be observed by the stagehands; to discipline or terminate their engagement in accordance with the terms of this Agreement;
(b) the right: to engage and control the stagehands; to plan, direct and control the stagehands and its operations; to operate and manage its operations in all respects in order to satisfy its commitments and objectives;
(c) the right: to determine the location and extent of its operations and their commencement, expansion, curtailment or discontinuance; to determine the direction of the working forces, the work to be done, the standards of performance, the schedules of work, the methods, processes and means of performing work, to use new, improved, or different methods or equipment; to determine the number of stagehands needed by the Producer at any time, and how many stagehands shall work in any job, the number of hours to be worked, starting and quitting times, and the methods and procedures to be used to ensure security of the property of the Producer, and generally to manage the undertaking and its business without interference; which rights are solely and exclusively the rights of the Producer unless specifically limited by this Agreement. Nothing in this Article restricts the right of the Union or a stagehand to file a grievance in accordance with the terms of this Agreement.

92 Article 7, dealing with strikes and lockouts, provides:

7.01 The Union agrees that for the duration of this Agreement, neither the Union nor any stagehand shall take part in or call or encourage or threaten any strike or picketing which shall in any way affect the operations of the Producer, nor shall there by any sympathy strikes or secondary boycotts. The Producer agrees that it will not engage in any lock-out for the duration of this Agreement.

7.02 The word "strike" and the work "lock-out" as used in this Article shall have the same meaning given to those words in the Ontario LABOUR RELATIONS ACT, R.S.O. 1990, c. L.2.

7.03 The Union and the stagehands acknowledge that any violation of Article 7.01 will cause the Producer and its patrons irreparable damage and, therefore, the Union and the stagehands agree that, in addition to any damages or other relief the Producer would be entitled to receive under this Agreement, as a result of any violation of Article 7.01, the Producer is entitled to an interim injunction without notice enjoining the Union, its officers, agents, members and the stagehands from violating Article 7.01.

93 Other provisions of the agreement deal with such matters as grievances and arbitration, rates of pay, meal breaks, and holidays.

94 The second document is titled a "Settlement", and provides:

1 The undersigned representatives of the Union and the Producer agree to unanimously recommend to their respective principals ratification of the attached Agreement.

2. The Union and the Producer agree that they are entering into the attached Agreement without prejudice to their respective positions on the Union's application for certification, dated February 7, 1995, being O.L.R.B. File No 3935. In the event that either party, on the expiry of the attached Agreement, or upon the expiry of any renewal of the attached Agreement, seeks a determination of the party's legal rights and obligations, if any, under the LABOUR RELATIONS ACT, then it is understood that either party may file an application under the legislation, provided that at least thirty (30) days have elapsed since written notice has been given to the other party that such an application is being made and the parties are unable to resolve their differences through mutual agreement.
3. The Union and the Producer agree to adjourn generally the Union's application for certification, dated February 7, 1995, being O.L.R.B. File No. 3935, the hearing for which is scheduled to commence Monday, May 29, 1995.
4. Upon ratification of the attached Agreement the Union agrees to withdraw its application for certification dated February 7, 1995, being O.L.R.B. File No. 3935, immediately.

95 From the evidence, it appears that the sole issue to which paragraph 2 of the above settlement was directed was the identification of the employer. CPI wished to reserve on its position that it was not the employer of stagehands. IATSE maintained its position that CPI (and Bass Clef and Donald K Donald) were employers of stagehands.

96 As is apparent from the above, although in substance, the "Agreement" contains all the terms and conditions one might expect of a collective agreement and resembles in almost all respects a collective agreement, the parties have deliberately refrained from characterizing it as such, and the stagehands as "employees." Further, they have characterized the parties as a "producer" and a union, rather than an "employer" and a union.

97 The Board heard evidence that throughout the negotiations between IATSE and CPI, IATSE never wavered in describing the document which it sought as a "collective agreement." As far as IATSE was concerned, it was engaged in collective bargaining. The evidence also establishes that CPI did not specifically object to IATSE's characterization of the process, and for its own part variously used the terms "collective agreement" and "agreement."

98 The Act defines "collective agreement" as:

> "collective agreement" means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement.

99 There is no question that IATSE is a trade union that represents stagehands. We have found that CPI is an employer of stagehands represented by IATSE Finally, the agreement entered into between IATSE and CPI contains provisions respecting terms or conditions of employment. Is there any reason why the Board ought not to find therefore that the agreement is and was at all relevant times a collective agreement within the meaning of the Act?

100 Counsel for MCA maintains that since the parties agreed to leave unresolved the issue of whether the document was a collective agreement within the meaning of the Act (and in particular, whether CPI was an employer within the meaning of the Act), then until such a determination is made, the document is no more than a commercial agreement for the supply of labour. MCA acknowledges that once the Board has made a finding that CPI was and is an employer of stagehands, the document becomes a binding collective agreement. However, until such a finding is made, the document has no status under the Act. The Board's finding cannot or should not be given retrospective effect. The corollary of this argument is that since there had been no such finding at the time of the sale of CPI to MCA, there were no bargaining rights or collective agreement to which MCA became bound.

101 We do not find the evidence of the parties' intentions to be helpful to our determination of whether the agreement between CPI and IATSE was at all material times a collective agreement. First, even if the parties' intentions are relevant in determining whether an agreement is or is not a collective agreement, it is clear that the parties in this case disagreed. There is no common intention by which the Board might be guided. Further, to the extent that there is a common intention, it is

only an understanding that it was unnecessary for the parties to have the matter litigated at that time. There is nothing in the documents or in the parties' conduct which we construe as an understanding that the agreement was NOT a collective agreement, or that it was NOT a collective agreement UNTIL the Board found so. This case is distinguishable on its facts from ONTARIO HYDRO, [1990] OLRB Rep Mar. 305, where the Board found a common intention not to be governed by the Act sufficient to estop a union from claiming that an agreement was covered by the Act, at least as long as it was in effect.

102 On a more general level, and apart from any estoppel arguments, it cannot be the case that parties whose arrangements meet certain definitions in the Act do not incur legal consequences under the Act until the Board has made a finding about their legal status. No cases were cited in support of the argument and the Board can think of no support for this proposition. It is a regular and uncontroversial aspecct of the Board's decision-making that it is often askedto determine whether a set of circumstances is governed by theAct. To accept the respondent's position here would be to find that until the Board makes that determination, no rights or liabilities exist. We reject such a conclusion. It is not the Board's determinations that create rights or liabilities; it is the parties' actions or arrangements. This is as much the case when the Board is asked to find whether a definition in the Act applies to a person or thing, as when the Board is asked to find whether a parties' actions violate the Act.

103 Although arising out of a different issue, the Board made the following comment in its decision in SUSAN FORBES, [1993] OLRB Rep. Dec. 1283, which we find applicable here:

> 15. Despite the parties' articulation in the very first paragraph of their Agreed Statement of Facts, it is not the function of the Board to "grant" or "withhold" trade union status under the Act. As the Board observed in ONTARIO HYDRO, [1989] OLRB Rep. Feb. 185 at paragraph 37:
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> ... It is clearly NOT the Board's function to "confer" or "withhold" the status of a trade union as the language of order Board decisions suggests. An entity or group of persons either is or is not a trade union, depending on whether the statutory definition is satisfied. The Board's function is to make a finding of fact.

104 It is interesting to note that in SUSAN FORBES, the Board even found an organization to be a trade union for the purposes of the Act where NEITHER the union nor the employer saw it as such.

105 In a sense, MCA's argument about "retrospectivity" is misplaced. It may be relevant to a situation where there has been legislative change. There, issues may arise as to whether new statutory provisions should have an effect on past actions. Retrospectivity may be an issue precisely because a statute has created new rights or obligations. But this is not the situation before us. As we have stated, the Board's interpretation or application of the Act does not CREATE rights or obligations.

106 Finally, MCA has suggested that it would be unfair for it to become bound to a collective agreement which had not yet been found to be a collective agreement at the time of its purchase of CPI. Without determining the extent to which such an argument could or should influence our findings on the issues before us, the equities do not weigh heavily in MCA's favour in any event. At the

time it purchased CPI, its legal counsel had a copy of the agreement between CPI and IATSE. Not only was MCA in a position to assess the nature of the obligations it might assume upon on the purchase, but the evidence is that the issue of "retrospectivity" or "retroactivity" had even been canvassed. Without reviewing the details of the interactions, it is sufficient to note that MCA was very much aware that there was a possibility that the agreement between CPI and IATSE might be found to be a collective agreement from its inception.

107 In conclusion, we are satisfied that at the time of the sale of CPI to MCA, CPI was bound to a collective agreement with IATSE. As a result of the sale, MCA is now a party to that agreement.

108 The remaining issues may be listed for hearing at the request of any party.

* * * * *

DECISION OF BOARD MEMBER J.A. RUNDLE

109 1. I have read the decision of the majority and, with respect, I cannot come to the same conclusions on the facts presented to this panel.

110 2. I am in agreement that MCA as producer of the Ottawa shows, should be deemed the employer for bargaining purposes. In light of the majority ruling in THEATRECORP (I was a member of that majority), I find that MCA fulfills the indicia set out in YORK CONDOMINIUM. I find that MCA's appointment of a promoter representative to oversee the construction, presentation and dismantling of the productions particularly indicative of an intention to control and manage the operation.

111 3. However, I cannot agree that the documents entered into by IATSE as bargaining agent and CPI or MCA are a collective agreement under the Act.

112 4. First and most importantly, both the bargaining agent and the producers made a deal whereby they AGREED TO DEFER the "who is the employer?" determination while they negotiated the terms of their employment relationship. When the purported voluntary recognition was drafted, the parties EXPLICITLY continued to hold in abeyance the employer determination. That question was not put to the Board until the instant case; accordingly, the status of employer remained in suspension until this proceeding was concluded and this decision was issued.

113 5. The LABOUR RELATIONS ACT, 1995, in all its incarnations, has consistently stated that a collective agreement requires there to be an employer and a union. In the absence of a declared or defined employer, or whereas in the present case -- the parties HAVE AGREED to postpone the determination of the employer's identity, a collective agreement cannot be said to be in existence, let alone binding on the workplace parties.

114 6. IATSE may certainly have had its reasons to agree to the deferral of the resolution of the identity of the employer: it could engage CPI or MCA in negotiating particular terms or details of what might eventually BECOME a collective agreement. The fact remains, however, that agree to defer they did. They cannot now renege on their agreement nor be seen to be asking the Board to overturn or overrule what was manifestly a voluntary suspension of one of the fundamental premises for the formation of a collective agreement.

115 7. Secondly, IATSE and MCA were the subject of a certification application as early as 1993. The proceedings were adjourned and remain unresolved to date. In the application, MCA responded that it was NOT the employer. CPI and IATSE were in parallel negotiations in 1994 and 1995, and these parties too agreed to "put the issue [of who is the employer] aside."

116 8. Thirdly, the majority acknowledges at paragraphs 17 to 28 that the document drafted by IATSE for CPI does not constitute a "voluntary recognition agreement." And at paragraphs 29 to 37, the majority reaches a similar conclusion with respect to negotiations between IATSE and MCA in 1993-1996.

117 9. Fourthly, the majority concludes by "default" that MCA is the employer. The default comes about because, in the words of the majority. "MCA and CPI are the only parties involved in the presentation of the live music shows ABOUT WHICH WE HEARD EVIDENCE which possess a degree of the fundamental control over stagehands sufficient to characterize them as employers." (emphasis added) Coming to a conclusion by default seems an inappropriate resolution of such a fundamental question.

118 10. Finally, the 1995 agreements between IATSE and CPl are a COMMERCIAL AGREEMENT and cannot be construed as a 'collective agreement then or now, given the parties' joint intention that the identity of the employer be held in abeyance. I disagree most emphatically with the majority's statement in paragraph 101: "There is no common intention... There is nothing in the documents or in the parties' conduct which we could construe as an understanding that the a agreement was NOT a collective agreement, or that it was NOT a collective agreement UNTIL the Board found so." (emphasis in original) On the contrary, everything CPI did (and IATSE agreed to) supports the inference that there was no intention for this to be a collective agreement--there was no employer!

119 11. In sum, I find that the majority is conferring the status of "collective agreement" on documents which the parties negotiated with the full knowledge that they could be anything but a collective agreement, in the absence of a statutorily prescribed signatory - party -- the employer. Further the purported agreement covers venues in the Regional Municipality of Ottawa Carleton OR THE REGIONAL MUNICIPALITY OF HULL. Clearly this Board is without jurisdiction to bind any party to any activity that occurs outside the Province of Ontario, which in my respectful submission is further indicia that this document was never intended to be considered a collective agreement.

120 12. Given this panel's ruling that MCA is the employer, the parties should now return to the bargaining table to effect the agreement IATSE is seeking. Again, because the parties AGREED to shelve the resolution of the employer question, the panel's finding can not bind MCA to a position that in the past had deliberately been left open and unanswered.

cp/s/das