UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ST. GEORGE THEATRE RESTORATION, INC.

and Case No. 29-CA-088688

THEATRICAL STAGE EMPLOYEE UNION,
LOCAL NO. ONE, INTERNATIONAL ALLIANCE
OF THEATRICAL STAGE EMPLOYEES

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DECISION

STATEMENT OF THE CASE

Kenneth W. Chu, Administrative Law Judge. This case was tried on February 13, 2013 in Brooklyn, New York. A complaint and notice of hearing was issued by the Regional Director for Region 29 of the National Labor Relations Board ("NLRB") on November 28, 2012[1] based upon a charge filed by the Theatrical Stage Employee Union, Local No. One, International Alliance of Theatrical Stage Employees (the "Charging Party" or "Union"). The complaint alleges that St. George Theatre Restoration (the "Respondent") violated Section 8(a)(5) and (1) of the National Labor Relations Act ("NLRA" or "Act") when:

1) Beginning about July 2012, Respondent Technical Director, Wayne Miller, unilaterally began performing lighting work previously performed by the unit.

2) About September 22, 2012, Respondent unilaterally implemented a change in unit employees working hours by limiting work hours to 12 hours per day.[2]

Respondent filed a timely answer to the complaint denying the material allegations in the complaint (GC Exh. 1).[3] Five individuals were called to testify during the trial. After the close of the hearing, the briefs were timely filed by the Acting General Counsel and Respondent, which I

[1] All dates are in 2012 unless otherwise indicated.

[2] At trial, the Acting General Counsel withdrew this allegation.

[3] Testimony is noted as "Tr."(Transcript). The exhibits for the Acting General Counsel and Respondent are identified respectively as "GC Exh." and "R Exh."

have carefully considered.[4] On the entire record, including my observation of the demeanor of the witnesses, I make the following

## FINDINGS OF FACT

### I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a New York corporation with its principal office and place of business in Staten Island, New York, is engaged in the business of operating a performing arts theater and center. During a representative 1-year period, the Respondent derived gross annual revenue valued in excess of $1,000,000 and purchased and received goods and materials valued in excess of $5,000 directly from suppliers located outside of the State of New York. Accordingly, I find, as the Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[5]

The Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. The Facts

The Respondent is a restored historic theater founded by the current Executive Director, Doreen Cugno ("Cugno"), and her mother. The Respondent is a not-for-profit entity and provides community outreach programs, educational programs, revenue generating shows and events to the public (Tr. 91-94). On June 5, the Board certified the Union as the exclusive collective bargaining representative of an appropriate unit of:

> All stage technicians, including electricians, carpenters, riggers, and sound and lighting technicians, excluding all other employees, the technical director, office clerical employees, guards, professional employees and supervisors as defined by the Act.

The Union requested bargaining soon after it was certified and continues to bargain with the Respondent at the time of this complaint (Tr. 22). The unit employees are not employed full time, but are called by the Respondent on a per diem basis when there is work to perform in the theater, such as maintaining the facility, equipment and lights; preparing the theater and stage for upcoming shows and events; and engaging in other theatrical activities as instructed by the Respondent. On July 2, the former Technical Director, David Cruse ("Cruse"), was replaced by Wayne Miller ("Miller") and the position title was changed to Production Manager. As the Production Manager, Miller testified he was and is responsible for maintaining the assets of the theater, preparing for upcoming shows or events at the theater, and for hiring the appropriate staff to cover the shows and to operate the theatric equipment (Tr. 117). It is not in dispute that Miller is a supervisor as defined by Section 2(11) of the Act.

The Acting General Counsel alleges that Miller unilaterally performed theater lighting work that was previously performed by a unit employee in violation of Section 8(5) and (1) of the

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[4] The Respondent mistakenly mailed its brief to the Board's Regional Office on the date due. The brief was then properly submitted to the Division of Judges' Office in New York on the following day. I find the mailing mistake as harmless error and accepted the brief as timely filed with this office.

[5] Respondent inadvertently denied, but subsequently admitted that it was and is engaged in commerce (Tr. 6).

Act. Specifically, it is alleged that the Respondent should have given work to unit employee Danielle MacDonald ("MacDonald") to design the repertory light plot in July and to perform lighting work at the theater on August 21, 22 and 24.

1. The Repertory Light Plot

The Acting General Counsel alleges that designing a repertory plot is unit work and a mandatory subject for bargaining. McDonald testified that she was and is the Lighting Director for the Respondent and has been performing the lighting work for the Respondent for the last 4 years before the arrival of Miller.[6] MacDonald said she was responsible for all aspects of preparing the lights and running the light console during the show. She was also responsible for preparing the lighting plan (also called a repertory light plot, or "rep plot"), which is a blueprint for positioning the light fixtures and identifying the corresponding light switches for each show. Depending on the lighting requirements for each event, MacDonald could use a rep plot from a previous show or one provided by the event coordinator. She could also prepare the theater lighting without a rep plot based upon the lighting instructions given by the event coordinator. So, in order to design the lights for a show, MacDonald could either use a previous rep plot, a plot that was furnished or simply follow the directions given by the event crew (Tr. 33-35).

MacDonald testified that Respondent paid her to design a rep plot for the Christmas holiday show in 2011, which has been used in subsequent events by Cruse (Tr. 35; GC Exh. 2). MacDonald testified that in the 4 years working with the Respondent, she had designed only one rep plot, the aforementioned Christmas show in 2011 (Tr. 35, 9-16). MacDonald said that she should have done the design of a new rep plot in July (Tr. 149). MacDonald repined that, instead, Miller decided to design his own rep plot. MacDonald said that Miller instructed her to use his plot when she setting up the lights on August 2, 3 and 7 (Tr. 20, 21). MacDonald testified that she was not sure if the rep plot she used on August 2, 3 and 7 was for an upcoming stage event (Tr. 42).

Miller testified that when he was hired in July, he asked MacDonald and the rest of the staff if there was a previous rep plot. Miller believed his conversation with McDonald and others occurred on July 12 (Tr. 136). According to Miller, MacDonald said to him that she had a rep plot from a Christmas show in 2011, but she refused to offer him a copy. Consequently, Miller designed his own rep plot, but used a design that was previous given to him by the lighting director for an upcoming show. Miller said he "by and large" took the other plot and copied it to suit his own design and the work was accomplished in about one hour. Miller emphasized that his rep plot was not designed for any particular show, but was intended to be used as a marketing tool to demonstrate the theater's lighting capabilities for potential clients (Tr. 118-123; R Exh. 4).

In contrast, MacDonald denied having a conversation with Miller about a previous rep plot in July, although she admitted having a conversation with Miller about the placement of light fixtures in the theater on August 2 (Tr. 147). McDonald denied telling Miller she already had a rep plot from the 2011 Christmas show because he did not asked her and she did not volunteer to tell him (Tr. 149). MacDonald did not complain to Miller in July or August that she should have been the one to design the new rep plot.

[6] Although she is referred as the "Lighting Director," McDonald is a member of the appropriate unit and has no supervisory responsibilities.

2. The Denial of Work on August 21, 22 and 24

The Acting General Counsel contends that Miller performed lighting work on August 21, 22 and 24 that should have been assigned to MacDonald to perform. Adam Chatfield ("Chatfield") is a unit employee and has been employed by the Respondent as the head carpenter and stagehand. He testified that Miller called him to work on August 21 and 22. He allegedly observed Miller performing lighting work that should have been assigned to MacDonald. According to Chatfield, Miller told him that the work they were doing on August 21 and 22 was to get the stage ready for the Japanese Dance Group scheduled to perform on August 24.

Chatfield sent two emails on August 21 and 22 complaining to Daniel Gilloon, the union organizer, that Miller was doing the lighting work on August 21 and 22 in preparation for the Japanese Dance Group. He also expressed surprise that McDonald was not working on those days (GC Exh. 3). The emails state, in relevant part, the following:

8/21: Today wayne (Miller) did the following:
Operating light board
Patching cables/soco
Directed focus
Picked color
Sorted color
Cut color
Framed color
Dropped color
Focused lights
Operated truss motors

8/22: Today wayne did the following:
Focused the entire upstage par truss himself (I was cleaning the stage getting ready for the show fri)
Moved cables and lights onstage
Tried to bring in the 2nd elec (I had to go over and do it after he was unable to move the lineset bc the aircraft cables are a mess)
Focused side lights on 2nd elec.

Miller testified that the theater was under construction throughout the 2012 spring and summer months and he needed someone to help clean the stage on August 21 and 22. He initially was inclined to use the porter (a non-unit employee) to perform the cleaning work, but Cugno instructed him to call one of the unit employees. Miller decided to call Chatfield to perform the work. Miller had Chatfield work from 9 a.m. to 1 p.m. on both days mostly cleaning the dusty stage and moving around equipment and other items.

Miller said that MacDonald did not work on August 21 and 22 because no lighting work was done on those dates. Miller said, at most, he focused and positioned some stage lights and changed or sorted some of the light filters. Miller testified he also switched a few lights on and off. He denies operating the main light console on those 2 days (Tr. 129-134). Miller testified that the light console was wrapped in plastic and was set aside to protect it from the construction and dusty conditions of the theater. A stage console was, however, used by him to hoist the lights above the stage. Miller insisted that the total lighting work he described performing amounted to 30 minutes for each day (Tr. 134). Miller denied telling Chatfield that the work done on August 21 and 22 was in preparation for the Japanese Dance Group. Miller

testified that he already knew by August 20 that the stage was in no condition to accommodate the performers on August 24 due to the construction being done in the theater.

Cugno testified that she informed Miller on August 20 that the stage was in no condition for the Japanese Dance Group to perform on August 24 because the theater was going through renovations since July. She instructed Miller to hire one of the unit employees to help clean up the stage and to perform other collateral work (Tr. 109-115). Cugno noted that Miller initially wanted the porter, but she insisted to Miller to hire a unit employee to perform the work. She stated that whenever possible, she would want the Union to perform the work (Tr. 93). According to Cugno, Miller and Chatfield only cleaned the stage and she was not aware that any lighting work was being done (Tr. 112).

McDonald also did not work on August 24. McDonald said she was not aware if the Japanese Dance Group had performed on August 24, but maintains that she had previously worked the light show for the same performers in 2011(Tr. 21, 22). Chatfield believed that her services were needed because Miller told him that their work on August 21 and 22 was for the Japanese Dance Group's performance on August 24. Chatfield admitted he was not aware if the Dance Group had actually performed on stage on August 24. He testified that he was not working on August 24 so he did not know if McDonald's services were needed to do the lights on August 24 (Tr. 62, 75).

Based upon the emails sent by Chatfield, Gilloon decided to make a surprised visit to the Respondent's theater on August 24.[7] He did not observe the Japanese Dance Group performing on the stage. Cugno informed Gilloon that there was no stage performance on August 24 due to the construction. She told him that the Dance Group was performing on the upstair mezzanine and that no stage lights were being used. Cugno said that the only lights used by the performers were the sunlight coming through the windows and the ceiling chandelier (Tr. 87, 88). She said that no unit employee was needed to perform any lighting work. Cugno stated that that the only "lighting work" performed on August 24 was the flipping on the circuit breakers that turned on the interior lights in the morning. This work was always done by whoever happens to arrive first at the theater (Tr. 103-106; R. Exh 1 and 2).

Gilloon also met Miller in the theater on August 24. Miller said he never met Gilloon before and asked why he was at the theater. Gilloon identified himself as the union organizer and informed Miller that he was at the theater under the impression that a supervisor was performing unit work. Miller said that he showed Gilloon the stage area and asked him whether any performance would be possible given the construction going on. According to Miller, Gilloon responded "no" and left the theater (Tr. 142). Gilloon was satisfied with this response. Gilloon said that Chatfield had in fact worked on August 24 and that he went over and told Chatfield that nothing was happening on the stage that would require McDonald to come to work (Tr. 82-89).

B. Discussion and Analysis

Where there is a conflict in testimony, I have credited Respondent's witnesses because for the most part their testimony was corroborated, less evasive and more on point. Based upon the credible testimony provided by Gilloon and corroborated by Cugno and Miller, I find more likely than not that no work was available for MacDonald to perform on August 24 at the

[7] As noted, Gilloon was and is an organizer for the Union, but was called as witness by the Respondent.

theater. The Acting General Counsel, in fact, withdrew the allegation that unit work was being performed by a supervisor on August 24 during the performance of the Japanese Dance Group (Tr. 158). The record is clear that the stage was not used by any dance group and that MacDonald's services were simply not needed on August 24.

Therefore, the only remaining issue to decide is whether unit work was being performed by Miller when he designed a rep plot in July and when he performed lighting work on August 21 and 22 to MacDonald's detriment.[8]

The Acting General Counsel contends that the Respondent violated Section 8(5) and (1) of the Act when it reassigned work performed by a bargaining unit employee to the supervisor without affording notice or an opportunity to bargain with the exclusive bargaining representative, citing *Harris-Teeter Super Markets, Inc*., 307 NLRB 1075; *Kohler Co.*, 292 NLRB 716, 720 (1989); and *A-1 Fire Protection, Inc.*, 273 NLRB 964, 966 (1984). The Respondent contends that the work done by Miller was insufficient to establish a past practice subject to protection and that the work done by Miller was not material, substantial and significant to violate the Act. *UNC Nuclear Industries*, 268 NLRB No. 128 (1984); *Rust Craft Broadcasting*, 225 NLRB 327 (1976).

It is well settled that an employer violates its duty to bargain collectively when it institutes changes in employment conditions without consulting the majority representative of its employees. Changes which significantly affect the working conditions of unit employees are subject to mandatory negotiations between the employer and the collective-bargaining representative of the employees affected. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Amoco Chemicals Corp.*, 211 NLRB 618 (1964). The Board has long held that the issue of whether supervisors may perform bargaining unit work is a mandatory subject of bargaining. *Crown Coach Corp*., 155 NLRB 625 (1965); *Operating Engineers Local 12*, 234 NLRB 1256 at 1258 (1978); *Maintenance Service Corp*., 275 NLRB 1422 at 1426 (1985); *Park Manor Nursing Home*, 312 NLRB No. 122 (1993). The *Crown Coach* case, as applied here, stands for the proposition that the preservation of nonsupervisory theater production and maintenance work for unit employees is a mandatory subject of bargaining. In pursuing such bargaining, the Union is entitled to insist upon measures necessary to preserve unit work for unit members and to ensure that such work is not eroded by collateral effects of supervisors performing unit work.

However, not every unilateral change in working conditions constitutes a breach of the bargaining obligation. The change unilaterally imposed must be a "material, substantial and a significant" one. Moreover, there arises no obligation to bargain concerning changes which depart in an insignificant manner from established practice while leaving the practice intact. *Peerless Food Products*, 236 NLRB 161 (1978); *UNC Nuclear Industries*, supra (1984) (changes in test requirements for nuclear reactor operators not material, substantial and significant); also, *Rust Craft Broadcasting,* supra.

1. The repertory design work performed by Miller was not a past practice

The Acting General Counsel contends that the parties never bargained over the work done by Miller on designing the rep plot in July. The Respondent maintains that Miller's design of a rep plot was not within the unit work routinely performed by MacDonald. I agree with the

[8] There was an allegation that unit work was being performed by a supervisor on August 31, but that allegation was withdrawn by the Union (Tr. 157).

Respondent. A past practice is defined as an activity that has been "satisfactory established" by practice or custom and becomes an established condition of employment due to its longstanding practice. *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349 (2003). The Respondent's general past practice was to have MacDonald prepare a lighting plot based upon the specifications required for an upcoming show at the theater. MacDonald testified that she would prepare a rep plot for a show by using a previous plot or in accordance with the rep plot or instructions provided by the show's lighting director. MacDonald's past practice was never to actually design a rep plot from scratch. MacDonald admitted she designed only one rep plot during her 4 year employment with the Respondent.

My review of the factual record leads me to believe that Miller did not unilaterally perform unit work. I credit Miller's testimony that he needed a rep plot for marketing purposes. When he asked MacDonald if a previous rep plot existed; she either responded in the negative or failed to volunteer an answer that she had designed one for the Christmas 2011 show. This necessitated Miller to manipulate his own rep plot based on a design from another show. As such, I find that designing a repertory plot by Miller under these circumstances was not routine unit work or an established practice. First, MacDonald's past practice was never to routinely design *original* (emphasis added) rep plots. She designed one in her 4 years with the Respondent. Her past practice was to prepare a rep plot either from an existing design or from instructions provided to her. Second, MacDonald testified that she would design rep plots only for upcoming events. The record shows that Miller's design was not for any upcoming event. MacDonald denied knowing if Miller's rep plot was used for any shows in August, but the record is clear that the stage lights could not be used in August due to the ongoing renovations. Third, Miller credibly testified that his rep plot was solely for marketing purposes. MacDonald never designed rep plots for marketing purposes. The Acting General Counsel presents no credible evidence to dispute these points.

Even assuming that designing a rep plot *regardless of the purpose* is considered unit work, I also find that this slight deviation of having Miller design one rep plot for marketing purposes did not materially, substantially and significantly erode the integrity of unit work and had still left the past practice intact of having unit employees prepare light plots for shows. *Peerless Food Products*, supra. There are no allegations that Miller designed another rep plot after August or that he had designed a rep plot for any upcoming stage events. This was a single non-reoccurring event and MacDonald currently still designs rep plots for stage shows. There have been no changes in any past practices or terms and conditions of employment for MacDonald or any other unit employees.

2. The work performed by Miller on August 21 and 22 was not material, substantial and significant

The Acting General Counsel contends that the parties did not bargain over the work performed by Miller on August 21 and 22. The Respondent maintains that any lighting work that was performed on August 21 and 22 was not material, substantial and significant. *Rust Craft Broadcasting of New York*, supra. I agree with the Acting General Counsel that the work performed by Miller on August 21 and 22 was in fact unit work reserved for unit employees and subject to mandatory bargaining. Miller changed the light gels and color filters, he positioned and focused the light fixtures, he operated the positioning of the lights from a stage console (but did not operate the main light console), he ensured that the lights were operational, and generally performed work normally reserved for MacDonald. Nonetheless, I disagree with the Acting General Counsel that there was a unilateral assignment of unit work to a supervisor that would require mandatory bargaining. I find that the Acting General Counsel failed to show that a supervisor had performed work reserved to unit employees that amounted to a material,

significant and substantial change from work normally and historically executed by unit employees as to deviate from established past practice in violation of Section 8(5) and (1) of the Act.

A fair number of Board decisions deal with the issue of whether a given unilateral act by an employer resulted in a material, substantial and significant change in the employees' terms or conditions of employment requiring mandatory bargaining. A reading of those cases will indicate no clear categorization so that every unilateral action by an employer can be easily pegged as having material, substantial and significant effects or as not having such effects.[9] In my opinion, the unit work that Miller allegedly performed was not a material, substantial and significant change. First, I credit the undisputed testimony of Miller regarding the fact that the lighting work performed by him had amounted to little than 30 minutes occurring over 2 days. Chatfield did not dispute the time spent by Miller in performing lighting work. Second, the undisputed purpose of having Chatfield work on August 21 and 22 was to clean, dust and mop the stage, which is work not normally performed by MacDonald. Any lighting work was merely collateral to the main purpose of cleaning the stage. Finally, as in the design of the rep plot, there are no allegations that Miller had previously or subsequently perform lighting work that has historically been done by a unit employee. MacDonald did and continues to perform lighting work and this single and temporary unilateral change does not in any manner erode the integrity of unit work. *UNC Nuclear Industries*, supra.

## Conclusions of Law

The Respondent has not violated the Act in any respect. On these findings of facts and conclusions of law and on the entire record, I issue the following recommend[10]

## ORDER

The Complaint is dismissed.

Dated: Washington D.C. April 9, 2013

Kenneth W. Chu
Administrative Law Judge

[9] For examples of employer action held not to have material, substantial, and significant effects, see *J. W. Fergusson & Sons*, 299 NLRB 882, 892 (1990) (employer increased the lunchbreak by 5 minutes while decreasing the employees' afternoon break by 5 minutes); *St. John's Hospital*, 281 NLRB 1163, 1168 (1986), enfd., 825 F.ed 740 (3d Cir.1987) (reimposition of restrictions on smoking and drinking during the 15-minute employee report time); *Advertiser's Mfg. Co*., supra (employees prohibited from parking in the first row of the plant parking lot); *Alamo Cement Co*., 277 NLRB 1031 (1985) (change in one employee's classification from ''mix chemist'' to ''assistant chief chemist'' resulting in ''a slight increase in his hourly wage,'' ''sporadic substitution'' for a supervisor, and his assisting in the preparation of a monthly report); *Weather Tec Corp*., 238 NLRB 1535 (1978) (employer unilaterally ended its practice of paying for the coffee supplies that the employees used to make the coffee for their morning and afternoon breaks); and *Peerless Food Products*, supra (limiting a union business agent's previously unlimited access to the plant).

[10] 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 Sect. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.