

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: May 17, 2011

TO : J. Michael Lightner, Regional Director
Region 22

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Mayo Center for the Performing Arts
Case 22-CA-29759

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) by unilaterally changing work rules where the parties were operating under an expired agreement that contained limited terms and conditions and did not contain a recognition clause. We conclude that the Employer had not recognized the Union as a Section 9(a) representative and therefore had no duty to provide notice and an opportunity to bargain over changes in work rules when those changes were implemented.

The Mayo Center for the Performing Arts (the Employer) is a nonprofit organization that operates a performing arts venue with five full-time production staff employees. In addition, the Employer employs stagehands referred by IATSE Local 632 (the Union) through a nonexclusive hiring hall arrangement. The Employer and Union have been parties to consecutive Memoranda of Understanding for over ten years. The most recent Memorandum expired in mid 2008, but the parties continued to apply it. That Memorandum sets forth pay rates, rates for Employer contributions to the Union health and welfare and annuity funds, a minimum number of hours for work calls, and break schedules. In the rare instances when the Employer utilizes workers who were not referred by the Union, the Employer negotiates pay rates with those workers directly.

The stagehands referred by the Union are paid a flat daily rate. Typically, they report to work on the day of a performance for the "load in." They unload the set and equipment needed for the performance from trucks and set up the stage. Some of the stagehands are needed during the performance, but many are not. After the performance, all the stagehands "load out" the set and equipment. Until December 2010,¹ the past practice was that those stagehands

¹ Unless otherwise noted, all dates in October-December are in 2010 and in January-February are in 2011.

who were not needed during the performance were allowed to leave, so long as they returned for the load out. However, on December 3, the Employer changed that practice; after the load in was completed at 12:30 p.m., the Employer refused to allow any of the workers to leave and insisted that they remain through the 8:00 p.m. performance. The Employer continued to refuse to allow any of the stagehands to leave after the load in on subsequent dates in December and January.

The parties' Memoranda of Understanding have never contained a recognition clause. During 2010, the parties met three times to negotiate a successor agreement. At the final session, held mid October, the Union requested a complete collective-bargaining agreement. The Employer wanted to continue with only a service agreement and refused to recognize the Union as an exclusive collective-bargaining representative, taking the position that the stagehands were independent contractors. Accordingly, on November 10, the Union filed a representation petition.

Pursuant to a Decision and Direction of Election, the Region conducted a representation election on January 18, in a unit of all full-time and regular part-time stage employees. The Union won the election and was certified on February 24.

The instant charge alleges that the Employer violated Section 8(a)(1), (3), and (5) by changing the load-in procedures because of the employees' union activity and without giving the Union notice and an opportunity to bargain. The Region has determined that the Section 8(a)(3) allegation is meritorious.

We conclude that the Region should dismiss the related Section 8(a)(5) allegation, absent withdrawal, because the Employer had no duty to bargain with the Union over terms and conditions of employment in December, when the unilateral change was implemented. At that time, the representation election had yet to be held and the Union had not yet been certified. And there is no evidence that the Employer ever voluntarily recognized the Union as an exclusive Section 9(a) representative. Instead, the Union functioned only as a labor supplier. Accordingly, the Employer had no duty to bargain with the Union over changes to the load-in procedures.

