American Federation of Musicians; Miami Federation of Musicians, Local 655 (Royal Palm Dinner Theatre, Ltd.) *and* National Association of Orchestra Leaders. Case 12–CB–2626

13 June 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 6 February 1985 Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondents jointly filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, American Federation of Musicians and Miami Federation of Musicians, Local 655, their officers, agents, and representatives, shall take the action set forth in the Order.

[1] In adopting the judge's decision, we have noted and corrected certain inadvertent errors which do not affect our agreement with his conclusions

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. This case was heard at Miami, Florida, on November 5–6, 1984. The charge was filed on April 2, 1984, by National Association of Orchestra Leaders (the Charging Party) and the complaint issued on May 17, 1984, alleging a violation of Section 8(b)(1)(B) of the National Labor Relations Act (the Act)[1] by the American Federation of Musicians (Respondent International or the International) and the Miami Federation of Musicians, Local 655 (Respondent Local, the Local, or, jointly with the International, Respondents) by filing, considering, and fining John Klingberg, an employee of Royal Palm Dinner Theatre, Ltd. (the Theatre), because the Theatre did not have a collective-bargaining agreement with Respondent International or Respondent Local. The primary issues are whether: (a) the charge was timely within the meaning of Section 10(b) of the Act;[2] (b) Klingberg was a supervisor within the meaning of Section 2(11) of the Act, at all material times; and (c) whether Respondents coerced or restrained the Theatre in its selection of a collective-bargaining representative by their actions with respect to Klingberg.

On the entire record including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the General Counsel, the Charging Party, and Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Theatre is and has been at all material times a Florida partnership with its principal office and place of business located in Boca Raton, Florida, where it is and has been engaged in the business of operating a dinner theatre presenting live theatrical productions and a full course dinner. During the fiscal year preceding issuance of the complaint, the Theatre, in the course and conduct of its business operations, derived gross revenues in excess of $500,000 and during the same period of time purchased and received at its Boca Raton, Florida facility goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Florida. Based on the foregoing commerce information which Respondents admit, I conclude that the Theatre is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondents admit, and I find that each is a labor organization within the meaning of Section 2(5) of the Act.[3]

[1] Sec 8(b)(1)(B) of the Act provides that "it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances"

[2] Sec 10(b) of the Act provides "that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof on the person against whom such charge is made"

[3] Respondent International denies that it was served with a copy of a charge filed against it contending that during the investigative stage it was not advised by the General Counsel that it was a respondent in the case and, further, there was nothing on the face of the charge to lead it to believe that it was in fact a respondent I find no merit to this contention The formal papers clearly reflect that a copy of the charge was served upon Respondent International on April 2, 1984, and was received by Respondent on April 5, 1984 It is clear that the name of the charged party set forth in the charge is sufficiently broad to include Respondent International It is likewise clear that Respondent International participated in the investigation of the charge and was aware of its involvement in the fining of Klingberg which is the predicate for the complaint herein Also the complaint clearly naming the International as the Respondent was duly served upon Respondent on May 17, 1984 As the General Counsel's brief points out citing *Kern's Bakeries, Inc*, 227 NLRB 1329 (1977), *it is the complaint and not the charge which gives* Respondent notice of the specific unfair labor practices for which a remedial order is sought The complaint here served to resolve any ambiguity of the charge regarding who the respondent or respondents were, and there was no fundamental unfairness practiced against the International since it was served with a copy of the charge when it was filed The addresses of both the Local and the International were on the face of the charge Respondent International has shown no prejudice here Moreover, the Board has long held that even a misnomer of a respondent in the charge provides no basis for quashing the complaint where the respondent has actual notice of the charge See *Peterson Construction Co*, 106 NLRB 850 (1953)

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Material Facts*

Klingberg was employed by the Theatre as its music director for over 2 years prior to the hearing in this case. Klingberg, a salaried employee, testified that he was responsible for all music at the Theatre whether it was related to a show production or some other aspect of the Theatre's operation. It was the Theatre's practice to use tape-recorded music in connection with its musical show productions rather than live musicians. It was Klingberg's function and responsibility to arrange for the production of the tape-recorded music, and he did so by arranging for a recording studio and contacting a musician contractor to supply the number and type of musicians necessary for the particular musical production to be presented at the Theatre. Klingberg's activities in this regard in the production of a tape recording for use in the musical "The Student Prince" to be staged at the Theatre in April 1983[4] provides the predicate for Respondent's actions against Klingberg which is the basis of the complaint herein. While Klingberg was a member of a Local of the International, neither of Respondents represented any of the Theatre's employees.

In early April, in preparation for the production of "The Student Prince" by the Theatre, having determined budget limitations for making prerecorded tapes through discussions with Jan McArt, a partner in the Theatre and an executive producer of the Theatre, Klingberg arranged a recording session at a recording studio then known as Audio Image Studios. He contacted Robert Rodriguez, a musician contractor, to provide the necessary musicians for the recording session. It was the first time Klingberg had used Rodriguez as musician contractor. The testimony of Klingberg and Rodriguez, who also testified herein, is in agreement that the two discussed the number of musicians that Klingberg would use for the taping session, the type of instruments required, whether certain musicians would be required to "double up" and play more than one instrument, the length of the recording session, and any cost incidental to cartage of certain musical instruments. It is undisputed that Klingberg did not specify any particular musicians to Rodriguez by name. However, when Rodriguez mentioned two harpists among his list of available musicians, Klingberg did state his preference for one of those names over the other. A flat rate for production of all the musicians for the session was agreed on between Klingberg and Rodriguez with specific provisions for any additional costs as a result of overtime beyond the originally estimated time required to complete the recording. Klingberg's only specified condition for the musicians to be used for the session was that they be able to "sight read" music.

The recording session was held on April 8, 1983. Klingberg, the only representative of the Theatre at the taping session, directed the musicians in their seating arrangements and conducted the musicians during the taping session. Through his conducting of the music, Klingberg articulated retards, crescendos, staccatos, and tempos and generally gave his artistic interpretation to the music in the interest of the production for the Theatre. At times Klingberg demonstrated, through the use of a piano, certain effects he wanted to achieve. In keeping with a previously established understanding with Rodriguez, Klingberg granted a specified amount of time for breaks during the recording session but personally determined exactly when the breaks would be taken. Although Klingberg had initially determined that 3 hours would be sufficient for the recording session, during the session he determined that an additional hour would be necessary and thus went into 1 hour of overtime. Beyond the actual recording of music, Klingberg's responsibilities at the studio extended to editing and mixing of the music recorded.

At the conclusion of the recording session, Rodriguez was paid in cash and he, in turn, paid the musicians directly by check. It is undisputed that the arrangement between Klingberg and Rodriguez did not provide for any type of withholdings from the pay of the musicians and it is clear that the Theatre made no such withholdings. Moreover, it appears that the Theatre made no withholdings for any musicians employed by it at the Theatre itself. Such musicians at the Theatre are normally utilized either in the Theatre's cocktail lounge or for show rehearsals. They are always paid in cash. The rehearsal musician, usually a pianist, is generally hired and used on a day-to-day basis.

Following completion of the recording, Klingberg utilized the recording for rehearsal of "The Student Prince" production as well as for the actual production. The production opened on April 12 and ran for a period of about 9 weeks.

On April 20, 1983, Gerald C. Storm, trustee of Respondent Local, filed a charge with Respondent International alleging violations of article 22, sections 1, 2, and 4, and article 13, section 26, of the bylaws of the International by Klingberg [5] The charges were based on Klingberg's employment at the April 8 recording session at the Audio Image Studio Klingberg was advised of the charges by J. Martin Emerson, secretary-treasurer of Respondent International, by letter dated April 27, 1983. Emerson's letter offered Klingberg an opportunity to respond and he did so by a letter dated June 3, 1983, in which he contended that he was a supervisor and that any effort to discipline him violated the Act. Storm filed

[4] All dates hereinafter are in 1983 unless otherwise stated

[5] Art 22, sec 1, prohibited members of the Union from engagements or employment in making sound tracks for recordings unless the person, firm, or corporation providing the engagement or employment "shall have previously entered into a written agreement with the Federation relating thereto" Sec 2 provided that members were required to report any employment or engagement which would result in the production of recordings to the Union in whose jurisdiction the engagement for employment was scheduled to take place Sec 3(a) provided that no member could perform services "for the purpose of producing, editing, or dubbing recorded music except where expressly authorized and covered by a contract with the Federation or when expressly authorized by the Federation" Art 13, sec 26, provided that "no member of the Federation shall perform in any establishment which uses, or permits the use of, music reproduced on records, transcriptions, tapes, wires, or any type of mechanical or electronic device as background for, accompaniment of, or in connection with any live performance (variety or musical), except with the explicit permission of, and on such conditions as may be imposed by the Federation"

a rebuttal with Respondent International dated June 13 to which Klingberg replied by letter dated July 12. In his July letter, he reemphasized his supervisory status and his contention that the effort to discipline him was unlawful.

On March 4, 1984, Klingberg was advised by Emerson that Respondent International's executive board had found him guilty of violation of article 22, section 1, of the bylaws and fined him $450. In the same communication, Klingberg was advised that the other allegations of the charge by Respondent Local had been dismissed. Klingberg was further advised that unless the fine was paid by April 2, 1984, his name would be suspended from the membership list and that a reinstatement fee might be exacted for any subsequent reinstatement.

B. *Arguments and Conclusions*

1. The 10(b) issue

Respondents' initial defense is an affirmative one premised on the argument that the charge was untimely and that the complaint was therefore precluded under Section 10(b) of the Act. In this regard Respondents contend that the Board's decision in *Postal Service Marina Center*, 271 NLRB 397 (1984), controls here. In the cited case the Board, reversing precedent which had not received court enforcement,[6] held that the 10(b) period runs from the time an employee receives unequivocal notice of an adverse employment action rather than from the time the adverse action becomes effective. Thus, a charge is untimely if filed more than 6 months after notice by an employer to an employee that the employee will be discharged on a date certain even if the charge is filed within 6 months from the date of the discharge. Respondents, by extension of this holding, argue here that the 10(b) period began to run when Klingberg received notice about April 27, 1983, of the charges filed against him by the Local and not on the date that he received notice, about March 2, 1984, of the fine imposed on him as a result of the Local's charges.

The General Counsel argues, in effect, that the rationale in *Postal Service*, supra, does not extend to cases involving union discipline, and, alternatively, that "unequivocal notice of adverse action" was not received by Klingberg until he received word of the fine. The charge was clearly timely with respect to the fine's imposition and the finding of a violation based on the fine is not precluded under Section 10(b), according to the General Counsel. The Charging Party's argument on this issue is in accord with that of the General Counsel.

I concur in the position of the General Counsel. I find that *Postal Service*, supra, is distinguishable. That case was made applicable only to situations where the operative decision to discharge an employee which is the basis for an alleged violation of the Act is made and announced in advance of a specific date for effectuation of the decision. In that situation, it is appropriate to "focus on the date of the unlawful act, rather than the date its consequences become effective." In the instant case, the filing of the internal union charges against Klingberg may have been independently violative had a timely charge been filed but, unlike the situation contemplated in *Postal Service*, it cannot be said that the imposition of the fine was based on an operative decision made and announced outside the 10(b) period. The fine cannot be viewed as a delayed but inevitable consequence of the internal union charges. Certain of the charges filed against Klingberg were dismissed by the International's executive board. The imposition of the fine was not simply a benign act. Rather, imposition of the fine, although a consequence of a charge, constituted an independent action giving force to the charge. In addition, the Board in *Postal Service* limited its application to the facts before it and specifically declined to "consider or discuss what, if any, implications it may have in contexts not before us." Accordingly, it cannot be concluded that the Board sought to overrule prior Board and court law in union discipline cases which holds that the 10(b) period does not begin to run until notice to the affected individual that a fine has been imposed and has become finally effective. See *Musicians Local 66 (Civic Music Assn.)*, 207 NLRB 647, 649 (1973), enf. denied on other grounds 514 F.2d 988 (2d Cir. 1975); *Carpenters New Mexico Council (A. S. Horner)*, 176 NLRB 797, 799 (1969), enfd. 454 F.2d 1116 (10th Cir. 1972); *Longshoremen ILWU Local 30 (U. S. Borax Corp.)*, 223 NLRB 1257 (1976), enfd. 549 F.2d 698 (9th Cir. 1977). Indeed, that the Board did not intend to depart from the principles of these cases in *Postal Service* is evidenced by the fact that the court's decision in *U. S. Borax* was cited in *Postal Service* as supportive of the result reached there. I, therefore, conclude that the notice to Klingberg of the imposition of the fine initiated the running of a new 10(b) period independent of any 10(b) period which may have begun based on the Local's institution of internal union charges against Klingberg. Accordingly, I find the charge was clearly timely under Section 10(b) with respect to the notice of the imposition of the fine. On the other hand, to the extent that the complaint independently alleges that the filing and notice to Klingberg of the internal union charges was unlawful, I find, in agreement with the contention of Respondents, that the charge was untimely since it was filed almost a year after those events.

The Local makes the further argument that it may not be held responsible in this case for its actions, since the internal charges filed against Klingberg were filed by the Local's trustee during the period from November 9, 1982, to December 5, 1983, when the Local was under trusteeship. As I concluded above, however, the application of Section 10(b) precludes the finding of a violation based on the Local's filing of the charges against Klingberg in any event. Nevertheless, the Local may not escape responsibility for imposition of the fine because the action which resulted in the fine was maintained by the Local and the fine was imposed after the trusteeship terminated, all within the 10(b) period. The record provides no basis for concluding that the Local (assuming,

[6] *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), enf denied in relevant part sub nom *Nazareth Regional High School v NLRB*, 549 F.2d 873 (2d Cir 1977), *California School of Professional Psychology*, 227 NLRB 1657 (1977), enf denied 583 F.2d 1099 (9th Cir 1978). See also *Mack Trucks*, 230 NLRB 993 (1977), enfd 573 F.2d 1302 (3d Cir 1978), cert denied 439 U.S. 825 (1978)

arguendo, that it was in fact and law not responsible by virtue of the trusteeship imposed upon it) was powerless to withdraw the charges against Klingberg or otherwise preclude the imposition of the fine based upon such charges after the trusteeship was terminated. Accordingly, I find no merit to the Local's defense in this regard.

2. The supervisory issue

Section 8(b)(1)(B) of the Act makes it an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances. On the merits of the alleged violation here, the General Counsel argues that Klingberg was at all times material a supervisor within the meaning of the Act and a representative of the Theatre for collective bargaining and grievance adjustment within the meaning of Section 8(b)(1)(B). Countering an argument announced at hearing by Respondents that the musicians utilized in the April 8 taping sessions were independent contractors, the General Counsel argues that such musicians were employees under Klingberg's supervision. And assuming, arguendo, that they were not, the General Counsel asserts that a finding of a violation is not thereby precluded because Respondents' actions against Klingberg would nevertheless impact upon his supervisory duties at the Theatre.

Further, with regard to Klingberg's supervisory status, the General Counsel argues that in conducting at the taping session Klingberg was performing a component part of his supervisory duties for the Theatre and was thus acting in a supervisory capacity. Alternatively, it is argued that even if Klingberg was not performing supervisory work at the taping session, such work consumed only a minimal amount of his worktime viewed in the context of the overall time Klingberg spent in supervisory duties. Examination of Klingberg's overall functions, the General Counsel contends, shows that Klingberg's work in conducting at the taping session was minimal and should not operate to preclude the application of Section 8(b)(1)(B) here. The Charging Party's brief largely parallels the arguments of the General Counsel.

Respondents' initial defense on the merits of the case sub judice is based on the argument that Klingberg did not perform supervisory work for the Theatre at the taping session on April 8. Here, Respondents rely essentially on two contentions. First, in this regard, Respondents contend that the musicians were independent contractors and not employees of the Theatre so that Klingberg had no employees to supervise at the taping session and could not have been acting in a supervisory capacity. Secondly, Respondents argue that, in any event, in conducting the music during the taping session, Klingberg was doing rank-and-file work, not supervisory work. Since performance of such work provided the basis for Klingberg's fine, the fine did not result from his supervisory work and, thus, could not have, in any way, impacted on his supervisory functions.

Respondents do not argue that Klingberg was not a statutory supervisor in regard to his work performed at the Theatre. The record fully substantiates the conclusion, which I hereby reach, that Klingberg was a supervisor within the meaning of Section 2(11) of the Act which defines the term supervisor. Thus, McArt testified Klingberg hired actors, actresses, and musicians at the Theatre. He set their pay within certain limits and scheduled their hours of work. He had complete authority to fire employees, reprimand them, grant them time off, and replace them if necessary according to McArt's uncontradicted testimony which I credit. Further, according to McArt, Klingberg had authority to adjust employee complaints.

Whether Klingberg was performing in a supervisory function in the taping session is another issue. If his work at such session was limited to waving a baton before a group of musicians some doubt is raised as to whether he was performing supervisory work. In several representation case decisions, the Board has included conductors and leaders of musicians in bargaining units. See *Alliance of Television Producers*, 126 NLRB 54 (1960); *Batjac Enterprises*, 126 NLRB 1281 (1960); *Cavendish Record Mfg. Co.*, 124 NLRB 1161 (1959). On the other hand, such decisions do not necessarily dictate that all individuals bearing the title "conductor" or "band leaders" perform nonsupervisory work. And in two other cases cited in the General Counsel's brief, *Independent Motion Picture Producers Assn.*, 123 NLRB 1942 (1959), and *Edward Small Productions*, 127 NLRB 283 (1960), the Board permitted conductors and leaders to vote in a representation election subject to challenge because there was an issue of the supervisory status of the persons occupying those positions. However, in neither case did the Board describe the duties of the conductors involved or suggest what factors it might consider significant in assessing their supervisory status. Conductors and leaders are somewhat analogous to directors and choreographers whose primary function concerns artistic direction. In *Musical Theatre Assn.*, 221 NLRB 872 (1975), the Board observed that the artistic direction and instruction of performers by a director or choreographer is in the nature of professional direction and is not to be equated with the exercise of supervisory authority in the employer's interest. By analogy, it must be concluded that some authority beyond that exercised by a conductor in his "professional artistic direction" is necessary to constitute him a supervisor.

In the recording session, Klingberg exercised all the attributes of professional musical direction, including establishing the seating arrangements, the selection of the types of instruments to be used, and the demonstration of desired methods to obtain a result consistent with his artistic interpretation of the music. But his functions went beyond simply conducting, leading, or waving a baton. They extended to scheduling the session, determining the hours to be worked, deciding whether additional time, i.e., overtime, was necessary and would be paid for by the Theatre, and deciding the overall amount that the Theatre would underwrite for the session. His direction and involvement extended to direction of the technical aspects of the recording process including mixing and editing. Klingberg was present at all times during the session and, in fact, was the only representative of the Theatre present. No other persons engaged in any kind

of supervision or direction. It is, therefore, evident that the entire session and its end product was subject to Klingberg's independent discretion and artistic taste. At no time before, after, or during the session did he divorce himself from the authority he possessed as a supervisor and representative for the Theatre.

Respondents would equate Klingberg's work in the taping session to the work of an individual employed in the building and construction industry who may work as a Section 2(11) supervisor on one job but as a rank-and-file employee on another, even for the same employer. In making this argument, Respondents rely on the Board's decision in *Electrical Workers IBEW Local 340 (Nutter, Inc.)*, 271 NLRB 995 (1984). There, in considering an 8(b)(1)(B) allegation, the Board found that a union fine against a supervisor while working for 29 percent of his worktime as a rank-and-file employee for his employer on one job with the balance of his time spent in a supervisory capacity on another job for the employer was not unlawful. Notwithstanding the fact that the supervisor continued to receive his foreman's pay while performing the rank-and-file work, it was clear in *Nutter* that the individual had no supervisory authority at the job location where he performed the rank-and-file work. The union's action against the supervisor was found not unlawful because such action was not imposed for any work of the supervisor on a jobsite other than the one where he performed the rank-and-file work. I find the *Nutter* case inapposite. In *Nutter*, there was no functional integration between the work performed by the supervisor on the two jobs. There is in the instant case. In *Nutter* the supervisor was working in the rank-and-file capacity to "keep a paycheck coming in." The performance of the rank-and-file work had no relationship to the individual's functions at the jobsite where he held supervisory status. In the case sub judice, Klingberg's work at the taping session was directly related to his supervisory functions at the Theatre. In fact, such work was attendant to and part of such supervisory functions. Moreover, in the *Nutter* case, the employer had other supervisors on the jobsite where the fined supervisor was performing rank-and-file work, and these supervisors could fulfill the responsibilities in the interest of the employer. Here, however, Klingberg was the only employer representative at the taping session and, as such, he necessarily had responsibilities beyond performance of rank-and-file work even if one concludes that Klingberg performed rank-and-file work in conducting the musicians. Finally, a quantitative distinction may be drawn between the *Nutter* case and the instant case, for there the supervisor admittedly spent 29 percent of his time on the nonsupervisory job. Here, however, although it is difficult to glean from the record on a percentage basis the exact time Klingberg spent on the recording session as compared with his other work, the estimate set forth in the General Counsel's brief of 3 percent cannot be far wrong, and I accept it as a general approximation. Thus, assuming again that Klingberg did rank-and-file work in the recording session, it was sufficiently incidental and insubstantial as to have no effect on his supervisory status for 8(b)(1)(B) purposes.

I conclude that *Nutter* in no way detracts from a conclusion here that Klingberg acted as a supervisor in the recording session. Rather, I find Klingberg's authority as a supervisor for the Theatre, which is manifest, extended into his conduct of the session.

Considering next Respondents' argument that Klingberg did not act as a supervisor at the recording session because the musicians were independent contractors rather than employees, the parties appear to acknowledge that the Board applies a "right to control" test in determining whether individuals are employees or independent contractors This test is based upon common law principles of agency. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). The test, as recently set forth in *Daily Mining Gazette*, 273 NLRB 350, 351–352 (1984), "provides that where the one for whom a service is performed retains the right to control the manner and means by which the desired result is accomplished, the person performing the service is an employee, but if control is reserved only over the end result, the person performing the service is an independent contractor." In deciding the issue, each case must turn on its own facts. *A. S. Abell Publishing Co.*, 270 NLRB 1200 (1984).

In arguing their side of this issue, Respondents assert that the musicians utilized were picked on their ability to sight-read music so that they could rely on their own skill and ability so that little direction would be necessary. They further point to the fact that the musicians were hired through a contractor, that they were hired for only a few hours, that they were not paid directly by the Theatre, and that they were not subject to withholdings and received no fringe benefits. To be sure, such factors do suggest independent contractor status. The General Counsel would discount these factors as insignificant and would emphasize instead Klingberg's "absolute control" over the musicians in the recording session to the extent of directing not only the result to be achieved but also the details in producing the result.

The issue presented is a close one. Research has disclosed no cases exactly on all fours although a number of cases have found musicians in circumstances somewhat different from those of the instant case to be independent contractors. Thus, in *Musicians Local 16 (Bow & Arrow Manor)*, 206 NLRB 581 (1973), musicians employed by an orchestra leader who contracted the services of the orchestra to a restaurant were found to be independent contractors rather than employees of the restaurant even though the orchestra had been used by the restaurant for several years, and the restaurant, which reserved the right to set and change hours of operation, had directed that certain kinds of music not be played, that the musicians maintain a certain appearance, and that certain standards of behavior be followed.

In *American Broadcasting Co.*, 117 NLRB 13 (1957), musical composers were found to be independent contractors because the dictates of their work related principally to the effects to be produced by the music, and the company for which the work was done did not control the manner in which the effects were to be achieved. Similarly, in *Alamo Co.*, 129 NLRB 1093 (1960), musicians utilized by a company which had contracted with

producers of a motion picture to score the picture were held to be independent contractors and not employees of the producers because all details of the score were left to the contracting company. On the other hand, "lounge musicians" were found by the Board to be employees rather than independent contractors in *Nevada Resort Assn.*, 250 NLRB 626 (1980), where considerable emphasis leading to this result was placed on the existence of "true control" over the exercise of the means of performance of the musicians with less emphasis on manner of payment and the absence of instances of overt control of the musicians as opposed to the existence of the right to control. In some cases the issue of employee status of musicians is largely determined by the existence of service contracts signed by the producer of the music even though the musicians may be more directly employed by a composer/conductor enterprise pursuant to an agreement with the producer. See *Reno Musicians Local 368*, 170 NLRB 271 (1968); *Edward Small Productions*, 127 NLRB 283 (1960). See also *Independent Motion Picture Producers*, supra.

The parties in their briefs herein have cited other cases involving independent contractor issues related not to musicians but to individuals in the entertainment industry. See *Radio City Music Hall v. U.S.*, 135 F.2d 715 (2d Cir. 1943); *Comedy Store*, 265 NLRB 1422 (1982); *Century Broadcasting Corp.*, 198 NLRB 923 (1972); *Strand Art Theatre*, 184 NLRB 667 (1970). The decisions reached in these cases, as well as those involving musicians, turn again on the existence of control by the ultimate user of the services or product over the individuals claimed to be either individual contractors or employees.

Considering the instant case in light of the foregoing precedent, I am persuaded, as urged by the General Counsel, that the musicians used in the recording session were employees of the Theatre, not independent contractors. That the individual musicians were not selected by Klingberg, that they were paid through Rodriguez, the contractor, with no withholdings by the Theatre, and that they were utilized for only a few hours, with no real likelihood of future use, are significant factors detracting from their employee status. These factors indicate a lack of control by the Theatre over the means by which the recorded music was to be produced. However, in my view, these factors are outweighed by Klingberg's selection of the number and type of instruments to be used, his selection of the time and place for the session, his selection of music to be played, his direction of every note played by the musicians, his demonstration of how the music was to be played, his decision regarding the time necessary for rehearsal before actual recording, his decision regarding the necessity for additional time, his decision regarding seating arrangements of the musicians, and his decisions regarding the time when breaks were to be taken. These factors all fully establish that he had complete control over not only the recording to be produced but the manner and means by which it would be produced. See *Reno Musicians*, supra. In producing the recording, the musicians were under the continuous supervision and exercised control of Klingberg and subject to his complete discretion and artistic interpretation and taste. It is difficult to perceive how Klingberg could have exercised more control over the manner and means of making the recording. I find then that the musicians in the recording session were employees. To hold otherwise would render meaningless the "right to control" test.

Considering the foregoing, I conclude that Klingberg was a supervisor within the meaning of the Act in conducting the recording session and directing all phases of the taped music.

3. The restraint or coercion

Respondents, citing *Florida Power & Light v. Electrical Workers IBEW Local 641*, 417 U.S. 790 (1974), and *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411 (1978), argue that the discipline imposed on Klingberg did not constitute restraint or coercion against the Theatre in violation of Section 8(b)(1)(B) because it was based on Klingberg's work in a nonsupervisory capacity and it had no effect on any collective bargaining or grievance handling tasks. The General Counsel, also citing *American Broadcasting Cos.*, argues to the contrary and asserts that Klingberg's fine might adversely impact upon Klingberg's functions at the Theatre in connection with grievance or complaint handling of actor employees some of whom are represented by Actors Equity.

I have already concluded above that Klingberg was acting as a supervisor for the Theatre during the recording session and was not doing rank-and-file work. In view of that conclusion, as well as the fact that he also worked in a supervisory capacity at the Theatre and in fact handled employee complaints or grievances[7] at the Theatre, I reach the further conclusion that Klingberg was an employer representative within the purview of Section 8(b)(1)(B).[8] It follows, and I find and conclude, that the fining of Klingberg for conduct in the performance of his supervisory duties for the Employer had a tendency to restrain or coerce the Theatre within the intent of Section 8(b)(1)(B).

Respondents argue finally that they did not violate Section 8(b)(1)(B) because they did not represent employees of the Theatre and no evidence was produced to establish that they had a desire to represent any of the Theatre's employees. In taking this position, Respondents rely on *NLRB v. Electrical Workers IBEW Local 73 (Chewelah Contractors)*, 621 F.2d 1035 (9th Cir. 1980), denying enf. 231 NLRB 809 (1977). In the Board's decision in the cited case, the Board found a violation of

[7] In *Norwalk Typographical 529 (Hour Publishing)*, 241 NLRB 310, 315 (1979), the Board held that "the distinction between contractual grievances and personal grievances 'has no relevance to the construction of the broad term "grievances" as used in Sections 2(11) and 8(b)(1)(B), and that it must be uniformly construed as including both personal grievances and contractual grievances'"

[8] Even if there were no evidence herein that Klingberg had grievance handling functions, the same result would be dictated by application of the Board's "reservoir doctrine" which holds that all supervisors within the meaning of Sec 2(11) of the Act are representatives of the employer within the meaning of Sec 8(b)(1)(B) even in the absence of evidence that the supervisor in issue is vested with specific authority to act for the employer in collective bargaining or grievance adjustment See *Sheetmetal Workers Local 85 (Suburban Sheet Metal)*, 273 NLRB 523 (1985), *Teamsters Local 296 (Northwest Publications)*, 263 NLRB 778, 779 fn 6 (1982), *Carpenters Wisconsin River Valley Council (Skippy Enterprises)*, 211 NLRB 222 (1974)

Section 8(b)(1)(B) based on a union's discipline of a supervisor-member for working for a company not having a contract with the union. The effect of the discipline, the Board concluded, was to altogether deprive the Company of its grievance adjuster or bargaining representative The court refused to enforce in the absence of a showing that the union either represented the company's employees or even had a desire to represent them. The Court reasoned that without such a showing, there was no incentive for the union to either influence the company's choice of bargaining representative or affect the supervisor's loyalty to the company.

The Board has not to date accepted and applied the Court's reasoning in *Chewelah* in subsequent cases involving Section 8(b)(1)(B). It thus still appears to be Board policy to find an 8(b)(1)(B) violation in cases where a union's action would tend to deprive an employer of a collective-bargaining representative or grievance adjuster without regard to whether the union represents or desires to represent the employer's employees See *Plumbers Local 364 (West Coast Contractors)*, 254 NLRB 1122 (1981). With due respect to the court in *Chewelah*, I am bound to follow Board precedent until reversed by the Board or the Supreme Court. *Consolidated Casinos Corp*, 266 NLRB 988 (1983); *Lenz Co.*, 153 NLRB 1399 (1965); *Iowa Beef Packers*, 144 NLRB 615 (1963)

Considering all the foregoing, I conclude that Respondents, by maintaining charges against Klingberg and by fining him for performing supervisory work for the Theatre, violated Section 8(b)(1)(B) of the Act.

CONCLUSIONS OF LAW

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

2. Royal Palm Dinner Theatre, Ltd. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. John Klingberg is, and has been at all times material herein, a supervisor within the meaning of Section 2(11) of the Act selected by Royal Palm Dinner Theatre, Ltd. for the purpose, inter alia, of collective bargaining and the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

4. By maintaining charges against John Klingberg and fining him, Respondents restrained and coerced Royal Palm Dinner Theatre, Ltd. in the selection and retention of its representatives for the purposes of collective bargaining and the adjustment of grievances, and thereby has engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

5 The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents engaged in the above unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action which will effectuate the policies of the Act More particularly, having found that Respondents unlawfully fined John Klingberg, I shall recommend that Respondents be ordered to rescind the fine and to remove all records of the disciplinary action and fine. The notice to Klingberg of the fine being levied carried with it a threat of suspension from membership in the absence of payment of the fine. The record does not establish whether the fine was paid or whether Klingberg was suspended. Accordingly, I shall recommend an Order encompassing the eventuality of membership suspension as well as partial fine payment.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondents, American Federation of Musicians and Miami Federation of Musicians, Local 655, Miami, Florida, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining and coercing Royal Palm Dinner Theatre, Ltd. in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances

(b) Maintaining charges against, fining, or otherwise disciplining John Klingberg or any other supervisor of Royal Palm Dinner Theatre, Ltd. for acts performed in execution of their supervisory duties for the Theatre.

(c) In any like or related manner restraining or coercing Royal Palm Dinner Theatre Center, Ltd. in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and remove all records or charges and fines based thereon levied against John Klingberg for performing supervisory duties while employed as a supervisor for Royal Palm Dinner Theatre, Ltd., and reimburse Klingberg, with interest, for any sum paid toward a fine

(b) Restore John Klingberg to membership in good standing with all attendant rights and privileges.

(c) Notify John Klingberg in writing that they have taken the action required in paragraphs 2(a) and (b) above.

(d) Post at their offices and any place where their meetings are customarily held copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps

[9] If no exceptions are filed as provided by Sec 102 46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102 48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

[10] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"

shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Furnish the Regional Director for Region 12 signed copies of such notices for posting by Royal Palm Dinner Theatre, Ltd., if willing, at its Boca Raton, Florida place of business where notices to employees are customarily posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce Royal Palm Dinner Theatre, Ltd. in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances by maintaining charges against, fining, or otherwise disciplining supervisors for acts performed in execution of their duties for the Theatre.

WE WILL NOT in any like or related manner restrain or coerce Royal Palm Dinner Theatre, Ltd. in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances.

WE WILL rescind and expunge all records of charges and fines based thereon levied against John Klingberg for performing supervisory duties while employed as a supervisor by Royal Palm Dinner Theatre, Ltd., and WE WILL reimburse John Klingberg, with interest, for any amounts paid on such a fine, restore him to membership in good standing with all attendant rights and privileges, and advise him in writing that this action has been taken.

AMERICAN FEDERATION OF MUSICIANS; MIAMI FEDERATION OF MUSICIANS, LOCAL 655