

American Federation of Musicians, AFL-CIO; and Reno Musicians Protective Association 368, AFL-CIO (Harrah's Club, et al.) and National Association of Orchestra Leaders. Cases 20-CC-771 and 20-CC-773

September 30, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND ZAGORIA

On June 30, 1969, Trial Examiner Robert L. Piper issued his Decision, in the above-entitled proceeding, finding that Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Charging Party and Judy Lynn filed exceptions to the Trial Examiner's Decision, and General Counsel and the Intervenor, Harrah's Club, filed exceptions to the Trial Examiner's Decision and supporting briefs. Respondents filed an answering brief, cross-exceptions, and a brief in support of cross-exceptions.

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 these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the complaint be, and it hereby is, dismissed in its entirety.

¹As we agree with the Trial Examiner that the appeals to Judy Lynn, Gaylord, and Holiday, and George Liberace constituted lawful primary activity, we find it unnecessary to consider whether these individuals were employees or independent contractors.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

ROBERT L. PIPER, Trial Examiner: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, was heard in Reno, Nevada, on November 25, 26, and 27, 1968,¹ pursuant to due notice. The consolidated complaint, which was issued on August 22, on a charge filed March 5 in Case 771 and a charge filed March 13 and amended March 14 and May 29 in Case

773, alleged in substance that American Federation of Musicians (hereinafter called AFM) and its Local 368 (hereinafter collectively called Respondents) engaged in unfair labor practices proscribed by Section 8(b)(4)(i) and (ii)(B) of the Act by inducing, encouraging and coercing employees of Judy Lynn, d/b/a The Judy Lynn Show, to engage in a strike or refusal to perform services, and by threatening, coercing or restraining Judy Lynn, Ronnie Gaylord and George Liberace, persons or employers engaged in commerce or in an industry affecting commerce, in both instances with an object of forcing or requiring Lynn and Gaylord to cease doing business with Harrah's Club and Liberace to cease doing business with the Ponderosa Hotel Co., both Nevada corporations engaged in commerce within the meaning of the Act. Respondents' answer denied the alleged unfair labor practices. All counsel filed briefs. The Intervenor's unopposed motion to correct the official transcript of proceedings is hereby granted.²

Upon the entire record in the case and from my observation of the witnesses, I make the following.

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Harrah's Club (hereinafter called Harrah's) is a Nevada corporation with places of business in Reno and Lake Tahoe, Nevada, where it is engaged in the operation of gambling casinos and restaurants. During the past year in the course and conduct of its operations Harrah's received gross revenue in excess of \$500,000 from its gambling operations and purchased and received goods valued in excess of \$50,000 directly from outside the State of Nevada. The Ponderosa Hotel Co. (hereinafter called the Ponderosa) is a Nevada corporation with a place of business in Reno, Nevada, where it is engaged in the operation of a gambling casino, restaurant, bar and hotel. During the past year in the course and conduct of its operations the Ponderosa received gross revenue in excess of \$500,000 from its gambling operations and purchased and received goods valued in excess of \$50,000 directly from outside the State of Nevada. Respondents admit and I find that Harrah's and the Ponderosa are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Judy Lynn, d/b/a The Judy Lynn Show, is a star singer, also engaged in the operation of an orchestra or band which accompanies her. They perform at various hotels, nightclubs, roadcos and other business establishments throughout the United States. During 1968, Judy Lynn was a party to a contract with Harrah's whereby she agreed to perform services valued in excess of \$80,000.

Ronnie Gaylord, a member of an act called Gaylord and Holiday, is an entertainer who performs at various hotels, nightclubs and other business establishments throughout the United States. During 1968, Gaylord was a party to a contract with Harrah's whereby he agreed to perform services valued in excess of \$100,000.

George Liberace is the leader of a band or orchestra which performs at various hotels, nightclubs and other business establishments throughout the United States. During 1968, Liberace was a party to a contract with the Ponderosa whereby he agreed to perform services valued

¹All dates hereinafter refer to 1968 unless otherwise indicated.

²Transcript errors are hereby noted and corrected.

in excess of \$20,000. The record establishes and I find that Judy Lynn, Gaylord and Liberace are persons and employers engaged in commerce or in an industry affecting commerce within the meaning of Sections 2(6) and (7) and (8)(b)(4) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondents are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Introduction and Issues

As a result of a labor dispute, Respondents engaged in a strike from March 1 to April 30 against the various casinos employing musicians in the Reno-Tahoe area, including Harrah's and the Ponderosa. As the result of contracts previously entered into, Judy Lynn and Gaylord and Holiday were scheduled to appear and appeared at Harrah's during the strike, and Liberace was scheduled to appear at the Ponderosa. Judy Lynn, the members of her band, Gaylord and Liberace were all members of Respondent AFM. Respondents, after placing Harrah's and the Ponderosa on their National Unfair List, threatened Judy Lynn, the members of her band, and Gaylord with union disciplinary action and expulsion if they performed or continued to perform services for Harrah's, threatened Liberace with union disciplinary action if he performed services for the Ponderosa, and instituted union disciplinary proceedings against Gaylord, Judy Lynn and the members of her band for continuing to perform services for Harrah's.

The issues as framed by the pleadings are (1) whether the artists or entertainers involved herein are persons or employers, i.e., independent contractors (which would make their musicians their employees) or employees of the casinos at which they performed; (2) if the entertainers herein are independent contractors and employers, whether Respondents' threats to them and to their employees of expulsion and other disciplinary action for performing services for their contracting clubs, primary employers with whom Respondents had a labor dispute, constitute threatening, coercing or restraining such independent contractors within the meaning of Section 8(b)(4)(ii)(B), and inducing or encouraging their employees to engage in a strike or a refusal to perform services within the meaning of Section 8(b)(4)(i)(B) of the Act; and (3) if such threats occurred, whether they constituted primary action within the meaning of the proviso to Section 8(b)(4)(B).

B. Chronology of Events

The facts in this case are substantially undisputed. On March 1, as the result of a bargaining dispute between the various casinos employing musicians in the Reno-Tahoe area and Local 368, Respondents called a strike against the casinos and placed them on their National Unfair List. As a result of contracts entered into in 1966 and 1967, Judy Lynn and Gaylord and Holiday were scheduled to appear at Harrah's during the course of the strike, and Liberace was scheduled to appear at the Ponderosa. The strike continued until April 30.

Judy Lynn, the members of her band, which varied from seven to eight, Gaylord and Liberace were all members of AFM but not of Local 368. In furtherance of

their strike, Respondents by telegrams, letters and written notices informed each of the above AFM members that Respondents were on strike against the clubs where they were scheduled to appear or were appearing, that such clubs had been placed on AFM's National Unfair List, and threatened them with expulsion from AFM or other disciplinary action if they performed or continued to perform services for the struck clubs. Such warnings included a quotation of or reference to Section 7c of Article X of Respondents' By-Laws, which reads:

Whenever any person, persons, organization or establishment is declared to be on the National Unfair or Defaulter List by the Federation, members cannot render services for or with such person, persons, organization, or for, or in, such establishment. If members render services for any person, persons, organization or establishment declared nationally unfair or in default by the Federation, such action shall constitute grounds for such members' expulsion from membership in the Federation and they can only be reinstated under such conditions as may be imposed upon them by the International Executive Board.

Thereafter, Respondents, as a result of intra-union charges, commenced disciplinary proceedings against Judy Lynn, the members of her band and Gaylord for continuing to perform services for the struck clubs in violation of Respondents' By-Laws. The strike terminated before Liberace's contract services commenced and accordingly he performed no services during the strike. Thereafter, the charges in this proceeding were filed.

As noted above, one of the principal issues litigated was whether the star entertainers involved herein are independent contractors or employees of the respective clubs with which they had contracts. If they were employees of the primary employers with whom Respondents had a labor dispute, the provisions of Section 8(b)(4) obviously would not apply. The record establishes clearly that Judy Lynn, d/b/a The Judy Lynn Show, and Gaylord and Holiday are independent contractors, and that the musicians accompanying them are their employees. Judy Lynn is a singing star, primarily country and western, accompanied by a band of seven or eight musicians, consisting of guitars, fiddles and a set of drums. She employs her musicians on a year-round or permanent basis, paying them an annual salary on a weekly basis whether or not they are performing, furnishes them with annual paid vacations, provides their uniforms costing thousands of dollars, supplies all of the musical instruments except the fiddles, pays all of their traveling expenses, files and pays required employer social security and tax deductions, establishes rules which the members of the band must observe, and hires and fires at will.

She and the band travel nationally and internationally, performing at clubs, hotels, rodeos, and the like for short intervals of time ranging from a single day to engagements of several weeks, each covered by a contract negotiated by her business manager or agents, all requiring the payment to her of thousands of dollars a week. In addition, she is a recording, radio and TV star, again customarily accompanied by her band. She also employs an office manager and a personal secretary and maintains a permanent office in Las Vegas, Nevada. She spends thousands of dollars a year on promotional material to enhance the securing of future contracts. Her contracts are for a fixed period of time and the clubs, *et al.*, including Harrah's, have no power to fire her or any members of her band. She alone determines the contents of her act, including the songs to be sung and played.

Necessarily, as part of the contractual arrangement the clubs fix the time and site of the performances, and some, specifically Harrah's, reserve the right to censor objectionable or so-called "blue" material. As an entrepreneur, Judy Lynn has annual fixed expenses substantially in excess of \$100,000 and capital investments in costumes, instruments and varied equipment also substantially in excess of \$100,000.

Gaylord and Holiday are primarily a comedy team, with some singing and dancing, normally accompanied by two musicians whom they employ, one on a permanent year-round basis and the other for each contracted engagement. They operate in much the same manner as Judy Lynn, traveling nationally and appearing in clubs and similar establishments by contract for limited engagements. They employ a personal manager and a conductor on a year-round basis and pay all of their traveling expenses and those of their accompanying musicians. They also expend large sums for promotional material and in general exercise the same attributes of an entrepreneur as found above with respect to Judy Lynn. Their contracts also call for the payment of thousands of dollars per week for their services. They too independently determine the contents of their act, with the single reservation of the censorship of "blue" material. As part of the contractual arrangement, the clubs necessarily fix the time and site of their appearances.

Respondents throughout their brief characterized Judy Lynn and Gaylord and Holiday as "orchestra leaders," apparently because of Respondents' reliance upon the Board's holding in the *Reno Musicians* case,³ involving the same local and the house bands permanently employed by the clubs in the Reno-Tahoe area, that the leaders of such house bands or orchestras were employees of the club and not independent contractors. The record herein establishes that Judy Lynn and Gaylord and Holiday are in no sense band or orchestra leaders as that term is used in the industry, but are star entertainers who employ musicians to accompany their acts. Judy Lynn is a singing star and does not lead or direct the band which accompanies her songs. While she is the employer of the musicians in the band, this no more makes her a "band leader" than the clubs which were found to be the employers of the house bands in the *Reno Musicians* case, *supra*. She is a singer accompanied by musicians, much like any other singing star, such as Ella Fitzgerald, Peggy Lee, and Dinah Shore, except that her repertoire is primarily country and western. Such other singers are accompanied by musicians customarily employed by the club at which they appear rather than by the star. Miss Lynn's unilateral decision to employ her own musicians in a specialized field on a permanent basis serves as a convenience both for her and the contracting clubs, but does not make her a "band leader" any more than other star singers. Gaylord and Holiday are primarily a comedy team, with occasional singing and dancing, employing two or more musicians to accompany them. Patently they are not "orchestra" or "band leaders" as the term is used in the industry, but are star entertainers accompanied by music.

The situation with respect to Liberace is not as clear, inasmuch as there is no question but that he is a band or orchestra leader as the term is used in the industry. However, he fronts a traveling name band which works for many different clubs throughout the year under

contracts such as those entered into by Judy Lynn and Gaylord and Holiday, and employs the same musicians year after year, although engagement by engagement instead of on a permanent basis as Judy Lynn and Gaylord and Holiday. The house bands involved in the *Reno Musicians* case, *supra*, were permanent year-round employees of the clubs, and their leaders were not entrepreneurs with substantial expenses and investments, subject to the risks of loss or profit as the entertainers herein, including Liberace. However, in view of the Board's decision issued June 11, 1969, involving the same strike and the same type of star entertainers, including Gaylord and Holiday, it is unnecessary to determine whether Liberace was an independent contractor or an employee for the reasons stated therein.⁴

The record unquestionably establishes that Respondents threatened Judy Lynn, the members of her band, Gaylord and Liberace, all members of AFM, with expulsion or disciplinary action for performing or continuing to perform services for a primary employer with whom Respondents had a labor dispute. Because of the very recent decision of the Board in the *American Guild of Variety Artists* case, *supra*, involving the same strike, the same type of clubs, including Harrah's, the same type of stars, including Gaylord and Holiday, and substantially the same type of union threats of disciplinary action, it is unnecessary to engage in an extended discussion of the applicable law.⁵ In that case, based upon substantially the same factual situation and issues, the Board found that the threats of the union were primary action, in aid of the primary labor dispute between the clubs and Respondents, within the meaning of the proviso covering such primary activity, and thus exempt from the proscriptions of Section 8(b)(4). There, as a result of the same strike considered herein and in support thereof, the American Guild of Variety Artists threatened its members, star entertainers including Gaylord and Holiday appearing at the Reno-Tahoe clubs, including Harrah's, with disciplinary action for not honoring Respondents' picket lines by performing or continuing to perform at the struck clubs, allegedly in violation of Section 8(b)(4)(ii)(B). There is no difference in substance between the activity considered there and that considered here.

The Board, primarily in reliance upon the decisions of the Supreme Court in the *General Electric* and *Carrier* cases,⁶ stated:

We find that Respondent engaged solely in permissible primary activity with respect to the pressures it exerted on all of these entertainers.

In that connection, the Board observed that it was unnecessary to decide whether the star entertainers involved were employees within the meaning of the Act as contended by the respondent therein.

After finding that the union therein threatened its member stars with disciplinary action if they continued to perform at the struck clubs, just as herein, that the work of the stars there involved "not only contributed to the operations which the strike was endeavoring to halt" but in fact was directly related to the normal operations of the

⁴*American Guild of Variety Artists, AFL-CIO (Harrah's Club, et al)*, 176 NLRB No 77 (1969).

⁵It is well established that decisions of the Board are binding upon its Trial Examiners, just as decisions of the Supreme Court are binding upon the Board.

⁶*Local 761, IUE v. N.L.R.B [General Electric Company]*, 366 U.S. 677 (1961). *United Steelworkers v. N.L.R.B [Carrier Corporation]*, 376 U.S. 492 (1964).

³*Reno Musicians Protective Union Local 368, AFM, AFL-CIO (Foster S Edwards)*, 170 NLRB No 56 (1968).

casinos," because such shows were "an important means of enticing the public to the clubs in the hope and reasonable expectation that . . . they can be induced to try their luck in the casinos," the primary business of the establishments, and that such work was "inextricably involved with and necessary to the normal operation of the casinos," the Board in reliance upon the decisions of the Supreme Court in *General Electric and Carrier, supra*, held that inducing such action "only at the situs of the dispute by persons 'contributing to the operations which the strike was endeavoring to halt'" constituted traditional primary activity outside the scope of Section 8(b)(4) ⁷

The Board further observed.

We reject the apparent view of the Trial Examiner and theory of the General Counsel that, because the star entertainers are independent contractors, rather than employees, appeals to them to honor a picket line lose their character as permissible primary activity when accompanied by threats of internal disciplinary action by the union of which they are members.

The finding of primary activity necessarily applies to the employees of such independent contractors

Accordingly, I conclude and find that the General Counsel has failed to sustain his burden of proving that Respondents have induced or encouraged employees in violation of Section 8(b)(4)(i)(B), or threatened, coerced, or restrained persons or employers in violation of Section 8(b)(4)(ii)(B).

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following.

CONCLUSIONS OF LAW

1. Harrah's and the Ponderosa are employers engaged in commerce within the meaning of the Act
 2. Judy Lynn and Ronnie Gaylord are persons and employers engaged in commerce or in an industry affecting commerce within the meaning of Sections 2(6) and (7) and 8(b)(4) of the Act.
 - 3 Respondents are labor organizations within the meaning of the Act.
 4. Respondents have not, as alleged in the complaint, induced or encouraged employees to engage in a strike or a refusal to perform services within the meaning of Section 8(b)(4)(i)(B) of the Act, or threatened, coerced, or restrained persons or employers within the meaning of Section 8(b)(4)(ii)(B) of the Act.
- Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following.

RECOMMENDED ORDER

It is hereby ordered that the complaint herein be, and it hereby is, dismissed

⁷*United Steelworkers v N L R B. [Carrier Corporation]*, 376 U S 492, 499 (1964)