

WE WILL notify Commercial Drywall Constructors, Inc., that we will reimburse it for expenses incurred to date by reason of the provisions in the contract relating to a performance bond and Administrative Fund Trustees.

PAINTERS DISTRICT COUNCIL No. 36, AFL-CIO,
Labor Organization.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 849 South Broadway, Los Angeles, California, Telephone No. 688-5229.

American Guild of Variety Artists, AFL-CIO and Al Fast and Golden Triangle Restaurant, Inc. and Tampa International Inn, Inc., The Outrigger Inn of St. Petersburg, Inc., d/b/a Outrigger Inn, Hawaiian Village Restaurant, Fontainebleau Hotel Corporation, d/b/a Fontainebleau Hotel, Morris Lansburgh, et al., d/b/a Deauville Hotel, Americana Hotel, Forty-Five Twenty-Five, Inc., d/b/a Eden Roc Hotel, and Carillon Hotel, Parties to the Contract (Minimum Basic Agreement) and Gold Coast Theatrical Agency, Inc., Gerry Grant Agency, Parties to the Contract (AGVA Franchise Agreement)

American Guild of Variety Artists, AFL-CIO and Clayton I. Hart and Al Fast. *Cases Nos. 12-CB-647, 12-CA-2393-1, and 12-CA-2393-2. November 18, 1965*

DECISION AND ORDER REMANDING

Upon charges and amended charges filed and served upon American Guild of Variety Artists, AFL-CIO, herein called Respondent or AGVA, a complaint and an amended complaint were served upon the parties on November 16, 1962, and July 15, 1963, respectively, in Cases Nos. 12-CA-2393-1 and 12-CA-2393-2, alleging violations by AGVA as an employer. On July 16, 1963, a consolidated complaint and notice of hearing in Cases Nos. 12-CA-2393-1, 12-CA-2393-2, and 12-CB-647 was issued, alleging violations of Section 8(a) (3) and (1), and 8(b) (1) (A) and (2) of the Act by AGVA as an employer and as a labor organization, respectively. By its answers, the Respondent denied any wrongdoing and moved that the Board decline jurisdiction herein and dismiss the complaint.

Thereafter, by stipulation executed on October 28, 1963, and filed with the Board on October 31, 1963, the parties agreed to waive all intermediate proceedings before a Trial Examiner on the question of jurisdiction and submit that issue directly to the Board, expressly

reserving their rights with respect to all other issues. By order of November 4, 1963, the proceeding was transferred to the Board. Thereafter, pursuant to permission granted by the Board in accord with the stipulation, both the Respondent and the General Counsel filed a brief and the Respondent also filed an answering brief.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Zagoria].

The Board has considered the entire stipulated record,² including the pleadings, the stipulation of facts, the affidavits and statement, as well as the aforesaid briefs, and makes the following:

FINDINGS AND CONCLUSIONS

Facts

The Respondent is a labor organization representing variety entertainers. AGVA has its national office in New York and maintains 26 branch offices, including 2 in Canada, 2 service stations, and 3 regional offices located in 20 States of the United States. These offices are staffed by 118 employees at a total yearly payroll of \$600,000.

As of January 31, 1962, AGVA represented approximately 13,500 active, plus about 7,000 inactive or withdrawn, members from whom it annually received dues and initiation fees in excess of \$1 million. It maintains and administers two welfare funds, based upon employer³ contributions made pursuant to contracts between AGVA and such employers. These contributions (approximately \$650,000 annually) are deposited in local banks and are thereafter withdrawn by AGVA and deposited in a central account in New York City. Pursuant to appropriate governing regulations, AGVA deposits 65 percent of the funds in savings banks and invests the remaining 35 percent in common stocks. The welfare funds, which at the time of the stipulation had a reserve of approximately \$800,000, are designed to pay accident, hospitalization, and death benefits to AGVA members.

AGVA negotiates and enforces employment contracts called Minimum Basic Agreements (hereinafter also referred to as MBA) with various employers. During the period in question, it was party to

¹ The Respondent requested oral argument before the Board. Because in our opinion the entire stipulated record, together with the briefs, adequately set forth the issues and the positions of the parties, the Respondent's request is hereby denied.

² The parties stipulated that the record in this proceeding shall consist of the charges and amended charges, the complaint, amended complaint, and consolidated complaint, the answers, the Respondent's motion to dismiss, a document entitled "Stipulation of Facts," affidavits of six named individuals, and the statement of one.

³ Unless otherwise specifically indicated, the term "employer" is used herein in its generic, rather than statutory, sense and refers to any entity for whom variety artists perform for compensation.

approximately 2,500 such agreements. Of these, approximately 2,000 were with employers engaged in the theater, nightclub, and hotel business, and the remaining 500 were divided into 2 groups—the outdoor group (circuses, fairs, etc.) and private organizations, referred to as club-date contracts, covering 1-night engagements. In addition, approximately 100,000 individual artists' engagement contracts are executed annually between performers and employers on an AGVA standard form of Artists' Engagement Contract, which supplements, and is subject to, the MBAs of the employer. AGVA also has some 900 agreements (called National Codes of Fair Practice) with theatrical agents and producers, which supplement the MBAs and which set forth minimum rules of fair practice between such agents and performers.

As a condition of entering into an MBA or an Artists' Engagement Contract, AGVA requires that the employer post bonds (either cash or bearer), in an amount equal to the value of the artists' services for 1 week, to insure against the employer's failure to pay the performer. These bond moneys are deposited in local banks in the areas where posted and are subsequently withdrawn by AGVA and deposited in a central account in New York City. Withdrawals from the fund are made where the employer defaults in its obligation to compensate the artists or requests that the performer be paid from the bond account. Withdrawals are also made for the purpose of reducing or totally withdrawing the amount posted. Approximately \$874,000 in bond payments are collected and disbursed by AGVA annually.

During the period in question, AGVA had Minimum Basic Agreements with hotels both in Florida and in other States, which hotels meet the Board's standards for asserting jurisdiction, i.e., each has an annual gross exceeding \$500,000, at least 75 percent of the rooms are occupied for a period of less than 30 days, and each annually purchases and receives goods, from outside the State wherein it is located, in an amount sufficient to establish statutory jurisdiction.⁴

With respect to the five hotels named herein, each of which executed an MBA with AGVA, the parties stipulated the following employment facts:⁵

Eden Roc: The entertainment season lasts approximately 17 weeks and consists of approximately two performers each week.

Deauville: The entertainment consists of 3 shows a week for 52 weeks a year, with a total of approximately 300 persons appearing 1 night each; in addition, there are about 30 performers whose tenure is from 1 week to 10 days during the height of the season, which season lasts approximately 17 weeks.

⁴ *Floridan Hotel of Tampa, Inc.*, 124 NLRB 261.

⁵ AGVA asserted that the facts relating to the Carillon and the Americana are not typical, but constitute exceptions to the general employment practices in the industry.

Fontainebleau: There are scheduled 150 1-night shows each year, consisting of about 300 performers appearing for 1 night each; there are also 4 or 5 star performers during a season who appear for periods ranging from 1 week to 10 days at a time.

Americana: There are 20 "steady" performers (the duration of whose engagement is more than 30 days and who are involved in an ice show). In addition, there are 50 1-night shows scheduled during the year, totaling 100 performers each appearing for 1 night.

Carillon: The entertainment season lasts 52 weeks a year and consists of two phases. In one phase, there is a permanent chorus (more than 30 days in duration), consisting of approximately 16 persons, which is supplemented by acts having a tenure of 4 to 10 weeks. In its other phase, there are 5 or 6 different acts per week throughout the entire year representing some 300 entertainers performing 1 night each.

With respect to the above hotels, the performers who appear on a 1-night basis earn an average of \$60 per night. The "steady" performers, i.e., those engaged for a period of 1 week or more, and who are not principal entertainers, earn an average of \$100 per week. Principal or star performers earn upwards of \$300 per week. The combined annual earnings of all performers in the United States, under AGVA's individual artists' contracts and MBAs, exceed \$5 million.

Discussion

It is not contended that the Board lacks statutory jurisdiction over the entertainment industry and, from the above facts, it is apparent that the Board's standards for asserting such jurisdiction, both over AGVA, acting as an employer, and over the hotels named herein, are also satisfied. AGVA contends, however, that (1) the Board should continue its practice of declining jurisdiction in the amusement industry particularly where, as here, over 96 percent of all employment is on a casual and temporary basis; (2) alternatively, the Board should not assert jurisdiction over variety artists when engaged by employers, such as the hotels herein, which are otherwise subject to the Board's jurisdiction; and (3) the Board should decline jurisdiction over AGVA as an employer under the Act, as its function relates solely to representing persons working as variety entertainers.

We find no merit in AGVA's contentions. Contrary thereto, the Board has not, as a general rule, refused to assert jurisdiction over employers engaged in the amusement industry.⁶ Rather, it has con-

⁶ *Carl Walter Ray, d/b/a Ray, Davidson & Ray*, 131 NLRB 433; *Edward Small Productions, Inc., et al.*, 127 NLRB 283; *Independent Motion Picture Producers Association, Inc.*, 123 NLRB 1942, 1948, footnote 19; *The League of New York Theatres, Inc.*, 129 NLRB 1429, 1432, and cases cited therein.

sistently done so, declining jurisdiction where the employer's business was essentially local in character,⁷ and where it involved racetracks and enterprises related thereto.⁸ These exceptions are very limited.

The fact, as urged by AGVA, that extensive competition exists among entertainers for available jobs, that employment in the industry is, to a great extent, casual and irregular, that performers shift frequently from employer to employer, often considerable distances apart, does not militate against the Board's assertion of jurisdiction.⁹ Nor is it material, as contended by AGVA, that variety entertainers are affected by seasonal business fluctuations;¹⁰ or, that such entertainers, when engaged at enterprises such as the hotels herein, perform a very special and limited function which is but remotely related to such establishments' principal business, and that, therefore, these performers may have no interests in common with other employees of the employer.

It appears from the record¹¹ that the entertainment aspect of an employer's business is an integral part of its total operations. In *Thunderbird Hotel, Inc.*,¹² we recently reiterated the well-established principles that, in determining whether or not to assert jurisdiction over an employer's business, or segment thereof, the Board looks to the impact on commerce of the totality of said employer's operation; and, once the Board's statutory jurisdiction is established, it is unnecessary to inquire into the nature of the goods or services furnished by the employer to its customers. Thus, contrary to AGVA's contention, it is immaterial that variety performers are engaged solely for the purpose of entertaining the employer's customers and may have only a remote interest in common with other employees. In fact, this matter of common interests would be relevant only on the question of an appropriate bargaining unit which is not involved herein.

AGVA's reliance on *Pinkerton's National Detective Agency, Inc.*,¹³ in support of its alternative contention (2) above is misplaced. The

⁷ *Olympia Stadium Corporation*, 85 NLRB 389; *Philadelphia Moving Picture Machine Operators Union #307-A, etc. (Keamco, Inc.)*, 90 NLRB 652; *Moving Picture Projectionists Local No. 150, I.A.T.S.E. (Southside Theatres, Inc., and Fanchon & Marco, Inc.)*, 109 NLRB 259; cf. *Philadelphia Orchestra Association*, 97 NLRB 548.

⁸ *Hiawath Race Course, Inc.*, 125 NLRB 388; *Meadow Stud, Inc.*, 130 NLRB 1202; *William H. Dixon*, 130 NLRB 1204; *Walter A. Kelley*, 139 NLRB 744; *Pinkerton's National Detective Agency, Inc.*, 114 NLRB 1363, 1364.

⁹ *Independent Motion Picture Producers Association, Inc.*, *supra*; see also *Batjac Enterprises, Inc., et al.*, 126 NLRB 1281.

¹⁰ *Ray, Davidson & Ray, supra*; *Coney Island, Inc.*, 140 NLRB 77 (some 100 days each summer constituted employer's business season); *Aspen Skiing Corporation*, 143 NLRB 707 (the employer's season lasted from Thanksgiving to Easter).

¹¹ Morris Lansburgh, one of the hotel owners and an affiant in support of AGVA's position, stated that the primary purpose for hiring entertainers is to furnish recreational activity to guests of the hotel and to publicize the hotel in order to attract other potential guests. Thus, the artists furnish a service which is considered desirable and even necessary to a hotel's continued successful operation.

¹² 144 NLRB 84, 86.

¹³ 114 NLRB 1363, 1364.

Board there declined jurisdiction upon a finding that the true employer of the employees involved was a racetrack operator, and refused to view the guard services apart from those of the business of the employing industry.

Finally, with respect to AGVA's contention (3) above, it is well settled that a labor organization, when acting as an employer *vis a vis* its own employees, is an employer within the meaning of Section 2(2) of the Act, and subject to the Board's jurisdiction.¹⁴ This is so regardless of the industry which it services and regardless of whether or not the Board has statutory jurisdiction over that industry.¹⁵

In view of the above, we find that it will effectuate the policies of the Act to assert jurisdiction over the Respondent herein, both in its capacity as an employer and in its role as a labor organization.¹⁶ Accordingly, we shall deny the Respondent's motion to dismiss the complaint herein and remand the case for further proceedings on the merits thereof.

[The Board denied the Respondent's motion to dismiss the complaint; and remanded this case to the Regional Director to arrange a hearing before a Trial Examiner, who shall prepare a Decision and Recommended Order.]

¹⁴ *Office Employees International Union, Local 11 (Oregon Teamsters) v. N.L.R.B.*, 353 U.S. 313; *Laundry, Dry Cleaning and Dye House Workers' International Union Local 26; et al.*, 129 NLRB 1446, footnote 2.

¹⁵ *Air Line Pilots Association International, et al.*, 97 NLRB 929 (the Board asserted jurisdiction over the association as an employer even though the industry which it serviced was subject to the Railway Labor Act).

¹⁶ We do not share AGVA's apprehension that chaos and disorder in the variety entertainment field must necessarily flow from our Decision herein. For, we cannot accept AGVA's premise that it must have complete freedom from the operations of the Act to maintain order, stability, and responsibility in collective bargaining on behalf of variety artists.

Alton Box Board Company Container Division and Paul D. Hirsch. *Case No. 14-CA-3599. November 18, 1965*

DECISION AND ORDER

On August 30, 1965, Trial Examiner Samuel M. Singer issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices as alleged and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief. Respondent has filed a brief in support of the Trial Examiner's dismissal.¹

¹ No exception was taken to the Trial Examiner's disposition of Respondent's position based upon the existence of a contractual grievance-arbitration procedure.