

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

Advice Memorandum

DATE: February 1, 2013

TO: Karen P. Fernbach, Regional Director
Region 2

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

SUBJECT: Martha Graham Center of Contemporary Dance
Case 2-CA-084722

530-8090-0167
530-8090-2000
530-8090-9000

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and (5) by refusing to negotiate a successor collective-bargaining agreement with the Union representing its musicians when it had not used live musicians for its dance performances for more than six years because of financial difficulties. We conclude that, in light of this prolonged and indefinite hiatus, the Employer is not presently obligated to bargain with the Union over terms and conditions for employees who do not have a reasonable expectation of future employment with the Employer.

FACTS

The Employer, Martha Graham Center of Contemporary Dance, has long operated a ballet and dance company that performs contemporary dance recitals throughout the United States, and regularly performs in New York City. In 2003, the Employer decided to use live musicians for a series of New York City performances and contacted the Union, the Associated Musicians of Greater New York Local 802, to make arrangements for musicians. Thereafter, the Employer voluntarily recognized the Union as the representative of all musicians employed by the Employer for dance performances in New York City, and the parties agreed to a collective-bargaining agreement effective December 1, 2003 – April 30, 2006. The collective-bargaining agreement required that the Employer utilize live music at all New York City dance performances, except for performances where a unique recorded musical performance was part of the dance routine or the musical sounds needed could not be produced by an orchestra.

In April 2006, during the term of the collective-bargaining agreement, the Employer started to use recorded music at its New York City performances instead of live musicians because of financial difficulties. Then, in May 2006, after the expiration of the collective-bargaining agreement, the parties scheduled a meeting

to negotiate a successor labor agreement. But during this meeting, the Employer informed the Union that it would not sign another collective-bargaining agreement in light of its financial difficulties that would impact its ability to comply with the terms of the contract. Specifically, the Employer claimed that it had a four million dollar debt and could not afford live musicians. As a result, the parties did not agree to a successor contract and the Employer ceased using live musicians for its New York City dance performances.

In 2007, the Employer scheduled a series of dance performances in New York City to begin in mid-September. Prior to the start of these performances, the Union contacted the Employer to communicate its opposition to the use of recorded music instead of live musicians, and informed the Employer that it had to sign a labor agreement with the Union. The Employer reiterated its prior insistence that it could not afford to use live musicians and would not sign a contract with that requirement. The Employer proceeded to use recorded music at these performances in lieu of live musicians. The Employer, despite the Union's protest, continued using recorded music at its three New York City performances in 2009 through March 2011. After the March 2011 performance, the Union insisted that the parties meet to negotiate a successor collective-bargaining agreement. The parties had a May 6, 2011 meeting to discuss a contract, but the Employer again refused to agree to a requirement that it use live music at New York City because of its difficult financial situation. The parties met again in November 2011, and the Employer submitted a counterproposal to the Union's insistence that the Employer use live musicians at all New York City performances. In light of the Employer's financial difficulties, it offered to use live music if its annual revenues ever reached \$16 million—a proposed threshold that the Employer later reduced to \$8 million.

In early 2012, the Union rejected the Employer's counterproposal and instead insisted that, at the very least, the Employer resume using live music for dance performances at "major" New York City venues. Thereafter, the parties arranged to meet on March 12, 2012, to further discuss the terms of a potential labor agreement. But the Employer retained new counsel and cancelled the scheduled meeting. Around this same time, the Employer again used recorded music in lieu of live musicians at two New York City dance performances.

Despite the Employer's abrogation of its contractual obligation to utilize live musicians for New York City dance performances back in April 2006, the Union did not contest the legality of the Employer's action until it filed a March 22, 2012 unfair labor practice charge in Case 2-CA-077221. The Region dismissed for Section 10(b) reasons the Union's allegation in that charge that the Employer had unilaterally eliminated the use of live musicians.

Subsequently, the Union repeatedly requested that the parties meet to negotiate a successor collective-bargaining agreement. In response, the Employer

has refused to meet and bargain with the Union because it does not employ any musicians and has no plans to do so in the future. However, the Employer has stated a willingness to negotiate with the Union in the future if it decides to use live musicians at New York City dance performances. On July 6, 2012, the Union filed the charge at issue here alleging that the Employer's refusal to negotiate a successor agreement violated Section 8(a)(1) and (5).

ACTION

As a preliminary matter, we agree with the Region that the Union's attempt to challenge the Employer's change to recorded music years later was precluded by Section 10(b). Although the Employer unlawfully stopped using live music for performances in the New York City area, the Employer's abrogation of its obligation to utilize live musicians was a repudiation of the collective-bargaining agreement at that time and not a continuing violation.¹

We also conclude that the Employer is not presently obligated to bargain with the Union about terms and conditions for these employees since there has been a prolonged and indefinite hiatus in the Employer's use of live musicians because of its ongoing financial difficulties, and employees do not have a reasonable expectation of future employment with the Employer.

Although the Board has not addressed in the context of the entertainment industry the impact that an employer's long-term discontinuation of its use of certain short-term casual employees has upon a collective-bargaining relationship, we find instructive the Board's analysis in cases addressing other employers' duty to bargain during a hiatus in operations. In these "hiatus cases," an employer's bargaining obligation during the hiatus depends on whether the shutdown is temporary or indefinite. If a shutdown is temporary, the employer remains obligated to bargain with the union during the hiatus; if a shutdown is indefinite,

¹ See, e.g., *St. Barnabas Medical Center*, 343 NLRB 1125, 1127-28 (2004) (finding employer's consistent failure to recognize union as the representative of certain registered nurses and apply the contract to them over a 17-month period akin to a total contract repudiation that did not constitute a continuing violation for 10(b) purposes, even though employer continued to recognize the union and apply collective-bargaining agreement to other unit employees); *A&L Underground*, 302 NLRB 467, 469 (1991) (rejecting application of continuing violation theory where union had clear and unequivocal notice of contract repudiation outside the 10(b) period based on employer letter stating it was not bound by terms of parties' agreement; employer "severed the bargaining relationship in one stroke, and its failure to apply the contract thereafter is little more than the effect of that action").

there is no bargaining obligation.² The primary factor distinguishing whether a shutdown is temporary or indefinite is whether employees have a reasonable expectation of reemployment.³

In situations where employees do not have a reasonable expectation of reemployment following an employer's shutdown, as in the case of a shutdown for financial reasons, the Board has found the hiatus to be indefinite or "permanent," and the employer has no obligation to bargain with the union during the hiatus.⁴ But in circumstances where employees have a reasonable expectation of reemployment following the employer's shutdown, as in the case of a shutdown for renovations, the Board has found a continuing bargaining obligation during the hiatus.⁵

² See, e.g., *Golden State Warriors*, 334 NLRB 651, 653-54 (2001) (emphasizing "the critical distinction between a temporary shutdown and an indefinite, apparently permanent, shutdown in determining whether a collective-bargaining relationship survived the hiatus") (citing *El Torito-La Fiesta Restaurants*, 295 NLRB 493, 494 (1989), *enforced*, 929 F.2d 490 (9th Cir. 1991)), *enforced sub nom. Warriors v. NLRB*, 50 Fed. Appx. 3 (D.C. Cir. 2002).

³ See *El Torito*, 295 NLRB at 494.

⁴ See, e.g., *Sterling Processing Corp.*, 291 NLRB 208, 209-10 (1988) (finding shutdown of poultry dressing facility "until further notice" due to economic conditions, accompanied by discharge of all employees, "indefinite in nature and substantial in duration"; circumstances extinguished employee expectation of recall and permitted employer, prior to reopening after 19 months as a different operation, to modify preexisting wages and working conditions); *Cen-Vi-Ro Pipe Corp.*, 180 NLRB 344, 344, 346 (1969) (finding four-year hiatus indefinite where employer's shutdown in operations was due to lack of business, there was no employee recall list, and no specific time when employer might resume operations was considered; although there was a "possibility" that operations could reopen at some "unforeseeable date," employees had no reasonable expectation of rehire since "[i]t was simply a matter for the *indefinite future* that business conditions *might* change") (emphasis in original), *enforced*, 457 F.2d 775 (9th 1972).

⁵ See, e.g., *Golden State Warriors*, 334 NLRB at 654-55, 671-72 (finding continued bargaining relationship in context of one-season hiatus where shutdown was announced as a planned, temporary suspension for arena renovations; employee vendors accustomed to seasonal layoffs had reasonable expectation of same seasonal reemployment practices once arena reopened); *El Torito*, 295 NLRB at 494-95 (finding continued bargaining relationship during planned 14-month shutdown of restaurant for remodeling; employees had reasonable expectation of reemployment

Here, after the Employer's initial unchallenged abrogation of its obligation to use live musicians at its New York City performances, the Employer has consistently iterated that it is unable to use live musicians for its New York City dance performances for the indefinite future due to its precarious financial situation. At no time since the Employer unilaterally discontinued its use of live musicians has it indicated that it would be able to reemploy live musicians in the foreseeable future. In this context, we conclude that the live musicians previously employed by the Employer have no reasonable expectation of reemployment and that the Employer's hiatus in its use of live musicians is indefinite. Thus, since none of the employees covered by the parties' expired collective-bargaining agreement have a reasonable expectation of reemployment, we conclude that the Employer has no duty to bargain with the Union at the present time.⁶

Accordingly, the Region should dismiss the instant charge, absent withdrawal.

/s/
B.J.K.

since they were told that they would be recalled and there was no doubt that the restaurant would reopen).

⁶ We note that if the Employer's financial situation improves and it decides to utilize live musicians again, the Employer's obligation to bargain should be assessed at that time. See, e.g., *Hankins Lumber Co.*, 316 NLRB 837, n. 5 (1995) (in context of indefinite closure, employer's duty to bargain upon reopening is determined by the circumstances at the time of reopening); *Sterling Processing*, 291 NLRB at 210-11 (finding employer obligated to bargain with union upon its reopening from indefinite shutdown because a majority of its work force consisted of pre-hiatus employees).