UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of IRON HORSE ENTERTAINMENT GROUP, INC, A SINGLE EMPLOYER and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, IATSE	Case Nos.: Date:	01-CA-068152 01-CA-078034 September 18, 2012

RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE CONSOLIDATED COMPLAINT

I. INTRODUCTION

In this case, General Counsel contends that the "Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act." Complaint ¶ 10. Respondent has, in fact, been bargaining in good faith with the Respondent, thereby rendering this action moot. The Complaint should be dismissed in deference to the Act's key goal of encouraging parties to resolve labor disputes by reaching collective-bargaining agreements rather than resorting to the Board's processes.

II. STATEMENT OF FACT

A. Negotiation Progress Prior To the Respondent Retaining Legal Counsel.

During the period between the certification and the time in which the underlying unfair labor practice charges were filed, the Respondent and the Charging Party held three collective bargaining negotiation sessions, on December 13, 2011, December 19, 2011 and January 25, 2012. During the negotiations, the employees were represented by the Vice-President of the International Union, Mr. Daniel Di Tolla, a professional negotiator with considerable experience in labor negotiations, while the Respondent was represented by its owner, Mr. Eric Suher, who has no labor negotiation experience whatsoever.

During the December 13 session, the Parties met and the Union presented the Respondent with a "proposal". In explaining said proposal to the Respondent, the Union indicated that the proposal was "customary" and was intended to embody the entire contract. The Union then requested that the Respondent agree to all of the provisions included in said "proposal". Inexperienced and unfamiliar with labor negotiations, Mr. Suher asked to be allowed time to review the Union's proposals. The Union's proposal was "customary" for employees of publicly funded venues in the area, however, it did not take into account the different funding structure of IHEG.

At the next session (December 19), the Respondent made a wage proposal, which represented an increase to the wages of most employees. The Respondent also explained the concerns regarding the Union's proposals, particularly the economic impacts of many of the proposals. The Union did not make further proposals at that session.

The next session was held January 25, 2012. At that session, the Union made minor modifications to its original proposals, none of which were economic in nature and none of which addressed the concerns voiced by the Respondent at the previous session. Mr. Suher reiterated to the Union that the Parties were still very far apart on the economics and that the Union's proposals were far too rich. The Union representative responded by stating "I don't even know why I bothered to make the drive here [to Springfield]" and the session concluded shortly thereafter.

B. Negotiation Progress Following the Respondent's Retainer of Legal Counsel.

Since the January 25 session, the Respondent retained the undersigned to advise and assist with negotiations. During the undersigned's representation of the Respondent, the Parties have held three (3) formal negotiation sessions, on May 25, 2012, June 11, 2012, and June 21, 2012, during which several significant articles were tentatively agreed to by the Parties and there was considerable and productive discussions relating to the Parties' positions with respect to the outstanding contract items. The Parties have also had several informal discussions related to bargaining away from the table, which have also resulted in marked progress toward reaching agreement.

Currently, the parties have tentatively agreed to the language for numerous contract articles, including Recognition, Non-Discrimination, Hiring, Union Security/Check Off, Wages and Payroll, Meal Periods and Breaks, Grievance and Arbitration, Safety, Union Access, and Severability. In addition, the Respondent currently has a three-year wage offer on the table that represents a wage increase for most of the unit, which was offered retroactively.

III. LEGAL STANDARD

A. The Duty to Bargain

Section 8(d) of the National Labor Relations Act provides: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...but such obligation does not compel either party to agree to a proposal or require the making of a concession...." Longstanding Board precedent holds that the parties must negotiate with the purpose of trying to reach an agreement. California Girl, Inc., 129 NLRB 209, 218-19 (1960) (citing NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395 (1952)). The Supreme Court has held that both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement," but that the Board cannot force an employer to make a concession on any specific issue or to adopt any particular position. Id.

To fulfill the duty to bargain in good faith, the parties should demonstrate "an open mind and a sincere desire to reach an agreement . . . as well as a sincere effort to reach common ground." Montgomery Ward, 133 F. 2d 676, 686 (9th Cir. 1943). Therefore, "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." Mid-Continent Concrete, 336 NLRB 258, 259 (2001), enfd. sub. nom., NLRB v. Hardesty Co., 308 F.3d 859 (8th Cir. 2002).

B. Board Policy of Amicable Resolution of Disputes

The Board has a "longstanding policy encouraging the amicable resolution of disputes without litigation." Hospital Perea Unidad, 356 NLRB No. 150 (2011). A key goal of the National Labor Relations Act is "encouraging parties to resolve labor disputes by reaching collective-bargaining agreements rather than resorting to the Board's processes." Id.

IV. ANALYSIS

The Complaint alleges that during the relevant time period, the "Respondent arrived to bargaining sessions unprepared to negotiate, made a wage proposal which was regressive, and failed to provide additional counterproposals despite being requested to do so." Complaint ¶ 9(b). These allegations form the basis of the General Counsel's claim that the Respondent has been failing and refusing to bargain collectively and in good faith. Complaint ¶ 10.

Respondent concedes that, prior to retaining counsel, Mr. Suher, acting as lead negotiator on Respondent's behalf was significantly inexperienced in labor negotiations and certainly was not an exemplary or even marginally skilled labor negotiator. However, since retaining legal counsel to advise with respect to negotiating, Respondent has arrived at all subsequent sessions prepared to negotiate; Respondent has made comprehensive counterproposals, using the Union's proposed language as the basis for its counterproposals; Respondent and the Union have tentatively agreed to several Articles; and Respondent has a wage offer on the table that represents an increase for the majority of the bargaining unit employees.

There are no allegations in the Complaint of per se violations of the obligation to bargain in good faith. Nor have there been any unfair labor practice charges filed against the Respondent

alleging any other violations of the Act. Other than the three allegations forming the basis of the Complaint (i.e., that Respondent arrived to bargaining sessions unprepared to negotiate, made a wage proposal which was regressive, and failed to provide additional counterproposals despite being requested to do so), there are no other indications that the Respondent has engaged in bad faith bargaining or that the Respondent has a proclivity for violating the Act.

Further, by agreeing to several Articles (many of which are beneficial to the Union, such as Union Security/Check Off and Union Access), the Respondent has demonstrated a sincere desire to reach agreement. The allegations made by General Counsel regarding Respondent's conduct, which form the basis of the Complaint, are no longer continuing issues with which the Union must contend, given the involvement of the undersigned on Respondent's behalf. The Parties have made significant progress on their own in coming to agreement, without the intervention of the Board or the requirement of litigation. As such, the Respondent asserts that this is an appropriate case for the Board to defer to its longstanding policy of deferring to the collective bargaining process to resolve disputes, rather than using the Board's processes.

V. CONCLUSION

It is clear that even if the case were to be decided in the Respondent's favor, the remedy issued by the Board would be an order to cease and desist from refusing to bargain and to bargain collectively, upon request by the Union. The Respondent is not refusing to bargain and has, in fact, been bargaining collectively with the Union. Thus, any potential remedy that would be ordered by the Board in this case would be moot.

Based upon the foregoing, the Respondent respectfully requests that the Consolidated Complaint be dismissed in its entirety.

Respectfully submitted,

ION HORSE ENTERTAINMENT
GROUP, INC.,

By its attorneys

/s/ Meghan B. Sullivan

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