

SS1 Entertainment, LLC d/b/a Steven Scott Entertainment and Associated Musicians of Greater New York, Local 802, AFL-CIO. Case 29-AO-00001

March 19, 2009

ADVISORY OPINION

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

Pursuant to Sections 102.98 and 102.99 of the Board's Rules and Regulations, on January 5, 2009, the New York State Employment Relations Board (NYSERB) filed a petition for an Advisory Opinion as to whether the Board would assert jurisdiction over the operations of SS1 Entertainment, LLC d/b/a Steven Scott Entertainment (the Employer) on the basis of its current standards. In pertinent part, the petition alleges as follows:

1. An unfair labor practice proceeding (SU-60122) is currently pending before the NYSERB.

2. Associated Musicians of Greater New York, Local 802 (the Union) and the Employer have taken opposing positions concerning whether the Board has jurisdiction over the Employer. The NYSERB seeks an advisory opinion as to whether the NLRB will assert jurisdiction over the Employer under the facts presented by the Employer.

3. The Employer is a New York corporation engaged in the business of providing bands, orchestras, and related entertainment to corporate and individual clients. In June 2002, the Employer purchased the name Steven Scott Entertainment, the telephone number, and the website address from Steven Scott Orchestras. According to the Employer, various bands and orchestras submit marketing materials to it. When the Employer receives an inquiry from a customer seeking musical entertainment, whether an individual or corporation, the Employer meets with the customer to discuss the type of entertainment required. The Employer will show the bands' promotional materials. After the customer picks a band, the Employer will contract with the customer to provide the entertainment. The Employer does not guarantee that the band will be available and may request that the customer select an alternate band. If the band is available, the Employer and the band enter into a contract for the event, and agree on a dollar amount. The Employer pays the band leader after the performance.

4. During the 12 months preceding September 29, 2008, the Employer had gross revenues in excess of \$500,000. Almost \$60,000 of that revenue comes from

services performed outside the State of New York. In addition, the Employer receives revenues exceeding \$125,000 from commercial clients in New York, some of which would meet the NLRB's jurisdictional standards.

5. The foregoing commerce data have been neither denied nor admitted by the Union nor have they been considered by the NYSERB.

6. There are no representation or unfair labor practice proceedings involving the Employer pending before the Board.

7. Although all parties were served with a copy of the petition for Advisory Opinion, no response was filed.

8. The Employer and the Union have filed position statements with the NYSERB. The Employer contends, inter alia, that the retail standard applies to its operation, that the standard for asserting jurisdiction over a retail enterprise is a gross volume of business over \$500,000, and that its operations satisfy that criterion. Therefore, the Employer asserts that the Board should find that it would assert jurisdiction over the Employer. The Union contends that the appropriate jurisdictional standard to be applied to a musical booking agency was articulated by the Board in *American Federation of Musicians (Penza Theatrical Agency, Inc.)*, 177 NLRB 842 (1969), in which the Board determined that "for jurisdictional purposes the determinative amount is [the employer's] income rather than the value of the contracts booked by him[.]" Id. at 842 fn. 1. Thus, the Union contends, the Employer must undergo an audit to determine whether its gross revenues, properly understood, meet that standard.

Having duly considered the matter, the Board¹ is of the opinion that, inasmuch as the Employer has gross annual revenue in excess of \$500,000 and direct inflow in excess of \$50,000, the Employer would satisfy either the Board's retail or nonretail standards.²

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

² We find the facts set forth here distinguishable from those in *Penza Theatrical Agency*, supra. In that case, the booking agency's customers paid the orchestras and bands directly, so the employer's "gross volume of business" consisted only of its commissions for brokering the services, and fell below the Board's jurisdictional standards. Here, the Employer collects the fees from the customers and pays the orchestras and bands itself. Thus, the "gross volume of business" need not be limited to the Employer's commissions for brokering the services.

Accordingly, the parties are advised that, based on the allegations incorporated into the petition, the Board would assert jurisdiction over the Employer under the current standards.